

APPEAL NOS. 20-35813, 20-35815
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX and JANE DOE, with her
next friends Jean Doe and John Doe,
Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of
Idaho, et al.,
Defendants-Appellants,

and

MADISON KENYON and MARY MARSHALL,
Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

UNOPPOSED INTERVENORS-APPELLANTS' MOTION
FOR A SEVEN-DAY EXTENSION OF TIME

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Under Circuit Rule 27-1, Intervenors-Appellants respectfully request a seven-day extension of time to file their supplemental brief addressing the question of whether the district court correctly determined the mootness issue.

Under this Court's August 19, 2022 order granting Intervenors-Appellants' motion for leave to file a supplemental brief addressing mootness, Intervenors-Appellants' brief is due September 2, 2022. Under the same order, Plaintiffs-Appellees may file a reply brief by September 16, 2022. Intervenors-Appellants now move the Court for an additional seven days to file their brief in light of new facts that recently came to their attention.

In June 2021, this Court remanded this case to the district court for "the limited purpose of determining whether Lindsay Hecox's claim is moot in light of [Hecox's] changed enrollment status at Boise State University." 4CA Dkt. 143, Order at 2. On remand, the parties submitted briefing and two sets of jointly stipulated facts for the district court's consideration. And on July 18, 2022, more than one year after this Court's remand order, the district court issued an order holding that the case is not moot because, among other reasons, Hecox had reenrolled at Boise State University for the Spring 2022 semester and had expressed an intent to try out for the women's track and cross-country teams again in the Fall 2022 semester. Dist. Ct. Dkt. 105, Order at 25.

In its order, the district court noted that Hecox had *enrolled* in nine credit hours for the Spring 2022 semester and was still attending those classes in April. *Id.* at 6, 8–9, 15. Based solely on that evidence, the district court made a (prophetic and now apparently untrue) factual finding that Hecox had actually “completed” those nine credit hours, which had certain impacts on Hecox’s NCAA eligibility. *Id.* at 8–9.

Yesterday, it came to Intervenor-Appellants’ attention that Hecox did *not* actually complete all nine of those credit hours in the Spring 2022 semester. Instead, Hecox completed only three credit hours, receiving “incompletes” for the other six credit hours the district court incorrectly assumed Hecox had completed. As the district court found, Hecox’s NCAA eligibility for the Fall 2022 season already depended on obtaining a waiver of certain NCAA requirements. *Id.* at 10–11. Having failed to complete more than three credit hours for the Spring 2022 semester, Hecox apparently also cannot meet two *more* NCAA requirements: NCAA Bylaws 14.4.3.2 and 14.4.3.1(c). *Id.* at 8–9.

Yesterday, it also came to Intervenor-Appellants’ attention that Hecox apparently did not make the women’s cross-country team for the Fall 2022 semester. As of the date of this filing, Hecox is not among the athletes listed on the team’s roster posted on the team’s website. 2022 Cross Country Roster, Boise State University Athletics, BRONCO SPORTS, perma.cc/N6AZ-9TBQ?view-mode=client-side&type=image.

Intervenors-Appellants do not know whether Hecox tried out for the team and failed to post a qualifying time, or whether Hecox chose not to try out for the team at all due to the above-mentioned problems surrounding Hecox's NCAA eligibility. Without that information, Intervenors-Appellants cannot assess the likelihood that Hecox will try out for the women's cross-country team *again* in the Fall 2023 semester. Hecox has previously expressed in court filings an intent to try out again in the Fall 2023 semester. Dist. Ct. Dkt. 105, Order at 12, 21–22, 25. But out of court Hecox has said, “I plan to try out maybe once more because if I fail to make it on twice, then it's probably not meant to be.” Dawn Ennis, *Outsports Transgender Athlete Advocate of the Year: Lindsay Hecox*, OUTSPORTS (Dec. 29, 2020), perma.cc/E47E-KPWS.

Intervenors-Appellants intend to argue the district court erred by allowing Hecox to “supplement the record with subsequent facts proffered in an effort to demonstrate the case is not moot.” *Robertson v. Biby*, 719 F. App'x 802, 804 (10th Cir. 2017). Hecox should not have been allowed to “breathe new life into . . . claims *after* they became moot.” *Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 326 (4th Cir. 2021) (emphasis added). Evidence that Hecox only completed three credit hours last semester and either failed to make or decided not to try out for the women's cross-country team this semester illustrates the fallacy of attempting to evade mootness based on after-occurring and therefore continually shifting facts.

But if the Court disagrees, Intervenor-Appellants also intend to argue the case is moot now due to Hecox's failure to complete more than three credit hours last semester, the resulting additional barriers to Hecox's NCAA eligibility, and Hecox's apparent decision not to try out for or failure to make the women's cross-country team this semester.

Intervenor-Appellants require additional time to confirm the facts tentatively represented above. Intervenor-Appellants wish to ensure they are providing the Court accurate information the Court may find relevant to the mootness determination.

Accordingly, Intervenor-Appellants respectfully request a seven-day extension of time, or until September 9, 2022, to file their supplemental brief addressing mootness. If the Court grants that extension, Intervenor-Appellants consent to the Court also extending Plaintiffs-Appellants' time for filing their reply brief to September 23, 2022.

Intervenor-Appellants' counsel conferred with Plaintiffs-Appellants' counsel before filing this motion, and Plaintiffs-Appellants consent to the Court granting it.

Respectfully submitted,

Madison Kenyon and
Mary Marshall,
Intervenor-Appellants

August 31, 2022 By: /s/ Roger G. Brooks

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2022, I electronically filed the foregoing motion for a seven-day extension of time with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

August 31, 2022

/s/ Roger G. Brooks
Roger G. Brooks
Counsel for Intervenor-Appellants