

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

**INTERVENORS-APPELLANTS AND DEFENDANTS-
APPELLANTS' MOTION TO STAY THE
SUPPLEMENTAL BRIEFING SCHEDULE**

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Counsel for Defendants-Appellants

Under Circuit Rule 27-1, Intervenor-Appellants and Defendants-Appellants move the Court to stay the supplemental briefing schedule. This case became moot in October 2020, and after-occurring facts cannot “unmoot” Hecox’s claims. But if the Court decides otherwise, the parties should be allowed sufficient time to provide the Court with all the complete and accurate information the Court may find relevant to the mootness determination and to deciding whether Hecox retains standing to challenge the Idaho Fairness in Women’s Sports Act.

Under this Court’s September 1, 2022 order granting Intervenor-Appellants’ motion for a seven-day extension to file a supplemental brief addressing mootness, Intervenor-Appellants’ brief is due September 9, 2022, and Plaintiffs-Appellees’ reply is due September 23, 2022. 4CA Dkt. 157, Order at 2. In its order, this Court also directed the parties to file supplemental briefing on Hecox’s standing to challenge the Act, extending the parties’ page limits from 15 to 25 pages. *Id.*

Upon information and belief, Hecox did not actually complete all nine credit hours Hecox had enrolled in for the Spring 2022 semester. 4CA Dkt. 155, Motion for Seven-Day Extension at 2. Hecox’s NCAA eligibility for the Fall 2022 season already depended on obtaining a waiver of certain NCAA requirements. Dist. Ct. Dkt. 105, Order at 10–11. And Hecox’s failure to complete more than three credit hours for the Spring 2022 semester means Hecox apparently cannot meet two *more* NCAA requirements: NCAA Bylaws 14.4.3.2 and 14.4.3.1(c). *Id.* at 8–9.

Moreover, Intervenor-Appellants have since learned that under new NCAA requirements, for Hecox to be eligible to compete in the 2022-2023 women's cross-country season, Hecox would have to show a total serum testosterone level below 10 nanomoles per liter. Sport-Specific Testosterone Thresholds, 2022 Fall Sports, perma.cc/73AD-VC2W. Thus far in this litigation, it has not been alleged that Hecox has been able to achieve *any* specific total serum testosterone level. As a result, the record does not contain any allegation or evidence Hecox will be able to comply with the NCAA's new eligibility requirements, which "apply to all NCAA competition." *Id.* At the time of this filing, Intervenor-Appellants and Defendants-Appellants also do not know whether the NCAA would consider granting waivers to transgender athletes who cannot meet the new testosterone-level requirements.

Relatedly, Intervenor-Appellants and Defendants-Appellants have also learned, upon information and belief, that the Mountain West Conference issued its own new transgender participation policy within the last two weeks. Undersigned counsel have reviewed the new policy, but they have been instructed that the policy's terms are intended to be kept confidential. So counsel are in the process of seeking to determine whether they can share that policy with this Court, and whether and to what extent it might impact Hecox's eligibility to compete.

Finally, Intervenor-Appellants previously informed the Court, upon information and belief, that it appeared from the team's website that the BSU women's cross-country team had already held tryouts for the Fall 2022 semester, and that Hecox either had decided not to try out or had not made the team. 4CA Dkt. 155, Motion for Seven-Day Extension at 2–3. “As of the date of [that earlier] filing, Hecox [was] not among the athletes listed on the team's roster posted on the team's website.” *Id.* at 2 (citing 2022 Cross Country Roster, Boise State University Athletics, BRONCO SPORTS, perma.cc/N6AZ-9TBQ?view-mode=client-side&type=image). It also appeared that new athletes had been added since the previous season, and the team's first meet was scheduled for September 2, seemingly suggesting tryouts had occurred.

Before filing that motion, counsel for Intervenor-Appellants reached out to counsel for the State Defendants-Appellants to confirm whether tryouts had in fact occurred and whether Hecox had failed to make the team or had failed to try out altogether. Counsel for the State Defendants-Appellants did not have that information either, so they asked counsel for the BSU Defendants-Appellants to reach out to the team's coaches to confirm. In the meantime, with their supplemental-brief deadline only two days away, Intervenor-Appellants moved for an extension, explaining that they would “require additional time to confirm the facts [they had] tentatively represented” in their motion. CA Dkt. 155, Motion for Seven-Day Extension at 4.

Intervenors-Appellants and Defendants-Appellants have since learned, upon information and belief, that combined tryouts for the 2022-2023 women's track and cross-country teams have *not* occurred. Again upon information and belief, the coaches are hoping to hold those tryouts by the end of September. Hecox will be allowed to try out. But BSU will not assess Hecox's eligibility to *compete* on either team unless and until Hecox makes the team. If Hecox does make the team and BSU determines that Hecox is not eligible to compete, BSU would then need to exercise its discretion to decide whether to request a waiver from the relevant NCAA requirements—assuming Hecox were eligible for such a waiver—and then the NCAA would need to exercise *its* discretion to decide whether to grant the waiver request, again assuming Hecox were eligible for a waiver. Dist. Ct. Dkt. 105, Order at 10–11, 21.

Intervenors-Appellants and Defendants-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). *Accord Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 326 (4th Cir. 2021) (rejecting attempt to “breathe new life into . . . claims *after* they became moot”). But they also wish to provide the Court all the accurate and up-to-date information the Court may find relevant to the mootness determination and to deciding whether Hecox retains standing to challenge the Act.

Accordingly, Intervenor-Appellants and Defendants-Appellants respectfully move the Court to stay the supplemental briefing schedule until it has been determined whether Hecox will be allowed to compete on the BSU women's track or cross-country teams during the 2022-2023 seasons. Specifically, they move the Court to stay the briefing schedule until (1) Hecox either does not try out for or does not make either team when tryouts are held later this semester; or (2) if Hecox does make either team, a determination has been made as to whether Hecox will be eligible to compete during the 2022-2023 seasons, including through the resolution of any NCAA waiver requests.

Intervenor-Appellants and Defendants-Appellants propose they be given 14 days to file their supplemental briefs from the date the parties learn and notify the Court of the occurrence of either of the events described above. Consistent with the current briefing schedule, Intervenor-Appellants and Defendants-Appellants further propose that Plaintiffs-Appellees be given 14 days after the filing of Intervenor-Appellants' and Defendants-Appellants' briefs to file their reply brief.

Counsel conferred with Plaintiffs-Appellants' counsel before filing this motion, and Plaintiffs-Appellants will file a response to this motion.

Respectfully submitted,

Madison Kenyon and
Mary Marshall,
Intervenors-Appellants

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

September 7, 2022

/s/ Roger G. Brooks

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2022, I electronically filed the foregoing motion to stay the briefing schedule 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.

September 7, 2022

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