

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, *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
District Court Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

**PLAINTIFFS-APPELLEES LINDSAY HECOX AND JANE DOE'S RESPONSE
TO INTERVENORS-APPELLANTS' MOTION TO STAY BRIEFING SCHEDULE**

On July 18, 2022, Judge Nye concluded that this case is not moot. His decision is thorough, well-reasoned, and satisfied the mandate placed on him by this Court. Nevertheless, on August 3, 2022, Intervenors-Appellants moved this Court for supplemental briefing to “address[] the question of whether the district court correctly determined the mootness issue.” Dkt. 152. This Court granted Intervenors-Appellants’ request. Dkt. 154.¹

Since that time, through two motions filed with this Court, Dkts. 155, 158, Intervenors-Appellants have attempted to introduce new alleged facts on appeal regarding mootness—some of which, as discussed further below, they now acknowledge are false, *see* Dkt. 158 at 3–4. At the same time, Intervenors-Appellants argue that Judge Nye erred in considering facts beyond those post-dating this Court’s remand order. *See* Dkts. 152 at 3, 158 at 4–5.

Setting aside this paradoxical position, Intervenors-Appellants’ insistence on introducing new factual allegations and legal arguments through procedural motions is inappropriate and should be rejected. For instance, on August 31, 2022, Intervenors-Appellants filed a motion filled

¹ The other Defendants-Appellants did not join Intervenors-Appellants’ motion.

with improperly raised assertions of law and representations of “fact” that were never raised before the District Court or presented to Plaintiffs-Appellees before filing; Intervenors-Appellants simply reached out before filing their motion to ask if Plaintiffs-Appellees objected to a 7-day extension for Intervenors-Appellants’ supplemental brief regarding the District Court’s mootness order. *See* Dkts. 154, 155. Intervenors-Appellants now admit in their present motion that their prior motion provided false information to the Court, and that Intervenors-Appellants did not verify the “facts” they relied on to justify their request for additional time before filing their motion. *See* Dkt. 158 at 4. This example shows the problematic nature of Intervenors-Appellants seeking to introduce new facts on appeal through improperly vetted procedural motions.

On September 7, 2022, Intervenors-Appellants filed another motion, to which Plaintiffs-Appellees presently respond, again improperly introducing legal argument and new assertions of “fact” under the guise of a procedural motion. *See* Dkt. 158 at 1–4.

Plaintiffs-Appellees do not object to a stay of the appellate briefing schedule regarding mootness and standing. However, Plaintiffs-

Appellees do object to Intervenor-Appellants' circumvention of this Court's supplemental briefing schedule by presenting legal and factual arguments in procedural motions. Plaintiffs-Appellees therefore respectfully request that this Court deduct from Intervenor-Appellants' allotted pages for supplemental briefing the four pages that Intervenor-Appellants dedicated in their motions to substantive factual and legal argument, meaning that Intervenor-Appellants' supplemental brief would be limited to 21 pages.

More fundamentally, to the extent this Court believes that the factual record must be supplemented before determining mootness and/or standing, Plaintiffs-Appellees respectfully request that this Court again remand this case to the District Court to complete any necessary additional fact finding. Remand will help ensure that the factual information presented to this Court is fully vetted and accurate—including, potentially, through the submission of stipulations, as the parties have done previously before the District Court. Remand will also allow the District Court to enter a protective order to manage the disclosure and confidentiality of personal health information that Intervenor-Appellants have now raised for the first time in their latest

procedural motion.² Dkt. 158 at 2. In short, remanding for any needed fact finding will prevent Intervenors-Appellants from continuing to provide this Court with inaccurate “facts” in procedural motions or otherwise and, separately, will protect the confidentiality of any personal health information that is deemed relevant to this dispute.

Dated: September 8, 2022

Respectfully submitted,

/s/ Kathleen Hartnett

² Plaintiffs-Appellees do not believe that disclosure of this information is necessary for this Court to determine mootness and/or standing and reserve all rights to challenge such disclosure at the appropriate time.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2022, I electronically filed the foregoing response 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.

/s/ Kathleen Hartnett
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