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Patricia S. Connor
Clerk of Court
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Submitted Electronically via CM/ECF

Re: No. 23-1078: *B.P.J. v. West Virginia State Board of Education, et al.*

Dear Ms. Connor:

Like Plaintiff-Appellant's previous notices of supplemental authority, B.P.J.'s latest notice addresses an inapposite decision. *See* ECF No. 176 (citing *Hecox v. Little*, No. 20-35813, 2023 WL 5283127 (9th Cir. Aug. 17, 2023)).

Hecox involves a different standard of review. It examines whether the district court "abused its discretion" in issuing a preliminary injunction, ECF No. 176-2, at 12—a "limited and deferential review" based on a narrow record. *Id.* at 62. This case shows how a complete record can make a decisive difference. ECF No. 89, at 29.

Idaho's law also has a verification process that includes "genital inspections." ECF No. 176-2, at 53. According to *Hecox*, this provision is "unconscionably invasive, with the potential to traumatize." *Id.* at 51. Thus, *Hecox* found that Idaho's law "perpetuates historic discrimination against both" women and men who identify as women—making *Clark I*, 695 F.2d 1126 (9th Cir. 1982), and *Clark II*, 886 F.2d

1191 (9th Cir. 1989) "inapposite." ECF No. 176-2, at 39. But genital inspections aren't part of West Virginia's law. So *Hecox*'s "extraordinarily fact-bound test" based on a "narrow question" doesn't apply. *Id.* at 60.

In some ways, *Hecox* tracks the district court's approach here. Both, for instance, used intermediate scrutiny. *Id.* at 66; ECF No. 53-8, at 556.

But where *Hecox* departs from the district court on the law, *Hecox* gets it wrong—contradicting itself, Ninth Circuit authority, and Supreme Court precedent. For example, it faults Idaho for implementing "unnecessary medical testing," ECF No. 176-2, at 53, but it approves Idaho's previous policy requiring "proof" that athletes sufficiently "suppress[ed] their testosterone levels," *id.* at 67, 16. And it discounts displacement's harms, contrary to *Clark II* and what Appellees have shown, even while it is forced to acknowledge that concerns over displacement are "reasonabl[e]." *Id.* at 60.

Hecox shows the dangers courts face when resolving difficult "policy question[s]." ECF No. 176-2, at 58-59. This Court should defer to the State's reasonable judgment in protecting fairness in female sports. *See id.* at 59.

Sincerely,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Lindsay S. See
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