IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

L.E., by next friends and parents, SHELLEY ESQUIVEL and MARIO ESQUIVEL,	)	
Plaintiff,	)	**No. 3:21-cv-00835**
v.	)	**Chief Judge Crenshaw**
BILL LEE, in his official capacity as Governor of Tennessee; et al.,	)	**Magistrate Judge Newbern**
KNOX COUNTY BOARD OF EDUCATION a/k/a KNOX COUNTY SCHOOL DISTRICT; et al.,	)	
Defendants.	)	

RESPONSE TO PLAINTIFF'S
NOTICE OF INTERVENING AUTHORITY

State Defendants respectfully provide this response to Plaintiff's notice of intervening authority.

First, Plaintiff continues to ignore the differences between Tennessee's Gender in Athletics Law—the law at issue in this case—and the laws of Idaho and other States. In *Hecox v. Little*, the Ninth Circuit agreed that "furthering women's equality and promoting fairness in female athletic teams is an important state interest." No. 20-35813, 2023 WL 5283127, at *13 (9th Cir. Aug. 17). "However, on the record before" the Ninth Circuit, *Hecox* determined that the Idaho law's "means—categorically banning transgender women and girls from all female athletic teams and subjecting all female athletes to intrusive sex verification procedures—are not substantially related to, and in fact undermine, those asserted objectives." *Id.* Tennessee's Gender in Athletics Law adopts neither of those means. The Act merely defines a "student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity" as "the student's sex at the time of the student's birth, as indicated on the student's original birth certificate." Tenn. Code Ann. § 49-6-310(a). Throughout this litigation, Plaintiff has provided no dictionary contradicting this definition of "gender" as "sex." And TSSAA remains the final decisionmaker on which students play on which teams. Plaintiff's Resp.to State Defendants' Statement of Material Facts # 20 at 10, Doc. 68, PageID# 2091. That is the record in this case.

Second, the sex discrimination decision in *Hecox* turned on Idaho's differential treatment of boys and girls. The Idaho law "discriminates on the basis of sex, because only women and girls who want to compete on Idaho school athletic teams, and not male athletes, are subject to the sex dispute verification process." *Hecox*, 2023 WL 5283127, at *12. And the Idaho law banned only biological males from playing on female teams; the law did "not ban 'biological females' from 'teams or sports designated for males.'" *Id.* In contrast, Tennessee's Gender in Athletics Law

applies equally to both sexes. The State Defendants already pointed out this distinction between Idaho's law and the Gender in Athletics Law. State Defendants' Resp. in Opp. to Plaintiff's Mot. for Summ. J. at 22, Doc. 70, PageID#2138. Yet Plaintiff's counsel—who also represent the plaintiff in *Hecox*—still have no explanation for their inconsistent argument in this case.

Third, the Ninth Circuit's approach to transgender status discrimination is inconsistent with the Sixth Circuit's published decision in *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023). In *L.W.*, the Sixth Circuit ruled that "rational basis review applies to transgender-based classifications." *Id.* at 419. The Sixth Circuit expressly acknowledged contrary decisions that *Hecox* relied upon, *id.* at 421, yet still ruled that "*Bostock v. Clayton County* does not change the analysis" because "that reasoning applies only to Title VII, as *Bostock* and [] subsequent [Sixth Circuit] cases make clear," *id.* at 420. And the Sixth Circuit has stood by its *L.W.* reasoning by allowing Kentucky to enforce a similar law. *See Doe 1 v. Thornbury*, No. 23-5609, 2023 WL 4861984 (6th Cir. July 31).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Response to Notice of Intervening Authority has been served through the e-filing system on August 21, 2023, to:

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