**APPEAL NOS. 20-35813, 20-35815**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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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.*

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

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# INTERVENORS-APPELLANTS MADISON KENYON AND MARY MARSHALL'S SUPPLEMENTAL BRIEF

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KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbrooks@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

CHRISTOPHER P. SCHANDEVEL
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
(571) 707-4655
cschandevel@ADFlegal.org
cbarnette@ADFlegal.org

*Counsel for Intervenors-Appellants*

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## BACKGROUND

More than two years ago, Plaintiff-Appellee Lindsay Hecox filed a complaint alleging an intent "to try out for the women's cross-country team at Boise State in fall 2020" and "for track in the spring." ER770.[1] Hecox's sex was identified as "male at birth," so Hecox alleged Idaho's Fairness in Women's Sports Act, codified at Idaho Code § 33-6203, would prevent Hecox "from joining a team with other women." ER770. Under then-existing "NCAA rules for inclusion of transgender athletes," Hecox allegedly would have been "eligible to compete in women's sports [that] fall." ER770. At the time, the NCAA allowed transgender athletes "to participate in women's sports after one year of hormone therapy suppressing testosterone." ER781. It did "not require athletes to certify hormone suppression to a certain level." ER621. *Accord* ER707–08.

Idaho State University women's track and cross-country runners Madison Kenyon and Mary Marshall subsequently moved to intervene to defend the Act. ER520–21. Both had competed against—and lost to—a biologically male athlete who identifies as female. ER526–28, ER535. The district court subsequently granted Hecox a preliminary injunction, allowing Hecox to try out for the women's cross-country team that fall. And Defendants and Intervenors appealed.

[1] "The parties agree that [the other plaintiff's] claim is now moot because she graduated from high school and is planning to attend college out of state." 4CA Dkt. 143, Order at 2 n.1 (citing cases).

On appeal, Hecox informed this Court that, with the Act enjoined, Hecox had tried "out for BSU's women's cross country and track teams in fall 2020, but did not make the team." 4CA Dkt. 65, Appellees' Br. at 17 n.4. Hecox also claimed to have taken a "temporary leave of absence from BSU to work full time, establish [in-state] residency, and save money for school." *Id.* Hecox allegedly planned to "return to BSU next school year," planned to "try out again for the track team," and "remain[ed] eligible to compete under NCAA rules." *Id.*

At argument, Hecox's counsel told the Court Hecox was "intending to return to school in the fall and try out again." Oral Argument Audio, 27:49–28:06, www.ca9.uscourts.gov/media/video/?20210503/20-35813/. But Hecox later clarified, "I will re-enroll at Boise State University in January 2022." 4CA Dkt. 140-2, Declaration at 4. Hecox also expressed an intent to "try out for track and cross-country," again adding, "I remain eligible to compete under NCAA rules." *Id.*

On June 24, 2021, this Court remanded 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 (emphasis added). The Court directed the district court to assess "information regarding the BSU re-enrollment process, the steps Hecox has taken toward re-enrollment, and the availability of BSU women's sports outside of NCAA teams," and then to "apply the required caution and care to the initial mootness determination." *Id.* at 4.

On remand, the parties submitted jointly stipulated facts for the district court's consideration in October 2021. Dist. Ct. Dkt. 92, First Stip'd Facts. Hecox submitted more new facts in December 2021. Dist. Ct. Dkt. 99-1, Decl. in Supp. of Pls.' Resp. Br. And then in March 2022, the district court informed the parties that it had been "unable to immediately address the parties' submissions," so the court ordered the parties to submit *another* round of stipulated facts, which was "not [to] contain legal argument." Dist. Ct. Dkt. 101, Order at 1.

On April 13, 2022, the parties submitted a new set of stipulated facts, noting Hecox had "enrolled in nine credits [for the] Spring 2022 semester" and was attending those classes. Dist. Ct. Dkt. 102, Second Stip'd Facts at 1. Hecox also had "joined and [was] playing for the BSU Women's Club Soccer team." *Id.* And Hecox expressed an intent "to try out for the BSU Women's Cross-Country Team in Fall 2022." *Id.* at 2.

The stipulated facts also "alert[ed] the Court that in January 2022, the NCAA Board of Governors [had] updated the transgender student-athlete participation policy governing college sports." *Id.* The available information at the time—which the stipulated facts linked to—provided that for the 2022–23 school year, transgender student-athletes would be required to "meet the sport standard for documented testosterone levels at the beginning of their competition season and again six months later." *Transgender Student-Athlete Participation Policy*, NCAA SPORT SCIENCE INSTITUTE, perma.cc/BHS3-T55E.

Finally, on July 18, 2022, more than one year after this Court's remand order, the district court issued an order holding that the case was not moot. Dist. Ct. Dkt. 105, Order at 25. Summarizing its findings, the court noted Hecox had "re-enrolled at BSU and [was] participating on the women's club soccer team" during the Spring 2022 semester, "intend[ed] to try out for the women's track and cross-country teams in the Fall 2022 semester, and again in the Fall 2023 semester," and although there were "some questions about Hecox's NCAA eligibility," Hecox could not "continue to play soccer, or compete for a spot on the women's track or cross-country teams, absent an injunction." *Id.*

Regarding Hecox's NCAA eligibility, 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 court made a factual finding that Hecox had actually "completed" those nine credit hours. *Id.* at 8–9. Upon information and belief, Hecox completed only three of those hours, receiving "incompletes" for the other six. But even counting all nine, the district court correctly concluded that Hecox could not meet NCAA Bylaw 14.4.3.1(b)'s requirement that a student-athlete complete 18 credit hours since the beginning of the previous fall term, or since the beginning of the preceding two semesters. *Id.* at 9. And again even including all nine credit hours, the district court correctly concluded Hecox could not qualify for either of two exceptions to that rule. *Id.* at 9–10.

As a result, even assuming Hecox *had* completed all nine credit hours, Hecox's NCAA eligibility for the Fall 2022 season still would depend on BSU's willingness to seek—and the NCAA's willingness to grant—a waiver of NCAA Bylaw 14.4.3.1(b). *Id.* at 9–11, 21. As the Court correctly found, "if Hecox is permitted to try out for, and makes the women's cross-country or track teams," Hecox still would "have to obtain an eligibility waiver from the NCAA to run for either team" in Hecox's junior year. *Id.* at 21. And that's even more certain now, given that Hecox failed to complete more than three credit hours for the Spring 2022 semester. As a result, Hecox cannot meet two *more* NCAA requirements: NCAA Bylaws 14.4.3.2 and 14.4.3.1(c). *Id.* at 8–9.

As the district court explained, it "lack[ed] information to assess either whether BSU [would] find a reasonable and good faith justification for submitting an eligibility waiver, or whether the NCAA [would] grant a waiver based on an unforeseeable hardship or other unspecified circumstances." *Id.* at 21. Indeed, "there is simply no way to accurately predict whether the NCAA will grant a waiver." *Id.* at 21 n.16. Apparently because of that uncertainty, the district court based its holding that this case is not moot on Hecox's inability to "continue to play soccer" or to "*compete for a spot* on the women's track or cross-country teams, absent an injunction." *Id.* at 25 (emphasis added). The court did *not* base its decision on whether Hecox would be eligible to compete *on the team* absent an injunction.

Relying on the NCAA's old policy, the district court also found that Hecox only was required "to complete at least 12 months of testosterone suppression treatment leading up to the Fall 2022 semester to compete on the women's track and cross-country teams." *Id.* at 10. And the parties did not dispute that Hecox had "undergone testosterone suppression treatment from September 2019 until the present." *Id.* at 10–11.

But as the stipulated facts established, that was no longer the NCAA's policy. Dist. Ct. Dkt. 102, Second Stip'd Facts at 2. Under its new policy, transgender student-athletes must "meet the sport standard for documented testosterone levels at the beginning of their competition season and again six months later." *Transgender Student-Athlete Participation Policy*, NCAA SPORT SCIENCE INSTITUTE, perma.cc/BHS3-T55E.

For women's cross-country, that means athletes like Hecox must be able to show a total serum testosterone level below 10 nanomoles per liter. NCAA, *Sport-Specific Testosterone Thresholds: 2022 Fall Sports*, perma.cc/73AD-VC2W.[2] And 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 that Hecox will be able to comply with the NCAA's new eligibility requirements, which "apply to all NCAA competition." *Id.*

[2] Upon information and belief, the Mountain West Conference issued a new transgender policy within the last two weeks. The conference has instructed the policy is to be kept confidential. And Intervenors are still assessing whether it might impose any additional barriers for Hecox.

## ARGUMENT

### I. Hecox's failure to make the cross-country and track teams and dropping out of school mooted this case two years ago.

#### A. When Hecox dropped out of school, any alleged future controversy depended on too many contingencies to keep the case alive.

"The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017) (cleaned up). "It is not enough that a controversy existed at the time the complaint was filed." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "The basic question in determining mootness is whether there is a *present* controversy as to which effective relief can be granted." *Bayer*, 861 F.3d at 862 (emphasis added). Importantly, a "moot case cannot be revived by alleged future harm that is 'so remote and speculative that there is no tangible prejudice to the *existing interests* of the parties.'" *Doe No. 1 v. Reed*, 697 F.3d 1235, 1239 (9th Cir. 2012) (quoting *Feldman v. Bomar*, 518 F.3d 637, 643 (9th Cir. 2008)).[3]

[3] The same is true where, as here, the plaintiff also sought declaratory relief below. The controversy must still be "of sufficient *immediacy* and reality" to warrant a declaratory judgment. *S. Cal. Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028, 1035 (9th Cir. 2009) (emphasis added).

As Intervenors argued on remand, Hecox's claims "became moot upon" Hecox's "withdrawal from BSU." Dist. Ct. Dkt. 95, Intervenors' Opening Mootness Br. at 8.[4] At that point, Hecox's alleged intent to try out for the women's track and cross-country teams two years later—in the Fall 2022 semester—failed to keep the case from becoming moot because it depended on speculation and numerous contingencies, as Defendants explained in detail in their opening brief on remand. Dist. Ct. Dkt. 96, Defendants' Opening Br. at 12–17.

Indeed, when this case was last before this Court, Hecox expressed an intent "to re-enroll in January 2022," but only "*after* achieving in-state residency." Dist. Ct. Dkt. 105, Order at 15 (emphasis added). *Accord* 4CA Dkt. 143, Order at 2 (same). And as the district court found, "[q]ualifying for in-state tuition required Hecox to satisfy *multiple* contingencies." Dist. Ct. Dkt. 105, Order at 15 (emphasis added).

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[4] Intervenors have not waived this argument. Hecox faults Intervenors for complying without objecting to the district court's order to submit a second round of stipulated facts. 4CA Dkt. 153-1, Opp. to Mot. for Suppl. Briefing at 4–5. But the district court ordered the parties *not* to include any legal argument in those stipulated facts. Dist. Ct. Dkt. 101, Order at 1. And besides, "mootness goes to the court's power to hear the case, and therefore may be raised at any time by the parties, or even sua sponte by the court under its independent obligation to ensure that it has authority under Article III." *S. Or. Barter Fair v. Jackson Cnty.*, 372 F.3d 1128, 1133 n.8 (9th Cir. 2004). *Accord Brock v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 889 F.2d 685, 687 n.1 (6th Cir. 1989) ("[M]ootness . . . cannot be waived or conceded by the actions or omissions of the parties.") (cleaned up)).

Specifically, Hecox had to "receive[] less than 50% of . . . financial support" from a "parent or guardian" and had to have "'continuously resided and maintained a bona fide domicile in the state of Idaho primarily for purposes other than educational for twelve (12) months preceding the opening day of the term for which [Hecox wished to] matriculate[].'" *Id.* at 15–16 (quoting Idaho Code § 33-3717B(1)(b)).

To establish "a bona fide domicile in Idaho, Hecox had to prove at least five of [seven different] criteria for the twelve months before the term" for which Hecox wished to qualify for in-state tuition. *Id.* at 16. To meet some of these requirements, "Hecox leased a residence" and "began working full-time in Idaho in December 2020." *Id.* Among other things, then, Hecox's future eligibility for in-state tuition depended on Hecox's ability to stay employed for a full year before reenrolling, and that of course was not entirely within Hecox's control.

Under these circumstances, Hecox's "bare statement of intention [to reenroll was] insufficient to escape mootness." *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 143 (2d Cir. 1994). *Accord Monahan v. Nebraska*, 687 F.2d 1164, 1168 (8th Cir. 1982). Hecox was not then "currently seeking" reenrollment because Hecox had to work for a year to qualify for in-state tuition first. *Bayer*, 861 F.3d at 865. And even after reenrolling, Hecox *still* would have to decide whether to try out again despite Hecox's ineligibility to compete without first obtaining a waiver from the NCAA. Dist. Ct. Dkt. 105, Order at 21.

As a result, once Hecox dropped out of school to save money and try to qualify for in-state tuition to reenroll, try again to make the team, and seek to meet the NCAA's eligibility requirements more than a year later, "the threat of governmental action," was more than "two steps removed from reality." *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 123 (1974).[5] That made the threat of the Act's enforcement against Hecox "so remote and speculative that there was no tangible prejudice to [Hecox's] existing interests," leaving "a want of a subject matter on which any judgment of this Court could operate." *Id.* (cleaned up).[6]

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[5] The additional barriers present here make the district court's reliance on cases like *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128 (9th Cir. 2004), and *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), misplaced. *Contra* Dist. Ct. Dkt. 105, Order at 18. In *Clark*, a single "added step" of having to obtain a new license and pay a fee was "not enough to moot [the] case." 259 F.3d at 1012. In *Barter Fair* the plaintiff merely had to obtain funding and find a new site. 372 F.3d at 1134. The threat of government action was *not* four or five "steps removed from reality," *Super Tire*, 416 U.S. at 123, as it was here (saving money and qualifying for in-state tuition, reenrolling, trying out again, making the team, and meeting NCAA eligibility requirements).

[6] *Accord Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990) (no case or controversy where "threat of future harm" to the plaintiffs was "based upon an extended chain of highly speculative contingencies, all of which would have to be fulfilled in order to have the threat . . . become manifest"); *Del Percio v. Thornsley*, 877 F.2d 785, 787 (9th Cir. 1989) (same where plaintiff had not shown likelihood she would face "disciplinary proceedings . . . in the immediate or near future"); *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 785 (9th Cir. 1979) (same where plaintiff effectively sought "an advisory opinion for possible use in the future when, as, and if he retire[d] for the second time").

### B. The district court erred by trying to revive the case based on facts that developed long after the case became moot.

Rather than assessing whether Hecox's changed enrollment status had mooted the case *in October 2020*, the district court held that the case was not moot because—more than a year later—Hecox had "followed through" with those plans "to obtain in-state residency and to re-enroll in BSU." Dist. Ct. Dkt. 105, Order at 17. The district court also thought it was enough that, regardless of Hecox's eligibility to compete on the women's track and cross-country teams, Hecox could not even "compete for a spot" on those teams or continue to play women's club soccer "absent an injunction." *Id.* at 20, 25. All of that was error.

"The Supreme Court has repeatedly emphasized that '[w]ithout jurisdiction the court cannot proceed at all in any cause.'" *Env't Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1076–77 (9th Cir. 2001) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). "Jurisdiction is power to declare the law, and when it ceases to exist, the *only function* remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 1077 (quoting *Steel Co.*, 523 U.S. at 94) (emphasis added). *Accord Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). Indeed, "[i]f an issue is moot," a federal court has "*no discretion* and must dismiss the action for lack of jurisdiction." *Ali v. Cangemi*, 419 F.3d 722, 724 (8th Cir. 2005) (en banc) (emphasis added).

As a result, courts have rejected plaintiffs' attempts to "breathe new life into [their] claims after they became moot." *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 326 (4th Cir. 2021).[7] "If anything, [] subsequent events might create a new claim," but they "do not revive the instant suit." *Robertson v. Biby*, 719 F. App'x 802, 804 (10th Cir. 2017). Stated differently, subsequent events that might give rise to a new claim "do not unmoot the case." *Id.*

In *Hirschfeld*, the plaintiff initially "challenged [a] prohibition on buying a handgun . . . while she was under 21." 14 F.4th at 326. After she turned 21, she "alleged for the first time that she wishe[d] to sell handguns to friends under 21." *Id.* But that "newly alleged injury was raised for the first time on appeal, and only after the case became moot," so the Fourth Circuit refused to consider it. *Id.*

So too here. Hecox never mentioned a desire to play club soccer in the complaint or in the district court before this case became moot on appeal. Hecox alleged that intent for the first time on remand, having "browsed the women's club soccer team's webpage" and played soccer "almost weekly" for six months. Dist. Ct. Dkt. 92, First Stip'd Facts at 10. This Court should reject that attempt to "breathe new life into [Hecox's] claims after they became moot." *Hirschfeld*, 14 F.4th at 326.

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[7] *Accord Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 838 F.3d 297, 304 n.8 (3d Cir. 2016) (holding that "a later conviction" could "not 'unmoot' the case and retroactively confer jurisdiction").

And the same applies to the district court's holding that Hecox's desire merely to "compete for a spot" on the track and cross-country teams was enough to revive Hecox's claims. Dist. Ct. Dkt. 105, Order at 20, 25. Hecox never alleged a bare desire to try out regardless of whether the NCAA's eligibility requirements would prevent Hecox from competing.[8] To the contrary, Hecox alleged that "[r]unning with people every now and then is not the same feeling as *competing together as a team* with regular practices, uniforms, and a coach." ER769–70 (emphasis added). If Hecox were "barred by [the Act] *from competing* in the Fall 2020 season," Hecox would "lose a season of NCAA eligibility." ER770 (emphasis added). And Hecox repeatedly claimed to be "eligible to compete in women's sports," ER770, indicating a desire to compete on the team, not a bare desire to try out.[9] This case became moot in October 2020, and neither an interest in playing club soccer nor a bare desire to try out again two years later can revive it.

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[8] Nor did Hecox allege BSU would have stopped Hecox *even from trying out* if the Act were in effect. Given that BSU only "evaluates a walk-on athlete's NCAA eligibility after the student-athlete makes the team," Dist. Ct. Dkt. 92, First Stip'd Facts at 7, it is reasonable to suspect BSU would enforce the Act's eligibility requirements the same way.

[9] Hecox did allege broadly that if the Act were in effect Hecox could not "participate in college athletics at all." ER771. But that was a reference to "running *on the team*," *id.*, not to merely trying out, and certainly not to club soccer, *contra* Dist. Ct. Dkt. 105, Order at 22. So reliance on that bare assertion was misplaced. *See Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.").

## II. Defendants did not have the burden to produce evidence to show mootness.

Though the stipulated facts established that, in October 2020, this case was moot, the district court inappropriately saddled Defendants with the burden of producing more evidence. "The burden in a civil case involves not one but *two* elements." *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986) (cleaned up). Courts "distinguish between . . . burden of persuasion, and . . . the burden of production or the burden of going forward with the evidence." *Ruan v. United States*, 142 S. Ct. 2370, 2380 (2022) (cleaned up). Though this Court has held that the party claiming mootness bears the "burden of *persuasion*," it has never held that means it also bears the burden of *production*. *S.F. BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9th Cir. 2002) (emphasis added). *Accord United States v. Brandau*, 578 F.3d 1064, 1069 n.2 (9th Cir. 2009) (stating the "the party asserting mootness" bore "the burden of persuasion").

The district court misread this Court's past use of the term "burden" to include *both* burdens. Dist. Ct. Dkt. 105, Order at 13 n.13. But the cases the district court cited did not distinguish between the two types. And by itself, the phrase "burden of proof" commonly refers to the burden of persuasion alone. *See Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 272–76 (1994) ("[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion.").

Courts assign the burden of *production* to defendants asserting mootness only in cases where those defendants voluntarily cease their offending behavior. *E.g.*, *Kovac v. Wray*, 449 F. Supp. 3d 649, 653 (N.D. Tex. 2020) ("A plaintiff bears the burden to prove that the Court has jurisdiction" except "when the defendants voluntarily cease the conduct that the plaintiff is challenging.") Under the "voluntary cessation" exception to mootness, "the mere cessation of illegal activity in response to pending litigation does not moot a case, unless the party alleging mootness can show that the 'allegedly wrongful behavior could not reasonably be expected to recur.'" *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 189 (2000)).

For the voluntary-cessation exception *not* to apply, a defendant must make it "absolutely clear" it will not revert to its prior behavior. *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018). That burden is a "heavy" one because the defendant must both persuade the court *and* produce evidence showing that its "challenged conduct cannot reasonably be expected to start up again." *Id.* at 1037. And that makes sense because the defendant is in the best position to produce evidence showing whether it will "return to its old ways." *Id.* at 1039 (cleaned up). *Accord Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1168 (9th Cir. 2022); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002).

That explains this Court's decision in *Rosemere*, which the district court cited for the proposition that "it is the defendant's burden to show [that] a plaintiff will *not* take certain action, rather than the plaintiff's burden to show that it will do so." Dist. Ct. Dkt. 105, Order at 17 (citing *Rosemere*, 581 F.3d at 1174). That was only true in *Rosemere* "because the voluntary cessation exception to mootness applie[d]." 581 F.3d at 1171. Specifically, the Defendant EPA had stopped engaging in the challenged dilatory behavior and had successfully moved to dismiss the case as moot on that basis. *Id.* at 1171–72. Under those circumstances, this Court rejected the EPA's attempt on appeal to "shift the burden" to the plaintiff "to defeat mootness." *Id.* at 1173.

That is not this case. Unlike in *Rosemere*, Hecox's claims did *not* become moot through Defendants' voluntary cessation of conduct Hecox was challenging. Defendants have never disclaimed an intent to enforce the Act. Instead, *Hecox's* own actions mooted this case. Hecox failed to post a qualifying time to make the women's track and cross-country teams. 4CA Dkt. 65, Appellees' Br. at 17 n.4. Hecox dropped out of school. *Id.* Only Hecox could decide to reenroll and try out again. Only Hecox could decide to enroll in *and complete* the required number of courses to meet the NCAA's eligibility requirements, which upon information and belief Hecox failed to do. And only *Hecox* can produce evidence showing an ability to meet the NCAA's new testosterone-level requirements, which thus far Hecox also has failed to do.

Shifting the burden of production to the defendant when the defendant has voluntarily ceased to engage in the challenged behavior "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). But that "principle does not aid" Hecox here because it is Hecox, not Defendants, "whose conduct sap[ped] the controversy of vitality, and [Hecox] can gain nothing from [] dismissal." *Id.*[10] It also makes little sense to require Defendants to proffer evidence to prove a negative about Hecox, namely that Hecox will *not* do something, when evidence of Hecox's own "activities and plans [are] uniquely within [Hecox's] possession." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 94 (2013). That burden belonged to Hecox, and Hecox failed to meet it.[11]

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[10] *City News* also shows why *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), is distinguishable despite the Supreme Court's holding in *Erie* that the case was not moot "*in part*" because the business there could have decided to operate again. *City News*, 531 U.S. at 283 (emphasis added). "That speculation standing alone, however, did not shield the case from a mootness determination." *Id.* In *Erie*, concerns the plaintiff was "attempting to manipulate the Court's jurisdiction . . . counsel[ed] against a finding of mootness." 529 U.S. at 288. "In this case, we confront no parallel circumstance." *City News*, 531 U.S. at 284. If anything, such concerns counsel *in favor* of finding mootness here.

[11] That's true even though BSU employees determined that Hecox did not qualify for a spot on the team *on the merits* because that is not the government action Hecox challenges in this case. As this Court's decision in *Gemtel* makes clear, when an *unchallenged* government action results in a claim apparently becoming moot, the plaintiff retains

## III. Hecox does not presently have standing to challenge the Act, and Hecox failing to make the team again or failing to obtain a waiver of the NCAA's eligibility requirements would cement that conclusion.

Subsequent events have also shown that Hecox does not currently have standing to challenge the Act. Hecox might fail to make the women's track and cross-country teams later this month or fail to be deemed eligible to compete under the relevant NCAA requirements.[12]

"Although most disputes over standing concern whether a plaintiff has satisfied the requirement when filing suit, Article III demands that an actual controversy persist throughout all stages of litigation." *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022) (cleaned up). That includes the requirement of an "injury in fact," or "an invasion of a legally protected interest which is (a) concrete and particularized," and "(b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up).

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the "burden of demonstrating jurisdiction, in the face of [the] apparent mootness of the claim," and it is the plaintiff's burden to "put forward" evidence to defeat mootness. *Gemtel Corp. v. Cmty. Redevelopment Agency of L.A.*, 23 F.3d 1542, 1545 (9th Cir. 1994).

[12] Two days ago, Intervenors and Defendants filed a joint motion to stay the briefing schedule after learning tryouts have not yet occurred but likely will occur by the end of this month. 4CA Dkt. 158, Motion to Stay at 3–5. The Court has not yet ruled on that motion, so Intervenors are only able to brief these issues based on hypothetical facts. If Hecox does not make the team, is deemed ineligible, or is unable to compete for some other reason, Intervenors may file a motion for leave to file an additional supplemental brief addressing mootness and standing.

It also means there must continue to be some "causal connection between the injury and the conduct complained of," meaning the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (cleaned up). Importantly, in cases where, as here, "one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," it necessarily "becomes the burden of the plaintiff *to adduce facts* showing that those choices have been or will be made in such manner as to produce causation and [to] permit redress-ability of injury." *Id.* at 562 (cleaned up) (emphasis added).

Hecox has not met and cannot meet that burden. As the district court correctly found, even if Hecox makes the women's track or cross-country team this semester, Hecox's eligibility to compete during the Fall 2022 season still would depend on BSU's willingness to seek—and the NCAA's willingness to grant—a waiver of NCAA Bylaw 14.4.3.1(b) because Hecox has not "complete[d] 18 credit hours since the beginning of the previous fall term." Dist. Ct. Dkt. 105, Order at 9–11, 21.[13] And Hecox does not qualify for an exception to that requirement. *Id.* at 9–10.

[13] Upon information and belief, because Hecox only completed three credits in the Spring 2022 semester, Hecox also cannot satisfy NCAA Bylaws 14.4.3.2 and 14.4.3.1(c) and will not be able to satisfy 14.4.3.1(b) in time for the Spring 2023 semester. Dist. Ct. Dkt. 105, Order at 8–9.

Thus, even if Hecox "makes the women's cross-country or track teams," Hecox will "have to obtain an eligibility waiver from the NCAA to run for either team." *Id.* at 21. And so Hecox's risk of being "barred . . . from competing" and losing another "season of NCAA eligibility," ER770, "depends on the unfettered choices made by independent actors not before the courts," *Lujan*, 504 U.S. at 562 (cleaned up), namely the NCAA's waiver committee, Dist. Ct. Dkt. 105, Order at 11, 21 n.16. This Court "cannot presume either to control or to predict" that committee's "exercise of broad and legitimate discretion." *Lujan*, 504 U.S. at 562 (cleaned up). So it is Hecox's burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 562 (cleaned up).

Hecox has failed to adduce any such facts. Indeed, the district court "lack[ed] information to assess" whether "the NCAA [would] grant a waiver based on an unforeseeable hardship or other unspecified circumstances." Dist. Ct. Dkt. 105, Order at 21. "[T]here is simply no way to accurately predict whether the NCAA will grant a waiver." *Id.* at 21 n.16. As a result, Hecox *already* is without standing because Hecox has not adduced sufficient facts to show causation and redressability.[14] And if Hecox is deemed ineligible to compete *irrespective of the Act*, the lack of causation and redressability will be indisputable.

[14] *Accord Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1017 (9th Cir. 2021) (plaintiffs failed to carry same burden).

So too if Hecox fails to make the team a second time. Because the BSU coaches responsible for making that decision are employees of a party that is "before the court[]," *Lujan*, 504 U.S. at 562, Hecox might not have the burden "to adduce facts" showing that decision "will be made in such manner as to produce causation and [to] permit redress-ability of injury," *id.* But as with the waiver decision, once the decision has been made and Hecox has failed to make the team again, the lack of causation and redressability will be indisputable. Hecox's inability to compete on the team will *not* be "fairly traceable to the challenged action of the defendant[s]," *id.* at 560 (cleaned up), meaning their enforcement of the Act.[15] Instead, it will be *solely* traceable to Hecox's inability to run fast enough to make the team.[16]

Failing to make the team a second time or being deemed ineligible to compete also would render the threatened injury Hecox alleged in the complaint far too "conjectural [and] hypothetical" to constitute an "injury in fact." *Lujan*, 504 U.S. at 560. Trying to prevent the case from becoming moot, Hecox has asserted an intent to try out *again* in the Fall 2023 semester. Dist. Ct. Dkt. 92, First Stip'd Facts at 10. But out of

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[15] That will be equally true if Hecox is unable to "meet the sport standard for documented testosterone levels," and thus unable to compete on that basis. *Transgender Student-Athlete Participation Policy*, NCAA Sport Science Institute, perma.cc/BHS3-T55E.

[16] *Cf. Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1302 (1992) (Stevens, J., in chambers) (recognizing that stay "applicant may fail to qualify [for the Olympics], thus mooting the entire matter").

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.

It also appears highly improbable that Hecox would be able to overcome the barriers to NCAA eligibility that have plagued this case since October 2020. Hecox would need to complete 72 credit hours by the start of the Fall 2023 semester to satisfy NCAA Bylaw 14.4.3.2. Dist. Ct. Dkt. 92, First Stip'd Facts at 7; Dist. Ct. Dkt. 99-2, Decl. of Ellen Staurowsky at 6; Dist. Ct. Dkt. 105, Order at 8. Since upon information and belief Hecox only completed three credit hours in the Spring 2022 semester, Hecox would need to complete *27 credit hours* during the 2022–23 school year to satisfy that requirement and avoid needing a waiver from the NCAA's waiver committee to compete in the Fall 2023 semester. And the record establishes that it is highly improbable Hecox would be able to complete that many credit hours in one school year.

Moreover, absent any evidence Hecox has been able to achieve a total serum testosterone level below 10 nanomoles per liter, NCAA, *Sport-Specific Testosterone Thresholds: 2022 Fall Sports*, perma.cc/73AD-VC2W, any potential future injury from the Act remains purely "conjectural [and] hypothetical." *Lujan*, 504 U.S. at 560.[17]

[17] Intervenors would consent to Hecox filing such evidence with this Court under seal.

## CONCLUSION

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). And especially in cases where, as here, "anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Id.*

Hecox has been one of the Act's most vocal opponents since Hecox testified against it in the state senate before its passage. 4CA Dkt. 33, Intervenors' Opening Br. at 12. But that is not enough. There may yet come a time when the federal courts' intervention in an actual conflict over the Act is really necessary. But even assuming it ever existed here, that time has long since passed.

This Court should vacate the judgment below and remand with instructions to dismiss the case as moot.

Respectfully submitted,

Madison Kenyon and
Mary Marshall,
*Intervenors-Appellants*

Dated: September 9, 2022

By: */s/ Roger G. Brooks*

KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street

ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

Scottsdale, AZ 85260
(480) 444-0020
rbrooks@ADFlegal.org

CHRISTOPHER P. SCHANDEVEL
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
(571) 707-4655
cschandevel@ADFlegal.org
cbarnette@ADFlegal.org

*Counsel for Intervenors-Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing Supplemental Brief 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/ Roger G. Brooks*
Roger G. Brooks
*Counsel for Intervenors-Appellants*

September 9, 2022

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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