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 KAYDEN HULQUIST'S OPPOSITION TO INTERVENORS-APPELLANTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Intervenors, independent of the State or any other defendant, ask this Court to overturn the District Court's well-reasoned July 18, 2022 Order finding that this case is not moot. The Court should reject that request. Lindsay Hecox has standing, and this case is not moot.

Following this Court's direction, the District Court made detailed factual findings related to potential mootness and concluded as follows:

> Hecox has re-enrolled at [Boise State University] and is participating on the women's club soccer team. She also intends to try out for the women's track and cross-country teams in the Fall 2022 semester, and again in the Fall 2023 semester. Although there are some questions about Hecox's NCAA eligibility, she cannot continue to play soccer, or compete for a spot on the women's track or cross-country teams, absent an injunction. Thus, Hecox's claim is not moot.

(Dkt. 149-2 ("Order") at 25.) Intervenors cannot dispute that Lindsay is currently enrolled at Boise State University ("BSU"), is playing on the women's club soccer team, and has stated that she intends to try out for the varsity cross-country and track teams in fall 2023. (*Id*. at 6, 12; Hecox Decl. ¶¶ 2, 14, 20.) As described further below, Lindsay ultimately did not try out for the women's cross-country and track teams this fall—despite her intent to do so—due to several challenging personal

circumstances from which she is recovering, including her father's death and contracting COVID-19. Under any reading of the Supreme Court's and this Court's precedent, Lindsay's case is not moot.

Intervenors' attacks on the District Court's process and reasoning are meritless. First, Intervenors criticize the District Court's finding by claiming that the District Court erred by developing the record and considering facts that occurred after October 2020 (a date of no particular significance) despite this Court *ordering* the District Court to "develop the record, resolve any factual disputes, and apply the required caution and care to the initial mootness determination." (Dkt. 143 ("Remand Order") at 4.) The District Court did precisely what it was asked to do, and, notably, Intervenors participated in that process without complaint, including submitting stipulated facts *after* October 2020. Second, Intervenors criticize the District Court's allocation of the burden of production, but the District Court expressly held that Lindsay's case was not moot regardless of who had the burden. (Order at 13, n.13.) Finally, Intervenors simply ignore Lindsay's current participation on the BSU's women's club soccer team in claiming that the case is "currently" moot based on a flawed analysis of the NCAA bylaws—an analysis that the

Court need not undertake in light of Lindsay's participation in soccer, and that in any event does not render the case moot. Intervenors' erroneous arguments were correctly rejected by the District Court and should be rejected again here.

II. BACKGROUND

On August 17, 2020, the District Court preliminarily enjoined H.B. 500—a law that prohibits transgender women and girls from playing on girls' or women's school-sponsored sports teams, Idaho Code § 33-6203(1)–(2). (1-ER-1.) Because of the injunction, Lindsay was able to try out for the BSU cross-country team in fall 2020. (Dkt. 140-2 ¶ 9.) Without the injunction, Lindsay would not have been able to compete for a spot on the team. (Order at 19.) Lindsay did not make the team, but resolved to continue training and to try out again the following year. (Dist. Ct. Dkt. 97-1 ¶¶ 2, 23-24.)

In October 2020, after struggling academically as a result of virtual learning and attempting to balance school and work, Lindsay took a leave of absence from BSU. (Dkt. 140-2 ¶¶ 12-13.) For the next year, Lindsay worked full-time and paid taxes in Idaho in order to save money for tuition, establish in-state residency, and benefit from lower tuition. (*Id.*

¶ 14.) Lindsay intended to return to BSU when she was eligible for the in-state tuition, (*Id.* ¶¶ 16-17), and in fact did re-enroll in January 2022 as an Idaho resident, (Order at 15).

On June 24, 2021, after holding oral argument on the appeal of the District Court's preliminary injunction order, this Court remanded the case to the District Court for the limited purpose of determining whether Lindsay's claim was moot. (Remand Order.) This Court's remand was prompted by Lindsay's decision to take a leave of absence. In the Remand Order, this Court provided the District Court with a specific mandate: "develop the record, resolve any factual disputes, and apply the required caution and care to the initial mootness determination." (Remand Order at 4.) Among other things, this Court expressly directed the District Court to determine whether Lindsay would be affected by H.B. 500 in the future, including if there are "BSU women's club teams that she plans to join." (*Id.* at 4; *see also id.* ("The mootness analysis would be aided by more information regarding … the availability of BSU women's sports outside of NCAA teams").)

On remand, the parties prepared stipulated facts to respond to this Court's questions. (Dist. Ct. Dkt. 92.) Due to the District Court's heavy

caseload and backlog of criminal matters as a result of COVID, (Dist. Ct. Dkt. 101), the District Court ordered the parties to file supplemental stipulated facts on March 16, 2022, enabling it to make a complete and updated record.

While this process was unfolding, all of the "contingencies" that Intervenors discuss (Dkt. 160 ("Motion") at 7-13), and nearly all of the questions that this Court raised (Remand Order at 3-4), were answered by the unfolding facts. As she intended, Lindsay in fact continued working full time, established in-state residency in Idaho, and continued to run and train athletically. (Dist. Ct. Dkt. 92 ¶ 4; Dist. Ct. Dkt. 97-1 ¶¶ 14-16, 23-24.) Lindsay also enrolled in nine credit hours at BSU for the spring 2022 semester and began playing on the BSU Women's Club Soccer team. (Dist. Ct. Dkt. 99-1 ¶ 2; Dist Ct. Dkt. 102 ¶ 5.) To the extent there were any questions regarding Lindsay's intention to re-enroll at school or join a "club sports" team, (Remand Order at 4), the passage of time confirmed what Lindsay has stated all along: she returned to school, joined the women's club soccer team, and continued training to try out for the women's cross-country and track teams.

During the spring 2022 semester—after the record before the District Court was submitted—Lindsay's father tragically and unexpectedly passed away. (Hecox Decl. ¶ 5.) Lindsay was understandably distracted from her courses while grieving, which led to her falling behind. Though Lindsay was able to complete three credit hours this past spring, her professors allowed her to take incompletes for her six remaining credits. Lindsay has until May 2023 to complete those six credit hours and she is on-track to do so with support from an academic coach. (*Id.* ¶ 6.)

On July 18, 2022, the District Court issued factual findings as required by the Remand Order and held that Lindsay's claim is not moot. (Order at 25.) Only Intervenors moved for supplemental briefing regarding whether Lindsay's case is moot: the State and the other defendants have not challenged the District Court's finding. (Dkt. 152.)

Since the District Court's order issued, Lindsay began the fall 2022 semester at BSU. She is currently a student and currently a member of the women's club soccer team. (Hecox Decl. ¶¶ 2, 20.) She is enrolled in 13 credit hours, but after contracting COVID at the start of this school year and missing classes during her recovery, she may be forced to drop

one class. (*Id.* ¶ 11.) She expects to complete at least 10 credit hours this semester and she intends to remain on the women's club soccer team for the duration of her time at BSU. (*Id.* ¶¶ 20, 21.)

Though Lindsay had intended to try out for the women's cross-country team this fall, as a result of contracting COVID and recovering from her recent personal challenges, including the grief from losing her father, she ultimately did not try out this fall. (*Id.* ¶ 13.) However, Lindsay continues running and training so that she can try out in fall 2023 and she also continues to work with her academic coach so that she can complete her coursework and meet the required number of credits for NCAA eligibility. (*Id.* ¶ 14.) It is currently unclear if Lindsay will complete the requisite number of credits to establish NCAA eligibility in fall 2023, but given that waivers and ultimate eligibility are determined only *after* tryouts occur, Lindsay is committed to trying out for the team in fall 2023. (*Id.* ¶ 17.)

Today, Lindsay is directly benefitting from the injunction ordered by the District Court. It allows her to play on the women's club soccer team at BSU. It also removes the barrier she would otherwise face when seeking to try out for the varsity cross-country and track teams. Without

the injunction, Lindsay would not be able to play any women's sports at BSU. As the District Court explained in its Order:

> Hecox has proven that she has a real and imminent need for relief because she cannot continue to play for the BSU women's club soccer team absent an injunction. Under its express terms, [H.B. 500] applies to all "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports," that, like the BSU women's club soccer team, are sponsored by "a public institution of higher education[.]" Idaho Code § 33-6203(1) (emphasis added). As such, Hecox needs the judicial protection she seeks through this litigation in order to continue playing on the BSU women's club soccer team. *Larson*, 302 F.3d at 1020.

(Order at 24-25.)

III. ARGUMENT

"The jurisdiction of federal courts depends on the existence of a 'case or controversy' under Article III of the Constitution." *Pub. Utils. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996). If an action or claim loses its character as a live controversy, then the action or claim becomes moot, and federal courts lack jurisdiction to resolve the underlying dispute. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797–98 (9th Cir. 1999); *see also Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 853–54 (9th Cir. 1985) ("A case, or an issue in a case, is

considered moot if it has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law") (cleaned up).

The case and controversy limitation on federal judicial authority underpins the doctrines of both standing and mootness. *Friends of the Earth, Inc. v. Laidlaw Env't. Servs.*, 528 U.S. 167, 180 (2000). The two inquiries differ in that standing is assessed by the facts that exist at the time a complaint is filed, while mootness involves addressing changed circumstances that arise after a complaint is filed. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001).

A. Lindsay Has Standing.

"[S]tanding is measured at the time of the complaint." *Arizona v. Yellen*, 34 F.4th 841, 848 (9th Cir. 2022); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992). To have Article III standing, Lindsay must have plead an "injury in fact," a causal connection between the injury she suffers and the conduct challenged before the Court, and that a favorable Court decision will redress the injury. *Lujan*, 504 U.S. at 560. In turn, to adequately plead "injury in fact," Lindsay must allege that she has suffered, or is likely to imminently suffer, a "concrete and particularized"

injury to a "judicially cognizable interest." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). As long as Lindsay can "demonstrate a realistic danger of sustaining a direct injury" from H.B. 500, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979), and that her fear of negative impact is not "imaginary or wholly speculative," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (citation omitted), then she has adequately alleged injury in fact. *See id*. at 160.

When the Complaint was filed, Lindsay was a student at BSU who intended to try out for the women's cross-country and track teams. (5-ER-762 at ¶ 6 ("Complaint").) The District Court "determined there was an actual case and controversy when Hecox filed her Complaint." (1-ER-31–41 ("Preliminary Injunction").) As the District Court correctly noted, H.B. 500 "categorically bars Hecox from trying out for BSU's women's cross-country and track teams." (Order at 19.) Absent an injunction enjoining H.B. 500, Lindsay could not try out for the teams, which itself is a redressable injury sufficient for standing. (Order at 19-20); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (holding twice-rejected white male applicant had standing to challenge medical school's admissions program because the requisite "injury" was plaintiff's

inability to *compete* for all 100 places in the class and not that he would have been *admitted* in the absence of the special program).

In short, Lindsay had standing when she filed her complaint, which is the time at which standing is assessed. Events that transpired after that time inform the separate Article III issue of mootness, discussed *infra*. *See, e.g.*, *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001) (standing is assessed by the facts that exist at the time a complaint is filed, while mootness involves changing circumstances that arise after a complaint is filed).

B. Lindsay's Case Is Not Moot.

The District Court correctly determined that Lindsay's case is not moot, and there is no basis for this Court to disrupt that determination. As Intervenors acknowledge, (Motion at 7), "[t]he basic question in determining mootness is whether there is a *present* controversy as to which effective relief can be granted." *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 862 (9th Cir. 2017) (emphasis added). Dismissal is appropriate only if Intervenors have demonstrated that there is "no effective relief remaining that the court could provide." *S. Or. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1134 (9th Cir. 2004) ("*Barter Fair*"). Thus, to obtain

dismissal of Lindsay's claim, Intervenors must show that it is "*absolutely clear* that [Lindsay] no longer ha[s] any need of the judicial protection that [she] sought." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam)) (emphasis added). And, as Intervenors' own cited case acknowledges (Motion at 7), "[i]n deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any effective relief*." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) (emphasis added).

A "present controversy," *Bayer*, 861 F.3d at 862, exists because Lindsay is indisputably: a student at BSU, (Hecox Decl. ¶ 2); an active member of the BSU women's club soccer team (on which she could not play absent the existing injunction of H.B. 500), (*id.* ¶ 20); training to improve her chances of making the BSU's women's varsity cross-country and track team, (*id.* ¶ 14); and intends to try out for the women's varsity cross-country and track team in fall 2023, (*id.* ¶ 17). Though there may be some questions regarding Lindsay's ability to ultimately participate on the team due to NCAA requirements, it remains firmly the case that,

because of H.B. 500, "she cannot continue to play soccer, or compete for a spot on the women's track or cross-country teams, absent an injunction." (Order at 25.) Because Lindsay is currently "subject to the challenged conduct, she has a stake in preserving the court's holding." *Camreta v. Greene*, 563 U.S. 692, 703 (2011) (finding even mere possibility of being subject to future conduct sufficient to find case not moot).

This case thus presents "an actual, ongoing controversy" for which this Court can provide "effective relief." *Bayer*, 861 F.3d at 862. It is not moot. None of Intervenors' arguments to the contrary have merit.

1. The District Court Did Not Misallocate Intervenors' "Heavy Burden" To Demonstrate Mootness.

Intervenors bear a "heavy burden" to establish mootness. *S.F. BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9th Cir. 2002). Their assertion of mootness must be approached "cautiously and with care to ensure that [Intervenors have] carried [their] burden of establishing that the claim is moot." *United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002).

Moreover, when assessing mootness, this Court has held it is defendant's burden to show a plaintiff will not take certain actions, rather than plaintiff's burden to show that it will do so. In *Barter Fair*,

this Court held the defendant had the burden of establishing mootness even where the plaintiff ceased the relevant conduct. 372 F.3d at 1134. The same logic informs several other decisions of this Court. *S.F. BayKeeper, Inc.*, 309 F.3d at 1159 (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)); *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1138 (D. Idaho 2013), *aff'd sub nom. McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015) (same). The District Court agreed (Order at 13) and dispensed with Intervenors' arguments to the contrary, (*id.* at 13, n.13).

Intervenors now argue at length that the District Court wrongly allocated the burden of production. (Motion at 14-17.) This argument wholly fails to engage with the District Court's determination that "even if Hecox has the burden of establishing her claim is not moot given the procedural posture of this case, the Court finds she has met this burden." (Order at 13, n.13.) Intervenors also fail to explain how the burden of production is relevant here, (*Cf.* Motion at 14), given that Lindsay has repeatedly provided declarations establishing her intentions, the definite and concrete steps she has taken to realize those intentions, and her current status as a BSU student athlete and member of the women's club soccer team. *See Rosemere Neighborhood Ass'n v. U.S. Env't Prot.*

Agency, 581 F.3d 1169, 1174 (9th Cir. 2009) ("[W]hen there is an argument about whether a plaintiff will again encounter a challenged activity, this court has required little more than what Rosemere has already supplied: a stated intention to resume the actions that led to the litigation").

Simply put, the Supreme Court's and this Court's precedent allocate the burden, including that of production, to the "party claiming mootness." Intervenors do not even attempt to argue that they have met their burden. And in any event, regardless who has the burden of production, the District Court correctly concluded that Lindsay has provided sufficient evidence to demonstrate that her case is not moot by making a clear statement of intention to resume the challenged conduct *and* engaging in activity that would be prohibited by the law but for the injunction (*e.g.*, playing on the women's club soccer team). (Order at 13.)

Moreover, Intervenors also fail to explain how they met their "burden of persuasion." (*Cf.* Mot. at 17.) Even Intervenors' own cited case (Motion at 14) states that "a defendant must show that the court cannot order any effective relief," *San Francisco BayKeeper, Inc.*, 309 F.3d at 1159. As discussed *infra*, Intervenors ignore Lindsay's

membership on BSU's women's club soccer team, her stated intention to try out for the women's varsity cross-country and track teams in fall 2023, and the concrete steps she has taken to see through her intentions to date (*e.g.*, establishing in-state residency, re-enrolling, joining the club soccer team, training for tryouts, etc.). It is thus indisputable that this Court can order "effective relief," as the present injunction of H.B. 500 is required for Lindsay to continue playing on the women's club soccer team and to be able to try out for the cross-country and track teams. (Order at 25 ("she cannot continue to play soccer, or compete for a spot on the women's track or cross-country teams, absent an injunction").)

2. The District Court Developed The Record As Ordered By This Court.

On June 24, 2021, this Court ordered the District Court to develop the record as it relates to mootness, including by inquiring whether Lindsay could play club sports at BSU. (Remand Order at 3-4.) The District Court did just that. In a well-reasoned and exhaustive opinion, the District Court assessed the factual submissions (including stipulated facts) presented by the parties—all of which spoke to questions raised by this Court in its June 24 Order—to determine that the case is not moot. Specifically, this Court provided the District Court with a non-exhaustive

list of seven questions to resolve, each of which received a dedicated section in the District Court's opinion.

Now, for the first time, Intervenors claim that the District Court erred by considering facts that occurred after the Complaint had been filed.[1] (Motion at 11-13.) But the Court's mandate could not have been clearer: "develop the record, resolve any factual disputes, and apply the required caution and care to the initial mootness determination." (Remand Order at 4.) To fulfill that mandate, the District Court was required to develop the record and incorporate those facts into its mootness assessment. *See, e.g.*, *Clark*, 259 F.3d at 1006 ("Mootness inquiries, however, require courts to look to changing circumstances

[1] Intervenors never once objected below to the December 2021 or April 2022 submissions of facts, despite having ample opportunity to do so. Indeed, the April 2022 submission of facts was a joint stipulation that required all parties—including Intervenors-Appellees—to sign on. (Dist. Ct. Dkt. 102 (Ex. A, "Suppl. Stipulated Facts on Mar. 16, 2022 Order").) Because Intervenors-Appellants failed to raise their objections before the district court, they cannot raise them now. *See, e.g.*, *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006) (recognizing general rule that issues not raised before the district court are waived). Intervenors respond with the *non sequitur* that mootness cannot be waived. (Motion at 8 n.4.) But objecting to the introduction of evidence certainly can be waived, as it was here. And Intervenors have shown a proclivity for submitting unapproved filings whenever they see fit. (*E.g.*, Dkts. 152, 157.) So it rings especially hollow for Intervenors to suggest they did not object out of an undefined concern that the filing would be inappropriate.

that arise after the complaint is filed").

A court must be "absolutely certain" that no relief will flow from its decision before it can deem the case moot. *S.F. BayKeeper, Inc.*, 309 F.3d at 1159. In order to do that, the District Court, consistent with this Court's Remand Order, necessarily assessed the facts—including any developments that occurred after the complaint was filed—to ensure itself that it has jurisdiction over the matter.

3. Intervenors' Desire to Litigate Mootness Based on Facts Frozen in "October 2020" Does Not Help Them.

Despite recognizing that this Court's precedent makes clear that mootness focuses on the "present," (Motion at 7), Intervenors spend an inordinate amount of time arguing that this Court should make a mootness determination based on the state of affairs in October 2020,[2]

[2] Intervenors' argument is inconsistent with other positions they have taken. For example, Intervenors ask this Court to consider factual developments that occurred between the time the Complaint was filed and October 2020. (Motion at 11.) But then, for whatever reason, Intervenors state that the Court should not consider anything that happened after October 2020. (*Id.* at 22.) And finally, Intervenors dedicate two improper filings (Dkts. 155, 158) and part of this motion to discussing Lindsay's spring 2022 grades, her current academic standing, and BSU's fall 2022 cross-country and track tryouts. *(See, e.g.*, Motion at 4.) The inconsistencies are numerous. This Court should reject Intervenors' baseless arguments and assess mootness based on the "present" state of affairs as the law requires. *Bayer*, 861 F.3d at 862.

(*id.* at 11, 13). This approach makes no sense and is unsupported by the law. But even if this were the law, this case would still not be moot.

Even after she took a leave of absence from BSU, Lindsay always maintained a clear and definite interest in returning to school and playing women's sports at BSU. (Dkt. 140-2 ¶¶ 12-17.) The Supreme Court and this Court have held repeatedly that an intent to resume activity implicating a challenged law establishes a live controversy. *See, e.g.*, *City of Erie*, 529 U.S. at 288 (holding that so long as the plaintiff "ha[d] an interest in resuming operations," it "ha[d] an interest in preserving the judgment" below and "a concrete stake in the outcome of [the] case"); *Clark*, 259 F.3d at 1012 n.9 (explaining that owner's "stated intention to return to business if the Ordinance is declared unconstitutional" meant that case was not moot); *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1001 (9th Cir. 2004) (holding that overbreadth challenge to a business license requirement that did not presently apply to plaintiff was not moot "[g]iven the county's expressed intention to amend the ordinance so as to have it apply to [the plaintiff]"); *Barter Fair*, 372 F.3d at 1134 (explaining that case would be moot "if the Fair had entirely ceased to operate, left the business,

and no longer sought or intended to seek a license," but finding it not moot because the fair's "stated intention [was] to return to business"); *Rosemere*, 581 F.3d at 1174 ("when there is an argument about whether a plaintiff will again encounter a challenged activity, this court has required little more than what Rosemere has already supplied: a stated intention to resume the actions that led to the litigation.").

Lindsay's claim is not moot for the same reasons the Supreme Court and this Court held that the above cases were not moot. And indeed, the argument against mootness is far stronger here than in any of those cases, as Lindsay has not only expressed "an interest" in resuming the challenged activity, but she is currently participating in women's sports at BSU, something that would not be permitted absent the injunction. (Order at 24 ("Hecox has proven that she has a real and imminent need for relief because she cannot continue to play for the BSU women's club soccer team absent an injunction").)

4. This Court Can Consider Lindsay's Participation on the Women's Club Soccer Team.

Intervenors next claim that the District Court impermissibly allowed Lindsay to "breathe new life" into her case by considering her participation on the women's club soccer team. (Motion at 12.) Not so.

Lindsay's Complaint clearly states that H.B. 500 bars her from participating in women's athletics at BSU. (Order at 22; *e.g.*, Complaint ¶ 38.) As the District Court correctly concluded, her Complaint was sufficiently broad enough to cover her participation on the women's club soccer team. (Order at 22.)

Moreover, "[i]n deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any effective relief*." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) (emphasis added). This Court's precedent anticipates Intervenors' argument and rejects it. Under *Reed*, Lindsay's participation on the women's club soccer team must be considered when determining if this Court can provide "*any* effective relief."[3] This Court can clearly provide relief to Lindsay: affirming the District Court's injunction would ensure

[3] In contrast, the plaintiff in *Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*—who had originally brought a claim to *purchase* firearms—attempted to bring an entirely new claim to *sell* firearms once her original claim became moot. 14 F.4th 322, 326 (4th Cir. 2021). Here, Lindsay simply seeks to affirm the injunction she already obtained based on the claims alleged in her complaint, including her claim that she is aggrieved by H.B. 500 because it prohibits her from playing women's sports at BSU, stigmatizes her, and violates her constitutional right to equal protection under the laws. (Order at 23-25.)

Lindsay could remain on the women's club soccer team and, separately, try out for the varsity cross-country and track teams in fall 2023.[4]

Intervenors simply ignore Lindsay's membership on the women's club soccer team, choosing instead to focus on arguments about NCAA bylaws and waivers, which apply to her potential participation in varsity cross-country or track. The reality is that Lindsay is *already playing women's sports at BSU*. By failing to address her participation on this team, Intervenors have simply failed to rebut a central obstacle to their mootness argument.

5. Lindsay Intends to Try Out for Varsity Cross-Country In Fall 2023.

As explained in her submissions to the District Court, and a declaration provided along with this submission, although Lindsay did not try out for the cross-country and track teams this fall due to unexpected personal challenges, she remains intent on trying out for the cross-country and track teams in fall 2023, and continues to train to meet that goal. She may or may not be academically eligible to compete in fall 2023, but she is taking as many courses as she can manage in an effort

[4] H.B. 500 expressly applies to "club" sports. Idaho Code Ann. § 33-6203(1); *Hecox v. Little*, 479 F. Supp. 3d 930, 983 (D. Idaho 2020).

to satisfy the credit-hour requirement set forth under NCAA rules. Also, Lindsay is well under the NCAA testosterone threshold that applies to cross-country and track.

Given that BSU determines eligibility and whether to apply for NCAA waivers or exemptions *after* tryouts occur, Lindsay does not have any current barriers to trying out for the women's cross-country and track teams assuming the injunction remains in place. This is sufficient to defeat Intervenors' claim of mootness. (Order at 21 ("Hecox may not need an eligibility waiver to run for the teams if she tries out again in the fall 2023 semester, depending on the number of credits she takes during her junior year. Hecox's expressed intent to try out again in the Fall of 2023 appears to satisfy the Ninth Circuit's mootness concerns, particularly because Hecox is currently an enrolled BSU student.").)

IV. CONCLUSION

This Court should affirm the District Court's determination that Lindsay's case is not moot and also affirm the District Court's preliminary injunction order—which is presently allowing her to play women's sports at BSU. To the extent this Court believes additional facts are required, Lindsay requests that her case be remanded so that factual

information can be produced under the strictures of a protective order (*e.g.*, personal medical information).[5] And finally, if this Court is inclined to dismiss the case, Lindsay requests leave to file an amended complaint.

Dated: September 23, 2022

Respectfully submitted,

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[5] Intervenors have already publicly discussed Lindsay's academic progress without her consent, (*see, e.g.*, Mot. at 4), information they apparently received from the State Defendants in violation of federal law. 34 C.F.R. § 99.1 *et seq.* Intervenors have also made baseless assumptions about Lindsay's testosterone levels. (*Id.* at 6.) Lindsay has a right to keep her medical and academic information private and requests remand to implement a protective order if this Court determines any specific medical or academic information is necessary to resolve this dispute.

Attorneys for Plaintiffs-Appellees
Lindsay Hecox and Kayden Hulquist

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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
Kathleen Hartnett
Counsel for Plaintiffs-Appellees