NO. A23-0373 & A23-0621

State of Minnesota

In Supreme Court

JayCee Cooper,

Appellant,

vs.

USA Powerlifting and
USA Powerlifting Minnesota,

Respondents,

BRIEF OF *AMICI CURIAE* INDEPENDENT WOMEN'S FORUM AND PAYTON MCNABB

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AMICI CURIAE'S IDENTITY, INTEREST, POSITION, AND AUTHORITY TO FILE[1]

The Independent Women's Forum ("IWF") is a 501(c)(3) non-profit organization that fights to expand women's options and opportunities. Through its many female athlete ambassadors, it has argued that allowing males to compete against females in sports will reduce opportunities for female athletes on the field and in scholarships. *See The Assault on Womanhood*, Independent Women's Forum, https://www.iwfeatures.com/our-stories/men-in-womens-spaces/ (accessed October 14, 2024).

IWF also produces the Competition Report, a comprehensive summary of the rise of male athletes participating in women's sports, the science behind the differences in men's and women's athletic performances, and the harm of allowing men to participate in women's sports. *See* Independent Women's Forum, *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports* (2d ed.), https://www.iwf.org/wp-content/uploads/2023/06/IWLC_CompetitionReport_2ndEdition.pdf [hereinafter "Competition Report"]. Additionally, IWF actively fights against the inclusion of men in women's

[1] No party or counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae*, their members, or their counsel made monetary contributions to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

sports through legal action. *See, e.g.*, Complaint, *Alabama, et al., v. Cardona, et al.*, No. 7:24-cv-533-GMB (N.D. Ala. Apr. 29, 2024).

Payton McNabb is an IWF ambassador and college student at Western Carolina University. On September 1, 2022, during a high school volleyball game, McNabb suffered a devastating injury from a male athlete who identified as transgender on the opposing team. That male athlete powerfully "spiked" the ball into McNabb's head and she was knocked unconscious for over 30 seconds. While unconscious, her body twisted into a "fencing position," indicating extreme trauma to the brain.

A later medical evaluation revealed that the ball's impact had caused a concussion, brain bleed, and severe head and neck injuries. McNabb continues to suffer the long-term effects from these injuries, including vision problems, memory loss, and partial paralysis to the right side of her body. Her injuries make her schoolwork more difficult to this day. McNabb has testified before the North Carolina General Assembly in support of the Fairness in Women's Sports Act and advocates to protect girls' and women's sports from dangerous and unfair competition. *See* Independent Women's Forum, *Payton McNabb*, https://www.iwf.org/female-athlete-stories/payton-mcnabb/ (accessed October 14, 2024).

This case concerns whether organizations, like Respondents USA Powerlifting and USA Powerlifting Minnesota, can maintain separate leagues for

women to compete and flourish in athletic competition, or whether Respondents are barred from protecting women by the Minnesota Human Rights Act ("MHRA"). The Court of Appeals correctly held that Respondents did not violate the MHRA through their reasonable and nondiscriminatory decision to exclude men, regardless of gender identity, from the women's powerlifting category because of the inherent strength advantages men possess.

For IWF, this case is central to its fight for women's opportunities. Appellant's view of what the MHRA requires—men competing against women—would devastate the separate category of women's sports by reducing playing time and available scholarships for female athletes who would suddenly be forced to compete against stronger and faster male competitors. That is exactly what IWF stands against. And for McNabb, this case is personal: competing against a male athlete put McNabb's life in danger, and she still suffers as a result today. The MHRA cannot, and fortunately does not, require that female athletes lose so much.

On July 25, 2024, the Court granted IWF and McNabb leave to file this brief. Respondents filed their brief on October 7, 2024.

ARGUMENT SUPPORTING AFFIRMANCE

I. Respondents did not discriminate against Appellant based on sex.

For years, this Court has been clear: plaintiffs alleging disparate treatment under the MHRA must demonstrate that a protected trait "actually motivated" the defendant's actions. *Goins v. West Grp.*, 635 N.W.2d 717, 722 (Minn. 2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)). Indeed, "[p]roof of discriminatory motive is critical in a disparate treatment claim." *Id.* Plaintiffs "may prove discriminatory intent by direct evidence or by using circumstantial evidence in accordance with the three-part burden-shifting test set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. July 12, 2001), *modified by* 632 N.W.2d 534 (Minn. Sept. 6, 2001).

Direct evidence is rare, and there is none here. This is not a case where "an employer announces he will not consider females for positions." *Hanson v. Dep't of Nat. Res.*, 972 N.W.2d 362, 373 (Minn. 2022) (quoting *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 720 (Minn. 1986)). Quite to the contrary, in this case the only "direct evidence" is that Respondents have sought to protect women from being eliminated from fair competition—they seek to *prevent*

discrimination against female powerlifters inherent in allowing males to compete against them.

While Appellant asserts single-sex sports policies discriminate on "transgender status," the real allocating mechanism is sex: males are not permitted in the female category. This type of sorting is not discriminatory to trans-identifying individuals; after all, females no matter how they identify may participate in the female category. In other words, this is not a case where Respondents "announce[d] [they] will not consider [transgenders] for [athletic competition]." *Sigurdson*, 386 N.W.2d at 720.

To that end, Respondents do not allow any athletes using testosterone or other androgens to compete, regardless of whether the prescription is for gender transition or not. Supp. Add. 3. Appellant's assertion that Respondents' policy "singles out transgender [athletes] mischaracterizes how the policy operates." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022). Indeed, Respondents have even created a separate "MX" division as an option for athletes who are transgender, non-binary, or do not wish to identify with a particular gender. Resp. Br. 19. *Cf. Adams*, 57 F.4th at 811. ("[T]he School Board gave transgender students an alternative option in the form of an accommodation. Ultimately, there is no evidence of purposeful discrimination against transgender students by the School Board . . . ."). If anything,

trans-identifying athletes have *more* opportunities to compete than individuals who identify as their sex.

Given that trans-identifying males can certainly compete in the male category, just like other males, this case really asks: "whether discrimination," i.e. separate categories, "based on biological sex necessarily entails discrimination based on transgender status." *Adams*, 57 F.4th at 809. The answer, as the court of appeals found, is simple. "It does not—a policy can lawfully classify on the basis of biological sex without discriminating on the basis of transgender status." *Id.*

The MHRA statutory text helps explain why. Start with public accommodations:

> It is an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, sex, or gender identity, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability.

Minn. Stat. § 363A.11(a)(1).

Now, one argument might be that the very existence of single-sex sports would violate this general command. That would obviously be the end of women's sports, and so Appellant does not argue that a separate division for female athletes manages to "deny any person the full and equal enjoyment of the . . . privileges, advantages, and accommodations" of USA Powerlifting. Nor

does Minnesota law. *See* Minn. Stat. § 363A.24, subd. 2 ("The provisions of section 363A.11 relating to sex, do not apply to restricting membership on an athletic team or in a program or event to participants of one sex if the restriction is necessary to preserve the unique character of the team, program, or event and it would not substantially reduce comparable athletic opportunities for the other sex."). Indeed, Appellant *wants* to compete in a division divided by sex. Separate competition divisions based on sex are part of the package of "privileges, advantages, and accommodations" that Respondents offer. Offering Appellant the same opportunity as every athlete—competition in a division based on biological sex—cannot possibly be considered the *denial* of an opportunity.

The business-discrimination provision is even more problematic for Appellant.

> It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service . . . to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, gender identity, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

Minn. Stat. § 363A.17(3). Again, Respondents did not bar Appellant, or any male, from USA Powerlifting competitions generally, just the female division. And Respondents did not present Appellant with a uniquely discriminatory contract for participation in powerlifting competition. Rather, it was the same contract available to all athletes: competitions divided based on biological

sex—and on top of that, with a third category for accommodating athletes in Appellant's position.

Disregarding the statutory text, Appellant starts from the premise that Respondents "violat[ed] the MHRA" and then claims that any "underlying rationale" for doing so should not be considered. App. Br. 22. That's backwards. The "underlying rationale" for any action taken goes directly towards whether there was a violation of the MHRA. It is only an unfair discriminatory practice to "deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation *because of*" a protected trait, Minn. Stat. § 363A.11, subd. 1(a)(1) (emphasis added), or to "*intentionally* refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract *because of* a person's" protected trait, *id.* § 363A.17(3) (emphasis added). In other words, inquiry into the "underlying rationale" for a decision is *embedded in* the MHRA.

At bottom, asserting that Appellant was discriminated against, on its own, does not make it true. The sole reason Appellant claims to have "proven" the case at this stage is because of Respondents' policy of enforcing biology-based competition divisions, based on the inherent differences in male and female physiology. App. Br. 18; *see* Supp. Add. 3–6 (Respondents' policy). Reversing the court of appeals' correct determination that Appellant has no direct

evidence of discrimination, on these facts, would eliminate the longstanding requirement in Minnesota case law that plaintiffs must demonstrate that the protected characteristic "actually motivated" the employer's conduct. *LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506, 514 (Minn. 2017) (quoting *Goins*, 635 N.W.2d at 722). Moreover, *on these facts*, such a holding would foreclose *any* public accommodation or business from maintaining separate spaces for men and women in Minnesota, no matter how good of a reason there may be to maintain those separate spaces. *See infra* Parts III–IV.

II. Consistent with analogous federal case law, Respondents have legitimate and non-discriminatory reasons to maintain separate competition categories based on biological sex.

Entirely lacking evidence of "purposeful, intentional or overt" discrimination by Respondents, *Hanson*, 972 N.W.2d at 373 (quoting *Goins*, 635 N.W.2d at 722), the *McDonnell Douglas* burden-shifting framework governs this case, *see LaPoint*, 892 N.W.2d at 510–11 (citing *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 623–24 (Minn. 1988)). Again, the plaintiff's burden remains the same: "prov[ing] discriminatory intent." *Hoover*, 632 N.W.2d at 542. And again, Appellant falls short.

The reason: Respondents have provided "some legitimate, nondiscriminatory reason" for the actions taken. *Hanson*, 972 N.W.2d at 373 (quoting *McDonnell Douglas*, 411 U.S. at 802). Respondents' "Transgender Participation Policy" has two relevant components. Supp. Add. 3. First, testosterone or

androgen use by athletes is not permitted. *Id.* This makes sense: "Powerlifting is a strength sport. Androgens, such as testosterone is a strength inducing substance, which would aid in the performance within this specific sport. Therefore, not allowed for any powerlifting athlete, no matter what their medical needs are." *Id.* at 5. Second, men are not permitted to compete in the women's category because "significant advantages are had, including but not limited to increased body and muscle mass, bone density, bone structure, and connective tissue." *Id.* at 3. Those advantages may be slightly reduced through testosterone suppression, but "the biological benefits given them at birth still remain." *Id.* at 5. Indeed, Respondents' Therapeutic Use Exemption Committee reviewed scientific literature and International Powerlifting Federation results to conclude that male powerlifters had a 64% performance advantage over females. Resp. Br. 17–18. There was only a 10% performance reduction from testosterone suppression in male athletes. *Id.* at 18.

Appellant claims that any justification for Respondents' policy "is, in itself, discriminatory" and based on stereotypes. App. Br. 24. Fundamental truths of human biology, however, are anything but discriminatory. It is the "fail[ure] to acknowledge even our most basic biological differences" that "risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001). In *Nguyen*, the United States Supreme Court considered whether imposing different requirements for a child's acquisition of

citizenship when a child is born outside of the United States to one citizen and one non-citizen parent depending on if the citizen parent is the mother or father violated the equal protection guarantee of the Fifth Amendment. *Id.* at 56–57. As the court explained, to mandate "Congress to speak without reference to the gender of the parent . . . would be to insist on a hollow neutrality." *Id.* at 64. Obviously, mothers must be present at birth, while fathers may not be. *Id.* at 68. "The distinction embodied in the statutory scheme . . . [was] not marked by misconception and prejudice, nor d[id] it show disrespect for either class." *Id.* at 73. To cast every difference between men and women as a "stereotype[] would operate to obscure those misconceptions and prejudices that are real." *Id.*

Moreover, Appellant's assertion about "stereotypes" is flashy, but an improper use of language. As the Court explained in *Nguyen*, a stereotype is a "frame of mind resulting from irrational or uncritical analysis." *Id.* at 68. Respondents have not decided who can compete in the women's powerlifting division based on who "walk[s] more femininely, talk[s] more femininely, wear[s] make-up, ha[s] her hair styled, and wear[s] jewelry." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 272 (1989) (O'Connor, J., concurring in the judgment). Respondents' policy "does not depend on how [athletes] act or identify." *Adams*, 57 F.4th at 809. It is not irrational to conclude, as Respondents did after ample review, that men generally have an enormous strength advantage in

powerlifting. Just like it is not irrational, as the Court did in *Nguyen*, to conclude that women have a different role in childbirth than men.

As a result, "[t]here has been a long tradition in this country of separating sexes in some, but not all, circumstances." *Adams*, 57 F.4th at 801; *see O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' program and deny them an equal opportunity to compete in interscholastic events."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("[T]hat a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says 'men only' looks very different on a bathroom door than a courthouse door."); W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2019) ("[S]ex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding.").

Even in *United States v. Virginia*, 518 U.S. 515, 550 n.19 (2001), where the Court held that the Virginia Military Institute ("VMI") could not refuse to admit women, the Court acknowledged that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex

privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." In other words, although the Fourteenth Amendment requires that women have access to VMI, the Amendment does not require the demolition of *all* gender-based distinctions at the school. *See id.* at 533 ("Physical differences between men and women, however, are enduring: 'The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" (quoting *Ballard* v. *United States*, 329 U.S. 187, 193 (1946))).

In sum, "the Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences." *Adams*, 57 F.4th at 809. Appellant therefore makes a truly radical claim that businesses should be foreclosed from defending separate athletic competition categories based on well-recognized biological differences between men and women that directly affect the fairness of competition. And, even more radical, that *any* reasonable reliance on these biological differences should entitle the plaintiff to summary judgment, no matter what a jury may think.

In contrast, the court of appeals' decision below is entirely reasonable. The court did not introduce a sea change in the law. It merely concluded that "Cooper's evidence is capable of proving unlawful discrimination based on sexual orientation (*i.e.*, transgender status) only if a fact-finder finds, as a matter

of fact, that Cooper's transgender status (rather than her male physiology) actually motivated USAPL's decision." *Cooper v. USA Powerlifting*, 5 N.W.3d 689, 702 (Minn. App. 2024); *see also id.* at 704 (applying the *McDonnell Douglas* framework and concluding that there are genuine issues of material fact necessitating a jury trial). In other words, the court of appeals left the ultimate questions of fact to the jury, where it belongs. *See LaPoint*, 892 N.W.2d at 514 ("Both the United States Supreme Court and our court have recognized that the ultimate question of whether the defendant discriminated against the plaintiff is one of fact."). This Court can, and should, resolve this case consistent with decades of Minnesota and federal case law.

III. Requiring female athletes to compete against male athletes would destroy fair competition in women's sports and put women at risk of serious physical harm.

Appellant's next argument is just as radical as those discussed so far. According to Appellant, separate competition categories for women, "based on research suggesting that men, on average, are stronger than women, is harmful to all women, cisgender and transgender alike." App. Br. 25 n.13. This assertion, to an individual like Payton McNabb, is absurd and offensive. What was harmful to McNabb was **not** the overwhelming scientific evidence that "men, on average, are stronger than women." What was harmful to her was that no coach or school administrator relied on science and evidence to protect her from competing against a man.

As an adolescent, McNabb devoted her whole life to athletic competition. She was a three-sport athlete—volleyball, basketball, and softball—and had hopes of playing in college with a scholarship. Two years ago, during her senior year of high school, however, those dreams were shattered. McNabb and her volleyball team showed up to play a rival high school and had to face a male athlete. Thanks to that male athlete's superior height and strength, he hit the ball much harder than McNabb's team was used to. Her team tried to compete by changing strategy and playing defensively. They moved their biggest *female* hitter to the front row but were still unable to return the male athlete's powerful spikes.

Toward the end of the game, one of those powerful spikes hit McNabb in the head and knocked her unconscious. One media outlet estimated that the male athlete spiked the ball "abnormally fast" at "approximately 70 mph." Competition Report, *supra*, at 48 (quoting Caroline Downey, *Female High-School Volleyball Athlete Suffers Serious Head Injury after Transgender Player Spikes 'Abnormally Fast' Ball*, Nat'l Rev. (Oct. 22, 2022), https://www.nationalreview.com/news/female-high-school-volleyball-athlete-suffers-serious-head-injuryafter-transgender-player-throws-abnormally-fast-ball/).

While unconscious, her body twisted into a "fencing position," indicating extreme trauma to the brain. Because McNabb was placed in the unfair position of playing a man in high school volleyball, she suffered a concussion, a brain

bleed, and severe head and neck injuries. Going forward, the school board at McNabb's school voted to forfeit all games against the male athlete's school "due to safety concerns." *Id.* (quoting Downey, *supra*). Faced with the end of her athletic career, McNabb suffered from depression. Her parents permitted her to try playing softball and basketball again, but she was unable to play like she had. Even today, McNabb continues to suffer from her injury, including vision problems, memory loss, and partial paralysis to the right side of her body.

What happened to McNabb was not an isolated incident. IWF has documented numerous other injuries in women's sports that occurred when men were allowed to compete against women. "For example, in a women's MMA fight, trans-identified biological male Fallon Fox famously fractured Tamikka Brent's orbital bone." Competition Report, *supra*, at 47. In women's field hockey, during the 2010 Western Massachusetts Division I title game, a male athlete hit a female goaltender running at full speed, causing a concussion and severe headaches for the next six months. *Id.* at 47. And in Maui, Hawaii, a male athlete injured at least two female athletes after transferring from the men's to the women's volleyball team. *Id.* at 48.

Nor should these incidents come as a surprise to any casual observer of, say, the NFL. Research does not just "suggest[] that men, on average, are stronger than women," App. Br. 25 n.13, it confirms it. And strength is only the start.

In total, men have about a 10% athletic advantage over women. Competition Report, *supra*, at 25. These biological differences start at birth. Men are born with larger lungs than females, which helps to oxygenate the blood; larger hearts, which helps pump blood more efficiently; and a higher level of circulating hemoglobin, which helps to transport oxygen in the blood. *Id.* Likewise, men are 4.5 inches taller on average, with a "longer, larger, and denser skeletal structure[]." *Id.* In sum, "male and female bodies have different biomechanics, with the female body 'set up to produce less force in running, jumping and throwing.'" *Id.* (quoting Andrew Langford, *Sex Differences, Gender, and Competitive Sport*, Quillette (Apr. 5, 2019), https://quillette.com/2019/04/05/sex-differences-gender-and-competitive-sport/). Finally, grown males have approximately 36% greater muscle mass than grown females and a larger portion of fast-twitch muscles "which allows them to generate greater force, speed, and anaerobically produced energy." *Id.* at 25–26 (quoting *Running: Why Are Men Faster than Women?*, Ohio State Univ. (Mar. 10, 2015), https://www.ohioforum.com/2015/03/running-why-are-men-faster-than-women/).

These biological differences result in an athletic advantage for men that may start before age 10 and is significant by age 15. "[T]he science is consistent and irrefutable that the 20-fold boost in testosterone that occurs during male puberty creates a significant, and lasting, athletic advantage for males." *Id.* at 26. The result: men jump approximately 25% higher than females, throw 25%

further, run 11% faster, accelerate 20% faster, punch 30-162% harder, and are about 30% stronger. *Id.* at 28. Real world examples abound. American track and field star Sydney McLaughlin is slower than the male record holder in the 400-meter hurdles. *Id.* at 32. Female Olympic swimmer Missy Franklin is almost the same height and has almost the same wingspan as male Olympian Ryan Lochte, but Franklin's 200-meter backstroke is nine seconds slower. *Id.* at 33. And famously, female tennis players Serena and Venus Williams lost in back-to-back sets of competition against Karsten Brassch, the 203rd-ranked men's player. *Id.*

In Olympic weightlifting, "the performance gap is between 31 and 37% across the range of competitive body weights between 1998 and 2020." Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Med. 199, 203 (2021). And in powerlifting "the male record (total of squat, bench press and deadlift) is 65% higher than the female record in the open weight category of the World Open Classic Records." *Id.* Importantly, even when females increase their bodyweight, the performance gap only increases. As a result, "females who are 60% heavier than males do not overcome these strength deficits." *Id.* at 203–04. In other words, "[a]llowing transgender women to compete in women's events" *does* "change the nature of

the sport," App. Br. 29, by introducing competitors that are in an entirely different league.

The male athletic advantage is not eliminated by testosterone suppression either. Competition Report, *supra*, at 35.

> Longitudinal studies examining the effects of testosterone suppression on muscle mass and strength in transgender women consistently show very modest changes, where the loss of lean body mass, muscle area and strength typically amounts to approximately 5% after 12 months of treatment. Thus, the muscular advantage enjoyed by transgender women is only minimally reduced when testosterone is suppressed.

Hilton & Lundberg, *supra*, at 199. Thanks to muscle memory, male athletes who were athletically trained prior to undergoing hormone therapy can make up any loss in strength from testosterone reduction with continued training. *See* Competition Report, *supra*, at 75 n.153; Taryn Knox, et al, *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 J. Med. Ethics 395, 398 (2019) ("[T]he phenomenon of muscle memory means muscle mass and strength can be rebuilt with previous strength exercise making it easier to regain muscle mass later in life even after long intervening periods of inactivity and mass loss. . . . hormone therapy will not alter bone structure, lung volume or heart size of the transwoman athlete, especially if she transitions postpuberty, so natural advantages including joint articulation, stroke volume and maximal oxygen uptake will be maintained."). In sum, even though testosterone suppression will impair male athletic performance, "it will not come

close to reducing male athletic performance to normal female levels." Competition Report, *supra*, at 37.

Therefore, *including* male athletes in women's sports acts to *exclude* female athletes. Forcing females to compete against male athletes who, because of their biology, will always be faster and stronger, decreases opportunities for female success. This necessarily corresponds to a decrease in scholarship opportunities and demoralizes female athletes who have trained for competition in a female-only league. *Id.* at 41–47. As IWF has reported, "[b]etween 2003 and 2022, there have been dozens of reported instances of biological males winning women's sports titles." *Id.* at 41. Rosters are limited, as is the number of athletes who can advance in the Olympics or receive a scholarship in their sport. *Id.* at 46–47. Women may also feel forced to push their bodies and compete unsafely when faced with new, biologically advantaged, competitors. The lesson for women, as Chelsea Mitchell—a high school track runner who lost four state championships to a male—wrote, is that "no matter how hard I work, I am unlikely to succeed, because I'm a woman." *Id.* at 43 (quoting Chelsea Mitchell, *I Was The Fastest Girl In Connecticut. But Transgender Athletes Made It An Unfair Fight*, USA Today (May 22, 2021), *reprinted by* Alliance Defending Freedom, https://adflegal.org/article/i-was-fastest-girl-connecticut-transgender-athletes-made-it-unfair-fight).

IV. The success of women's sports under Title IX's mandate of gender equity is case in point.

Appellant's final radical argument is that there is somehow *no* business reason to maintain competition categories separated based on biological sex. That assertion flies in the face of the proliferation of women's sports—now an entire industry and business—under Title IX.

"There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports." *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996). Indeed, the statute "has precipitated a virtual revolution for girls and women in sports. Title IX has paved the way for significant increases in athletic participation for girls and women at all levels of education." Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 24 U. Mich. J.L. Reform 13, 15 (2000). In 1971, there were less than 300,000 female athletes playing interscholastic sports. By 1999, there were over 2.6 million. *Id.* By 2018–19, the number had increased even further to about 3.4 million. Women's Sports Foundation, *50 Years of Title IX: We're Not Done Yet*, at 31, https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf (accessed Oct. 14, 2024).

And the numbers do not tell the whole story. "These changes in women's sports have been accompanied by increased status and respect for female

athletes and a growing enthusiasm for women's sports in popular culture, fueled by recent public successes of elite female athletes." Brake*, supra*, at 16. Women's competitions take center stage at the Olympic games, and professional women's teams have gained millions of viewers. *Id.* at 17. The reason: in 1975, federal agencies determined

> that equality in this context requires more than an equal right for male and female students to try out for the same teams. Instead of adopting such a classic formal equality stance, the regulations permit schools to offer separate athletic teams for male and female athletes, and set standards for measuring equal opportunity in the context of sex-separate programs.

Id. at 47.

Thanks to Title IX, "[i]t is no longer commonplace for an athletic department to assume that a female is on the field to land a husband rather than a medal." Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 133 (2019). The provision of separate athletic competition for women is what "makes it possible for women and girls also to benefit from the multiple positive effects of these experiences, and for their communities and the broader society to reap the benefits of their empowerment." *Id.* at 132. Anything different "would ensure precisely the opposite—that spaces on selective teams and spots in finals and on podiums would all go to boys and men." *Id.*; *see also Adams*, 57 F.4th at 821 (Lagoa, J., specially concurring) ("To open up

competition to transgender women and girls hinders biological women and girls—over half of the United States population—from experiencing these invaluable benefits and learning these traits.").

Appellant is essentially saying that Respondents have *no* business interest in facilitating fair and safe competition in powerlifting for over half of the United States population. This is absurd given that Appellant is asking Minnesota's courts to send a message to women athletes: "no matter how hard I work, I am unlikely to succeed, because I'm a woman." Competition Report at 43 (quoting Chelsea Mitchell). Women should have a fair chance to compete in powerlifting, and Respondents have a clear business interest in giving them that chance by maintaining separate competition categories for men and women. That system has allowed an entire industry of female athletics to develop, starting in grade-school and continuing throughout a woman's life. This Court should not demand that Respondents—and all female athletes—lose so much.

CONCLUSION

The Court should affirm the court of appeals and remand this case to the district court for trial.

Respectfully submitted,

Date: October 14, 2024

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