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STATE OF MINNESOTA
IN COURT OF APPEALS

Jaycee Cooper,

Respondent,

v. **A23-0373**

USA Powerlifting,

Appellant,

USA Powerlifting Minnesota,

Respondent on Related Appeal.

Jaycee Cooper,

Respondent,

v. **A23-0621**

USA Powerlifting,

Appellant.

BRIEF OF INDEPENDENT COUNCIL ON WOMEN'S SPORT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

June 16, 2023

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel confirms that neither the Independent Council on Women's Sport (ICONS), nor any of its members has a parent corporation and no publicly held corporation owns 10% or more of the stock of ICONS of any of its members.

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INTEREST OF *AMICI CURIAE*[1]

Amici are the Independent Council on Women's Sport (ICONS) and its members identified in Section I below. ICONS is a network and advocacy group comprised of current and former collegiate and professional women[2] athletes, their families and supporters who believe the next generation of women and girls deserve the chance to be champions and to see an expanded and celebrated world of women's sports. Reflecting their experience, *Amici* have an interest in the preservation of the female category in sport.

SUMMARY

Recognizing biological differences between the sexes and protecting women's spaces from male intrusion are foundational for women to succeed in sports and in life. It is the experience of *Amici* that legal protections giving women the opportunity to take part in and

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[1] Counsel affirms the undersigned counsel authored this brief, no counsel for any party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus curiae*, its members, or counsel, contributed money intended to fund preparing or submitting this brief.

[2] As used herein the terms "male" "female" "man" "woman" "men" "women" and "girls" and "boys" are used to refer to members of the male or female sex without regard to gender identification.

succeed in sport are essential to the advancement of women and depend on the law's basic ability to distinguish between women and men and courts' capacity to evaluate, compare, and equalize the opportunities of the former in comparison to those of the latter.

Amici explain why protection against male advantage afforded girls in the earliest stages of youth and developmental sport is just as vital as protection in elite sport. Rather than diminished, protections for girls should be upheld, not deferred to some later time such as post puberty. It is a misguided, objectifying, and patently discriminatory trope that girls are undeserving of protection until they reach an elite level in sport, as if women are not worthy of protection until they prove themselves world class athletes. Deferring protection of girls will cause them to leave competitive sport, never learning to love it or discovering the benefits it can provide them.

ARGUMENT

I. EXPERIENCE OF INDIVIDUAL *AMICI*

Sex separated sport is necessary for girls to develop a healthy view of their own bodies. For many girls, lessons learned in sport are vital to overcoming obstacles and succeeding in life. Yet, due to male biological advantages, failing to protect the girls' category will cause

girls to leave sport. Therefore, protecting sex separation in girls' sports is foundational to the health, happiness, and success of future generations of women.

A. Lauren Bondly, Age-Group National Champion Triathlete, U.S. National Team Member, Engineer

Lauren Bondly explains why participation in sex separated sport is vital to women developing a healthy view of their own bodies:

"It is impossible for me to overstate the importance competitive sport has played in my life. I can say without risk of hyperbole it saved my life and career.

"Like many young women, I suffered from anorexia in my late teens and early twenties. I began running to burn calories and create another means to control my compulsive weight loss. One day I entered a local 5k road race and in part because I had given myself permission to eat a full meal the night before – just for this special occasion – I ended up winning my age group. This was the turning point in my illness.

"Anorexia deceives sufferers into believing it is virtuous to be hungry, that each lower number on the scale is an accomplishment – no matter how low it goes. But at that race, I had achieved a real

accomplishment more powerful than the fake self-esteem boosts anorexia offered. I looked at the women's podium, at strong, incredible female bodies and realized they were not all that different from mine. All I had to do was get healthy, redirect my obsessive tendencies and one day that could be me on the overall women's podium. Now on occasion – it is. Through sport, I re-learned my relationship with food and my body; I don't know if I would have otherwise.

"Fast forward to graduation from college with a degree in engineering, I soon learned why my chosen career has the reputation it does. Years at my first company were full of unwanted sexual advances and some of the most inappropriate comments imaginable until I left for a company where I was initially treated like a secretary instead of an engineer. In the middle of that period, I switched to triathlon needing something more challenging to convince myself of my capability in the face of so many claiming I was incapable. If I did not have that one outlet where I could count on having a fair chance to succeed, I would have thrown my diploma in the trash and quit engineering. Today I am happy and satisfied with my career, but it would have been unbearable

to continue facing unfairness and humiliation day after day in those earlier years if I had not had competitive sport to balance it out.

"Sport is not just a game. I have witnessed the desire to be the best motivate women to quit alcohol and drugs, to leave abusive relationships, and like me, to overcome mental health issues and foster the fortitude to endure and overcome injustice.

Sport is too important to turn it into a tool that teaches girls to get comfortable being on the receiving end of injustice, or that hard work and overcoming adversity is futile. We cannot replace the strong female bodies on the women's podium with impossibly unattainable male bodies and pretend that will have no effect on young girls and women who need strong female role models.

Finally, sport must be about fairness. If women do not deserve and receive fairness in the one place where 'fair play' is supposed to be ensured and upheld, what chance do women have in business or elsewhere where women are treated unfairly, and are told to, and expected to, just accept it?"

B. Jennifer Sey, U.S. National Champion Gymnast, U.S. National Team Member First Female Global Brand President at Levi Strauss & Co., Producer of Emmy Award Winning Documentary on Abuse of U.S. Gymnasts

Sport is integral to girls overcoming obstacles and succeeding in life. From age 6 Jennifer Sey pursued her dream of competing on the U.S. gymnastics team and winning a national championship, a goal she realized after more than 10 years of dedication and hard work.

The determination developed as an athlete fueled a pioneering career in business and led her to stand up for the rights of marginalized individuals. Jennifer began working as an entry level employee at Levi Strauss & Co. in 1999, eventually becoming chief marketing officer and then the first female brand president, never losing focus on a desire to use her opportunities as a platform to help others.

Jennifer experienced abusive training practices as an elite gymnast which she wrote about in her 2009 autobiography, *Chalked Up*, a book other gymnasts would point to as giving them courage to speak up. In 2017 Jennifer became an executive co-sponsor of the first black employees' group at Levi's, engaging the company in improving racial diversity. She was a producer of *Athlete A*, a documentary on the

Larry Nassar scandal at USA Gymnastics which won an Emmy as the 2020 Outstanding Investigative Documentary.[3]

In 2021 Jennifer told NBC commentator and Know Your Value founder Mika Brzezinski, "I suffered from imposter syndrome probably up until about last year. . . I went to Stanford coming out of gymnastics. I was convinced that at any moment, somebody was going to pop out from behind the curtain and tell me I didn't belong. A lot of women . . . have this."[4] Jennifer explained her experiences in competitive gymnastics helped find her voice and shape her leadership style, telling Brzezinski, "I've learned that your life and journey is not a straight line, and you will get knocked down. When you advocate for yourself, it's not always going to go the way that you want. But you keep going."[5]

Jennifer's path to career success flowed directly from lessons learned as a female athlete, and she is concerned that allowing males to compete in the female category of sport will deprive girls of opportunities to compete on a level playing field. She explains:

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[3] *See* https://www.indystar.com/story/news/local/2021/10/01/athlete-a-wins-emmy-outstanding-investigative-documentary/5945215001/.
[4] *See* https://www.nbcnews.com/know-your-value/feature/how-i-went-elite-gymnast-global-brand-president-levi-s-ncna1272382/.
[5] *Id.*

"I started gymnastics in 1975, at 6 years old, just three years after the passage of Title IX. In 1976 Nadia Comaneci won the Olympics. Accelerated by the passage of Title IX, gyms started popping up all over the United States – and active little girls like me took to them in droves. With the promise of college scholarships, sport – and gymnastics in particular – gave little girls a chance to thrive.

"By age 10 I made my first National Team. And in 1986, just 9 months after fracturing my femur at the World Championships, I became the National Champion. Gymnastics taught me the values of perseverance, hard work, and discipline. Ultimately, I learned that never giving up meant I could achieve mastery; I learned applying my passion for sport could make me a champion; and I learned directing my commitment could result in a hard-won sense of personal fulfillment.

"After leaving competitive sport, I applied these lessons to my career in business. I started at Levi's in 1999 as an entry level assistant. Corporate America was then rife with sexism and sexual harassment. I put my head down and worked hard. I was highly coachable, and I never gave up, always wanting to get better at my craft. Ultimately, in 2020 I became Levi's first female Global Brand

President after years as an award-winning Chief Marketing Officer.

"My time as an elite athlete was invaluable, honing the perseverance required to succeed in business. Knowing I could compete on an even playing field against other fiercely dedicated girls and succeed amidst injuries, losses, and other setbacks, shaped me, and enabled my success as a woman in business.

"Recent developments in U.S. sport cause me concern. I see the opportunities of fiercely dedicated girls and young women to compete on a level playing field being sacrificed to a view that says the opportunities of women must take second place to the feelings of males seeking validation through playing women's sport. The idea that the rights of girls must be sacrificed to make others feel better about themselves must be fought vigorously. If it is not, it will lead directly to the feelings of inadequacy and helplessness that plague young girls and against which I have been fighting all my life."

C. Janel Jorgensen McArdle, Olympic Silver Medalist, Chief Operating Officer Swim Across America

Janel Jorgensen McArdle knows that protecting sex separated sport is essential to girls remaining in sport. She speaks from the experiences of a life at the highest levels of competitive sport and sport-

based philanthropy and as a woman heading a national organization with thousands of volunteers that has raised over $100 million for cancer research, prevention, and treatment.

Janel first faced unfair competition when she reached the pinnacle of her sport, competing against the East Germans at the Seoul Olympics in 1988. She explains, "We all knew what was happening and we knew we were robbed of a gold medal we deserved. We were told to be silent, to not risk being called poor losers. Now, decades later, it's well understood the East Germans were doping, and East German victory was tainted.

"Testosterone and androgenizing drugs were given in large quantities to East German athletes, creating an unfair advantage clean athletes could not overcome. The East German scandal was enormous and remains a black mark on the history of women's sport. Yet, the scandal we are creating in women's sports today is even worse. I had the benefit of sex-testing, a cheek swab to verify my biology. I knew with full confidence the athletes I was racing were women, even if some were artificially enhanced with male androgens.

"However, despite every possible effort to enhance their performance with drugs, East German women could not have qualified to compete with the men. But now, by allowing male bodies in women's sport we are taking unfairness to another level, not even hiding the intent to make women face an insurmountable physical obstacle, barely debating how much unfairness women in sport will face.

"Today, we do not ask women to compete against women who have taken drugs, we ask women to compete against the biological advantage of being born male that even women on drugs could not overcome. There is no excuse for asking female athletes, of any age, to compete with less talented versions of male biology.

"I left the Olympics with a silver medal at 17 and continued my swimming career, winning 17 National Championships at Stanford, wrapping up a career that gave me amazing opportunities, friendships, and skills. Then, I went to work in the corporate world, and 13 years later, with my father facing cancer, an opportunity came to lead Swim Across America, a non-profit dedicated to raising money and awareness for cancer research, treatment, and prevention.

"Working at Swim Across America has been a way that a sport so impactful and important in shaping my life has helped me benefit the lives of others. I have been involved with Swim Across America for over 35 years in many roles: Olympian, swimmer, board member, COO, and CEO, and repeatedly seen how my sport of swimming has changed, and in some cases saved, people's lives.

"Yet, for as much as I love swimming, I know that if I had been faced with gross unfairness in my sport early on or repeatedly, I would not have continued. If I stood on the block next to a male body that I knew I could not beat, the frustration would have forced me to quit. Had that happened my life may have had fewer meaningful and significant opportunities to impact others.

"I want sport for girls growing up today to be what it was for me until I got to the Olympics . . . an amazing environment where I learned confidence, perseverance, and grit. I know what it feels like to step up to the starting block and know that even if I were given a head start, I couldn't compete against the illegal drugs pulsing through my competitor's veins. I know what it feels like to be a 17-year-old girl standing on the Olympic podium holding the wrong-colored medal

because it wasn't a fair race. I don't want other young girls and women to endure similar experiences, but I see that they are, and with increasing regularity. There is no excuse for perpetuating this injustice. Our girls deserve fair and equal opportunities in sports.

"After all the progress women have made in recent decades, I do not understand why so many people are turning a blind eye to injustice and to the history of what women have fought for. Of course, boys and men facing gender dysphoria should be cared for, however, allowing them to compete in the women's category only unjustly shifts pain and unfairness to girls and women who will throughout their lives in sport face a deficit far greater than I faced in the starting blocks in Seoul when lining up against the East Germans.

"Some say sport only needs to be fair at the highest, most elite levels. I emphatically disagree. Girls need to know they don't have to reach elite levels to be worthy of fair treatment and fair competition. If rules and laws do not clearly convey that girls deserve fair sports at every level, many will forsake athletic opportunities. But we also risk something even worse, adults communicating to girls that fairness is not really a concept that applies to them."

D. Marshi Smith, NCAA Champion, Medical Device Sales Representative, ICONS Co-Founder

Marshi Smith explains why protecting girls' sport is essential to future generations of women – "I started my career in sales shortly after graduating from the University of Arizona. My Olympic dreams had been torn away from me by a training-induced, shoulder injury the year after winning a NCAA backstroke title. Heartbroken, I found myself suddenly sitting across a desk from managers asking me to convince them to hire me with exactly zero hours of work experience on my resume. I stepped into the interview underqualified on my resume but extremely confident in my own ability to learn and thrive. When the management team asked me about my work experience, I told them the story of my junior year on the swim team.

"At the start of that season, I told myself and my coach I had decided to win an NCAA title. I wrote a goal sheet outlining the race to achieve my goal time, 52.82 a time I chose to break my school record by .01 seconds. I described my devotion to reaching that goal from swimming sets before dawn to running hundreds of grueling stadium steps and always drifting to sleep believing my dream was achievable...52.82...52.82...52.82. I talked about walking onto the pool

deck at the NCAA Championships that year knowing nobody could possibly want to win more than I did. And then I did. I touched the wall in 52.82 exactly to the hundredth of a second. I broke my school record. I won a national title. The manager hired me on the spot.

"At the time I was one of only two women working for the company in a national sales position. I stood on the national stage as a top sales representative several times in my career, often as one of very few women. They say, 'a picture is worth a thousand words.' Below is a picture of the 2017 National Sales Meeting 'Territory of the Year' Award winners from my company. It won't be difficult for the reader to pick me out in the picture. Yet, I know my life would not have led to that stage had men been allowed to compete against me in sport.

"Although my goal has changed, I have equal passion and devotion today to what I had on my college pool deck. My new goal sheet commits to preserving the equal chance for my seven-year-old daughter to see herself as a champion. She has just begun her swim lessons and deserves the same opportunity to participate and win in her sport that my son does. I cannot sit by and accept that I may have been one of the last generations of women with the right to fair treatment and equal

opportunity in sport. This generation and the next deserve to tell the stories that launch careers.

"The women's category in sport has tremendous value for women. Separating girls from boys is the indispensable key to unlocking the transformative power of sport to change young girls' lives. If legal decisions throw away that key, it will place the dreams of millions of young girls outside their reach and communicate that young girls, unlike boys, are not deserving full protection even from a law that was meant to protect them."

II. RESPONDENT HAS NOT STATED A PUBLIC ACCOMMODATION SEX OR SEXUAL ORIENTATION DISCRIMINATION CLAIM

Amici disagree with the premise underlying both Respondent's lawsuit and the district court's decision that sport eligibility rules are an appropriate topic for judicial review under public accommodations laws such as the MHRA. *Amici* have each had careers in sport and are well aware that public accommodations laws have not traditionally been relied on as a basis for court scrutiny of sport eligibility rules. *See, e.g., M.U. by & Through Kelly U. v. Team Illinois Hockey Club, Inc.*, 2022 IL App (2d) 210568, ¶ 27, appeal allowed sub nom. *M.U. v. Team Illinois Hockey Club, Inc.*, 199 N.E.3d 1178 (Ill. 2022) ("neither a youth hockey team nor any type of sports association or organization" would be a place of public accommodation under Illinois law). *Amici* submit that finding a sport eligibility rule reviewable as a public accommodation is inimical to fair competitive sport and inconsistent with the historic application of public accommodation statutes such as the MHRA.

There is no reason to assume public accommodations statutes were ever intended to be used in the fashion employed by the district

court in this case. Public accommodations law does not have a substantial history of court oversight of sport eligibility rules. Rather, public accommodations statutes are rooted in the common law principle that, "innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995). "As one of the 19th-century English judges put it . . . "[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants.'" *Id.* quoting *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng.Rep. 94, 96 (N.P.1835); M. Konvitz & T. Leskes, A Century of Civil Rights 160 (1961).

There is no robust legislative or case law history in any State, and certainly there is none in Minnesota, applying public accommodations law to scrutinize sport eligibility rules. "[T]he common law definition of public accommodation has become even more restrictive over time [and] [t]he modern view holds that any expansion beyond the traditional

categories of innkeepers and common carriers requires the enactment of positive law." Yoo, Christopher S., The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy (2021). Journal of Free Speech Law, Vol. 1, P. 463, 480 2021, U of Penn Law School, Public Law Research Paper No. 21-30, *Available at* SSRN: https://ssrn.com/abstract=3912855. Thus, application of the MHRA (or the public accommodations law of any State) to alter a sport eligibility rule should require a clear manifestation of the legislature's intent that the law was intended to reach sport eligibility rules. The MHRA evidences no such intent.

Absent clear legislative direction the MHRA should not be applied to invalidate sport eligibility rules founded on classifications such as age, weight, and sex. The simple reason for not applying the MHRA to USAPL's rules is that a sport organization's eligibility rules are not a place of public accommodation. The sports exception to the MHRA confirms that the Minnesota legislature never intended the MHRA to reach eligibility rules as a public accommodation. Because the MHRA was never intended to serve as a vehicle for obtaining judicial review of sport eligibility rules, *Amici* suggest that the Respondent's claim

against USAPL should not be allowed to proceed.

A. The USAPL's Eligibility Rules are Not a Place of Public Accommodation.

For the public accommodation provisions of the MHRA to apply to the USAPL's eligibility rule, that rule must affect a "place of public accommodation." Pursuant to the MHRA:

> "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

Minn. Stat. Ann. § 363A.03.

Whether an entity is a public or private accommodation under the MHRA turns on two criteria: (1) the selectiveness of the group in the admission of members; and (2) the existence of limits on the size of the membership. *Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 921 (Minn. App. 1999), *review denied.* Thus, in the *MasterShield* case an apartment complex was not a place of public accommodation with respect to claims brought by an invitee of an apartment resident because the apartment complex was "selective with respect to membership" and therefore "not open or accessible to the general public." Therefore, while the

apartment complex was covered under the MHRA in relation to such things as its lease terms and its business practices relating to apartments it offered to the general public, it was not covered under the MHRA in regard to how it treated the invitees of apartment residents. Similarly, while the USAPL may be covered by the MHRA as a place of public accommodation in relation to memberships and with respect to its treatment of the members of the public who will attend its competitions as spectators, this does not mean the USAPL is a public accommodation with respect to the eligibility criteria applied to the limited group of individuals the USAPL permits to compete in its powerlifting competitions.

Eligibility for USAPL competitions requires satisfaction of criteria beyond those required for either membership in the USAPL or attendance as a spectator at a USAPL-sanctioned or organized competition. "Competition takes place between lifters in categories defined by sex, bodyweight and age."[6] Therefore, while one may become

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[6] USAPL Technical Rules, version 2022.2, *available at*: https://www.usapowerlifting.com/wp-content/uploads/2022/06/USAPL-Rulebook-v2022.2.pdf.

a member of USAPL regardless of sex, bodyweight[7] or age,[8] these additional factors limit the categories in which one may compete in a USAPL competition. In addition, competitors must:

- Have a current USAPL Powerlifting registration;[9]
- Have met the qualifying total for the weight class in which they seek to compete;[10]
- Have agreed to drug testing and not be subject to any current sanction for an anti-doping rules violation;[11]
- Only be wearing equipment that meets the specifications in the USAPL rulebook.[12]
- Have satisfied any other registration or enrollment criteria specified by the competition organizer.

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[7] There is a required weigh-in several hours before every competition. There are eleven (11) female weight classes in the Open division at: 44, 48, 52, 56, 60, 67.5, 75, 82.5, 90, 100, and 100+ kilograms. There are twelve (12) male weight classes at: 52, 56, 60, 67.5, 75, 82.5, 90, 100, 110, 125, 140, 140+ kilograms.

[8] USAPL competitors may compete only within prescribed age classes of between eight and fourteen years for the youth category, fourteen to nineteen in the teen category and must be over fourteen years of age to compete in the Open category. Additionally, USAPL competitors compete within the following additional categories: sub-junior (ages 14-18), junior (ages 19-23), Master I (ages 40-49), Master II (ages 50-59), Master III (ages 60-69), Master IV (ages 70 and above).

[9] USAPL Technical Rules.

[10] *Id.*

[11] *Id.*

[12] *Id.*

Thus, like the apartment complex in *MasterShield*, USAPL and event organizers applying USAPL rules are selective regarding who may enter USAPL-sanctioned tournaments. Entry is not open to any member of the public. Rather, to participate in a USAPL competition, competitors must satisfy a host of requirements that prevent competitors from competing against all other members of the public and limit the competition to narrowly defined categories based on criteria that are evidently set to ensure familiarity with the sport (such as being a USAPL members and completing entry requirements), skill in the sport (such as meeting qualifying weight totals in order to be able to compete in certain instances), and competitive fairness (including being subject to potential drug testing, and being categorized by age, bodyweight and sex). Additionally, there may also be space limitations at a competition that could restrict the field of possible entrants. Therefore, qualification to compete in a USAPL event, unlike attendance as a spectator at a USAPL competition or simply becoming a USAPL member, is a selective process not open to members of the general public. Accordingly, participation in a USAPL competition is not a place of public accommodation within the meaning of the MHRA,

and USAPL's eligibility standards for competitors are not subject to evaluation under the MHRA.

In *Gold Star Taxi & Transportation Serv. v. Mall of America Co.*, 987 F.Supp. 741, 752 (D.Minn.1997) the U.S. District Court for the District of Minnesota applied the same analysis as in *MasterShield* to conclude that, as to the taxi drivers who wished to provide services there, the Transit Station at the Mall of America in Bloomington, Minnesota was not a public accommodation within the meaning of the MHRA. According to the district court, "the Transit Station [was] a public accommodation for persons seeking to use the taxicab services provided there," however, that did not make it a place of public accommodation for the taxi drivers who wished to "provide" services there "not merely enjoy the benefits of access to, a public accommodation." *Id.*

In the *Gold Star* case, the court noted that "the Mall never permitted unfettered public access to provide taxicab service at the Transit Station." *Id.* at 752-53. Rather, the "right to provide such services in Bloomington is limited by municipal regulations. A person must meet various qualifications in order to be eligible, and it is illegal

to solicit fares without a license." *Id.* at 753. Additionally, "there were a limited number of qualifying persons and companies able to legally provide service to the Mall." The court said, that "[f]or all these reasons, the Mall Transit Station is not a place of public accommodation for providers of taxicab service." *Id.*

If the taxi transit station in *Gold Star* is not a place of public accommodation for taxicab drivers due to the qualifications required of prospective taxi drivers who wished to use it, it is apparent that USAPL competitions which are limited to only USAPL members who must meet a variety of additional criteria are not a public accommodation with respect to USAPL athlete members who wish to compete in them. Analogous to the taxi transit station in *Gold Star*, USAPL has not permitted unfettered access to individuals wishing to compete in its events. Instead, USAPL competitions are limited to USAPL members, and not all members of the public, and those members must further agree to submit to drug testing protocols, satisfy registration and entry requirements and for entry within particular competition categories must satisfy age, bodyweight, and sex preconditions. USAPL powerlifting competitions are not open to all comers. Thus, they are not

places of public accommodation as to the powerlifters who compete in them. Accordingly, USAPL's eligibility standards and classifications for its competitive divisions based on age, bodyweight and sex are not subject to review under the MHRA.

B. The MHRA Does Not Apply to Objective, Facially Neutral, Sport Eligibility Rules that Merely Uphold a Separate Sex-Based Category for Women.

The District Court's reasoning poses a grave threat to separate girls' and womens' sports in Minnesota by invalidating biological sex as a criterion used to define the women's category. The court's radical decision does not find even a shadow of support in the MHRA. Even for competitions with low or no appreciable barriers to public entry, such as a mini-marathon or other mass start running or cycling race that might be characterized as places of public accommodation, the Minnesota legislature specifically provided a separate section authorizing teams, programs or events which are limited "to participants of one sex." Minn. Stat. § 363A.24.2. Thus, not only does the public accommodations law not reach USAPL's powerlifting competitions but Respondent's sex discrimination and sexual orientation discrimination claims are foreclosed by the MHRA's sports exception as well.

The district court sought to draw a distinction between sex discrimination claims and sexual orientation discrimination claims, with the sports exception applying to the former but not the later. However, the line drawn by the district court runs counter to the language of the statute and the historic non-use of public accommodations laws to micro-manage sport eligibility criteria.

The District Court read the reference to "provisions of section 363A.11 relating to sex" as not encompassing discrimination "because of . . . sexual orientation" even though both sexual orientation discrimination and sex discrimination fall under § 363A.11. *District Court Opinion* at 32. However, the court failed to explain the rationale for its conclusion that sexual orientation claims are not claims "relating to sex," a conclusion that is at odds with the plain language of the statutory text. Sexual orientation claims do relate to sex. For instance, in *Hively v. Ivy Tech Community College of Indiana,* 853 F.3d 339 (7th Cir. 2017), the Seventh Circuit ruled that sexual orientation discrimination was sex discrimination under Title VII. *Hively* is relevant as "interpretation of the MHRA is informed by interpretations of similar provisions in the federal anti-discrimination statutes."

Monson v. Rochester Athletic Club, 759 N.W.2d 60, 65 (Minn. Ct. App. 2009). "The MHRA's prohibitions on sex discrimination parallel those of Title VII." *Taylor v. City of Fridley*, 659 F. Supp. 2d 1029, 1048 (D. Minn. 2009); *accord Hunter v. United Parcel Serv., Inc.,* 697 F.3d 697, 702 (8th Cir. 2012) ("When interpreting cases under the MHRA, Minnesota courts give weight to federal court interpretations of Title VII claims because of the substantial similarities between the statutes."); *Darke v. Lurie Besikof Lapidus & Co., LLP*, 550 F. Supp. 2d 1032, 1043 (D. Minn. 2008) ("Minnesota courts have a long history of interpreting the MHRA to be consistent with Title VII"); *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 624 (Minn.1988) ("[I]n the past we have generally applied to our Human Rights Act the interpretation federal courts have applied to cases arising under Title VII."); *Meads v. Best Oil Co.*, 725 N.W.2d 538, 545 (Minn. Ct. App. 2006) ("Minnesota courts have regularly construed the MHRA in accordance with Title VII"). Thus, it was inconsistent with consistent Minnesota precedent to fail to apply *Hively* federal cases finding that sexual orientation claims are a subset of sex discrimination claims when interpreting the MHRA.

Moreover, excluding "sexual orientation" discrimination claims from the ambit of claims "relating to sex" is inconsistent with the district court's own adoption of the reasoning of Justice Gorsuch in *Bostock v. Clayton County*, 140 S.Ct. 1731, 1741 (2020) in which Justice Gorsuch defined sexual orientation discrimination as a subset of sex discrimination. *See District Court Opinion* at 14-15, quoting *Bostock* ("it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"). Thus, for this reason as well, the MHRA sports exception applies to both sexual orientation and sex discrimination claims. Therefore, the sports exception bars both the sexual orientation discrimination and sex discrimination raised by Respondent.

C. Respondent was Not Denied Equal Enjoyment of Goods, Services, Facilities, Privileges, Advantages, or Accommodations.

Finally, the District Court overlooked that the operative language of Minnesota's public accommodations law is different than other sections of the MHRA such as the employment provision which forbids "an employer, because of . . . sex [or] sexual orientation . . . to . . . *discriminate* against a person with respect to" certain listed aspects of

employment, Minn. Stat. § 363A.08, subd. 2(3) (emphasis added), and such as the education provision which states an educational institution may not "*discriminate* in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . sex [or] sexual orientation." Minn. Stat. § 363A.13, subd. 1 (emphasis added). The MHRA defines "discriminate" as "includ[ing] segregate or separate." MHRA, § 363A.03, subd. 13. Thus, the education and employment provisions in the MHRA employ terminology disfavoring segregating or separating based on protected criteria.

In contrast, the public accommodations section prohibits "deny[ing] any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sexual orientation or sex." The public accommodations provision does not expressly prohibit separation by sex so long as individuals are not denied the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations. Therefore, a place of public accommodation should have more freedom than a public school or an employer to

separate individuals through reliance on biological criteria.

However, even if USAPL powerlifting competitions were considered a place of public accommodation, Respondent has not been denied the equal enjoyment of the goods and services sold by USAPL any more than the employee in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) was not denied use of a restroom by a policy which permitted the transgender employee in *Goins* to only use the restroom which comported with the employee's biological sex. While the employee did not like not being able to use their restroom of choice, they were treated equally from the standpoint that the same biological dividing line applied to all employees. Likewise, Respondent does not like having to compete in the competitive division for which they qualify based upon biology. Nonetheless, Respondent is being treated equally to all other powerlifters by having the same eligibility rules apply to everyone and not permitting lifters to pick and choose their competition division. *See, e.g.*, *Kuketz v. Petronelli*, 443 Mass. 355, 821 N.E.2d 473, 473–74 (2005) ("a fitness club's refusal to permit a wheelchair racquetball player to compete in a club league under the condition that the wheelchair player receive two bounces and his able-bodied . . .

opponents receive one bounce is not an act of discrimination on the basis of physical disability").

III. CONCLUSION

Because Respondent is being treated equally to all others who have experienced the performance enhancing effects of male puberty Respondent has not articulated a basis for relief under Minnesota's public accommodations law. The public accommodations provisions of the MHRA do not forbid the USAPL from using eligibility criteria based on biology to protect fair competition in the women's category in its powerlifting competitions. The district court misinterpreted the MHRA and should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I filed the foregoing *Brief of Independent Council on Women's Sport as Amici Curiae in Support of Appellant* electronically with the Clerk of the Court. Notice of this filing will be sent by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Minn. R. Civ. App. P. 132.01, subd. 3. The brief was prepared with Microsoft Word for Microsoft 365, which reports that the brief contains 6,263 words.

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