

STATE OF MINNESOTA
IN SUPREME COURT

JayCee Cooper,

Petitioner,

v.

Nos. A23-0373; A23-0621

USA Powerlifting;
USA Powerlifting Minnesota,

Respondents.

**REQUEST OF
THE INDEPENDENT WOMEN'S FORUM AND PAYTON MCNABB
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
IN SUPPORT OF RESPONDENTS**

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July 23, 2024

Pursuant to Minnesota Rule of Appellate Procedure 129.01, the Independent Women’s Forum (“IWF”) and Payton McNabb (collectively “*Amici*”) respectfully seek leave to file an *amicus curiae* brief in the above-captioned appeal in support of Respondents and affirming the court of appeals’ decision.

Interest and Identity of Prospective *Amici Curiae*

IWF is a 501(c)(3) non-profit organization which fights to expand women’s options and opportunities and, through its many female athlete ambassadors, has argued that allowing males to compete against females in sports will reduce opportunities for female athletes on the field and in scholarships. *See Female Athlete Stories*, Independent Women’s Forum, <https://www.iwf.org/female-athlete-stories/> (accessed July 19, 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 from allowing male-bodied athletes 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_CompensationReport_2ndEdition.pdf [hereinafter “Competition Report”]. Additionally, IWF actively fights against the inclusion of men in women’s sports through legal action. *See, e.g., Complaint, Alabama, et al., v. Cardona, et al.*, No. 7:24-cv-533 (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, a 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 she advocates to protect girls’ and women’s sports from dangerous and unfair competition. *See Payton McNabb*, Independent Women’s Forum, <https://www.iwf.org/female-athlete-stories/payton-mcnabb/> (accessed July 19, 2024).

Position of Prospective *Amici Curiae*

IWF and McNabb seek leave to write an *amicus curiae* brief in support of Respondents and in support of affirming the court of appeals. *Amici* would argue that the court of appeals correctly followed this Court’s precedent and

correctly interpreted the Minnesota Human Rights Act (“MHRA”). *Amici* would also defend Respondents’ justification for excluding Appellant from the women’s division: competing against male athletes would destroy fair competition in women’s sports.

I. The court of appeals applied the correct legal standard to Appellant’s discrimination claims.

This Court has, for over 20 years, required plaintiffs alleging disparate treatment to demonstrate that the plaintiff’s protected trait “actually motivated” the defendant’s decision. *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)); *see also LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506, 513 (Minn. 2017). Motivation matters because, under the *McDonnell Douglas* burden-shifting framework, endorsed by this Court for decades, *LaPoint*, 892 N.W.2d at 510–11 (citing *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 623–24 (Minn. 1988)), a defendant carries its burden by articulating “legitimate and nondiscriminatory reason for the adverse employment action,” *Hansen v. Robert Half Int’l Inc.*, 813 N.W.2d 906, 918 (Minn. 2012). In other words, courts in Minnesota and across the country have recognized for decades that employers, business owners, and any other individual who has opened up a place of public accommodation has not violated antidiscrimination law when there was a legitimate reason for the action.

Respondents have good reason in this case. The “basic biological differences” between men and women have long been acknowledged, and therefore allow decisionmakers “to address the problem at hand in a manner specific to each gender.” *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (“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))). That is why under Title IX, a federal statute prohibiting discrimination based on sex in education, separate sports teams for women have not only been required, but have flourished. *See Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (“What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports.”); *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818–19 (11th Cir. 2022) (Lagoa, J., specially concurring).

Recognizing physical differences between men and women in athletic performance is not rooted in stereotypes or generalizations, as Appellant claims, but common sense long recognized in American law. *See Nguyen*, 533 U.S. at 73 (“Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.”); *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.”). Indeed, the Supreme Court has blessed “[s]ex classifications,” based on the “[i]nherent differences” between the sexes “to advance full development of the talent and capacities of our Nation’s people.” *Virginia*, 518 U.S. at 533. The court of appeals was right to accept Respondents’ legitimate and nondiscriminatory policy, and this Court would turn antidiscrimination law on its head by rejecting it.

II. Requiring female athletes to compete against male athletes would destroy fair competition in women’s sports.

As discussed above, women’s sports have flourished as a direct result of Title IX and separate athletic opportunities for women. *See, e.g.*, Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 24 U. Mich. J.L. Reform 13 (2000); 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 (2019). This makes sense: “[p]hysiological differences between females and males begin *in utero*,” and result in vast differences in athletic performance during and after puberty. Competition

Report, *supra*, at 25. Males have larger lungs, approximately 36% greater muscle mass once grown, and a larger portion of fast-twitch muscles which contribute to greater force and speed than females. *Id.* at 26. And even males that have taken steps to suppress their testosterone production still benefit from the significant advantages conferred by male puberty including lung volume, muscle size, and speed. *Id.* at 35–37.

Including male athletes in women’s sports therefore acts to *exclude* female athletes. Competing against an athlete who, because of their biology, will always be faster and stronger, decreases opportunities for female success which 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.

Finally, in powerlifting, female athletes will be pushed to lift more weight than they safely can, solely to compete against male athletes with a biological strength advantage. This raises serious safety concerns. As McNabb told the North Carolina General Assembly, “[a]llowing biological males to compete against biological females is dangerous. I may be the first to come before you with an injury, but if this doesn’t pass, I won’t be the last.” *Id.* at 49.

Desirability of IWF and McNabb’s Participation as *Amici Curiae*

IWF and McNabb believe that their *amicus* brief is desirable because the Court would benefit from their discussion on the correct legal standard to apply

in this case, as consistent with federal antidiscrimination law, and a thorough analysis of the dangers of allowing men to participate in women's sports.

For these reasons, IWF and McNabb respectfully request the opportunity to participate in this case as *amici curiae*.

Date: July 23, 2024

Respectfully submitted,

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CERTIFICATE OF DOCUMENT LENGTH

I hereby certify that this document conforms to the requirements of the applicable rules, including Minnesota Rule of Appellate Procedure 129.01(c), is produced with a proportional font of Century Schoolbook, size 13, and the length of this document is 1,401 words. This document was prepared using Microsoft Word Version 2406.

July 23, 2024

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