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**Via E-mail [hjud.exhibits@oregonlegislature.gov;  
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Representative Jeff Barker  
Chair, House Judiciary Committee

Re: Amateur Athletes (Portland Winterhawks) and the Employment Exemption  
Our File No.: WES 158-1

Dear Chair Barker and Members of the House Interim Judiciary Committee:

My name is Tim Bernasek. I am an attorney at Dunn Carney, here to testify about amateur athletes like those playing for the Portland Winterhawks and their exclusion from state employment laws. I am here on behalf of the Portland Winterhawks and the Western Hockey League (WHL). Some of you are familiar with this issue as it was the focus of SB 901 and HB 3466 during the 2017 Legislative Session.

As you may know, Portland Winterhawks players are registered amateur athletes under rules established by USA Hockey and Hockey Canada, the governing bodies for amateur hockey (and Olympic hockey) in the United States and Canada. The Portland Winterhawks are members of the WHL. The Portland Winterhawks are one of only five teams in the U.S.; the other 17 teams in the WHL are in Canada. The WHL is a member of the Canadian Hockey League (CHL).

**Litigation:**

In spite of being registered as amateur athletes, class action lawsuits have commenced in Canada alleging that all CHL players, including Portland Winterhawks/WHL players, should be considered employees. The claim is that young amateur athletes between the ages of 16 and 20, many of whom play hockey while they are attending high school or



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are enrolled in post-secondary courses, are “working” and that they should be covered by minimum wage, overtime, and related provisions.

These players however, with their parents’ consent, have made the decision to play at the highest level of competition for their age group in the American and Canadian amateur hockey systems rather than playing for other junior hockey teams at lower levels. The players and their families know that they are making an agreement to play amateur hockey at the highest level of competition without the expectation of any wages, but rather for the opportunity to develop as an elite hockey player, and for the select few, to become professional hockey players in the next stage of their hockey development.

The CHL class action lawsuit is for \$180 million while the WHL class action lawsuit is for \$60 million. Possible damages are mounting at a pace of as much as \$17 million per year.

The class action lawsuits are now before the courts and the WHL, CHL, and all member teams are vigorously defending against the claims and for the quality of the player experience. The WHL and CHL have worked extremely hard over the last decade to continually review, refine and improve the player experience. The world class player experience and commitment to the development of team players, both on and off the ice, extends much farther than some may realize.

Not only do all WHL Clubs provide the highest caliber coaching and training facilities available to amateur hockey players, the WHL also offers extensive health and safety initiatives; top-of-the-line equipment; billeting; team travel costs and player out-of-pocket expenses. Furthermore, all WHL clubs also offer professional development initiatives within the WHL Players First Support Services program, including a league-wide security network; police mentorship; mental health and respect workshops.

The WHL supports its players whether they continue their hockey careers at the professional level or pursue their education at a post-secondary institution/trade school of their choice by taking advantage of their fully-guaranteed WHL Scholarship.

In response to the litigation and the threat it poses to teams like the Winterhawks, the states of Washington and Michigan and the Canadian provinces of British Columbia, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia have clarified that their respective employment laws/employment standards do not apply to such players and have thus ensured the current understanding that such players are not employees is maintained. SB 901/HB 3466 would have done the same in Oregon had either passed last Session.



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### **Oregon's Treatment of Amateur Athletes:**

As amateur athletes, the Portland Winterhawks players have specifically been exempted from Oregon's workers' compensation system. ORS 656.027(13) specifically provides that persons declared to be amateur athletes under the rules of the U.S. Olympic Committee or the Canadian Olympic Committee are exempt from workers' compensation coverage. Similarly, as amateur athletes, like all amateur athletes in Oregon, these players have not been considered employees for purposes of Oregon's employment laws. As the United States Supreme Court noted in *Christopher v. SmithKline Beecham Corp.*, where there is a lengthy period of inaction by the government regarding a particular industry practice, it is very likely that the practice is lawful. 132 S.Ct. 2156,2168 (2012). The Seventh Circuit Federal Court of Appeals has similarly noted that while it may be "possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing", the "more plausible hypothesis is that the Department did not think the industry's practice was unlawful." *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (2007).

Even though there is compelling case law in support of the continued treatment of Portland Winterhawks players, and other amateur athletes, as exempt from employment laws, the fact remains that with the exception of the workers' compensation statutes, Oregon's other employment statutes including those addressing wage/hour, child labor, and unemployment are silent on the issue. Given the current litigation threat, it is important to clarify where Oregon stands related to the status of amateur athletes like those playing for the Portland Winterhawks.

In the upcoming 2018 Session, the Portland Winterhawks and the WHL will again ask the Legislature to put Oregon in the same position as Washington, Michigan and the Canadian provinces to expressly provide that Portland Winterhawks players are amateur athletes as opposed to employees.

While the Winterhawks and the WHL seek to expressly provide in Oregon's employment statutes that Portland Winterhawks players are amateur athletes, it is important to point out that this does not change their current status as amateur athletes. As discussed above, these players are registered as amateurs and Oregon has traditionally considered them as such.

### **The Risk:**

If the class action lawsuit against the CHL and the WHL succeeds, it will have a catastrophic impact on the Portland Winterhawks. Without an exemption for amateur athletes under Oregon law, the Portland Winterhawks will be forced to either declare



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bankruptcy or relocate to a province in Canada or a state (like Washington) where the exemption is in place. It would be hard to comprehend Oregon losing its only WHL franchise under these circumstances.

The WHL and the CHL are focused on player education and development. All high school players are required to graduate in a timely fashion. Over 20% of all WHL high school students achieve honor student status each year.

All WHL Clubs, including the Portland Winterhawks, are required to fund a mandatory scholarship for all players on their team. For each year played, a player receives a full scholarship at the post-secondary institution of their choice. This scholarship funding can also be used to pursue training related to technical trades including computer science, electrician, plumbing, etc. This provision ensures the majority of players who do not move on to a professional hockey career can pursue a post-secondary education or other development in the trades.

Should the WHL not successfully defend the class action lawsuit, players and their families will be at risk of losing this extensive education development benefit and the number of CHL and WHL teams will be reduced. This, in turn, will eliminate opportunities many players will have to play in what is regarded as the finest development league of its kind in the world today.

In addition, the Portland Winterhawks are currently working with the Tualatin Hills Park and Recreation Department (THPRD) in a public-private partnership to create a two-sheet ice rink at its Walker Road complex in Beaverton. This major addition to the Walker Road facility will create new recreational/fitness programming for Oregonians and will add significantly to the metro area economy. The additional tournaments and events are anticipated to create a net increase of 8,200 room nights valued at nearly \$1,000,000 in increased lodging revenues annually. This \$1,000,000 impact does not include additional revenues related to increased dining, retail shopping, and entertainment. The project relies on the continued viability of the Portland Winterhawks and its related Junior Winterhawks program. A legislative solution to the uncertainty created by litigation risk is necessary to ensure the continued viability of the Portland Winterhawks.

**Conclusion:**

I appreciate the opportunity to be with you here today and thank you for your attention. I hope we are able to work together to get to a point that Oregon is on par with the other states and provinces that have solved this issue in a way that will help ensure the



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continued viability of WHL/CHL teams and their related developmental leagues that provide such a tremendous benefit to those players who seek to play hockey at the highest amateur level.

Very truly yours,

Timothy J. Bernasek

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