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## Better Late than Never: Why the USOC Took So Long To Fix a Failing System for Protecting Olympic Athletes from Abuse

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BETTER LATE THAN NEVER: WHY THE USOC TOOK SO  
LONG TO FIX A FAILING SYSTEM FOR PROTECTING  
OLYMPIC ATHLETES FROM ABUSE

I. INTRODUCTION

At the 2012 Summer Olympic Games in London, the United States sent 530 athletes to compete, a team comprised of 269 women and 261 men.<sup>1</sup> This was the first time women outnumbered men on Team USA, and the United States was on the leading side of a worldwide trend of increasing female participation at the Olympic Games.<sup>2</sup> The 2016 Summer Olympics in Rio set a record for female participants at forty-five percent and the United States broke its own record from 2012 with 292 female participants out of 555 athletes.<sup>3</sup> However, this increase in female participation has not been without a significant number of sexual misconduct allegations made against adults connected to Olympic sport organizations.<sup>4</sup>

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1. See Bill Chappell, *Year of the Woman at the London Games? For Americans, It's True*, NPR (Aug. 10, 2012, 1:21 PM), <https://www.npr.org/sections/thetorch/2012/08/10/158570021/year-of-the-woman-at-the-london-games-for-americans-its-true> [<https://perma.cc/Q3KR-MF36>] (reporting statistics of athlete participation at London Olympic Games).

2. See *id.* (discussing impressive feats achieved by women at 2012 Olympics and noting for United States in particular it was “Year of the Woman at the Olympics”).

3. See Claire Warner, *How Many Female Athletes Are Competing in the 2016 Olympics? The Rio Games Are Worth Watching*, BUSTLE (July 24, 2016), <https://www.bustle.com/articles/174518-how-many-female-athletes-are-competing-in-the-2016-olympics-the-rio-games-are-worth-watching> [<https://perma.cc/G99J-G2RE>] (discussing increase in female participation at Olympics and historic achievement of these elite female athletes).

4. See Will Hobson & Steven Rich, *Every Six Weeks for More Than 36 Years: When Will Sex Abuse in Olympic Sports End?*, WASH. POST (Nov. 17, 2017), [https://www.washingtonpost.com/sports/every-six-weeks-for-more-than-36-years-when-will-sex-abuse-in-olympic-sports-end/2017/11/17/286ae804-c88d-11e7-8321-481fd63f174d\\_story.html?utm\\_term=.f6bd60c16ef0](https://www.washingtonpost.com/sports/every-six-weeks-for-more-than-36-years-when-will-sex-abuse-in-olympic-sports-end/2017/11/17/286ae804-c88d-11e7-8321-481fd63f174d_story.html?utm_term=.f6bd60c16ef0) [<https://perma.cc/8HY7-ACPL>] (noting “[m]ore than 290 coaches and officials associated with the United States’ Olympic sports organizations have been publicly accused of sexual misconduct since 1982” which has spanned across “15 sports and amounts to an average of eight adults connected to an Olympic organization accused of sexual misconduct every year—or about one every six weeks—for more than 36 years”); see also Warner, *supra* note 3 (discussing growing number of women athletes participating in Olympics). This Comment refers to perpetrators as male and victims or complainants as female. While the author recognizes that there are certainly exceptions, this Comment primarily addresses how the legal voids within the Ted Stevens Olympic and Amateur Sports Act and a culture of resisting change affects female athletes.

The sexual assault allegations referred to herein taint the otherwise historic achievement and growing number of female sport opportunities at the Olympics.<sup>5</sup> Since 1982, over 290 coaches and officials within the United States' Olympic sport organizations have faced public accusations of sexual misconduct.<sup>6</sup> The latest scandal, amongst a series of publicized incidents, involves the United States National Gymnastics Team ("USA Gymnastics").<sup>7</sup> In 2015, sexual abuse claims were filed against Larry Nassar, a former USA Gymnastics team doctor.<sup>8</sup> In 2017, notable Olympic gymnasts and gold medalists McKayla Maroney, Aly Raisman, Gabby Douglas, and Simone Biles joined the 150-plus female athletes in publicly accusing Larry Nassar of sexual abuse.<sup>9</sup> This case is not an isolated incident, but rather continues to highlight preventable errors committed by Olympic sport organizations that have put numerous children at risk.<sup>10</sup> Nassar has since pled guilty to sexually assaulting ten girls and has been sentenced to sixty years on federal child pornography charges and forty to 125 years for molesting young girls under the guise of medical treatment.<sup>11</sup>

For years, sexual assault has occurred in numerous Olympic sport organizations as a result of a culture that prioritizes limited

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5. See generally Hobson & Rich, *supra* note 4 (discussing growing problem of sexual abuse in Olympic sport organizations).

6. See *id.* (discussing statistics of sexual abuse spanning last three decades).

7. See *id.* (discussing sexual abuse claims against USA Gymnastics and former team doctor Larry Nassar).

8. See *id.* (discussing origination of claims, and continuation of claims arising after first report against Nassar).

9. See generally Christine Hauser, *McKayla Maroney, Describing Sexual Abuse, Calls Larry Nassar a 'Monster of a Human Being'*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/sports/mckayla-maroney-larry-nassar.html> [<https://perma.cc/XAA5-YHNT>] (discussing notable gymnasts who have spoken publicly claiming abuse by Larry Nassar); see also Tracy Connor, *Larry Nassar Accuser Count is Up to 265, Judge Says*, NBC NEWS (Jan. 31, 2018, 1:58 PM), <https://www.nbcnews.com/news/us-news/larry-nassar-accuser-count-265-judge-says-n843316> [<https://perma.cc/KD69-FA9T>] (noting 150 women made impact statements at Larry Nassar's sentencing, but over 265 females have claimed Nassar sexually abused them).

10. See Hobson & Rich, *supra* note 4 (quoting Katherine Starr, former Olympic swimmer and abuse victim, stating, "[w]e're hearing all about gymnastics, but the problems in gymnastics are equally as prevalent in every other sport").

11. See Tracy Connor, *Coach Slams Gymnastics Doctor Larry Nassar for Hiding His Face*, NBC NEWS (Jan. 17, 2018, 4:20 PM), <https://www.nbcnews.com/news/us-news/coach-slams-gymnastics-doctor-larry-nassar-hiding-his-face-n838396> [<https://perma.cc/9GNX-PVMX>] (discussing Nassar's sentencing hearing where over 150 women accused him of sexually assaulting them, charges against him and disgrace filling the courtroom).

legal risk and gold medals over safeguarding children.<sup>12</sup> The United States Olympic Committee (“USOC”) has resisted change and continues to exhibit flaws in its responses to suspicions of abuse.<sup>13</sup> Historically, the USOC has employed ineffective procedural safeguards to protect Olympic athletes, particularly with respect to underage females.<sup>14</sup>

This Comment explains the fundamental issues within the Olympic organization, exploring its history of turning a blind eye to sexual abuse allegations coupled with ineffective methods of removing abuse from sports.<sup>15</sup> This Comment argues that the USOC is in the best position to combat the issue of sexual abuse.<sup>16</sup> Further, this Comment argues that changing the culture of youth sport should begin with the USOC and trickle down to the National Governing Bodies (“NGBs”).<sup>17</sup> Part II of this Comment discusses the previous and current governing law that the USOC must follow, including the Ted Stevens Olympic and Amateur Sports Act (“Ted Stevens Act”) and the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 (“SafeSport Act”).<sup>18</sup> Part II also examines sexual abuse scandals within several NGBs.<sup>19</sup> Part III analyzes the sexual abuse that has plagued the Olympic organizations for decades by looking at legal cases against the USOC, focusing particularly on the recent scandals within USA Swimming and USA Gymnastics.<sup>20</sup> Part III also analyzes changes to federal law and discusses the nondisclosure agreement (“NDA”) process and

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12. *See id.* (discussing resistance to change by USOC and highlighting reasons for why abuse cases continue to rise in Olympic sport organizations).

13. *See id.* (stating USOC has resisted change to federal law governing it, despite flawed responses officials have historically given to suspicions of abuse).

14. *See* Haley O. Morton, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, 23 WM. & MARY J. WOMEN & L. 141, 143 (2016) (“Olympic athletes, mostly underage females, have almost no effective grievance procedure within their own National Governing Bodies (NGB), nor do they have statutory grounds for a civil suit, to combat sexual abuse from coaches.”).

15. For further discussion of the fundamental issues within the Olympic organization, see *infra* notes 24–29 and accompanying text.

16. For further discussion of the changes that should be made by the USOC to combat sexual abuse, see *infra* notes 168–197 and accompanying text.

17. For further discussion of the USOC’s ability to combat the abuse, see *infra* notes 167–197 and accompanying text.

18. For further discussion of the Ted Stevens Act, see *infra* notes 65–76 and accompanying text.

19. For further discussion of the sexual abuse within Olympic sport organizations, see *infra* notes 97–160 and accompanying text.

20. For further discussion of the scandals in USA gymnastics and USA Swimming, see *infra* notes 100–119, 120–145, 223–227, 268–288, and accompanying text.

legality of NDAs in this context.<sup>21</sup> Finally, Part IV summarizes the arguments made in this Comment.<sup>22</sup>

## II. LEGAL BACKGROUND

Historically, Olympic athletes have had ineffective procedural safeguards and reporting systems within their NGB for combating sexual abuse by coaches and officials, leading to an ineffective recourse process for athletes after sexual abuse has occurred.<sup>23</sup> The USOC has traditionally claimed that its hands are tied regarding the issue of combatting sexual abuse situations, deferring to these ineffective NGBs to take action.<sup>24</sup> The USOC has only started recognizing the growing issues and improving its own safety policies in the last three years.<sup>25</sup> In 2017, the USOC implemented a new non-profit agency, the U.S. Center for SafeSport (“SafeSport”), to deal with suspected abuse in Olympic sport organizations.<sup>26</sup> SafeSport was supposed to begin operations in 2015; however, a lack of funding ultimately delayed its commencement until 2017.<sup>27</sup> Recent trends are shining a light on sexual abuse in Olympic sport organizations and forcing the USOC and NGBs to start making the necessary changes alongside the SafeSport Act, a law aimed at preventing sexual abuse in amateur athletics.<sup>28</sup> As the leader in the Olympic

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21. For further discussion of the changes to federal law and the NDA process, see *infra* notes 228–289 and accompanying text.

22. For further discussion of the arguments made in this Comment, see *infra* notes 289–298 and accompanying text.

23. For further discussion of the historical procedural safeguards and reporting systems, see *infra* notes 161–197 and accompanying text.

24. See Cecelia Townes, *When USOC-Sanctioned Officials and Coaches are Accused of Assault – Who is Responsible?*, ESPNW (Mar. 29, 2017), <http://www.espn.com/espnw/voices/article/18988930/when-usoc-sanctioned-officials-coaches-accused-sexual-assault-responsible> [<https://perma.cc/4T9F-28WK>] (“In instances of allegations of sexual assault, the USOC has argued that the NGBs and local clubs that employ coaches and officials are responsible for responding to claims of misconduct.”).

25. See *id.* (discussing creation of U.S. Center for Safe Sport, but qualifying it as very small step taken by USOC toward protection of athletes from sexual assault).

26. See *id.* (discussing creation of SafeSport).

27. See *id.* (discussing delayed commencement of SafeSport).

28. See *Protecting Young Victims From Sexual Abuse and Safe Sport Authorization Act*, Pub. L. No. 115-126, Title II, §§ 201-04, 132 Stat. 318, 320-25 (2018) (codified as amended in scattered sections of 18 U.S.C., 34 U.S.C. and 36 U.S.C.) (noting aim of new law is “to prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse to law enforcement authorities”); see also Hobson & Rich, *supra* note 4 (quoting statement by USOC board member Susanne Lyons, who, according to her statement: “think[s] we all feel, in hindsight, how could we have let this take so long? . . . All up and down that

organizations, it should be the USOC's primary purpose to protect its athletes.<sup>29</sup>

### A. Structure of Olympic Sport Governance

Olympic sport governance in the United States is structured as a pyramid.<sup>30</sup> The USOC sits at the top of the pyramid, and is headquartered in Colorado Springs.<sup>31</sup> Under the USOC sits forty-seven Olympic and Pan American NGBs.<sup>32</sup> There is one NGB for each sport, such as USA Gymnastics and USA Swimming.<sup>33</sup> Finally, under the NGBs are the coaches and clubs sponsored by NGBs which work directly with athletes, many of whom are children.<sup>34</sup>

#### 1. *United States Olympic Committee*

The USOC, serving as both National Olympic Committee and National Paralympic Committee, is a multifunctional committee.<sup>35</sup> Congress created the USOC in 1894 to oversee the NGBs, stating its mission as “support[ing] U.S. Olympic and Paralympic athletes in achieving sustained competitive excellence while demonstrating the values of the Olympic Movement, thereby inspiring all Americans.”<sup>36</sup> The Committee is responsible for training, entering, and funding United States teams, primarily for the Olympic and Paralympic Games.<sup>37</sup> But its responsibilities are not limited solely to the Games themselves and the Olympic Movement.<sup>38</sup> The USOC

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food chain, there were failures in the system that I think everyone regrets . . . The best we can do now is just go forward aggressively”).

29. See Townes, *supra* note 24 (“While the USOC may have delegated certain duties to its NGBs, it is ultimately the USOC’s purpose to protect its athletes.”).

30. See Hobson & Rich, *supra* note 4 (discussing bureaucracy overseeing Olympic sport organizations).

31. See *id.* (discussing USOC as overarching body governing all United States Olympic organizations).

32. See *id.* (discussing NGBs, many of which are also headquartered in Colorado Springs).

33. See *id.* (discussing NGBs and tumultuous events surrounding USA Gymnastics in particular).

34. See *id.* (discussing fundraising mechanism of NGBs to allow coaches and clubs “across the country the opportunity to use the prestige of an association with the Olympics to attract top students”).

35. See *About the USOC*, TEAM USA (2018), <https://www.teamusa.org/About-the-USOC> [<https://perma.cc/BT37-5DEY>] (discussing role of USOC).

36. *Id.* (discussing history of USOC).

37. See *id.* (describing USOC as “responsible for the training, entering and funding of U.S. teams for the Olympic, Paralympic, Youth Olympic, Pan American and Parapan American Games, while serving as a steward of the Olympic Movement throughout the country”).

38. See *id.* (discussing additional roles of USOC that do not revolve around support during actual competition); see also *Leading the Olympic Movement*,

is also responsible for aiding athletes through their NGBs, “providing financial support and *jointly* working to develop customized, creative and impactful athlete-support and coaching education programs.”<sup>39</sup> Most importantly, the USOC prides itself on supporting athletes “on and off the field of play” and providing Olympic Training Center facilities for athletes, which include sports medicine, strength and conditioning, and psychology.<sup>40</sup>

## 2. *National Governing Bodies*

The forty-seven NGBs sit below the USOC in the governance structure of the Olympic organization and play a direct role with athletes.<sup>41</sup> Each NGB is responsible for abiding by the rules and regulations of the Ted Stevens Act and its recent amendment, which together lay out several duties pertaining to sports development and coaching.<sup>42</sup> NGBs are responsible for selecting and sending athletes to the Olympic Games and supporting the growth of the sport down to youth levels.<sup>43</sup> Essentially, under the supervision of the USOC, the NGBs of each sport follow their own procedures of checks and balances and democratic processes.<sup>44</sup>

## 3. *U.S. Center for SafeSport*

SafeSport opened in 2017, acting as the “first and only national organization of its kind.”<sup>45</sup> SafeSport focuses on ending all forms of abuse in sports, which includes addressing claims of bullying and

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OLYMPIC.ORG, <https://www.olympic.org/the-ioc/leading-the-olympic-movement> [<https://perma.cc/U8GA-27L5>] (last visited July 19, 2018) (“The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism . . . The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values.”).

39. *About the USOC*, *supra* note 35 (emphasis added).

40. *See id.* (noting USOC’s provision of performance services for athletes).

41. *See generally* Hobson & Rich, *supra* note 4 (discussing Olympic organization’s hierarchical structure).

42. *See* Lisa Marshall, *Report Card Gives U.S. Olympic Sports a D for Self-Governance*, CU BOULDER TODAY (Nov. 30, 2017), <https://www.colorado.edu/today/2017/11/30/report-card-gives-us-olympic-sports-d-self-governance> [<https://perma.cc/F8UL-2Q8M>] (discussing responsibilities of NGBs, including self-governing Olympic sports in United States).

43. *See id.* (noting one primary role of NGBs is to select athletes for Olympic Games).

44. *See generally id.* (discussing USOC supervision of NGBs and reports of how well functioning certain NGBs are based on evaluation done for democratic process, transparency, checks and balances, and solidarity).

45. *Who We Are*, U.S. CTR. FOR SAFESPORT, <https://safesport.org/who-we-are> (last visited Jan. 17, 2019).

harassment in addition to physical and emotional sexual misconduct.<sup>46</sup> SafeSport seeks to foster a national sport culture of respect, safety, and support for athletes both on and off the playing field.<sup>47</sup> In response to a lacking system in the Olympic Movement for handling sexual abuse, SafeSport investigates and resolves alleged policy violations of the SafeSport Code for the forty-seven NGBs within the U.S. Olympic and Paralympic organizations.<sup>48</sup>

In 2010, prior to the SafeSport Act, the USOC formed a working group with an initiative to better protect athletes and develop recommendations regarding misconduct in sport.<sup>49</sup> The group created SafeSport as a nonprofit to “respond to abuse claims and implement a unified set of policies for preventing, identifying and reporting misconduct among the 47 national governing bodies (NGBs) that oversee USOC sports.”<sup>50</sup> SafeSport initially did not create any legal obligation, rather the USOC “required all NGB’s, as a condition of membership, to implement athlete safety policies.”<sup>51</sup> However, in 2017, the SafeSport Act codified a legal obligation by placing a duty on any adults working with minor athletes to report any suspicion of sexual abuse.<sup>52</sup> SafeSport is required to fully investigate any claims of sexual assault and report to law en-

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46. See Cecelia Townes, *Q&A With Shellie Pfohl, CEO of the U.S. Center for SafeSport*, ESPNW (Apr. 6 2017), <http://www.espn.com/espnw/voices/article/19082380/qa-shellie-pfohl-ceo-us-center-safesport> [<https://perma.cc/5TA5-J7WW>] (“The U.S. Center for SafeSport is designed to make sure that athletes are safe, supported and strengthened through sports. To that end, we address bullying, harassment, hazing, as well as physical, emotional and sexual misconduct in sport.”).

47. See generally *id.* (stating SafeSport will prevent future harm and respond to already reported harm).

48. See *id.* (discussing SafeSport’s role in handling claims of sexual misconduct, while noting work extends far beyond Olympic family as resource for all youth sport organizations).

49. See Stephen Meyers, *USOC CEO Provides Details on Initiative to Protect Athletes*, USA TODAY (Sept. 22, 2016), <https://www.usatoday.com/story/sports/olympics/2016/09/22/usoc-ceo-scott-blackmun-center-for-safe-sport/90868876/> [<https://perma.cc/9EFY-XGGV>] (noting USOC CEO Scott Blackmun’s recognition that “sexual abuse is obviously a societal issue” and “as leaders in the world of sport, we have to do everything in our power to keep our athletes safe”).

50. *Id.*

51. *Id.*

52. See generally 34 U.S.C. § 20341 (providing adults’ reporting obligations); see also *SafeSport Code for the U.S. Olympic and Paralympic Movement*, U.S. CTR. FOR SAFESPORT (effective Mar. 3, 2017), <https://77media.blob.core.windows.net/uscss/1488581091937.2017-03-03—safesport-code—final.pdf> [<https://perma.cc/2UH9-Q3QG>] (discussing how to foster “a sport community where all persons who participate in sport programs and activities can work and learn together in an atmosphere free of all forms of emotional, physical and sexual misconduct”).



forcement agencies within twenty-four hours.<sup>53</sup> SafeSport is then “authorized to and will issue sanctions up to and including being [permanently] banned.”<sup>54</sup>

The USOC had ethics policies which required NGBs to adopt minimum policy standards prior to SafeSport’s creation in 2015 and its official opening in 2017.<sup>55</sup> The USOC had an ethics policy that read: “Coaches do not engage in sexual/romantic relationships with athletes or other participants over whom the coach has evaluative, direct, or indirect authority, because such relationships are likely to impair judgement or be exploitative.”<sup>56</sup> The minimum policy standards for NGBs, focusing on protecting athletes, did not become a requirement until 2012 and NGBs were not required to adopt the standards until December 2013.<sup>57</sup> These policies target the existing problems in the Olympic regime and serve as a baseline for NGBs to follow as they attempt to improve their systems.<sup>58</sup> The policies included the following guidelines:

- (1) Prohibited conduct includes bullying; hazing; harassment (including sexual harassment); emotional misconduct; physical misconduct; and sexual misconduct (including child sexual abuse) between NGB employees, athletes, coaches and officials.<sup>59</sup>

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53. See 34 U.S.C. § 20341(c)(12) (noting reporting requirement “as soon as possible” means within 24-hours).

54. Townes, *supra* note 46; and see, e.g., *Permanently Ineligible Members*, USA Gymnastics, [https://usagym.org/pages/aboutus/pages/permanently\\_ineligible\\_members.html](https://usagym.org/pages/aboutus/pages/permanently_ineligible_members.html) [<https://perma.cc/36K9-9WNM>] (last visited July 19, 2018) (listing publicly all persons permanently banned from membership with USA Gymnastics with relevant rule or Bylaw that was violated listed next to his/her name).

55. See Morton, *supra* note 14, at 153–54 (discussing ill-equipped USOC and NGB’s for addressing abuse committed by sanctioned coaches); see also Meyers, *supra* note 49 (noting USOC CEO Scott Blackmun’s statement that “[t]he USOC created the center after more than four years of developing protocols for preventing and reporting allegations of abuse”); see also United States Olympic Committee, *U.S. Olympic Committee Announces Formation Of U.S. Center For Safe Sport Advisory Council*, TEAM USA (Feb. 9, 2015, 6:15 PM), <https://www.teamusa.org/News/2015/February/09/US-Olympic-Committee-Announces-Formation-Of-US-Center-for-Safe-Sport-Advisory-Council> [<https://perma.cc/KZE5-BAX5>] (discussing approval of independent entity SafeSport in June 2014 and announcement in 2015).

56. *United States Olympic Committee Coaching Ethics Code*, USA NAT’L KARATE-DO FED’N, <https://www.teamusa.org/USA-Karate/Officials-and-Coaches/Coaches-Resources/USOC-Coaching-Ethics-Code> [<https://perma.cc/M5P2-Z9HV>] (last visited Feb. 6, 2018).

57. See Morton, *supra* note 14, at 153 (discussing requirement to adopt minimum standards placed by USOC on NGBs).

58. See *id.* at 154 (discussing minimum requirements and their progressiveness, but also their limited application).

59. See generally *Minimum Standards Policy for Athlete Safety Programs*, <http://www.usfsa.org/content/Minimum%20Standards%20Policy%20from%20USOC>.

- (2) Each “NGB shall require criminal background checks for those individuals it formally authorizes, approves or appoints (a) to a position of authority over, or (b) to have frequent contact with athletes.”<sup>60</sup>
- (3) “Beginning January 1, 2014, each NGB shall require education and training concerning the key elements of their safety program for those individuals it formally authorizes, approves or appoints (a) to a position of authority over, or (b) to have frequent contact with athletes.”<sup>61</sup> “Before January 1, 2014, each NGB shall offer and encourage the same.”<sup>62</sup>
- (4) A requirement that “[e]ach NGB shall establish a procedure for reporting misconduct.”<sup>63</sup>
- (5) A grievance process, free from bias and conflicts of interest, to address misconduct allegations, and in cases where the Ted Stevens Act applies, strict compliance with the Act’s requirements.<sup>64</sup>

## B. Governing Olympic Sports

### 1. *The Ted Stevens Olympic and Amateur Sports Act*

The Ted Stevens Act is one of the current laws governing Olympic sport organizations and, prior to 2018, was the most applicable source of sports law for American Olympic sports.<sup>65</sup> Congress passed the Ted Stevens Act in response to a lack of internal organization within Olympic governance.<sup>66</sup> Although the USOC has governing powers over United States Olympic sports, both the USOC and NGBs must still comply with the Ted Stevens Act in protecting

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pdf [<https://perma.cc/KZ6U-GRB8>] (last visited Feb. 6, 2018) (referring to prohibited conduct under policy).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* (referring to enforcement of policy and grievance process).

65. *See* Matthew Mitten, *Legal Protection of Sports Participation Opportunities in the United States of America*, FOR THE RECORD: THE OFFICIAL NEWSLETTER OF THE NAT’L SPORTS L. INST., 1, 2 (2008), <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/v19i4.pdf> [<https://perma.cc/D2BQ-MNNF>] (discussing legal protection of Olympic sports athletic participation opportunities under Ted Stevens Act); *see also* Morton, *supra* note 14, at 150 (“While Title IX provides remedies for students and student-athletes experiencing sexual assault, the [Ted Stevens Act] only implicates athletes seeking solutions to issues affecting their ability to participate in competition.”).

66. *See* Morton, *supra* note 14, at 150 (discussing origination of Ted Stevens Act in response to “intra-organizational political ‘squabbles’”).

athletes' ability to participate in competition.<sup>67</sup> Under the Ted Stevens Act, the USOC must establish a procedure for "swift and equitable resolution of disputes relating to" Olympic athlete participation, guaranteeing all athletes, officials, and coaches "fair notice, due process and a hearing in the event of a dispute."<sup>68</sup>

Although athletes are ineligible to be USOC members, the Ted Stevens Act requires an election of an Athletes' Advisory Council ("AAC") to ensure open lines of communication with the USOC and adequate representation of athlete interests.<sup>69</sup> The mission of the AAC is "to communicate the interests and protect the rights of athletes, in cooperative support of the USOC achieving its mission."<sup>70</sup> The Ted Stevens Act also requires athletes to hold a minimum of twenty percent of the membership and voting power held by its Board of Directors, committees, and each NGB.<sup>71</sup> Finally, the Ted Stevens Act requires the NGBs provide all athletes with an equal opportunity to participate without "discrimination on the basis of race, color, religion, sex, age, or national origin."<sup>72</sup> If there is an issue regarding an athlete's participation (e.g., challenges to standards for selecting athletes to participate in United States competitions or accusations of substance abuse), the USOC must enact a swift resolution on its own, while the NGB launches a concurrent

67. See Mitten, *supra* note 65, at 2 (citing 36 U.S.C. §220501 (2008)) (noting both USOC and each NGB must comply with Ted Stevens Act).

68. *Id.* at 3 (citing 23 U.S.C. § 220509(a)) (discussing "swift and equitable resolution"); see also Will Hobson, *Senator Dianne Feinstein Calls for Changes to Olympic Sports Law to Protect Children from Abuse*, WASH. POST (Feb. 22, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/02/22/senator-dianne-feinstein-calls-for-changes-to-olympic-sports-law-to-protect-children-from-abuse/?utm\\_term=.8495a9f39227](https://www.washingtonpost.com/news/sports/wp/2017/02/22/senator-dianne-feinstein-calls-for-changes-to-olympic-sports-law-to-protect-children-from-abuse/?utm_term=.8495a9f39227) [<https://perma.cc/WBR8-J59G>] (discussing framework of Ted Stevens Act, and setting forth requirements in event of dispute); see also Matthew J. Mitten, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 93 (2008) (discussing protection of Ted Stevens Act over Olympic sport disputes).

69. See Mitten, *supra* note 65, at 2 (noting certain requirements of Ted Stevens Act); see also *Athletes' Advisory Council*, TEAM USA, <https://www.teamusa.org/athlete-resources/athletes-advisory-council> [<https://perma.cc/7DX6-GHJ3>] (last visited July 2, 2018) ("The [Athletes' Advisory Council] consists of at least one athlete from each National Governing Body (NGB) which the United States is represented at the Olympic and Pan American Games, eight athletes representing the Paralympic Sport Organizations or NGBs designated to govern a Paralympic sport, and six athletes elected by the AAC to serve at-large, including a chair and two vice chairs.").

70. *Athletes' Advisory Council*, *supra* note 69.

71. See Mitten, *supra* note 65, at 2 (citing 36 U.S.C. §§ 220504(b)(2), 220522(a)(1), and 220522(a)(8)) (noting voting requirements for athletes under Ted Stevens Act).

72. *Id.* (citing 36 U.S.C. §220504(a)(8)).

internal investigation.<sup>73</sup> Ultimately, an athlete that is dissatisfied with the outcome of an investigation may submit to a final and binding arbitration.<sup>74</sup> This arbitration takes place between the athlete, the NGB, and a single arbitrator or a panel of arbitrators.<sup>75</sup> The arbitrators decision in settling the dispute is based on a conclusion of law and factual determination of whether (1) the athlete had a fair opportunity to qualify for protected competitions, and (2) the NGB's selection process was "fair, reasonable, and consistently applied to all athletes."<sup>76</sup> Because this process is binding, a court will only interfere if an arbitrator did not have sufficient authority, or exceeded the authority granted, to rule on the specific issue at hand.<sup>77</sup> As discussed in *Gault v. United States Bobsled & Skeleton Foundation*,<sup>78</sup> the standard of review of an arbitrator's decision is only limited scrutiny.<sup>79</sup>

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73. See Mitten, *supra* note 65, at 2, 4 n.29 (discussing arbitration procedures for traditional challenges, such as athlete selection, follow "rational basis" test, while those involving doping disputes follow special arbitration process between arbitrator, U.S. Anti-Doping Agency, and athlete); see also *Olympic Athlete Eligibility, NGB Determination, and Doping Disputes: An Overview*, AM. ARB. ASS'N, [https://www.adr.org/sites/default/files/document\\_repository/Olympic+Athlete+Eligibility.pdf](https://www.adr.org/sites/default/files/document_repository/Olympic+Athlete+Eligibility.pdf) [<https://perma.cc/J4VN-CT7N>] (last visited July 2, 2018). The expedited arbitration process can be illustrated using the following example: "Three days prior to the opening of the Nagano Games in '98, an Olympic skier filed an arbitration. The AAA acted quickly and had an arbitration hearing scheduled within 24 hours; the arbitrator decided the skier was eligible for the games." *Id.*

74. See Mitten, *supra* note 65, at 4 n.29 (noting final and binding arbitration must be in accordance with Commercial Rules of American Arbitration Association); see also Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 534 (2002) (discussing due process for athletes suspended for doping, allowing athletes right to hearing, challenging her ineligibility under Ted Stevens Act, first to NGB, then to USOC, finishing with appeal to American Arbitration Association).

75. See Mitten, *supra* note 65, at 4 (discussing who is normally selected as arbitrator or member of panel).

76. *Id.* at 2, 4 (citing *In re Arbitration between Sean Wolf and U.S. Rowing Ass'n*, Case No. 30 190 00635 02 (American Arb. Ass'n, Aug. 9, 2002) and *In re Arbitration between Rebecca Conzelman*, Case No. 30 190 404 04 (American Arb. Ass'n, April 6, 2004)) (discussing arbitration process and illustrative obligations of arbitration panel).

77. See Mitten, *supra* note 65, at 4 (citing *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1003 (7th Cir. 2000)) (discussing limited circumstances when courts will interfere with arbitration process).

78. 578 N.Y.S.2d 683, 685 (N.Y. App. Div. 1992).

79. See Mitten, *supra* note 65, at 4 (quoting court in *Gault*) ("[A]lthough we also may disagree with the arbitrator's award and find most unfortunate the increasing frequency with which sporting events are resolved in the courtroom, we have no authority to upset it when the arbitrator did not exceed his authority."); see also *Lindland*, 227 F.3d at 1003 (noting courts will vacate or refuse to affirm arbitrators award if it is "result of 'corruption,' 'fraud,' 'evident partiality,' or any similar bar to confirmation").

Despite the Ted Stevens Act providing some protection of athletes' ability to participate in the Olympics, courts have continuously held that athletes have no constitutional right to participate in the Olympic Games.<sup>80</sup> For example, in *DeFrantz v. USOC*<sup>81</sup> the Court determined the USOC is a private organization rather than a state actor.<sup>82</sup> Thus, the USOC is not subject to the constraints of the United States Constitution, and further, even if its conduct was considered "state action," athletes still do not have a constitutional right to participate in the Olympic Games.<sup>83</sup> A Seventh Circuit judge noted, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games."<sup>84</sup>

## 2. *United States Center for Safe Sport Authorization Act of 2017*

The Ted Stevens Act was originally intended to resolve disputes centered on participation in the Olympics; it did not directly speak to sexual assault reporting.<sup>85</sup> Recognizing the fragmented law and the need for amendment, California United States Senator Dianne Feinstein successfully lobbied Congress to amend the Ted Stevens Act to include concrete processes and remedial actions when sexual misconduct claims arise.<sup>86</sup> In 2018, Congress passed the SafeSport Act, aimed at preventing amateur athletes from systematic sexual abuse.<sup>87</sup> The law implements stronger abuse-prevention measures by requiring any adult working with amateur athletes, therefore eve-

80. See Mitten, *supra* note 65, at 94 ("A U.S. athlete has no federal constitutional right to participate in the Olympic Games.")

81. 492 F. Supp. 1181 (D.D.C. 1980).

82. See Mitten, *supra* note 65, at 2 (discussing lack of federal restraints on USOC).

83. See *id.* (discussing lack of constitutional protection for athletes regarding participation in Olympics).

84. *Id.* at 5 (quoting *Michels v. USOC*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, C.J., concurring)).

85. See generally Hobson, *supra* note 68 (discussing inadequacies of Ted Stevens Act for addressing sexual assault allegations and reporting).

86. See *id.* (discussing efforts made by individuals, rather than USOC, to change law and better protect children).

87. See Maureen Groppe, *Trump Signs Law to Protect Abuse of Athletes—A Response to USA Gymnastics Scandal*, INDYSTAR (Feb. 14, 2018, 6:54 PM), <https://www.indystar.com/story/news/politics/2018/02/14/trump-signs-law-prevent-abuse-athletes-response-usa-gymnastics-scandal/336879002/> [<https://perma.cc/V7HE-Z48V>] (discussing recent bill aimed at protecting athletes from sexual abuse, in part responding to sexual abuse scandal in USA Gymnastics, passed by Congress and signed into law by President Donald Trump in February 2018).

ryone who works under Olympic organizations, to be *mandatory* and prompt reporters of suspected abuse.<sup>88</sup>

Although the USOC had already implemented SafeSport, the SafeSport Act designates SafeSport as a nationally recognized organization, serving as the “independent national safe sport organization . . . for the United States.”<sup>89</sup> The SafeSport Act, for the first time in history, imposed a legal duty upon Olympic officials at all levels to protect children from abuse.<sup>90</sup> Under the SafeSport Act there are: (1) requirements that all adult members of NGBs, or adults authorized to work with amateur athletes, “report immediately any allegation” of sexual abuse; (2) mechanisms making this reporting duty easy, without obstacle, and fully confidential; (3) “procedures to limit one-on-one interactions between an amateur athlete” and adults when under a NGB’s jurisdiction; (4) procedures prohibiting retaliation against individual reporters of sexual abuse; (5) oversight procedures by independent auditors to ensure the law is properly followed; and (6) mechanisms for NGBs to prevent adults, who are the subject of such sexual abuse allegations, from working with minors.<sup>91</sup> Additionally, the legislation “extends the statute of limitations for victims to sue alleged perpetrators, recognizing that children sometimes don’t realize they were abused until years later.”<sup>92</sup> The statute of limitations does not begin until the victim reaches the age of twenty-eight, or up to ten years after the “reasonable discovery” of the abuse, whichever is later.<sup>93</sup> Finally, the SafeSport Act creates a civil remedy for any minor who is a victim of sexual assault and suffered a personal injury, allowing a court to award punitive damages in addition to other equitable re-

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88. *See generally id.* (discussing requirements of legislation, noting all adults who interact with amateur athletes must report suspected child abuse, including sexual abuse, within twenty-four hours to local law enforcement).

89. 36 U.S.C. § 220541(a)(1).

90. *See generally* Groppe, *supra* note 87 (noting SafeSport Act’s “aim[ ] to fix a patchwork of state reporting rules by requiring adults who interact with amateur athletes to report suspected child abuse, including sexual abuse, within 24 hours to local law enforcement”).

91. 36 U.S.C. § 220542(a)(2)(C) (discussing legal duties implemented by SafeSport Act to prevent sexual abuse in sports); *see also* 36 U.S.C. § 220530 (noting requirement that NGBs limit to one-on-one interactions between minors and adults to situations of emergencies).

92. Associated Press, *Following Larry Nassar Case, Congress Passes Bill Aiming to Protect Amateur Athletes from Abuse*, USA TODAY (Jan. 29, 2018, 7:45 PM), <https://www.usatoday.com/story/sports/2018/01/29/congress-bill-aiming-protect-amateur-athletes-abuse/1077273001/> [<https://perma.cc/G9VE-HWQ6>].

93. *Id.* (noting SafeSport Act recognizes need for statute of limitations to extend beyond when victim realizes she has been abused).

lief as appropriate.<sup>94</sup> The USOC continuously announced its support for the bill, however, never lobbied Congress for changes as Senator Feinstein did.<sup>95</sup> The legislation, if effective moving forward, should considerably improve young athletes' safety.<sup>96</sup>

### C. Claims Within NGBs

Over the last decade, numerous allegations of sexual misconduct against various Olympic NGB's have surfaced, some making national headlines.<sup>97</sup> The Larry Nassar scandal brought USA Gymnastics into the news, highlighting this specific sport for its failure to protect its athletes from sexual abuse.<sup>98</sup> Although USA Gymnastics has found itself at the center of media backlash, the problems of sexual misconduct are prevalent in other sports within the Olympic sport organizations.<sup>99</sup>

#### 1. USA Gymnastics

Larry Nassar began working in USA Gymnastics in 1986 and continued in the organization until 2015, serving for four Olympic Games and leaving just prior to the 2016 Summer Olympics in Rio.<sup>100</sup> Throughout Nassar's career as a team doctor for both USA Gymnastics and Michigan State University athletics, victims claim they reported numerous cases of Nassar's abuse, dating back to

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94. See 18 U.S.C. § 2255(a) (noting such persons who were victims of sexual assault under SafeSport Act may sue in civil court and recover actual damages or liquidated damages of \$150,000, and any associated costs, in addition to punitive damages when appropriate).

95. See Hobson & Rich, *supra* note 4 (discussing working group created by USOC focused on abuse prevention and never suggested changes to Ted Stevens Act because not "part of [their] strategy," but option of pushing Congress for change to Ted Stevens Act was available to USOC to improve policies known to be inadequate).

96. See *id.* (discussing positive impact changing law should have on Olympic sport organizations).

97. See *id.* (noting problems exist across all sports, but public only hears about headlines).

98. See *id.* (noting "[w]hile the Nassar case has captured public attention because of the renown of a few of his accusers, it is far from an isolated instance").

99. See *id.* (noting "[t]he problem of sexual abuse in Olympic sports organizations extends well beyond the confines of one sport, or one executive," as more than 290 coaches and officials from more than fifteen sports within the United States Olympic organization have been accused of sexual misconduct since 1982).

100. See Ryan Connors, *Larry Nassar Case: What You Need to Know About Former Michigan State, USA Gymnastics Doctor*, AJC (2018), <https://www.ajc.com/sports/college/larry-nassar-case-what-you-need-know-about-former-michigan-state-usa-gymnastics-doctor/iffjOn0xbVitNMgpNb3e5K/> [<https://perma.cc/B7LS-RBT2>] (discussing Nassar's career as team doctor from 1986 to 2015 with USA Gymnastics and 1997 to 2016 with Michigan State University).

1997, but neither organization took action.<sup>101</sup> Documented complaints show that in 2015, USA Gymnastics received a sexual abuse complaint about Nassar, but officials waited five weeks from the first complaint to inform law enforcement of the allegations.<sup>102</sup> However, Michigan State University, where Nassar continued to work with young athletes, was not informed of the claims until August 2016.<sup>103</sup> The alleged victims filed suit in September 2016, claiming USA Gymnastics “not only hid complaints about Nassar, it failed to adequately supervise his activities.”<sup>104</sup>

In 2017, USA Gymnastics team member and Olympic gold medalist McKayla Maroney filed suit against the USOC and USA Gymnastics.<sup>105</sup> Maroney alleged that officials attempted to keep her silent regarding the sexual abuse she suffered while being treated by former team doctor Larry Nassar.<sup>106</sup> Maroney also alleged that the USOC knowingly concealed Nassar’s misconduct.<sup>107</sup> The USOC has denied all knowledge of the payout by USA Gymnastics to Maroney as a part of the settlement.<sup>108</sup> In addition to making claims that the USOC has overlooked sexual abuse of minors for decades, Maroney seeks to nullify an NDA she signed as a settlement deal with USA Gymnastics in December 2016.<sup>109</sup> Maroney’s

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101. *See id.* (discussing “detailed examples of accusers whose complaints about Nassar appeared to fall on deaf ears”).

102. *See id.* (discussing lack of USA Gymnastics urgency in addressing allegations).

103. *See id.* (discussing USA Gymnastics’ failure to alert Nassar’s current employer of allegations, arguably allowing him to continue abusing athletes).

104. Tim Evans et al., *Former USA Gymnastics Doctor Accused of Abuse*, INDYSTAR (Jan. 24, 2018, 4:35 PM), <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/> [<https://perma.cc/9X8J-9H9M>].

105. *See* Richard Winton et al., *McKayla Maroney Accuses USOC and USA Gymnastics of Covering Up Sexual Abuse with Secret Settlement*, L.A. TIMES (Dec. 21, 2017, 12:50 PM), <http://www.latimes.com/local/lanow/la-me-maroney-gymnastics-settlement-20171220-story.html> [<https://perma.cc/U4T2-NTB4>] (discussing Maroney’s lawsuit claiming Nassar’s sexual abuse and USOC and USA Gymnastics’ concealment of knowledge).

106. *See id.* (discussing Maroney’s confidentiality agreement and monetary settlement with USA Gymnastics).

107. *See id.* (indicating USOC was also one defendant and claims it had “fundamentally flawed” system for preventing abuse and protecting children).

108. *See id.* (reporting USOC has continuously denied all allegations of knowledge and concealment of sexual abuse).

109. *See* Alyssa Bailey, *Chrissy Teigen Pledges to Pay \$100K Fine for McKayla Maroney*, ELLE (Jan. 16, 2018), <http://www.elle.com/culture/career-politics/a15174640/mckayla-maroney-larry-nassar-nda-chrissy-teigen-response/> [<https://perma.cc/PV82-F4F2>] (detailing how NDA Maroney signed as part of settlement deal with USA Gymnastics would require Maroney to pay large fine if she speaks about alleged abuse or agreement).



attorney argues that “requiring [Maroney] to sign an NDA was manipulative and unlawful,” and further noted that confidentiality agreements in child sex abuse cases are unlawful in California.<sup>110</sup> California’s current law “treads a smart middle ground” regarding NDAs for sexual crimes, prohibiting them for the types of sexual crimes that could rise to the level of felonies or those perpetrated against children.<sup>111</sup> Maroney has been outspoken about her abuse, breaking her NDA through a social media post in October 2017 to share her harrowing experience.<sup>112</sup> Maroney also gave a victim impact statement at Nassar’s sentencing hearing, stating “[h]e abused my trust, he abused my body and he left scars on my psyche that may never go away . . . he needs to be behind bars so he will never prey upon another child.”<sup>113</sup>

Maroney’s complaint attacks the USOC’s failures over the last few decades.<sup>114</sup> It claims that “the USOC continued to overlook sexual abuse of minors . . . cit[ing] a 1999 letter from then-USA

110. See Alanna Vagianos, *McKayla Maroney Signed Confidentiality Agreement with USA Gymnastics About Alleged Sexual Abuse*, HUFFINGTON POST (Dec. 21, 2017, 3:21 PM), [https://www.huffingtonpost.com/entry/mckayla-maroney-abuse-confidentiality\\_us\\_5a3aa78ee4b0b0e5a79f167a](https://www.huffingtonpost.com/entry/mckayla-maroney-abuse-confidentiality_us_5a3aa78ee4b0b0e5a79f167a) [<https://perma.cc/NTN6-FKW7>] (“Maroney’s lawyer says USA Gymnastics broke the law by asking her to agree to the settlement.”).

111. See Jessica Levinson, *Non-Disclosure Agreements Can Enable Abusers. Should We Get Rid of NDAs for Sexual Harassment?*, NBC THINK (Jan. 24, 2018), <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-we-get-rid-ncna840371> [<https://perma.cc/6GWZ-F9RB>] (“Essentially in California, parties cannot enter into a confidential settlement agreement for the worst types of sexual crimes—those that rise of the level of felonies or are perpetrated against children. But the state does allow agreements in other cases. Ultimately, California may strike the balance about as well as any government can.”)

112. See Victor Mather, *Olympic Gymnast McKayla Maroney Says She Too Was Molested by Team Doctor*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/sports/olympics/gymnast-mckayla-maroney-team-doctor-sexual-abuse.html> [<https://perma.cc/94ZV-CXGQ>]. In this since deleted Twitter post, Maroney stated the following:

For me, the scariest night of my life happened when I was 15 years old. I had flown all day and night with the team to get to Tokyo. [Nassar had] given me a sleeping pill for the flight, and the next thing I know, I was all alone with him in his hotel room getting a ‘treatment’. [sic] I thought I was going to die that night.

*Id.*

113. Scott M. Reid, *Mckayla Maroney’s Letter to Judge in Larry Nassar Child Porn Case*, ORANGE CTY. REG. (Dec. 6, 2017, 10:22 AM), <https://www.ocregister.com/2017/12/06/mckayla-maroney-letter-to-judge-in-nassar-child-porn-case/> [<https://perma.cc/TUG4-T7YZ>] (discussing statement in Maroney’s victim letter, read at Larry Nassar’s sentencing hearing in January 2018).

114. See Winton, *supra* note 105 (noting complaint points out actions USA Gymnastics and USOC could have taken decades earlier, when problems of sexual abuse first presented).

Gymnastics President Robert Colarossi to [the] USOC.”<sup>115</sup> The letter detailed the USOC’s and USA Gymnastics’ “fundamentally flawed” methods for preventing abuse and urged the USOC to take action.<sup>116</sup> Additionally, Maroney’s complaint states the USOC showed “an apparent indifference to the welfare of young women,” evident by the eleven-year-gap between Colarossi’s letter and the USOC’s first discussions of a handbook aimed at preventing abuse.<sup>117</sup> In response to Maroney’s and other USA Gymnasts’ complaints, the USOC maintains that it was first made aware of the “possibility” of Nassar’s sexual abuse in 2015 and immediately contacted law enforcement.<sup>118</sup> Throughout the proceedings, the USOC and USA Gymnastics have spoken publicly in support of victims, but have not reached out to any individual athletes to express sympathy.<sup>119</sup>

## 2. USA Swimming

USA Swimming found itself entangled with a similar series of sexual abuse accusations almost a decade before details of Larry Nassar’s abusive actions came to light.<sup>120</sup> A study of decades-long

115. *See id.* (noting previous occasion where USOC could have taken action); *see also* Hobson & Rich, *infra* notes 177–179 and accompanying text.

116. *See* Winton, *supra* note 105 (noting claims of USOC’s “apparent indifference to the welfare of young children”).

117. *See id.* (noting Maroney’s suit claimed “the USOC took 11 years to create a program and handbook aimed at preventing access to minors by sexual abusers, and then ‘maintained its course and culture of ignoring abuse’”).

118. *See id.* (noting USOC continues to support Maroney as she speaks out about abuse; however, maintaining USOC only became aware in 2015 and took immediate action).

119. *See* Jeré Longman, *Will Larry Nassar Take Down the U.S. Olympic Committee?*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/sports/olympics/larry-nassar-usoc.html> [<https://perma.cc/GL5G-2JHY>] (discussing comment at Larry Nassar’s sentencing by Aly Raisman’s that “[n]either U.S.A. Gymnastics nor the U.S.O.C. have reached out to express sympathy or even their support—not even to ask: ‘How did this happen? What do you think we can do to help?’”); *see also* Nancy Armour, *USOC Needs to Answer for its Failing in Abuse Scandals, in Gymnastics and Other Sports*, USA TODAY SPORTS (Feb. 9, 2018, 2:47 AM), <https://www.usatoday.com/story/sports/winter-olympics-2018/2018/02/08/armour-olympics-usoc-sexual-abuse-scandals-gymnastics/322431002/> [<https://perma.cc/L82H-CUJU>] (discussing comment prior to start of Pyeongchang Winter Olympics by Olympic chairman Larry Probst, saying “[t]o the women, both those who chose to testify and those who did not, who have demonstrated tremendous bravery, poise and strength in the most difficult circumstances imaginable, let me say this: The Olympic system failed you and we are so incredibly sorry”).

120. *See generally* Nancy Armour & Rachel Axon, *USOC Did Not Heed Sexual Abuse Warnings in 2004, 2005*, USA TODAY (Mar. 31, 2017, 6:16 PM), <https://www.usatoday.com/story/sports/olympics/2017/03/31/usoc-sexual-abuse-usa-swimming-senate/99826600/> [<https://perma.cc/RE2U-2QJK>] (discussing USA Swimming allegations ignored by USOC).

history of abuse in USA Swimming revealed more than 100 coaches with lifetime bans from the sport.<sup>121</sup> In an exposé of USA Swimming, a journalist noted that “[t]here’s a horror in the shadows of American competitive swimming: a continuing legacy of sexual abuse, usually involving male coaches who prey on young women—and a governing body that looks the other way.”<sup>122</sup>

USA Swimming’s issues are illustrated by the story of Anna Strzempko—an accomplished swimmer with promise for athletic success.<sup>123</sup> At thirteen-years-old, Anna led her club swim team to nationals in middle-distance freestyle after it had gone through a five-year drought, marking a turning point in her career.<sup>124</sup> After her race, her coach called her into her office, telling her she had the potential to compete in the 2012 Olympic Trials, which were then four years away.<sup>125</sup> After her coach expressed this confidence in her athletic ability, he allegedly raped her.<sup>126</sup> When Anna met her mother after the event, her mother wondered why Anna was so subdued and not more excited at the news.<sup>127</sup> Anna said she was happy, just “shocked,” and proceeded to vomit the entire evening.<sup>128</sup>

The abuse continued for the next two and a half years, with Anna recalling her coach “periodically rap[ing] her in the storage room just above her local YMCA pool.”<sup>129</sup> To ensure Anna’s silence, her coach continuously emphasized that no one would ever believe her if she said anything about the abuse:

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121. See David Ariviere, *Long-Term Sexual Abuse by USA Swimming Coaches Documented in New Article*, FORBES (Nov. 14, 2014, 3:24 PM), <https://www.forbes.com/sites/davidlariviere/2014/11/14/long-term-sexual-abuse-by-usa-swimming-coaches-documented-in-new-article/#26c6d83957e2> [<https://perma.cc/8C6J-JPPG>] (discussing accusations within USA Swimming organization).

122. Rachel Sturtz, *The Sex Abuse Scandal Plaguing USA Swimming*, OUTSIDE ONLINE (Nov. 6, 2014), [http://sol-reform.com/News/wp-content/uploads/2014/11/The-Sex-Abuse-Scandal-Plaguing-USA-Swimming-Swimming-OutsideOnline.com\\_.pdf](http://sol-reform.com/News/wp-content/uploads/2014/11/The-Sex-Abuse-Scandal-Plaguing-USA-Swimming-Swimming-OutsideOnline.com_.pdf) [<https://perma.cc/359N-DPXS>] (discussing sex abuse in USA Swimming).

123. See *id.* (noting Anna Strzempko was only 9 years into amateur career when first raped by coach).

124. See *id.* (discussing Anna’s youth swimming success and Olympic dreams).

125. See *id.* (outlining Anna’s conversation with coach in which he first told her she could have chance to compete in Olympic trials, then proceeded to slap and rape her, leaving her lying on cement floor).

126. See *id.* (analyzing Anna’s recount of rape, after which the coach left her “lying face up on the room’s cement floor”).

127. See *id.* (discussing Anna’s conversation with her mother after receiving news from coach, as well as mother’s suspicions at her reaction).

128. See *id.* (referring to emotional and physical toll first rape had on Anna).

129. *Id.*

Frozen by a mix of awe and fear that's common among young rape victims, Strzempko didn't tell anybody about what was going on. Out of guilt for losing her virginity to her middle-aged coach, she never told her parents. Out of shame, she never told her friends. She kept swimming, but she tried to escape the sport in her own self-damaging ways.<sup>130</sup>

Almost three years after the abuse began, Anna told a friend, who immediately told Anna's parents.<sup>131</sup> Her mother reported the abuse to YMCA officials, who suspended the coach.<sup>132</sup> This was the start of an ongoing legal and emotional battle for Anna, whose coach continues to deny any wrongdoing.<sup>133</sup> The local police who interviewed Anna found that she "didn't 'act' like an abuse victim," and police stated that Anna did not have a viable case without DNA or an eyewitness.<sup>134</sup>

The Massachusetts Department of Children and Families' ("DCF") investigation found Anna's story credible, and hoped to remove the coach from the profession.<sup>135</sup> Although the DCF initially ruled in Anna's favor, the investigation ran aground when the coach attacked Anna's credibility on appeal and challenged the DCF investigators' procedure.<sup>136</sup> In 2012, the YMCA fired the coach without citing a reason, however, if another organization decided to hire him, he could still work with underage females.<sup>137</sup>

Anna's family also brought the case to the attention of USA Swimming, the NGB of the YMCA swimming program.<sup>138</sup> USA Swimming conducted its own investigation and interviews, but

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130. *Id.*

131. *See id.* (discussing first time Anna spoke out about abuse).

132. *See id.* (detailing Anna's mother's reaction and swift reporting to YMCA officials, who suspended, but did not immediately fire, coach).

133. *See id.* (noting Anna is still pursuing legal action against coach, almost ten years since first abuse).

134. *Id.* (discussing police response to allegations but their inability to pursue criminal action because of lack of eye witnesses and no DNA evidence).

135. *See id.* (noting Anna's family's report to DCF, who pursued their own investigation and supported her report based on her statement to police).

136. *See id.* (providing challenge made by Anna's coach to ruling against him, using tactics such as "bringing forth witnesses who spoke in support of his good character and claiming that the kinds of encounters she described could not have happened in a Y that was usually teeming with other people . . . [and claiming he] never closed doors during meetings").

137. *See id.* (noting YMCA fired coach in 2012 but did not make statement and refused to discuss publicly).

138. *See id.* (explaining clubs perform under NGB, and in this case USA Swimming was NGB responsible for YMCA swimming program).

ceded its exploration of the case after the DCF overturned its initial ruling on appeal.<sup>139</sup> Recently, Anna and her family have hired a lawyer to look into the possibility of pursuing legal action against USA Swimming alleging a lack of institutional oversight and against the YMCA for leaving a minor vulnerable to abuse.<sup>140</sup> Many have criticized Anna and her family for bringing down a beloved and renowned coach in the USA Swimming organization, with one teammate writing on social media, “no one believes you anyways you stupid whore =).”<sup>141</sup>

In 2014, when USA Swimming’s executive director Chuck Wielgus was set to be inducted into the International Swimming Hall of Fame (“ISHOF”), Anna supported the Women’s Sport Foundation’s petition to protest his induction.<sup>142</sup> The petition exposed USA Swimming’s unsettling history, as the myriad of coaches with lifetime bans demonstrates, and Wielgus’ enabling of a culture that looked the other way.<sup>143</sup> The petition highlighted numerous cases in which USA Swimming worked against victims of abuse, rather than working with them.<sup>144</sup> Ultimately, the ISHOF withdrew Wielgus’ name from consideration.<sup>145</sup>

### 3. USA Taekwondo

The recent case *Gatt v. USA Taekwondo*,<sup>146</sup> in which a coach sexually abused three female Olympic hopefuls, further exemplifies the issue of sexual abuse across the spectrum of all Olympic sport organizations.<sup>147</sup> The lawsuit alleged the USOC and USA Tae-

139. *See id.* (discussing USA Swimming’s decision to end investigation, notifying Anna they would not explore case further).

140. *See id.* (discussing consideration by Anna and her family to pursue legal action, hiring lawyer Johnathan Little).

141. *See id.* (noting many sided with coach, believing Anna was making claims to seek attention).

142. *See id.* (discussing Anna’s support for WSF’s petition, along with nineteen other women who have reported sexual abuse).

143. *See id.* (discussing Wielgus’ role in scandals as someone who responded to outside pressures instead of as leader in protecting victims).

144. *See id.* (“The petition went on to describe some of the botched cases, the ways in which USA Swimming had actively worked against victims of abuse, and an alleged culture of cover-up and scorched-earth litigation that bought silence.”).

145. *See id.* (noting ISHOF’s decision to no longer consider Chuck Wielgus’ induction).

146. No. BC599321, 2015 WL 13754995 (Cal. Super. Ct. July 24, 2017).

147. *See* Compl. for Damages at 7-11, *Gatt*, No. BC599321, 2015 WL 13754995 (detailing allegations of sexual abuse committed by USA Taekwondo coach Marc Gitelman); *see also* 3 *Athletes Awarded \$60M in Sex Case vs. Coach*, CBS NEWS (Aug. 4, 2017, 5:28 AM), <https://www.cbsnews.com/news/3-taekwondo-athletes-awarded-60m-in-sex-case-vs-coach-marc-gitelman/> [<https://perma.cc/Q2SH-JDQE>] (noting

kwondo failed to protect the female athletes and “subjected the [female athletes] to cruel and unjust hardship in conscious disregard of the [female athletes’] rights and safety.”<sup>148</sup> The female athletes were awarded sixty million dollars by a Los Angeles County Superior Court judge in a default judgment against Marc Gitelman.<sup>149</sup> However, they are currently appealing a judge’s decision to dismiss the organizations as defendants.<sup>150</sup>

During a police investigation prior to the formal lawsuit, Yazmin Brown, one of the athletes, filed a formal complaint with the USA Taekwondo Ethics Committee (“the Ethics Committee”) in September 2013.<sup>151</sup> The Ethics Committee is responsible for reinforcing the USOC’s Code of Conduct, which expressly prohibits any form of sexual harassment.<sup>152</sup> In addition to her formal complaint, Brown submitted previous Facebook conversations with Gitelman, her coach, which illustrated the “extensive sexual relationship he pursued with her while she was a minor.”<sup>153</sup> The two other girls who ultimately joined Brown in the 2015 lawsuit also provided detailed narratives to the Ethics Committee, bolstering the credibility of Brown’s complaint with their similar experiences with the coach.<sup>154</sup> A disciplinary panel, after hearing the multiple credible reports from the victims, recommended an immediate lifetime ban for Gitelman.<sup>155</sup> However, this raised concerns that Gitelman might sue under the Ted Stevens Act, claiming the panel did not allow him a cross-examination and violated his due-process

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award of \$60 million to three female taekwondo athletes sued after being sexually assaulted by Marc Gitelman for years).

148. Compl. for Damages at 24, Gatt, No. BC599321, 2015 WL 13754995.

149. *See 3 Athletes Awarded \$60M in Sex Case vs. Coach, supra* note 147 (noting judgement awarded to female athletes after Gitelman failed to respond adequately to lawsuit and was found in default).

150. *See id.* (discussing lawsuit by three female athletes, who were minors when abused, noting coach repeatedly abused them from 2007 to 2014 and alleging that unusual relationship was well-known).

151. *See Morton, supra* note 14, at 159 (noting complaint originally filed with Ethics Committee for USA Taekwondo, going to Malia Arrington, Director of Ethics and SafeSport for USOC).

152. *See id.* (quoting USOC’s Code of Conduct, which prohibits “any act of sexual harassment including but not limited to requests for sexual favors, physical conduct of a sexual nature by and between persons participating in the affairs or activities of USAT directed towards any other member or person participating in such events/activities”).

153. *Id.*

154. *See id.* (discussing two additional female athletes, who had similar experiences, coming forward to Ethics Committee in support of Brown).

155. *See Hobson & Rich, supra* note 4 (noting decision by disciplinary panel, recommending immediate ban for Gitelman after three women came forward accusing him of abuse).

rights.<sup>156</sup> Despite substantial evidence of Gitelman's wrongdoing, USA Taekwondo waited to ban Gitelman until his 2015 conviction.<sup>157</sup>

The complaint against Gitelman, which also named the USOC and USA Taekwondo as co-defendants, alleged that he "invited the young athletes to his hotel room to watch videos of their previous taekwondo matches before he sexually abused them."<sup>158</sup> Gitelman was convicted of multiple felony counts, "including oral copulation of a minor, unlawful sexual intercourse and lewd acts upon a child."<sup>159</sup> The judge sentenced Gitelman in October 2015 to more than four years in prison and required him to register as a lifetime sex offender.<sup>160</sup>

### III. LEGAL VOID LEADS TO A HISTORY OF ABUSE AND LACK OF USOC INTERVENTION

Why has the USOC sat back for so long amid all the publicity surrounding sexual abuse and the Olympic sport organizations?<sup>161</sup> The USOC has continuously asserted that they are "responsible for athletes only in the short period from when they are named to the Olympic team through a Winter or Summer Games."<sup>162</sup> At all other events, the USOC places the burden of protecting and caring for athletes on NGBs.<sup>163</sup> In addition to the USOC shifting the primary responsibilities for athletes to NGBs, the USOC also claims the Ted Stevens Act, which requires strict due-process for accused abusers, limits the USOC's ability to discipline abusers.<sup>164</sup> This attempt by the USOC to rationalize its decisions, "will seem like eva-

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156. *See id.* (noting USA Taekwondo's lawyer raised concerns of due process rights in disciplinary process which resulted in disciplinary panel not banning coach for fear of legal liability for USA Taekwondo).

157. *See id.* (noting despite credible reports, USA Taekwondo did not ban Marc Gitelman until criminally convicted in 2015).

158. Leila Miller, *Sexual-Abuse Victims Get \$60-Million Judgment Against Former Taekwondo Instructor*, L.A. TIMES (Aug. 3, 2017), <http://www.latimes.com/local/lanow/la-me-ln-taekwondo-instructor-judgement-20170803-story.html> [<https://perma.cc/52TM-KMZC>].

159. *Id.*

160. *See id.* (noting Gitelman's conviction by jury in Pomona Superior Court in Los Angeles County, California).

161. *See generally* Hobson & Rich, *supra* note 4 (questioning why child abuse in Olympic sport organizations continues to happen).

162. Longman, *supra* note 119.

163. *See id.* (noting USOC has continuously shifted burden of responsibility for caring for athletes to individual NGBs when events are not held at USOC facilities).

164. *See* Townes, *supra* note 24 (noting various ways USOC removes blame from its own inaction in handling sexual abuse cases).

sive legalese to many, an explanation few are likely to accept.”<sup>165</sup> Further, with a legal void in the Ted Stevens Act and no independent agency to work with abuse allegations, the system continued to operate without checks and balances for decades.<sup>166</sup>

#### A. USOC: “Our Hands are Tied”

The USOC capitalizes from its athletes’ success and is quick to celebrate their moments at the Olympic Games, but has looked away when called to change a failing system for protecting abuse in its organization.<sup>167</sup> However, after years of claiming its hands are tied, the USOC is now under critical review for failing to adequately protect athletes.<sup>168</sup> Placing responsibility on the USOC is not to say that it must act as both police and prosecutor.<sup>169</sup> Rather, it is the obligation and duty of the organization to ensure a safe training environment for children and athletes that should be incumbent upon all constituents involved in Olympic sports, not shifted to a single entity.<sup>170</sup> As the top governing body in the Olympic structure, the USOC has the power and resources to enact changes within and lobby for legislation that will prevent this abuse from continuing.<sup>171</sup>

Year after year, the USOC and its NGBs sell the dream of Olympic glory to children and families across the country. They offer the allure of athletic accomplishment and national pride. What they don’t reveal is that their insufficient policies on sexual abuse could open the door for predators. But it must stop. The USOC owes it to the athletes to provide a safe environment for them to be the next generation of champions.<sup>172</sup>

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165. Longman, *supra* note 119.

166. See Hobson & Rich, *supra* note 4 (noting Ted Stevens Act requires written allegations prior to restricting person’s ability to pursue participation in Olympics, therefore playing “recurring role in mishandled abuse cases”).

167. See Longman, *supra* note 119 (discussing Aly Raisman’s “scathing rebuke” of Olympic Committee).

168. See *generally id.* (discussing USOC’s lack of action regarding sexual assault allegations).

169. See Townes, *supra* note 24 (noting “mere buck passing” nature of USOC’s claims that it is not responsible for sexual abuse cases).

170. See Maureen A. Weston, *Tackling Abuse in Sport Through Dispute System Design*, 13 U. ST. THOMAS L.J. 434, 457–58 (2017) (“Every athlete has the right to engage in sport free of physical and emotional harassment and abuse.”).

171. See *id.* (discussing how USOC could set example for protecting athletes).

172. Townes, *supra* note 24.



In 2012, the USOC first discussed making education programs focused on preventing sexual assault and background checks mandatory for all sports, but received major pushback from NGBs.<sup>173</sup> Officials for USA Softball argued that mandatory background checks would affect “competitive market share” and disapproved of a “top-down” approach from the USOC.<sup>174</sup> Many Olympic officials feared that victims would use a handbook as evidence that officials knew the athletes suffered abuse and did not do enough to stop it.<sup>175</sup> However, the other approach to avoid legal liability would be to stop sexual misconduct from happening in the first place.<sup>176</sup> It was not until 2014 that the USOC first required all Olympic sport organizations to implement measures to prevent sexual misconduct and policies to handle allegations.<sup>177</sup> As early as 1999, the USOC knew that it had a problem and child athletes were at risk, after USA Gymnastics CEO Bob Colarossi wrote a detailed letter to the USOC.<sup>178</sup> Colarossi wrote “[t]he USOC can either position itself as a leader in the protection of young athletes or it can wait until it is forced to deal with the problem under much more difficult circumstances.”<sup>179</sup> For fifteen years, the USOC chose not to position itself as a leader, and hundreds of children were victim-

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173. See Hobson & Rich, *supra* note 4 (examining USOC’s first attempts to set prevention policies in place).

174. See *id.* (discussing push back from several NGBs out of fear that abuse prevention handbook would increase risk of getting sued by victims).

175. See *id.* (noting several Olympic officials expressed concerns that “the handbook could get them sued by victims, who would use it as evidence that Olympic officials knew abuse was a problem but weren’t doing enough to stop it”); see also Diana Moskovitz, *Report: Olympic Sports Dragged Feet On Protecting Athletes From Sexual Abuse*, DEADSPIN (Nov. 17, 2017, 6:38 PM), <https://deadspin.com/report-olympic-sports-dragged-feet-on-protecting-athle-1820560734> [<https://perma.cc/CLE7-R4NH>] (discussing apprehensions NGBs had toward USOC mandate for preventing and handling sexual misconduct allegations).

176. See Moskovitz, *supra* note 175 (noting prevention of sexual misconduct cases is best way to avoid suit).

177. See Will Hobson & Steven Rich, *Documents: USOC Alerted to Sex Abuse Problems Long Before Taking Action*, WASH. POST (Mar. 6, 2017), [https://www.washingtonpost.com/sports/olympics/documents-usoc-alerted-to-sex-abuse-problems-long-before-taking-action/2017/03/06/8ca2a89e-0230-11e7-ad5b-d22680e18d10\\_story.html?utm\\_term=.abc57dec6db](https://www.washingtonpost.com/sports/olympics/documents-usoc-alerted-to-sex-abuse-problems-long-before-taking-action/2017/03/06/8ca2a89e-0230-11e7-ad5b-d22680e18d10_story.html?utm_term=.abc57dec6db) [<https://perma.cc/HJ9S-2BKW>] (discussing well-known issue of sexual misconduct within Olympic organization long before preventative measures were taken). For further discussion of minimum requirements under the new policy, see *supra* note 59 and accompanying text.

178. See Hobson & Rich, *supra* note 177 (reporting lack of basic—and common—sex abuse prevention measures and USOC’s failure to combat issue once alerted).

179. *Id.*

ized as a result.<sup>180</sup> Notably, across various sports, officials almost always call the children “athletes.”<sup>181</sup> While these talented athletes were to be considered both children and athletes, they should be seen as children first who need protection from abuse despite their elite athletic abilities.<sup>182</sup>

Anna Strzempko’s story of abuse is only one of many amongst Olympic sport organizations.<sup>183</sup> Anna’s story illustrated the need to improve policies in youth sports, because “the measures aimed at protecting young athletes in NGB-affiliated teams are too fragmented and attenuated to provide proper remedies for coaching abuse victims and [a]s a result, victims like Anna are bound to meet resistance when they report abuse to their local club teams and respective NGBs.”<sup>184</sup> The approach of each NGB to combat sexual abuse without strict regulation proved insufficient, as evidenced by the creation of SafeSport to take over the primary responsibility once resting entirely on NGBs.<sup>185</sup> Most importantly, allowing NGBs to create and direct their own reporting systems lacked the requisite independence and bias-free consideration.<sup>186</sup> When a claim is brought to an NGB, there is “an incentive to protect the sport’s image and the winning coach, and to avoid liability and adverse publicity.”<sup>187</sup> Taking into consideration the financial costs of an in-

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180. *See id.* (noting USOC did not implement mandatory preventative measures until 2014, fifteen years after receiving notice of problem of sexual misconduct). For a discussion on the rising number of victims of sexual assault in Olympic sport organizations, *see* Hobson & Rich, *supra* notes 4–9 and accompanying text.

181. *See* Hobson & Rich, *supra* note 4 (pointing out that during interviews with adults throughout elite USA Swimming organization, Victor Vieth, former sex crimes prosecutor, noticed reluctance among coaches and parents to use word “children”).

182. *See id.* (emphasizing number of children participating in programs). Vieth was further quoted as saying the following:

You’ve got 320,000 children in your organization, and you need to see them first as children before you see them as athletes. There really was the mentality of the possibility that this could be the next gold medal winner at the Olympics, and that mentality was not just among the coaches and the people running the groups; it was among the parents themselves.

*Id.*

183. *See generally* Morton, *supra* note 14 at 173 (discussing Anna Strzempko’s story and growing legal concern of coaches inflicting abuse in Olympic sport organizations).

184. *Id.* at 156 (citation omitted)

185. *See* Weston, *supra* note 170, at 444–45 (suggesting importance of independence for successful reporting system).

186. *See id.* at 445. (noting “[r]eporting systems directed by powers governing the sport pose at least the appearance of lacking independence”).

187. *Id.*

ternal investigation and the resources needed, private organizations such as NGBs struggle to properly handle every case that arises.<sup>188</sup> This burden is highlighted in the way all three previously noted NGB's handled sexual abuse allegations: USA Gymnastics, USA Swimming, and USA Taekwondo.<sup>189</sup>

A culture of putting medals before athletes, avoiding legal liability, and maintaining reputation plagues the USOC and trickles down to NGBs.<sup>190</sup> USA Taekwondo, which waited to fire its coach despite credible reports of sexual misconduct, is an example of an NGB putting the possibility of a lawsuit for wrongful termination above protecting children from future cases of abuse.<sup>191</sup> This indicates NGBs "might [have been] protecting their coaches at the expense of athletes' safety."<sup>192</sup> It is rational to believe that an NGB's failure to remove a coach, reportedly shown to be an abuser, reasonably suggests the coach will repeat the abusive behavior.<sup>193</sup> This inaction is conceivably condoning abusive behavior by the coach.<sup>194</sup>

When it comes to protocol for handling sexual misconduct allegations, there is nothing that inhibits the USOC or NGBs from conducting an investigation and taking all steps to ensure the children's safety.<sup>195</sup> The failure to act seems to come from a desire of

188. *See id.* (noting internal burden created when NGB's deal with sexual abuse allegations).

189. *See Townes, supra* note 24 (reporting most prominent sexual abuse cases arising under USOC regime).

190. *See Hobson & Rich, supra* note 4 (discussing interviews and records that "highlight a culture in which limiting legal risk and preserving gold-medal chances have been given priority over safeguarding children"); *see also* Weston, *supra* note 170, at 439 (discussing Penn State football scandal as "an example of the dangers of institutional reverence given to coaches of winning athletic programs and of the potential for an institution or sport governing body to protect a coach over a victim to safeguard reputation and limit liability").

191. *See* Will Hobson & Steven Rich, *An Athlete Accused Her Coach of Sex Abuse. Olympic Officials Stayed on the Sideline.*, WASH. POST (Feb. 14, 2017), [https://www.washingtonpost.com/sports/olympics/an-athlete-accused-her-coach-of-sex-abuse-olympic-officials-stayed-on-sideline/2017/02/14/35a6fc76-d2eb-11e6-a783-cd3fa950f2fd\\_story.html?utm\\_term=.9cf972cb5e8d](https://www.washingtonpost.com/sports/olympics/an-athlete-accused-her-coach-of-sex-abuse-olympic-officials-stayed-on-sideline/2017/02/14/35a6fc76-d2eb-11e6-a783-cd3fa950f2fd_story.html?utm_term=.9cf972cb5e8d) [<https://perma.cc/T4AE-Z5EN>] (noting USA Taekwondo's fear of coach filing retaliation suit under Ted Stevens Act if he was fired for allegations ultimately won out against protecting the accused athletes and future athletes).

192. Morton, *supra* note 14, at 159–60.

193. *See id.* at 172 ("Additionally, when a coach is shown to have been an abuser, an NGB's failure to remove him from coaching or properly screen him before allowing him to coach elsewhere suggests the NGB should reasonably foresee repeat abusive behavior.").

194. *See id.* (discussing example of repeat behavior by coach and arguing NGBs should be held accountable).

195. *See* Hobson, *supra* note 68 (discussing second hand abuse allegations not investigated, because of policy requiring written letter from parent before USA Gymnastics took action).

the Olympic sport organizations to avoid legal liability, to preserve reputation, and to put gold medals above the children's welfare.<sup>196</sup> The USOC and the NGBs have historically chosen to shift the burden, which arguably created a "culture and atmosphere that conceal[ed] known and suspected sexual abusers."<sup>197</sup>

#### B. USOC Recognized Its Failure When It Created the U.S. Center for SafeSport

Despite the USOC historically claiming that it is not directly responsible for preventing abuse in the organization, the creation of the U.S. Center for SafeSport may indicate otherwise.<sup>198</sup> While the USOC continuously claimed protection of athletes is not the organization's responsibility, creation of this independent agency suggests the USOC has recognized the challenges many NGBs face when investigating claims of misconduct.<sup>199</sup> Evidently, the USOC recognizes NGBs may not be best-suited to create and sustain the safest environments for young athletes.<sup>200</sup> Officials sought to open SafeSport in 2015, but because they had to postpone the opening until 2017, analysts have not had the opportunity to assess the center's effectiveness thus far.<sup>201</sup> Further, there are still questions as to whether the USOC, NGBs, or SafeSport are liable in the event of mishandling future cases.<sup>202</sup>

As an oversight entity with complete independence and expertise in sexual misconduct, SafeSport certainly fills some of the gaps

196. See Hobson & Rich, *supra* note 4 (noting Olympic sport organizations "highlight a culture in which limiting legal risk and preserving gold medal chances have been given priority over safeguarding children").

197. Winton, *supra* note 105 (discussing allegations that Maroney has made detailing USOC and USA Gymnastics role in covering up known sexual abuse).

198. See Meyers, *supra* note 49 ("[SafeSport] will respond to abuse claims and implement a unified set of policies for preventing, identifying and reporting misconduct among the 47 national governing bodies (NGBs) that oversee USOC sports.").

199. See Weston, *supra* note 170, at 454–55 (quoting Malia Arrington, USOC Senior Director of Ethics and SafeSport, who said: "[o]ne of the greatest challenges many NGBs face is limited resources and expertise to investigate claims of misconduct . . . . With this independent entity, we have the ability for the first time to provide that resource to them so we can create and sustain safe environments for young athletes.").

200. See *id.* at 454 ("Justification for the Center is premised upon the need to provide a centralized and national source of expertise in this area, which individual NGBs handling these matters often lack.").

201. See Hobson & Rich, *supra* note 177 (discussing years of delays prior to opening SafeSport).

202. See Townes, *supra* note 24 (discussing questions about who is responsible when sexual abuse cases arise, noting it is ultimately USOC's purpose to protect its athletes).

that have historically existed in NGBs own policies and enforcement of policies.<sup>203</sup> The creation of SafeSport “to provide a forum to educate and train athletes, parents, coaches, and others in preventing, detecting, and reporting violations is an important step in ensuring athlete well-being and attainment of full potential.”<sup>204</sup> This does not mean the USOC is absolved from dealing with sexual abuse.<sup>205</sup> A significant limitation of SafeSport is that it can act only when it gets a report.<sup>206</sup> Therefore, the “front lines of abuse prevention” will remain those who are directly working with athletes: “local clubs and coaches affiliated with Olympic organizations and the officials who oversee those sports communities.”<sup>207</sup> Further, SafeSport has responsibilities similar to a college Title IX office but does not have the same resources.<sup>208</sup> For example, as of 2017, University of Maryland had a student population of fifty thousand and a Title IX office with a full-time staff of seven.<sup>209</sup> SafeSport had a full time staff of nine and four contract investigators to handle a population of thirteen million.<sup>210</sup>

Alongside SafeSport’s implementation, leaders in youth sport must also take action to ensure its effectiveness.<sup>211</sup> These actions begin with (1) changing the culture in sport from focusing on med-

203. See Weston, *supra* note 170, at 454. Explaining that:

[SafeSport] is [d]esigned to be an independent entity which will oversee education programs for safe sport, and investigate and adjudicate claims of misconduct in sports that are managed by USOC-sanctioned NGBs. Justification for the Center is premised upon the need to provide a centralized and national source of expertise in this area, which individual NGBs handling these matters often lack.

*Id.* (second alteration in original) (internal quotation marks omitted) (citation omitted) (quoting Press Release, *United States Olympic Committee, U.S. Olympic Committee Announces Formation of U.S. Center for Safe Sport Advisory Council* (Feb. 9. 2015), <http://www.insidethegames.biz/articles/1033621/usoc-announce-nine-member-united-states-center-for-safe-sport-board>).

204. *Id.* at 458.

205. See Townes, *supra* note 24 (discussing USOC’s ability to protect its athletes and insignificant efforts USOC has taken other than opening U.S. Center for SafeSport).

206. See Hobson & Rich, *supra* note 4 (examining limitations of SafeSport due to requirement that those reporting to SafeSport be accountable and act first).

207. *Id.* (discussing result of limitations to when SafeSport can act puts responsibility back on clubs, coaches, and Olympic organizations such as NGBs).

208. See *id.* (comparing SafeSport to University of Maryland’s Title IX office, which investigates on campus gender discrimination).

209. See *id.* (noting most of University of Maryland’s students and faculty, who comprise population of fifty thousand, live on campus or nearby).

210. See *id.* (reporting SafeSport covers investigations involving athletes, coaches, and officials throughout United States).

211. See generally Tim Evans et al., *Safe Center: Is It The Answer to Athlete Sex Abuse?*, INDYSTAR (Mar. 22, 2017, 3:05 PM), <https://www.indystar.com/story/news/2017/03/08/safesport-center-answer-athlete-sex-abuse/98775554/> [<https://>

als to protecting children, (2) educating and training parents, athletes, and coaches, and (3) eliminating one-on-one interactions, instruction, or training between athletes and coaches.<sup>212</sup> In addition, there must be a collective and established awareness, which will give parents, coaches, and athletes an education and training to prevent abuse.<sup>213</sup>

Further, Congress' passing of the SafeSport Act "support[s] [a] steadfast commitment to ending these horrific crimes."<sup>214</sup> With this legislation, there are real criminal consequences for failure to protect and report abuse.<sup>215</sup> Parents, volunteers, officials, coaches, and athletes are all mandatory reporters and have a duty to report suspected abuse.<sup>216</sup> The SafeSport Act's enactment gives the USOC the tools to create a better culture; however, there is still tremendous flexibility granted to the USOC and NGBs in the methods for protecting abuse.<sup>217</sup>

The clubs are accountable to NGBs, NGBs are accountable to the USOC, and the USOC arguably has believed it is the top of the pyramid, unaccountable to any organization and immune to any oversight.<sup>218</sup> However, the USOC is, or should be, accountable to Congress.<sup>219</sup> By re-evaluating the Ted Stevens Act and establishing the SafeSport Act, a legal duty ensures the USOC is accountable to

perma.cc/GTF9-SVN6] (discussing whether Safe Center will be successful and its effectiveness).

212. *See id.* (arguing SafeSport's need to remain independent to be effective, as well as necessary actions to take regarding sexual misconduct).

213. *See id.* (noting creation of issue awareness campaigns and training and educating not only coaches and officials, but also parents and community sport organizers, will help get "upstream" and prevent abuse).

214. Groppe, *supra* note 87.

215. *See* Associated Press, *supra* note 92 (noting criminal punishment of up to one year in prison could result for failure to report sexual abuse allegation).

216. *See* Alexandra Starr, *New Legislation to Outlaw Failing to Report Sexual Abuse in Olympic Sports*, NPR (Feb. 14, 2018, 5:03 AM), <https://www.npr.org/2018/02/14/585668348/new-legislation-to-outlaw-failing-to-report-sexual-abuse-in-olympic-sports> [<https://perma.cc/AWK6-LHRX>] (discussing SafeSport Act's effect on everyone involved in athletic community).

217. *See generally* Gregory S. Love, Esq. & Kimberlee D. Norris, Esq., *Preventing Child Sexual Abuse in Youth Sport—New Federal Legislation Takes Extraordinary Step*, ABUSE PREVENTION (Feb. 2, 2018), <https://abusepreventionsystems.com/wp-content/uploads/2018/02/New-Legislation-Sexual-Abuse-in-Youth-Sport-2-2-2018.pdf> [<https://perma.cc/6RFW-KWXL>] (discussing consequences of SafeSport Act).

218. *See* Mary Louise Kelly, *Fallout Between USA Gymnastics and U.S. Olympic Committee Continues*, NPR (Jan. 26, 2018, 4:19 PM), <https://www.npr.org/2018/01/26/581142523/fallout-between-usa-gymnastics-and-u-s-olympic-committee-continues> [<https://perma.cc/V8LW-9GFK>] (explaining structure of Olympic organizations and reporting system of each).

219. *See id.* (noting USOC does not have organization to report to directly).

the law.<sup>220</sup> Imposing a duty on the USOC and NGBs to thoroughly investigate sexual assault claims and prevent their occurrence, in addition to reporting them to SafeSport, makes the organizations liable in the event a case is mishandled.<sup>221</sup> Increased liability ensures that although victims cannot erase the emotional and physical harm, they are properly compensated for the trauma they have suffered.<sup>222</sup>

SafeSport's biggest challenge will be making sure it has the means and fortitude to fully investigate and adjudicate in a fair manner.<sup>223</sup> With backing from the codification of the SafeSport Act, SafeSport now has more credibility and autonomy than when it stood alone, but it must investigate claims even when they may be controversial.<sup>224</sup> In the case of Anna Strzempko, a coach's reputation impeded the investigation and made for a large amount of backlash.<sup>225</sup> This is just one case demonstrating that acting on suspicion and, when necessary, using the full support of the law to suspend coaches from participating during an investigation, is dire for preventing sexual abuse in amateur sports.<sup>226</sup> As a fully inde-

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220. *See id.* (suggesting way to prevent USOC from mishandling cases involving sexual abuse is to hold them more accountable, as shown by Congress asking for investigation into how case involving USA Gymnastics could have happened under USOC).

221. *See* Morton, *supra* note 14, at 169 (“[A] duty for the USOC and the NGBs to properly oversee and maintain a safe sporting environment follows from that special relationship. Breaching that duty by failing to check the coach’s background or not thoroughly investigating sexual abuse claims would be akin to per se negligence and entitle a victim to damages in a private cause of action.”).

222. *See* Lindsay Gibbs, *Congress Passes Bill to Protect Amateur Athletes from Sex Abuse*, THINK PROGRESS (Jan. 30, 2018, 4:45 PM), <https://thinkprogress.org/congress-bill-abuse-victims-d50642f8723e/> [<https://perma.cc/CWY7-HTYF>] (discussing importance of damages, both statutory and punitive, for victims of sexual assault).

223. *See* Starr, *supra* note 216 (noting discussion in which former U.S. Swimmer, Nancy Hogshead-Makar stated: “[w]hether or not SafeSport has—is going to have the backbone to be able to get these molesters out just remains to be seen”).

224. *See id.* (noting SafeSport has immunity from being sued for libel while conducting investigations).

225. *See* Sturtz, *supra* note 122 (discussing email by parent with concerns of inappropriate behavior by Anna’s coach and later that accused coach mocked that email in front of athletes during practice, discouraging similar concerns from being raised again). For further discussion of the case involving Anna Strzempko, see *supra* notes 122–141 and accompanying text.

226. *See* Sturtz, *supra* note 122 (discussing suspension of coach during pending investigation by local police, his ability to continue working with young children, and severe backlash that arose from coach and parents who did not believe allegations); see also Jessica Lahitou, *How the Safe Sport Act Could Stop the Next Larry Nassar*, BUSTLE (Feb. 9, 2018), <https://www.bustle.com/p/how-the-safe-sport-act-could-stop-the-next-larry-nassar-8162315> [<https://perma.cc/E5TJ-G9PK>] (detailing new regime that SafeSport Act created, where Congress has created duty on USOC to report suspicions sexual abuse cases).

pendent agency, unlike an NGB with an interest in preserving reputation, it is more likely SafeSport will be able to act in the athletes' best interests.<sup>227</sup>

### C. An Amendment to the Ted Stevens Act: Is it Adequate?

Prior to the SafeSport Act, the Ted Stevens Act gave unnecessary deference to the USOC and NGBs and their processes for preventing abuse in the sport, failed to adequately provide remedies for victims, and lacked a provision for placing liability on the USOC and NGBs for knowingly retaining abusers.<sup>228</sup> Strongly establishing the eligibility and participation framework for the Olympic organization, the Ted Stevens Act's language did not speak verbatim to the issue of sexual misconduct.<sup>229</sup> Rather, portions of the law intended to protect athletes' rights to compete have often acted as a barrier to attempts by victims of sexual abuse to have coaches or officials quickly barred from working with children and other athletes.<sup>230</sup> Additionally, there is no cause of action under the Ted Stevens Act affording victims appropriate damages after experiencing the trauma of sexual abuse.<sup>231</sup>

The Ted Stevens Act established that "the USOC is responsible for overseeing Olympic sport in the U.S.," acting as a regulatory body supporting NGBs.<sup>232</sup> Therefore, in instances of sexual assault, when the USOC traditionally claimed NGBs are responsible for responding to these claims of misconduct, the gap led to the mishandling of many sexual assault cases.<sup>233</sup> In addition to the USOC

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227. See 36 U.S.C. § 220541(a)(1) (stating SafeSport will "serve as the independent national safe sport organization and be recognized worldwide as the independent national safe sport organization for the United States"); see also Gibbs, *supra* note 222 (quoting statement by survivor of Larry Nassar's abuse as saying that "[t]here must be a thorough investigation. Time is not on our side. We must act now. Time's up. Every minute that goes by with unanswered questions, more innocent children can be harmed"); see also Lahitou, *supra* note 226 (arguing there should be far less bias in investigations of sexual abuse due to SafeSport's existence).

228. See Morton, *supra* note 14, at 157 (discussing failure of Ted Stevens Act to adequately address sexual assault).

229. See Townes, *supra* note 24 (examining language explicitly within Ted Stevens Act).

230. See Morton, *supra* note 14, at 152 (discussing fragmented Ted Stevens Act regarding handling of sexual misconduct claims).

231. See *id.* at 152–53 (discussing third issue sexual assault presents to NGBs).

232. Townes, *supra* note 24 (noting USOC traditionally does not involve itself in misconduct claims).

233. See *id.* (noting USOC continuously has pushed issue of handling sexual misconduct claims to NGBs, claiming their hands are tied, leading to ineffective reporting and inability to combat abuse, as evidenced by USA Gymnastics scandal involving Larry Nassar).



placing blame on NGBs, the USOC also claimed the Ted Stevens Act, requiring strict due-process for accused abusers, limited the USOC's ability to discipline abusers.<sup>234</sup> Prior to 2018, when an athlete in the Olympic organization had a complaint of sexual abuse, the Ted Stevens Act ultimately provided the arbitration process to allege the NGB infringed upon their participation eligibility.<sup>235</sup> The arbitration process has been found effective in some disputes, such as athlete doping suspensions, however, arbitration as an appeals process is unsuitable for sexual assault allegations.<sup>236</sup>

The SafeSport Act provides changes to almost all failing aspects of the Ted Stevens Act.<sup>237</sup> Not only does it extend mandatory reporting to adults in NGBs, it also extends to a wide spectrum of amateur youth sport organizations through a "catch-all" category.<sup>238</sup> Interpreted broadly, the SafeSport Act requires any adult working with minors or amateur athletes to report immediate suspicions of sexual abuse to SafeSport and law enforcement, regardless of whether the organization is NGB-sponsored.<sup>239</sup> One of the most vital change in the SafeSport Act, however, is the requirement for "prevention training."<sup>240</sup> To be effective, the training must aim at stopping abuse before it happens, not reacting to it and providing a remedy.<sup>241</sup> Despite having no "visual profile," sexual abusers often exhibit recognizable behaviors that potential victims and their advocates can spot before the abuser acts.<sup>242</sup> While both reporting and

234. *See id.* (discussing excuses continuously made by USOC for why it has not combatted issue of sexual abuse within its NGBs).

235. *See id.* at 157 (outlining Ted Stevens Act application to sexual assault allegations).

236. *See* Morton, *supra* note 14, at 152 (noting ineffectiveness of arbitration for sexual misconduct allegations despite its effectiveness in employment context).

237. *See generally* Love & Norris, *supra* note 217, at 1 (arguing SafeSport Act is extraordinary step in preventing child abuse in youth sports).

238. *See id.* at 2 (discussing who SafeSport Act covers, noting broad extension across youth sport organizations).

239. *See id.* at 3–4 (explaining requirement to report suspicions of abuse falls on individuals working under NGBs as well as "covered individuals," which includes participating adults for amateur sport organizations not sanctioned by NGBs).

240. *See id.* at 4–5 (discussing prevention training as new part of SafeSport Act, noting language in SafeSport Act which states "[a]n applicable amateur sports organization shall . . . offer and provide consistent training to all adult members who are in regular contact with amateur athletes who are minors, and subject to parental consent, to members who are minors, regarding prevention and reporting of child abuse").

241. *See id.* (arguing effective prevention training must be proactive rather than reactive).

242. *See id.* (noting many sexual abusers exhibit certain behaviors prior to committing abuse, making prevention training key to spotting these behaviors).

prevention are important, “teaching millions of parents, coaches and league officials how to prevent sexual abuse is truly ambitious and groundbreaking.”<sup>243</sup>

Despite the above stated improvements, the SafeSport Act provides little direct guidance on prevention training and how to establish policies and procedures that prevent abuse.<sup>244</sup> Studies have found that one-on-one interactions between coaches and athletes are a common theme in sexual abuse cases, but understanding the “grooming process” of abusers in addition to limiting one-on-one interactions is as important in preventing abuse.<sup>245</sup> The grooming process begins with an abuser gaining access through a program serving children, selecting a child and gaining trust of the child, her parents, and other coaches, beginning to engage in inappropriate behavior, and finally attempting to keep the victim quiet.<sup>246</sup> The new law requires NGBs to create “reasonable procedures” to limit one-on-one interactions between minors and adults, but fails to provide specific direction beyond this limitation.<sup>247</sup> The “reasonable procedures” should include a USOC universal policy, *completely* eliminating one-on-one time between an adult and a child, therefore requiring the relevant NGB to seek and be granted permission from a parent for anything contrary.<sup>248</sup> A universal prevention training should provide specific training that is tailored to understanding the grooming process and spotting behaviors that may place a child at risk of abuse.<sup>249</sup> Preventive training has the ability to dramatically change youth sports:

If 20 million American adults are trained to understand the offender’s grooming process through the training re-

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243. *Id.* at 5.

244. *See generally id.* (discussing SafeSport Act and both direct and indirect ramifications of new law).

245. *See* Love & Norris, *supra* note 217, at 7 (discussing grooming process of molesters and procedures preventing this as playing key role in preventing sexual abuse); *see also* Evans, *supra* note 211 (analyzing study that revealed one-on-one interactions present in numerous sexual abuse cases).

246. *See* Love & Norris, *supra* note 217, at 7 (presenting four broad “grooming processes” abusers follow: gaining access, selecting child, introducing nudity and sexual touch, and keeping victim quiet).

247. *See id.* (noting intent of SafeSport Act to establish policies and procedures to prevent abuse, but also SafeSport Act’s failure to provide specific direction on how to do so successfully).

248. *See* Evans, *supra* note 211 (emphasis added) (discussing feasibility of blanket ban on one-on-one interactions, noting obligation would then fall on NGBs to justify any such interaction).

249. *See* Love & Norris, *supra* note 217, at 7 (noting benefits to alerting parents and coaches to grooming processes and several behaviors that place children more at risk).

quirements of the Safe Sport Act, 20 million sets of eyes will be better equipped to recognize predatory behaviors before a child is victimized. As a result, children will be safer in youth sport programs.<sup>250</sup>

This is a best practice and should be adopted by SafeSport on behalf of the USOC as a strictly monitored training program and prevention policy.<sup>251</sup> The responsibility should be on the USOC and SafeSport to ensure these procedures are universal and strictly followed across NGBs.<sup>252</sup> The USOC and SafeSport should also require proper training on the grooming process, rather than allowing each NGB to implement their own interpretation of “reasonable procedures.”<sup>253</sup> The SafeSport Act is a big step in calling for prevention policies, but without specific guidance on limiting one-on-one interactions, there could be obstacles to its effectiveness.<sup>254</sup>

The final policy in the SafeSport Act that has a significant effect is the clause for damages in civil court.<sup>255</sup> The Ted Stevens Act had an ineffective arbitration process after the grievance procedures for sexual assault cases, which presented a serious issue for victims and a lack of private remedy.<sup>256</sup> To recover damages outside of the arbitration process under the Ted Stevens Act, tort law required finding a private cause of action, which in turn required finding that an internal dispute in the USOC’s governance structure had infringed upon an athlete’s participation.<sup>257</sup> The lack of meeting both requirements in almost all cases negated a private cause of action for athletes who have been sexually assaulted by a coach, requiring the athlete to go through the unfavorable arbitration process.<sup>258</sup> Additionally, the USOC and NGBs argued

250. *Id.* at 7.

251. *See id.* (arguing “an understanding of the grooming process is the key to establishing” procedures to protect young athletes).

252. *See Evans, supra* note 211 (noting NGBs will work with SafeSport to develop procedures).

253. *See id.* (explaining that NGBs will work with SafeSport to develop procedures).

254. *See Love & Norris, supra* note 217, at 7 (noting legislation on prevention policies for sexual abuse is currently “weak”).

255. *See* 18 U.S.C. § 2255(a) (stating damages may be sought in U.S. District Court for violation of SafeSport Act).

256. *See Morton, supra* note 14, at 162 (discussing private remedy under Ted Stevens Act, but also its serious limitations).

257. *See id.* (noting courts often defer to Ted Stevens Act because it favors resolution through internal mechanisms rather than judicial systems).

258. *See id.* at 164 (discussing obstacles in tort law which force arbitration placing athletes at disadvantage).

the allegations arose from participation in the sport, and therefore must submit to arbitration.<sup>259</sup> That argument “[cut] against an underlying assumption that sexual assault should not be an inherent part of an athlete’s right to protected competition under the Ted Stevens Act.”<sup>260</sup> During the entire process, including arbitration, there was unwarranted deference and positioning power given to the USOC and NGB.<sup>261</sup> This included a lack of opportunity for appealing arbitration, privacy given to the NGB, and increased settlement potential because of fear instilled in a victim, which is favorable to the NGB.<sup>262</sup> As in McKayla Maroney’s case, a monetary settlement often also comes with an NDA.<sup>263</sup> In private relationships where no legally cognizable duty is owed, tort law does not interfere; these obstacles for remedy are removed with the SafeSport Act.<sup>264</sup> Congress designed the Ted Stevens Act and its arbitration process to settle disputes about Olympic participation or positive drug tests, but the policy does not contemplate protecting athletes and providing a remedy against sexually abusive coaches.<sup>265</sup> The changes implemented in the SafeSport Act codified civil remedies for victims and eliminated the need to rely on the inadequacy of tort law.<sup>266</sup> The SafeSport Act created a legal duty, therefore the USOC, and all covered persons, may no longer deflect liability with the argument that they are judgement proof because they owe no legal duty.<sup>267</sup>

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259. *See id.* at 162 (noting “the Act will only recognize an athlete’s right to compete if an internal dispute in the USOC’s governance structure infringes upon participation”).

260. *Id.* at 161.

261. *See id.* (noting similarity between advantages of NGBs and employers in arbitration process).

262. *See id.* (noting arbitration presents challenges for victims, including “greater privacy for the employer, enhanced settlement potential, and lack of opportunity for appeal”).

263. *See* Bailey, *supra* note 109 (noting that “because of a non-disclosure agreement contained in a settlement agreement Maroney signed with USA Gymnastics, Maroney could face a \$100,000 penalty for speaking about her alleged abuse or the settlement”).

264. *See* Lahitou, *supra* note 226 (“But with the passage of the Safe Sport Act, Congress has now taken that option away, making everyone involved responsible for addressing sexual abuse that occurs on their watch.”).

265. *See* Morton, *supra* note 14, at 150 (noting Ted Stevens Act’s application to very “narrow” questions of eligibility).

266. *See* 18 U.S.C. § 2255(a) (stating victims of sexual abuse are compensated with minimum of \$150,000).

267. *See* Lahitou, *supra* note 226 (discussing USOCs reliance on “no duty” rules prior to SafeSport Act).

## D. NDAs: Should They Always be Legal?

The effect of an NDA is to silence a victim, and in the wake of sexual assault allegations across industries, many argue they should not be permitted, especially when sexual abuse allegations involve a child.<sup>268</sup> Despite the arguments against their legality, NDAs are common features of many settlements and can often be a useful tool that works in favor of a victim who wishes to move on without gaining attention.<sup>269</sup> In sexual assault cases particularly, NDAs arguably have more to do with money and power than the law itself.<sup>270</sup> California's balance, prohibiting NDAs for the worst types of sexual crimes, is a good model that should be followed by other state legislatures.<sup>271</sup>

The SafeSport Act was enacted at a time of media outrage over the sexual abuse in USA Gymnastics that spanned decades, without claims to law enforcement and the USOC being taken seriously.<sup>272</sup> This was partly due to NDAs keeping abused athletes quiet as part of their terms.<sup>273</sup> In many sexual assault cases, NDAs do more harm than good because they allow perpetrators to escape solely because they have enough money to silence a victim.<sup>274</sup> These settlements jeopardize the public by hiding sexual predators from law enforcement and allowing the same perpetrator to repeat illegal actions.<sup>275</sup> To change a culture of secrecy for perpetrators of sexual abuse, several legislatures are proposing legislation that would, if enacted,

268. See Michelle Fabio, *The Harvey Weinstein Effect: The End of Nondisclosure Agreements in Sexual Assault Cases?*, FORBES (Oct. 26, 2017), <https://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/#178b4f122c11> (noting in scandal surrounding television producer Harvey Weinstein, NDAs were also part of settlement agreements).

269. See *id.* (noting NDAs are common features in settlements where aggrieved party agrees to not pursue litigation or discuss terms of agreement with others in exchange for money).

270. See Levinson, *supra* note 111 (“[S]exual harassment and assault is not about sex, it is about power . . . [and] [c]onfidential settlement agreements can give perpetrators even more power over their victims by silencing them.”).

271. See Fabio, *supra* note 268 (noting that California prohibits use of NDAs in felony sexual assault cases).

272. See *id.* (“[NDAs] prevent the public from knowing about predatory conduct that harms [the public] and stop government officials from being able to perform critical law enforcement duties that are designed to protect [the public].”).

273. See *id.* (arguing NDAs allow perpetrators to retain continued power over victims by silencing them).

274. See Levinson, *supra* note 111 (“Confidential settlement agreements can give perpetrators even more power over their victims by silencing them.”).

275. See *id.* (discussing use of NDAs to prevent victims from speaking out, which allows perpetrators to act again).

prohibit the use of NDAs in the settlement of claims for sexual assault or harassment.<sup>276</sup>

Despite the harm NDAs may cause, there are arguments to be weighed to the contrary on the issue of using NDAs in sexual abuse cases.<sup>277</sup> While NDAs have the effect of silencing victims, often because the threat of financial penalty if a victim breaks the NDA is enough to keep her quiet, they sometimes prove to be beneficial.<sup>278</sup> Many victims prefer to sign an NDA because an NDA protects victims from unwanted attention and public retaliation and gives financial restitution, a large monetary sum.<sup>279</sup> This financial support allows many victims to continue living without a paycheck.<sup>280</sup> Other harms that come from prohibiting NDAs may include: (1) clogging of court systems because without NDAs, parties may never settle claims; (2) a slippery slope in which NDAs become unenforceable in areas other than the context of sexual assault and harassment; and (3) increasing government intervention in agreements between private parties.<sup>281</sup> These compelling reasons for allowing NDAs make it difficult to propose blanket illegality.<sup>282</sup>

The looming question surrounding McKayla Maroney's NDA with USA Gymnastics is whether it was legal.<sup>283</sup> As a prevalent victim in the case, Maroney's complaint against the NDA's legality with

276. See Charles Thompson, *Pa. Bill Would Ban Non-Disclosure Agreements in Sexual Assault Claims*, PENNLIVE (Nov. 15, 2017), [http://www.pennlive.com/politics/index.ssf/2017/11/bill\\_would\\_say\\_no\\_more\\_to\\_non-.html](http://www.pennlive.com/politics/index.ssf/2017/11/bill_would_say_no_more_to_non-.html) [<https://perma.cc/QDR2-8BTD>] (reporting that state senator from Berks County has introduced legislation to prohibit NDAs in sexual assault or harassment cases).

277. See *id.* (noting people will be hurt if NDAs become unenforceable, but also if opposite decision is made).

278. See *id.* ("Clearly, [NDAs] can cause real harm. The monetary damages attached to violating a non-disclosure agreement make it impractical for most victims to ever consider breaking it."); see also Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, MOTTO (Nov. 28, 2017), <http://motto.time.com/5039246/sexual-harassment-nda/> [<https://perma.cc/UMC5-AZF9>] (noting consequences of breaking NDA require calculated risk).

279. See Martin, *supra* note 278 (discussing benefits of signing NDAs are sometimes high, particularly in cases where victims prefer to stay silent).

280. See *id.* (noting pros and cons of NDAs).

281. See Levinson, *supra* note 111 (discussing reasons weighing against prohibiting NDAs).

282. See Martin, *supra* note 278 (noting benefits to victims signing NDA in Harvey Weinstein scandal include protection from being retaliated against or ostracized by an employer).

283. See Vivian Kane, *The Very Existence of Non-Disclosure Agreements in Sexual Abuse Cases is Despicable*, THE MARY SUE (Jan. 17, 2018, 6:24 PM), <https://www.themarysue.com/mckayla-maroney-nda-abuse/> [<https://perma.cc/ZVK6-LQ53>] (discussing question of legality surrounding NDAs in sexual abuse cases, particularly with McKayla Maroney).

USA Gymnastics received much notoriety.<sup>284</sup> Because NDAs have the ability to silence vulnerable victims of sexual assault and empower molesters, the SafeSport Act should create a provision prohibiting their use when the SafeSport Act is violated.<sup>285</sup> Part of the grooming process for sexual abusers is silencing the victim through threats, persuasion, and tools such as NDAs.<sup>286</sup> Despite the outrage over these agreements and the harmful impact on victims, the SafeSport Act is silent to the issue.<sup>287</sup> To simply get rid of NDAs in sexual assault or harassment cases would create serious concerns, but that should not mean they can continue to be used in cases similar to McKayla Maroney's.<sup>288</sup>

#### IV. CONCLUSION

The USOC traditionally did not intervene in coach-inflicted sexual abuse cases, claiming NGBs were responsible for combatting the issue and abiding by the Ted Stevens Act.<sup>289</sup> The scandal involving sexual abuse in USA Gymnastics, although just one of many, brought light to an issue plaguing amateur sports.<sup>290</sup> When over 150 women publicly accused Larry Nassar of sexual abuse spanning two decades, a glaring discrepancy in the Ted Stevens Act was exposed.<sup>291</sup> It did not provide proper policies and procedures for preventing sexual abuse in amateur sport and remedying victims.<sup>292</sup>

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284. See Levinson, *supra* note 111 (discussing \$100,000 fine that would have resulted against Maroney had USA Gymnastics enforced her NDA); see also Vagianos, *supra* note 110 (noting NDAs are illegal in California for child sex abuse cases, and Maroney should be able to speak to whomever she wants about abuse).

285. See Levinson, *supra* note 111 (arguing that without some NDAs in sexual assault cases, some powerful men would likely have been stopped earlier, and further that harmful effect of NDAs is exemplified by looking to dozens of NDAs signed by accusers of abuse by Larry Nassar).

286. See Love & Norris, *supra* note 217 (noting “keeping the victim quiet” includes “subtle or direct threats, shame, embarrassment, and access to team”).

287. See Gibbs, *supra* note 222 (discussing provisions included in SafeSport Act, which do not currently include language as to legality of NDAs).

288. See Levinson, *supra* note 111 (“By passing laws that ban all NDAs, we will marginalize rather than empower the people we’re aiming to protect. Many of my clients would never have come forward if they knew the only option was full public disclosure of their experiences.”).

289. See Townes, *supra* note 24 (discussing USOC’s previous claims “that it is doing all that it can to protect athletes’ safety”).

290. For further discussion of sexual abuse allegations in USA Gymnastics, see *supra* notes 100–119 and accompanying text.

291. For further discussion of the Ted Stevens Act and the amendment(s), see *supra* notes 228–267 and accompanying text.

292. For further discussion of the Ted Stevens Act and the amendment(s), see *supra* notes 228–267 and accompanying text.

The changes implemented in the SafeSport Act represent an “extraordinary step” by lawmakers to prevent child sexual abuse in youth sport.<sup>293</sup> By making it a crime to fail to report a suspicion of sexual abuse, punishable by up to one year in prison, a legal duty is placed on the USOC, SafeSport, NGBs, coaches, parents, and athletes across youth sports.<sup>294</sup> Although the SafeSport Act is indeed extraordinary, it does not erase decades of the USOC’s failure to prevent young women from sexual abuse and continues to lack efficacy in its direct preventative measures, including training persons in detecting grooming processes by potential abusers and prohibiting NDAs in cases of sexual assault.<sup>295</sup>

Sexual abuse scandals in many NGBs, such as USA Swimming and USA Taekwondo, did not reach the same level of media scrutiny as USA Gymnastics.<sup>296</sup> However, these scandals played a key role changing a failing Olympic system.<sup>297</sup> The SafeSport Act is set to mark the end of an era of sexual abuse by changing the culture of youth sport organizations and the Olympics and putting athlete well-being ahead of medals.<sup>298</sup>

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293. See Love & Norris, *supra* note 217, at 1 (noting SafeSport Act and its aim to prevent sexual abuse in youth sports).

294. For further discussion of the legal duty under the SafeSport Act, see *supra* notes 90–91 and accompanying text.

295. See Love & Norris, *supra* note 217, at 7 (noting SafeSport Act “stops short of providing specific direction beyond limiting one-on-one interaction between adult and minor athlete”). For further discussion of NDAs in cases of sexual assault, see *supra* notes 268–288 and accompanying text.

296. See generally Hobson & Rich, *supra* note 4 (discussing many coaches and officials within Olympic sport organizations that have been accused of sexual abuse since 1982).

297. See Gibbs, *supra* note 222 (discussing origin of SafeSport Act dated back to early 2017, however, it passed in Congress soon after survivors confronted Nassar in court about abuse).

298. See Starr, *supra* note 216 (noting focus of SafeSport Act is to promote culture where athletes’ well-beings come first).

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