

**HIDING BEHIND A LEVEL PLAYING FIELD: HOW
THE INTERNATIONAL ASSOCIATION OF
ATHLETICS FEDERATION ATTEMPTS TO
REGULATE THE FEMININE IDEAL BY
PERPETUATING DISCRIMINATORY PRACTICES
AGAINST FEMALE OLYMPIC RUNNERS FROM NON-
WESTERN COUNTRIES**

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I. INTRODUCTION.....	266
A. <i>What Is Hyperandrogenism?</i>	267
B. <i>Who Are the Players?</i>	268
II. HISTORY OF THE IAAF’S FOCUS ON REGULATING THE FEMININE IDEAL.....	269
III. THE IAAF’S INITIAL VICTIM: DUTEE CHAND’S RISING CAREER HALTED BY DISCRIMINATORY REGULATIONS.....	274
A. <i>The IAAF’s Continued Attempts at Discrimination: the 2018 IAAF Regulations</i>	275
IV. IAAF DISCRIMINATORY REGULATIONS STRIKE AGAIN, THIS TIME ENTANGLING RISING TRACK AND FIELD POWERHOUSE, CASTER SEMENYA.....	277
A. <i>Newly Restricted Events in the 2018 Regulations Directly Target Caster Semenya</i>	278
V. THE HYPERANDROGENISM REGULATIONS ONLY TARGET WOMEN AND ARE DISCRIMINATORY ON THEIR FACE.....	280
A. <i>The 2018 Regulations Are Discriminatory on Their Face and in Effect and Thus Violate Human Rights, the IAAF Constitution and the Olympic Charter.</i>	285

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B.	<i>The Hyperandrogenism Regulations Violate the Olympic Charter and Should Be Declared Void.....</i>	287
C.	<i>The Regulations Target Female Athletes and Thus Are Discriminatory and Violate the IAAF Constitution.....</i>	288
D.	<i>The Regulations Violate Article 2 of the Universal Declaration of Human Rights.....</i>	290
VI.	THE REGULATIONS SUBJECT CASTER SEMENYA TO INHUMAN AND DEGRADING TREATMENT AND VIOLATE ARTICLE 5 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.....	294
A.	<i>The IAAF Regulations Arbitrarily Interfered with Caster Semenya's Privacy and Violate Article 12 of the Universal Declaration of Human Rights.....</i>	299
VII.	THE IAAF SUCCOMBS TO SOCIETAL PRESSURES OF REGULATING THE FEMALE BODY BY ALLOWING FOR THE IMPLEMENTATION OF DISCRIMINATORY PRACTICES	301
A.	<i>The IAAF's Discriminatory Regulations Continue to Target Female Runners from Non-Western Countries.....</i>	302
VIII.	RULING SUSPENDED	303
IX.	CONCLUSION: THE 2018 HYPERANDROGENISM REGULATIONS ARE DISCRIMINATORY ON THEIR FACE AND IN EFFECT, AND THUS SHOULD BE INVALIDATED.....	303

I. INTRODUCTION

This note concerns the validity of the International Association of Athletics Federations' ("IAAF") Regulations governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "Hyperandrogenism Regulations"). It will discuss how these discriminatory regulations have halted the careers of non-western rising track and field stars Caster Semenya, and Dutee Chand. Caster Semenya and Dutee Chand had been successful competitors and were singled out for scrutiny because of their success as well as their physical appearances and the status of their countries of origin.

The Hyperandrogenism Regulations place restrictions on the eligibility of female athletes with high levels of naturally occurring testos-

terone to participate in competitive athletics.¹ This note will discuss the new IAAF regulations that govern eligibility of female athletes with hyperandrogenism to compete in women's competition and how these regulations are not only discriminatory on their face but also violate international human rights. Even if argued the regulations are not written in a discriminatory way, the regulations are discriminatory as applied, as they have only severely impacted non-western women runners to date. Therefore, the regulations, which establish a framework for the determination of the eligibility of females with hyperandrogenism to participate in international competitions in the female category, should be declared void.²

A. What Is Hyperandrogenism?

Hyperandrogenism is a medical condition which produces excessive levels of androgens/ testosterone in the female body.³ There are various forms, but the form the IAAF regulations target is hyperandrogenism in intersex women. This condition leads women to have testosterone levels that are much higher than average for females.⁴ Typically, women produce very small levels of testosterone.⁵ The regulations were promulgated due to a belief that this additional testosterone gives these women a competitive advantage.

1. *Dutee Chand v. Athletics Fed'n of India (AFI) & The Int'l Ass'n of Athletics Fed'ns (IAAF)*, Interim Arbitral Award, CAS 2014/A/3759, ¶¶ 41-44 [hereinafter *Chand*].

2. Regulation 1.1 states the regulations establish a "framework for the determination of the eligibility of females with Hyperandrogenism to participate in International Competitions in the female category." The Hyperandrogenism Regulations "replace the IAAF's previous Gender verification Policy and the IAAF has now abandoned all reference to the terminology "gender verification" and "gender policy" in its rules." *Id.*, ¶ 41.

3. LISA DAWN BAVINGTON, REGULATING HYPERANDROGENISM IN ELITE FEMALE ATHLETES: THE HISTORY AND CURRENT POLITICS OF SEX-CONTROL IN WOMEN'S SPORT 4 (Thesis, Doctor of Philosophy, University of Otago, Nov. 8, 2016), available at https://www.researchgate.net/profile/L_Bavington/publication/325828966_Regulating_Hyperandrogenism_in_Elite_Female_Athletes_The_History_and_Current_Politics_of_Sex-Control_in_Women%27s_Sport/links/5b284b3645851509895cb539/Regulating-Hyperandrogenism-in-Elite-Female-Athletes-The-History-and-Current-Politics-of-Sex-Control-in-Womens-Sport.pdf (last visited Jan. 28, 2019).

4. *Hyperandrogenism explained and what it means for athletics*, USA TODAY (Aug. 2, 2016), available at <https://www.usatoday.com/story/sports/olympics/2016/08/02/hyperandrogenism-explained-and-what-it-means-for-athletics/87944968/> (last visited Feb. 1, 2019). The term "Intersex" stands for either a disorder or a difference of sex development. Estimates of the number of intersex people vary widely, ranging from one in 5,000 to one in 60. Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAGAZINE (June 28, 2016), available at <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> (last visited Mar. 5, 2019).

5. BAVINGTON, *supra* note 3.

B. Who Are the Players?

The International Association of Athletics Federations is the international governing body for the sport of athletics and track and field.⁶ The IAAF has a total of 215 member federations divided into six area associations.⁷ The Olympic movement includes organizations, athletes and other persons who agree to be guided by the Olympic Charter.⁸ The concerted, organized universal and permanent action, carried out under the authority of the International Olympic Committee (IOC) and all individuals as well as entities involved are committed to upholding the values of Olympism.⁹ The Olympic movement is made up of the IOC, the International Federations (IFS), and the National Olympic Committees.¹⁰ The IOC is a non-profit, international organization.¹¹ It is made up of a Congress, whose members are honorary and whose purpose, or role, is consultative; the Session, or the “supreme organ” of the IOC whose decisions are final; the Executive Board, which generally oversees the affairs of the IOC; and the President, whose duties are to make decisions when the Session cannot make them.¹² International Sports Federations seeking IOC recognition must ensure that their statutes, practice and activities conform with the Olympic Charter.¹³

The IOC has a judicial process in place for disputes that are not resolved through the Session or Executive Board. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.¹⁴ The Code of Sports Related arbitration and mediation rules is the set of procedural rules which govern CAS procedures.

6. *About The IAAF*, IAAF (2019), available at <https://www.iaaf.org/about-iaaf> (last visited Mar. 2, 2019).

7. *International Association of Athletics Federations (IAAF)*, DUCKSTERS (2019), available at https://www.ducksters.com/sports/track_and_field/iaaf.php (last visited Mar. 5, 2019).

8. *Factsheet: The Olympic Movement*, INTERNATIONAL OLYMPIC COMMITTEE (Apr. 2015), available at https://stillmed.olympic.org/Documents/Reference_documents_Factsheets/The_Olympic_Movement.pdf (last visited Jan. 25, 2019).

9. *See id.*

10. Linda Sheryl Greene, *Mirror, Mirror on the Wall – Gender, Olympic Competition and Persistence of the Feminine Ideal*, 31 WIS. J.L. GENDER & SOC'Y 57 (2016).

11. *Id.*

12. *Id.*

13. *Olympic Charter*, INT'L OLYMPIC COMM. (Sept. 15, 2017), available at <https://olympics.com/ioc/olympic-charter> (last visited Jan. 30, 2018).

14. *See Greene, supra* note 10.

The IOC formed the CAS because of increased disputes in international sports, and because there was no forum to hear the disputes, and no authority to settle them. The CAS is an international arbitral tribunal to provide a forum for the settlement of private disputes that arise in the sport.¹⁵ The rules and regulations of the relevant sport organization which issued the challenged decision is the source of substantive law that is applicable to hearings in the CAS.¹⁶ Where there is a discrepancy related to a regulation, the panel will use the law of the country where the federation that issued the challenged decision is domiciled. Often Swiss law is applied since many of the international federations are established in Switzerland.¹⁷ The Olympic Charter states that the Charter governs and serves as statutes for the IOC, and by being recognized through the IOC, the IAAF is also bound by the terms of the Olympic Charter. Lastly, the IAAF has its own constitution which describes the rules and regulations the IAAF must follow in addition to following the Olympic Charter.

II. HISTORY OF THE IAAF'S FOCUS ON REGULATING THE FEMININE IDEAL

Female athletes have endured discrimination since they were first allowed to compete at the highest level of athletics. It has been theorized that sex testing¹⁸ originally surfaced to guard against men masquerading as women, in an attempt to compete and win women events.¹⁹ While this may well be the source of the regulation, the only documented incident of this happening, was in 1936.²⁰ One can only conclude that their real purpose of such invasive discriminatory techniques was to discourage women or limit participation of women in the sport who defied gender norms. With only one such "masquerading incident," these tests have continued to progress and shifted the focus on targeting

15. Haley K. Olsen-Acre, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207 (2007).

16. Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, A Symposium*, 2012 J. DISP. RESOL. 68 (2012).

17. *Id.* at 69.

18. For the purposes of this note "sex testing" and "gender verification" will be used interchangeably. These terms refer to the procedures that sport organizations implement to ensure that only females compete in the designated female events.

19. Olsen-Acre, *supra* note 15.

20. *See id.*

women who do not align with the traditional feminine ideal.²¹ In addition, although men masquerading as women was the stated justification for the implementation of sex testing, these tests were never performed on male athletes.²²

The institution of sport is formally organized around the notion that there are only two sexes, male and female, and sport is nearly solely segregated by binary sex category.²³ As a result, when athletes do not fit into the pre-conceived definitions of what a male or female athlete should be, or should look like, there is simply no place within the institution of competitive organized sport for those athletes.²⁴ Because they cannot fit into these traditional and narrow gender definitions, targeted female athletes are subjected to discriminatory gender tests.²⁵ Society has dictated the terms for who can identify as a man or a woman, and these regulations continue to protect its rigid definition of what a female should be and what characteristics she should possess.

It is easy to think of a list of characteristics that are attached to concepts of the societal norm for male and the norm for female, like testosterone vs. estrogen, or perhaps rational vs. emotional.²⁶ If a woman is associated with too much testosterone, or if she has too much muscle, society passes judgment because she does not fall into one of the rigid categories that society has designed for “normal” men and women. Therefore, those who cross the threshold into the gray area that society has not given much thought to, like transgender, intersex, or hyperandrogenic athletes, are subjected to rigid and embarrassing scrutiny. The discrimination against female athletes dates back to the nineteenth

21. Padawer, *supra* note 4. (“The rationale for decades was to catch male athletes masquerading as women, though they never once discovered an impostor. Instead, the athletes snagged in those efforts have been intersex women – scores of them.”)

22. Olsen-Acre, *supra* note 15.

23. Cheryl Cooky & Shari L. Dworkin, *Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy*, 50 J. OF SEX RESEARCH 103 (2013).

24. *Id.* Therefore, historically there has been no formal place within the institution of competitive organized sport for athletes who exist outside of the dichotomous categories of male and female and who subsequently “fail” sex testing.

25. Serena Williams has often been called an “ape” and “gorilla.” It’s common for women athletes – especially when they win – to be derided as something other than women. In any sport in which a woman has to actually train to be a formidable competitor, and has a physique that reflects that, you’ll find discussion of their reputed sexual desirability permeating the conversation. Erika Nicole Kendall, *Female athletes often face the femininity police – especially Serena Williams*, THE GUARDIAN (July 14, 2015), available at <https://www.theguardian.com/commentisfree/2015/jul/14/serena-williams-female-athletes-femininity-police> (last visited Mar. 7, 2019)

26. Olsen-Acre, *supra* note 15.

century when the Olympics were first established.²⁷ The organizers of the early Olympic Games heavily relied on sex or gender testing to disqualify athletes who appeared to have an unfair advantage.²⁸ In the very beginning stages of sex testing, visual and physical examinations of female competitors' genitalia by doctors were employed to verify gender but there was no such evaluation of men. To date, there is still no such evaluation of men. In fact, because men's bodies and sports competition are the "standard," men don't have to prove they are men, but in international competitions since the 1940s women's bodies underwent strict- public scrutiny. Yet, even in its 2019 decision to implement these discriminatory practices against women, the IAAF wants you to believe there is no other alternative and that the policing of women's bodies protects the integrity of the sport in its entirety, though the same checks and balances on men do not exist.²⁹

If an athlete presents with XX chromosomes, the IOC defines her as female, and if the athlete presents with XY chromosomes then he is classified as male.³⁰ However, because of this rigid structure, the IOC does not account for athletes that have genetic anomalies, of which they have no control over, and which often do not provide a competitive advantage.³¹ A female athlete could present with an XY chromosomal configuration, but her body does not properly respond to testosterone, so her body produces female features with very minimal male aspects.³² Nevertheless, she would still be disqualified and humiliated for not fitting into the IOC's definitions of female.³³

While the IOC has abandoned the practice of chromosomal sex testing, they have moved into the realm of disqualifying athletes due to their hormonal levels.³⁴ These tests are highly invasive, shame-

27. *See id.*

28. *Id.*

29. Victoria Jackson, *The Decadelong Humiliation of Caster Semenya*, SLATE (May 1, 2019), available at <https://slate.com/technology/2019/05/caster-semenya-testosterone-gender-appeal-ruling.html> (last visited July 24, 2019.)

30. *Id.*

31. *Id.*

32. *Id.*

33. For example, female athletes who have hyperandrogenism, or androgen insensitive syndrome. Chromosomal disorders are congenital and sometimes hereditary, many do not offer any competitive advantage do people who have them. Interestingly, sex tests that rely on chromosomal analysis fail to recognize some disorders that might actually provide some type of advantage, such as androgen- secreting tumors. Olsen-Acre, *supra* note 15.

34. IAAF introduces new eligibility regulations for female classification, WORLD ATHLETICS (Apr. 26, 2018), available at <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica> (last visited Mar. 2, 2019).

inducing practices which are historically fueled by discriminatory objectives.

The purpose of the Modern Olympic Games was to simultaneously develop the minds and bodies of young people.³⁵ It was hoped that resurrecting the Olympic Games would bring back the ideals of physical, mental, and spiritual excellence.³⁶ However, these goals were meant solely for male athletes. When the Modern Olympic Games were established in 1896, women were not allowed to compete.³⁷ The beginning stages of integrating women into the sport did not begin until over thirty years later, in 1928.³⁸ The IAAF excluded female athletes for even longer. It did not include female athletics until 1963.³⁹

Since the early days of research into gender and its many facets, a woman's interest in competing in sports caused her femininity to become suspect which made her subject to surveillance and regulation.⁴⁰ The very participation of women in elite-level athletics serves as a highly visible challenge to traditional notions of femininity, as women are supposed to be fragile, petite beings, not muscular forces competing in, and training for similar events that men do.⁴¹ Although Semenya is not the first athlete to have her identity as a woman challenged, she has en-

35. See *The Modern Olympic Games*, SCHOLASTIC (2019), available at <https://www.scholastic.com/teachers/articles/teaching-content/modern-olympic-games/> (last visited Jan. 29, 2019).

36. *Id.*

37. Greene, *supra* note 10.

38. *Id.*

39. Hans Bolling, *The Beginning of the IAAF: A Study of its Background and Foundation*, IAAF (2007), at 5, available at <https://iaafmedia.s3.amazonaws.com/competition/info/9ae4cea1-f84c-44ec-852f-74bb974d0f5a.pdf> (last visited Jan. 28, 2019).

40. Visual observation and gynecological examination had been tried on a trial basis for two years at some competitions leading up to the 1968 Olympic Games, but these invasive and demeaning processes were jettisoned in favor of laboratory-based genetic tests. On-site gender verification has since been found to be highly discriminatory, and the cause of emotional trauma and social stigmatization for many females with problems of intersex who have been screened out from competition. Despite compelling evidence for the lack of scientific merit for chromosome-based screening for gender, as well as its functional and ethical inconsistencies, the IOC persisted in its policy for 30 years. L. J. Elsas, A. Ljungqvist et al., *Gender Verification of Female Athletes*, 2 GENET MED. 249 (2000).

41. See Kristin Wilde, *Women in Sport: Gender Stereotypes in the Past and Present*, available at <http://wgst.athabascau.ca/awards/broberts/forms/Wilde.pdf> (last visited Jan. 29, 2019); see Amanda Nicole Schweinbenz and Alexandria Cronk, *Femininity Control at the Olympic Games*, THIRD SPACE (2010), available at <http://journals.sfu.ca/thirdspace/index.php/journal/article/view/schweinbenzcronk/329> (last visited Jan. 29, 2019); Carlie Minichino *Gender Specific Rules in Sport are Based on an Outdated Idea of Femininity*, (2009) (Honors Theses Paper 471, Colby College), available at <https://pdfs.semanticscholar.org/6d49/344ccfd9e4c831d0140551f0e886068e80a3.pdf> (last visited Jan 29. 2019).

dured this obsession over her eligibility in the women's category longer than any athlete in history.⁴²

Sex and gender testing of female athletes can be seen through much of the twentieth century.⁴³ Testing began in the 1960s and has included various invasive as well as humiliating methods. These include nude parades before a panel of judges, chromosome and DNA analysis, and most recently, testosterone testing.⁴⁴ In 1968, the IOC implemented chromosomal testing, to determine which athletes lacked the ability to process testosterone. This method proved to be imperfect and excluded athletes that should have been allowed to compete.⁴⁵ Following these chromosomal procedures, the IOC permitted invasive gynecological inspections, and now fast forwarding to 2019, the IOC allows the proliferation of regulations requiring invasive inspections of the female body through testosterone testing.⁴⁶

Routine sex testing was done in past Olympic competitions but was dropped only ten years ago because of the continued inaccuracies related to the reliance on a single trait to verify sex. In addition, similar problems arise when relying on testosterone levels alone to determine if an athlete is "too masculine to compete."⁴⁷ Yet, the re-emergence of sex testing for female athletes came in May of 2011 and June of 2012 when the IAAF and the IOC introduced these regulations governing the eligibility of females with hyperandrogenism.⁴⁸ At the center of the current dispute is South African middle-distance runner, Caster Semenya, as well as Indian sprinter Dutee Chand.⁴⁹

42. Jackson, *supra* note 29.

43. See Elsas, *supra* note 40.

44. Alex Hutchinson, *An Imperfect Dividing Line*, NEW YORKER (Mar. 27, 2015) available at <https://www.newyorker.com/sports/sporting-scene/dutee-chand-gender-testing-imperfect-line> (last visited Jan. 29, 2019).

45. *Id.*

46. See Martin Fritz Huber, *The Controversy Around Caster Semenya Explained*, OUTSIDE (July 12, 2017), available at <https://www.outsideonline.com/2198906/caster-semenya-debate> (last visited Jan. 29, 2019). No governing body has so tenaciously tried to determine who counts as a woman for the purpose of sports as the I.A.A.F. and the International Olympic Committee (I.O.C.). Those two influential organizations have spent a half-century vigorously policing gender boundaries.

47. Tracie White, *Media advisory on new Olympics testosterone policy: Stanford expert available to comment on unfair treatment of women athletes*, STAN. MED. (June 25, 2012), available at <http://med.stanford.edu/news/all-news/2012/06/media-advisory-on-new-olympics-testosterone-policy-stanford-expert-available-to-comment-on-unfair-treatment-of-women-athletes.html> (last visited Jan 29, 2019).

48. *Id.*

49. Huber, *supra* note 46.

III. THE IAAF'S INITIAL VICTIM: DUTEE CHAND'S RISING CAREER HALTED BY DISCRIMINATORY REGULATIONS

To enforce its perception of the feminine ideal in sports, the IAAF has implemented two sets of regulations that impose restrictions on female athletes' bodies.⁵⁰ The IAAF first enacted the Hyperandrogenism Regulations in April 2011. These regulations established a framework for the determination of the eligibility of females with hyperandrogenism to participate in international competitions.⁵¹ These regulations are mandatory, and all inclusive, meaning they prohibit female athletes from competing in any event if, when tested, their testosterone levels fell above a certain level.⁵² It is important to note that not all female athletes are tested, and that the initial basis for subjecting women to these tests is subjective, and based on a cursory review of their physical features.

Dutee Chand, now a twenty-two-year-old female athlete of Indian nationality, is a star athlete for India.⁵³ The spotlight has been on Dutee Chand since age eighteen when she rose to fame through her dominance in the women's 100m and 200m races. She has won a number of national junior athletics events in India and is currently a national champion in the women's 100m race.⁵⁴ In 2012, Chand became a national champion in the under-18 category in the 100m event.⁵⁵ In addition, she took bronze in the women's 200m event at the 2013 Asian Athletics Championships.⁵⁶ In the same year, she became a national champion in the 100m and 200m races at the Indian National Senior Athletics Championships. The following year, Chand won two gold medals at the Asian Junior Athletics Championships in 200m and 4x400m relays.⁵⁷ With these prestigious performances, Chand hoped to qualify to represent her country in the 2014 Commonwealth Games.⁵⁸ However, the

50. See *Chand*, *supra* note 1, ¶ 41.

51. *Id.*

52. *Id.*, ¶ 42.

53. *Id.*, ¶ 1.

54. See *Dutee Chand Athlete Profile*, IAAF (2019), available at <https://www.iaaf.org/athletes/india/dutee-chand-275950> (last visited Jan. 29, 2019).

55. *Dutee Chand breaks 100m record*, THE HINDU (July 14, 2012), available at <https://www.thehindu.com/sport/athletics/dutee-chand-breaks-100m-record/article3636513.ece> (last visited Jan. 29, 2019).

56. Greene, *supra* note 10.

57. See *Dutee, relay team clinch gold medals*, DECCAN HERALD (June 15, 2014), available at <https://www.deccanherald.com/content/413832/dutee-relay-team-clinch-gold.html> (last visited Jan. 29, 2019).

58. Padawer, *supra* note 4.

IAAF subjected her to sex testing and declared her ineligible to compete as a female athlete due to the hyperandrogenism policies. She was subsequently dropped from the roster.⁵⁹

The IAAF prohibited Chand from competing in the female category of the 100m and 200m dash. Chand refused to comply with medical interventions to lower her testosterone levels and filed an appeal to the CAS.⁶⁰ In 2015, Chand challenged the regulations which led to a determination by the CAS that the 2011 regulations did discriminate against women and discriminated based on a natural physical trait.

In July 2015, the Court of Arbitration for sport suspended the 2011 IAAF regulations regarding Hyperandrogenism. The CAS held in their decision that the IAAF failed to establish that the hyperandrogenism regulations are necessary and proportionate to pursue the legitimate objective of organizing competitive female athletics to ensure fairness in elite women's competition.⁶¹ The panel concluded that there was not enough scientific evidence to conclude that hyperandrogenic female athletes have a significant performance advantage that is necessary for exclusion or prohibition from competition.⁶² The IAAF, however, did not simply accept this decision and move forward. Instead, the IAAF developed the 2018 Hyperandrogenism regulations as a response to the 2015 CAS ruling.⁶³

*A. The IAAF's Continued Attempts at Discrimination:
the 2018 IAAF Regulations*

The new regulations were largely based on a study published in the *British Journal of Sports Medicine*.⁶⁴ This study was conducted by Stephanie Bermon and Pierre Garnier, who work for the IAAF medical examiners. In addition, their study was jointly commissioned by the

59. See Rohan Sen, *Asian Games 2018: Dutee Chand ends 16-year wait for India with silver in 200m*, INDIA TODAY (Aug. 29, 2018), available at <https://www.indiatoday.in/sports/asian-games-2018/story/asian-games-2018-dutee-chand-ends-16-year-wait-for-india-with-silver-in-200m-1326566-2018-08-29> (last visited Jan. 29, 2019).

60. BAVINGTON, *supra* note 3, at 6.

61. See Chand, *supra* note 1, ¶ 547.

62. Andrew, *New IAAF Testosterone Regulations are Bigoted and Targeted*, VICTORY PRESS (May 2, 2018), available at <https://victorypress.org/2018/05/02/new-iaaf-testosterone-regulations-are-bigoted-and-targeted/> (last visited Jan. 29, 2019).

63. See White, *supra* note 47; see also Mokgadi Caster Semenya, SOUTH AFRICAN HISTORY ONLINE (2019), available at <https://www.sahistory.org.za/people/mokgadi-caster-semenya> (last visited Mar. 2, 2019); see also ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 199 (Michael Bérube ed., 2014).

64. See Andrew, *supra* note 62.

IAAF.⁶⁵ In this study, when compared with the lowers female ft (free testosterone) tertile, women with the highest ft tertile performed significantly better in 400m, 400m hurdles, 800m, hammer throw, and pole vault.⁶⁶ The IAAF then tailored the 2018 regulations to fit these findings and lowered the acceptable blood testosterone levels for athletes participating in certain women events to no more than 5 nmol/L as opposed to 10 nmol/L which was the amount in the previous regulations.⁶⁷ Though the IAAF relied on the study, scientists in the field disagreed with the findings. These scientists felt that the data and conclusions drawn in the Bermon and Garnier article were so erroneous that they called for a retraction of their findings and demanded the study be performed again.⁶⁸

Some of the errors cited by the experts included duplicated athletes, meaning there was more than one time recorded for an individual. Repeating the same time once or more than once for an individual athlete indicates a clear data error. Finally, sometimes no athlete in the sample could be found with the reported time for that event.⁶⁹ Even in the best of circumstances, the IAAF's reliance on this data to support the enactment of the regulations would be misguided. However, with the IAAF rushing to overcome the 2015 Chand decisions, by relying on scientifically flawed data, the IAAF's true purpose became clear: to target hyperandrogenic females from underrepresented countries and prohibit their participation.⁷⁰

The testing methodology further proves this intent. The sample size of athletes Bermon and Garnier tested only contained women from non-western and developing countries.⁷¹ Thus, strengthening the arguments that these 2018 IAAF regulations are targeting not only women, but women in particular from non-western countries.⁷² As data is not

65. See *id.*; see also Stéphane Bermon and Pierre-Yves Garnier, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes*, BRIT. J. SPORTS MED. (July 3, 2017), available at <https://bjsm.bmj.com/content/51/17/1309.info> (last visited Jan. 27, 2019).

66. *Id.*

67. *Id.*

68. Roger Pielke Jr., *A Call for Bermon and Garnier (2017) to be Retracted*, SPORTS INTEGRITY INITIATIVE (July 13, 2018), available at <https://www.sportsintegrityinitiative.com/call-bermon-garnier-2017-retracted/> (last visited Jan. 28, 2019).

69. *Id.*

70. Andrew, *supra* note 62.

71. See Chand, *supra* note 1, ¶¶ 22, 355.

72. See WORLD ATHLETICS, *supra* note 34. The new Regulations require any athlete who has a Difference of Sexual Development (DSD) that means her levels of circulating testosterone (in serum) are five (5) nmol/L or above and who is androgen-sensitive to meet

being made public, there is no way for other scientists to verify, analyze, or fact check Bermon and Garnier's conclusions.⁷³ It should be noted that peer review is crucial especially in a scientific field, as this involves subjecting the author's work to the scrutiny of other qualified experts to check its validity.⁷⁴ This is needed to rule out false positives and other errors that could mislead the reader. "Without publicly available raw data, it is not possible to perform all the desired checks on the data."⁷⁵ As a result, it is "reasonably likely" that the connection found here between female athletes having a slight competitive advantage due to hyperandrogenism could have occurred by chance.⁷⁶ The IAAF needed scientific data to confirm that hyperandrogenic females hold an advantage over females with "normal" testosterone levels in order for the amended regulations to be accepted in 2018, and Bermon and Garnier, in a study the IAAF paid for, provided that data.⁷⁷

IV. IAAF DISCRIMINATORY REGULATIONS STRIKE AGAIN, THIS TIME ENTANGLING RISING TRACK AND FIELD POWERHOUSE, CASTER SEMENYA

These new regulations for testosterone testing arose as a result of very speculative and subjective comments that were made regarding a South African runner, Caster Semenya.⁷⁸ Semenya's rise from unknown teenager to world champion catapulted her into sporting infamy and put a direct target on her back.⁷⁹

the following criteria to be eligible to compete in Restricted Events in an International Competition (or set a World Record in a Restricted Event at competition that is not an International Competition):(a) she must be recognized at law either as female or as intersex (or equivalent);(b) she must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and(c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to remain eligible.

73. Jacalyn Kelly, Tara Sadeghieh & Khosrow Adeli, *Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide*, JIFCC (Oct. 24, 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4975196/> (last visited Mar. 7, 2019).

74. *Id.*

75. Andrew, *supra* note 62.

76. *Id.*

77. *IAAF approves new rules on hyperandrogenism*, THE GUARDIAN (Apr. 12, 2011), available at <https://www.theguardian.com/sport/2011/apr/12/iaaf-athletics-rules-hyperandrogenism-caster-semenya> (last visited Jan. 27, 2019).

78. White, *supra* note 47.

79. *IAAF to fight Swiss Court Ruling on Caster Semenya* THE JAPAN TIMES (June 5, 2019) available at <https://www.bbc.com/sport/athletics/48114137> (last visited July 24, 2019)

Mokgadi Caster Semenya, was born in Ga- Masehlong, a village near Polokwane in South Africa.⁸⁰ When Semenya was eighteen, she won both the 800m and 1500m races at the African Junior Championships in 2009 with record breaking times.⁸¹ In August of that same year, she won gold in the 800m at the World Championships setting the fastest time in that event for the year.⁸² Semenya, a trail blazer in the 800m and 1500m races, was receiving international attention for continual progression in these events as she was only eighteen, yet was ranked the number one women's runner in the 800m.⁸³ After Semenya shocked the track world with her win by 2.5 seconds in the 800m at the 2009 World Championship, complaints from her competitors arose relating to her physique.⁸⁴ For example, one of her fellow athletes said that Caster Semenya was "too masculine" and that "these kinds of people should not run with us... For me, she is not a woman. She is a man".⁸⁵ As a result, Semenya was forced to undergo sex testing that ultimately was not kept confidential and left her humiliated.⁸⁶ Furthermore, after her gold medal win at the Olympics in 2016, her opponent stated, "there were 'obvious' athletes with heightened testosterone."⁸⁷ The continued scrutiny and humiliation followed Semenya for years throughout her dominant career.

*A. Newly Restricted Events in the 2018 Regulations
Directly Target Caster Semenya*

After creating a bold presence in the track and field world, the IAAF amended its regulations to prohibit Caster Semenya from contin-

80. SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

81. *Id.*

82. *Id.* The South African began raising eyebrows when she won the world junior championships in 2008 and the senior world title the following year, with dramatic improvement in her times. As a result, the IAAF made Semenya take a sexual verification test, which was initially kept secret but revealed by the media in 2009. Mitch Phillips, *Athletics: Semenya's reign to be ended by new IAAF gender rule*, REUTERS (Apr. 25, 2018) available at <https://www.reuters.com/article/us-athletics-iaaf-hyperandrogenism/athletics-semenyas-reign-to-be-ended-by-new-iaaf-gender-rule-idUSKBN1HW27R> (last visited Feb. 28, 2019).

83. SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

84. See White, *supra* note 47; see also SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

85. *Id.*

86. See *id.*

87. Tom Morgan, *Caster Semenya wins 800m: beaten GB finalist Lynsey Sharp criticizes rule changes over 'obvious' hyperandrogenous women*, TELEGRAPH (Aug. 21, 2016), available at <https://www.telegraph.co.uk/news/2016/08/21/lynsey-sharp-criticises-obvious-hypoadrogenous-women-having-bein/> (last visited July 24, 2019).

ued domination in the sport. The 2018 regulations are more specific than the 2011 IAAF regulations. In fact, the amended regulations that were proposed in 2018 restricted female athletes from competing in the following events if their testosterone level is above 5 nmol/L: 400m races, 400m hurdle races, 800m races, 1500m races, one mile races and all other track events over distances between 400m and one mile.⁸⁸ The scientific evidence the IAAF relied on when determining which events to regulate, stated that pole vaulters and hammer throwers with hyperandrogenism may potentially have an advantage as well.⁸⁹ Interestingly, it has been established that Poland, a western country, dominates the women's hammer throw.⁹⁰ However, these events are not restricted or subjected to this testing.⁹¹

Out of the five events listed in the regulations, Caster Semenya's main event, the 800m, showed the least amount of advantage at 1.78%, technically in the IAAF's own study.⁹² Meaning, athletes with hyperandrogenism competing in the 800m have the least advantage.⁹³ Interestingly enough, the 1500m race, another event Semenya dominates, is subject to this regulation when the IAAF's own study showed no scientific evidence to support a correlation between high testosterone and high performance in the event.⁹⁴ Nevertheless, where women from non-western countries are dominating events, athletes such as Semenya are subjected to regulations such as these which are promulgated to stop their successes. With these facts, it is hard not to conclude that the IAAF is operating not for the betterment of sport, but instead based on discriminatory motives. It does not appear as though the IAAF is concerned with establishing a fair playing field as the organization argued.

88. Andrew, *supra* note 62.

89. Interestingly the IAAF's policy omits hammer throw and pole vault- which the study showed had the highest margins of improved performance and throws. Instead, the policy regulates a range of events from the 400m through 1500m races, all in Semenya's specialty. James Maasdorp, *Commonwealth Games: IAAF rule change could end career of Caster Semenya*, ABC NEWS (Apr. 11, 2018), available at <https://www.abc.net.au/news/2018-04-11/new-iaaf-rules-could-end-the-career-of-caster-semenya/9641160> last visited (Jan. 30, 2019).

90. Martin Bingisser, *Ranking the Best Throwing Nations*, HMMR MEDIA (Oct. 21, 2016), available at <https://www.hmmrmedia.com/2016/10/ranking-the-best-throwing-nations/> (last visited Mar. 7, 2019).

91. But two events — hammer throw and pole vault — didn't make the IAAF's list of Restricted Events despite showing the highest percentage of advantage in the study. At 4.53%, hammer throw is about 1.5% higher than any of the other events flagged as showing a notable difference. See Andrew, *supra* note 62.

92. *Id.*

93. *Id.*

94. Huber, *supra* note 46.

Although the information in the Bermon article has been declared unreliable, the IAAF fully relied on this data when making conclusions regarding hyperandrogenism and accepted the advantage hammer throwers and pole vaulters receive by failing to regulate those events.

V. THE HYPERANDROGENISM REGULATIONS ONLY TARGET WOMEN AND ARE DISCRIMINATORY ON THEIR FACE

Like the 2011 regulations, the 2018 Hyperandrogenism regulations are discriminatory on their face and should therefore be invalidated. When the 2011 Hyperandrogenism regulations were suspended, CAS concluded that the regulations were *prima facie* discriminatory, being that they are a sex-based eligibility rule.⁹⁵ Such discrimination is, unless justified, contrary to the Olympic charter, the IAAF constitution, and the laws of Monaco. If the testosterone regulations cannot be justified as a reasonable and necessary response to a legitimate need, then they should be declared invalid.⁹⁶ “Reasonable and necessary” means there needs to be a rational connection between the regulations and the objectives the regulations are designed to meet, and the regulations should be minimally impairing on any right to freedom they regulate.⁹⁷

The IAAF failed to establish that the 2011 regulations were a necessary and proportionate means of achieving a legitimate objective.⁹⁸ The IAAF still has not met this burden with the 2018 regulations as these regulations are still sex-based eligibility rules and therefore would be classified as *prima facie* discriminatory just as the 2011 regulations were.

In regard to the 2011 regulations, the CAS ruled that the IAAF failed to meet their burden.⁹⁹ CAS gave the IAAF two years to present evidence supporting the 2011 rules, and the IAAF was unable to do so. Because of this, the 2011 ruling still stands and Chand’s events are excluded from the 2018 rules. The two main differences between the 2011 and 2018 regulations are the restricted events and the amount of testosterone that triggers the regulations. Substantively, the regulations are still written in a discriminatory fashion by only targeting women, and as applied, continue to only impact women from non-western coun-

95. *Chand*, *supra* note 1.

96. *Revoke Discriminatory Athletics Gender Regulations*, HRW (July 26, 2018), available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (last visited Jan 29, 2019)

97. *Id.*

98. *Chand*, *supra* note 1, ¶¶ 536, 547.

99. *Id.*

tries.¹⁰⁰ As a result, the IAAF's new regulations continue to operate under the same discriminatory standards which were struck down by the CAS in the Chand case.¹⁰¹

The 2018 regulations also fail to meet the burden of showing the rational connection between the regulations themselves and the objective they are designed to meet. Here, since the 2018 regulations again prevent female athletes with hyperandrogenism from participating in certain events, the IAAF would need to meet the burden of showing a rational connection between regulating hyperandrogenic females and creating a fair playing field in the sport. The IAAF contends that these regulations are being implemented in order to foster a fair and competitive environment across all events.¹⁰²

If there is a rational connection between sex-based regulations and the objective of protecting competition in sport, surely there must be similar regulations regarding male athletes? However, there are no such regulations that hinder men with higher levels of testosterone or different advantageous immutable traits from participating in any events. This leaves one to conclude either that the IAAF is not concerned with a fair and competitive environment across all events for men, or that the IAAF is simply targeting women. The evidence supports the latter. The organization cannot unilaterally decide to regulate some events where they have discovered disadvantages and not others. This blatantly highlights the IAAF's flawed argument that they are establishing these regulations to create a level playing field, as there is no such level playing field created in the male events.

Gender-based discrimination is a higher suspect class, and any gender-based classification must be substantially tailored to serve an important government interest.¹⁰³ The standard by which this regulation must be analyzed is whether the discriminatory effect of the regulation has a substantial relationship to achieving an important and legitimate government objective.¹⁰⁴ When reviewing such regulations, the CAS

100. *Chand, supra* note 1, ¶¶ 22, 42, 355.

101. *See id.*

102. Alice Dredger, *Redefining the Sexes in Unequal Terms*, N.Y. TIMES (Apr. 23, 2011), available at <https://www.nytimes.com/2011/04/24/sports/24testosterone.html> (last visited Jan. 29, 2019).

103. Letter from Human Rights Watch to Lord Sebastian Coe, President IAAF re: *Eligibility Regulations for The Female Classification* (July 24, 2019), available at https://www.hrw.org/sites/default/files/supporting_resources/hrw_letter_iaaf_femaleclassification_20180724.pdf (last visited Mar. 2, 2019); CAS 2014/A/3759, *supra* note 1; see BAVINGTON, *supra* note 3.

104. *Chand, supra* note 1, ¶¶ 536, 547.

must ask, do the ends justify the means? In other words, does this gender discrimination aimed solely toward women athletes, substantially relate to achieving the goal of preventing scandals and having fair competition? The idea behind this policy is to make a move toward creating the mythical "level playing field."¹⁰⁵ However, the only thing this regulation does is allow men to further regulate the female body of which they know nothing about, as well as put constraints on what classifies as a "gender appropriate" woman in the field of Olympic sports.

This idea of making elite sports a "level playing field" is quite frankly, unrealistic, as fair sporting competitions do not necessarily require that athletes be equal in every imaginable respect.¹⁰⁶ It is impossible to make every athlete equal, as each athlete is subjected to different environments that can contribute to their successes.¹⁰⁷ In fact, scientists and the media credit part of Usain Bolt's success to the very earth in which he was raised.¹⁰⁸ However, we do not see athletes from Usain Bolt's town being excluded from events solely for being born in a place where it has been known to give athletes an advantage. These athletes have no control over where they grow up and are not targeted, yet here, Caster Semenya is being punished for being born differently and not fitting into the begrudgingly accepted athletic feminine ideal. Punished for something of which she has no control over, even though the science suggests that she has very minimal advantage in her running events. There are a plethora of biological, psychological, sociological, and economic factors that influence athletic performance.¹⁰⁹ As a result, sports can never be a truly level playing field as we are not all born the same, thus these regulations implemented with the purpose of making competitions fair completely targets and victimizes many women who are born with naturally higher testosterone levels.¹¹⁰

105. Dredger, *supra* note 102.

106. See Thomas Murray, *Making Sense of Fairness in Sports*, 40 HASTINGS CTR. REP. (2010), available at <https://onlinelibrary.wiley.com/doi/full/10.1353/hcr.0.0241> (last visited Jan. 29, 2019).

107. One could argue to some extent that all elite athletes are freaks of nature – these athletes are in the best handful in the world at what they do, especially when considering a talent pool as large as that of Athletics. See Claire Thomas, *Built for speed: what makes Usain Bolt so fast?*, TELEGRAPH (Aug. 20, 2016), available at <https://www.telegraph.co.uk/usain-bolt-worlds-fastest-man/0/built-for-speed-what-makes-usain-bolt-so-fast/> (last visited Feb. 28, 2019).

108. *Id.*

109. Chand, *supra* note 1, ¶ 116.

110. See Francisco J. Sánchez et al., *The New Policy on Hyperandrogenism in Elite Female Athletes Is Not About "Sex Testing."* 50 J. SEX RES. (2013); see BAVINGTON, *supra* note 3, at 79.

The options are hard; perhaps even cruel. Either the athletes with hyperandrogenism submit to being made gender “normal” through hormone treatments, or they cannot compete.¹¹¹ Male athletes need not worry.¹¹² It is only women who are being limited in terms of natural biochemical advantage.¹¹³ “There is no perfect solution, one that is reasonably objective universally applicable and universally satisfying.”¹¹⁴ But is requiring an individual to submit to hormone treatments to become “normal” a solution or a punishment? While there may not be a perfect solution, there is surely a solution that respects the individual human and civil rights of athletes while still promoting fairness in sport. Promoting fairness at such a high caliber of sporting events is a legitimate objective, however solely discriminating on one class of people based on their gender substantially prejudices this objective and does not serve to meet this interest.¹¹⁵ The IAAF allows females to compete with certain testosterone levels that they classify as normal, but when women have “too much” testosterone the IAAF steps in and takes females out of the events for not being “female enough,” since testosterone is something that is typically associated with male bodies.¹¹⁶ In fact, the IOC policies in 2012 determined that athletes ineligible to compete in the female categories were eligible to compete in the male categories if they met a high enough testosterone level.¹¹⁷ Based on this, one can clearly conclude that the IAAF believes that female athletes should be classified as ineligible because their testosterone levels are not feminine enough, and are considered to be too masculine to

111. Dredger, *supra* note 102.

112. “The spectrum of identity stretches far beyond the binary, say human rights activists, so shouldn’t Semenya’s physical abilities be celebrated the same way as Usain Bolt’s height and Michael Phelps’s wingspan are? Either way this verdict does not signal the end of the debate.” *Caster Semenya: Olympic 800m champion loses appeal against IAAF testosterone rules*, BBC (May 1, 2019), available at <https://www.bbc.com/sport/athletics/48102479> (last visited July 27, 2019).

113. *See id.* American swimmer Michael Phelps owes his unique genetic endowment to physical traits associated with Marfan Syndrome (e.g., arm span, big feet stature), which contributes to his dominance over the rest of the field. Yet, despite the obvious advantages there are no arguments that they should be excluded from competition against lesser-males. *See* BAVINGTON, *supra* note 3, at 80.

114. *Id.*

115. Chand, *supra* note 1, ¶ 40.

116. *Id.*

117. BAVINGTON, *supra* note 3, at 82; *see generally* IOC Regulations on Female Hyperandrogenism, (IOC) (June 22, 2012), available at https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf (last visited Jan. 29, 2019)

compete in female categories. However, they are also likely not masculine enough to compete in male categories.

With the easily accessible evidence that men have varying testosterone levels and natural traits that provide them with advantages, can we believe that this regulation is trying to serve the greater good of the sport? However, men's bodies are not scrutinized in the same manner as female athletes.¹¹⁸ In addition, when presented with such evidence that there is disparity between male athlete in their testosterone levels, as well as advantages because either genetic or physical traits, the IAAF has concluded that this has no bearing on their competition and has never regulated these known advantages.¹¹⁹ So does this mean that men with lower testosterone levels are not "masculine" enough? Well, no. Since there is a disparity among male athletes' testosterone levels that is not addressed, how concerned really is the IAAF with creating a level playing field?

While the justification may be that these regulations serve to create a level playing field, this is not met when the IAAF is fully banning female athletes with higher than average levels.¹²⁰ Instead, women are allowed to compete with certain levels of testosterone, but if an athlete has what the IAAF arbitrarily determines is too much testosterone, the athlete is essentially not classified as a woman anymore by the IAAF and is instead, subjected to sex testing under this discriminatory regulation.¹²¹ These regulations do not serve a legitimate purpose because they are wholly discriminatory against an entire gender. The regulations target the rights of an already marginalized minority, women from non-western countries, against the alleged need to ensure fair competi-

118. BAVINGTON, *supra* note 3, at 99.

119. Despite the obvious advantages that Phelps and Bolt have over their peers, questions abound why there aren't more athletes like them rather than arguments that they should be excluded from competition against lesser-than males. See BAVINGTON, *supra* note 3, at 79, 97.

120. Since 1928, competition in Athletics has been strictly divided into male and female classification and females have competed in Athletics in a separate category designed to recognize their specific physical aptitude and performance. It is known from experience that there are rare cases of young females competing in Athletics today who are affected by hyperandrogenism which, if the condition remains undiagnosed or neglected, can pose a risk to health. Despite the rarity of such cases, their emergence from time to time at the highest level of women's competition in Athletics has proved to be controversial since the individuals concerned often display masculine traits and have an uncommon athletic capacity in relation to their fellow competitors. See Chand, *supra* note 1, ¶ 4, 116.

121. See *id.*

tion for the majority.¹²² This perceived difference is through no fault of the athletes' own, as they were born with this condition. This stigmatizing and discriminatory paradigm does not belong in the world of sports.

As discussed earlier, the purpose of the Olympic Games was to bring back the ideals of physical, mental and spiritual excellence.¹²³ These women are being penalized for an immutable characteristic, whereas, when men have similar immutable traits, there are no invasive regulations or penalties.¹²⁴ As a result of the discriminatory regulatory scheme, the 2018 IAAF Hyperandrogenism regulations should be invalidated as it does not further the objectives of making the sport fair, and is contrary to the spirit of the sport itself, as well as the Olympic ideal.¹²⁵

A. The 2018 Regulations Are Discriminatory on Their Face and in Effect and Thus Violate Human Rights, the IAAF Constitution and the Olympic Charter.

The IAAF regulations governing the eligibility of females with Hyperandrogenism to compete in women's competition should be declared invalid because the 2018 Hyperandrogenism regulations are sex-based eligibility restrictions and are therefore prima facie discrimination. Furthermore, women are specifically targeted through such regulations and men are not subjected to any such testing or regulations.¹²⁶ If testosterone is a driver of sport performance, the concern about guaranteeing physical equality based on hormonal characteristics should not be limited to female athletes, as not all male athletes have the same testosterone levels and therefore, some men are disadvantaged compared to

122. Andy Bull, *Caster Semenya and Dutee Chand run ragged by IAAF's moving goalposts*, THE GUARDIAN (Jan. 23, 2018), available at <https://www.theguardian.com/sport/2018/jan/23/caster-semenya-dutee-chand-iaaf-hyperandrogenic> (last visited Nov. 7, 2018)

123. SCHOLASTIC, *supra* note 35.

124. Jamaican sprinter Usain Bolt's success centers on a genetic predisposition for known variables that naturally factor into his performance (i.e., height, fast-twitch muscle fibres, etc.). Yet no action is taken to hinder his performance in the sport. BAVINGTON *supra* note 3, at 79.

125. See *Olympic Charter*, *supra* note 13.

126. Even where conditions that result from natural genetic variation have the potential to result in a competitive advantage, it is problematic to disqualify athletes on the basis of these while advantages resulting from the other genetic variations (for example, tallness that runs in one's family) are not cause for exclusion. This seems especially unfair given that sex differentiation among athletes is also surprisingly common: one study found that one in 504 female athletes competing in selected events, including the Olympic Games, between 1972 and 1990, was disqualified for failing the sex chromatin test. See Olsen-Acre, *supra* note 15.

other males based on this criterion. In fact, it has been established that male pole vaulters produce less testosterone than male sprinters.¹²⁷

However, the difference in testosterone levels in the men's category remain unproblematic.¹²⁸ Additionally, the newly proposed regulations by the IAAF that did take effect on November 1, 2018 states that female athletes with testosterone levels above 10 nmol/L are not allowed to compete in the female category.¹²⁹ Women with elevated testosterone must reduce their level for six months, by medical intervention (e.g., by use of hormonal contraceptives) before being eligible to run and must maintain that lowered testosterone level.¹³⁰ A regulation that targets female athletes, more specifically female athletes from non-western countries, contributes to the discriminatory nature of the regulation.

The regulations allow for an investigation to be initiated into an athlete's gender, but do not include any scientific standards upon which to base the investigation. More specifically, the regulations allow the IAAF to investigate female athlete's biological autonomy if there are "reasonable grounds for believing" that a female athlete may have hyperandrogenism; however, there is no set procedure to determine which athletes may have this condition, it is based on pure observation and speculation.¹³¹

These new regulations violate internationally protected fundamental rights and discriminate against women on the basis of their sex and their sexual characteristic which violates Articles 2, 3, 5 and 12 of the Universal Declaration of Human Rights, as well as the Olympic charter, and IAAF constitution. It has long been held in matters before the CAS that where a regulation is inconsistent with a higher-ranking legal rule, such as a constitutional principle or the Olympic charter, the CAS must

127. It's been shown in a study that male pole vaulters and hammer throwers had lower testosterone than the male sprinters. That means that the study shows high levels of testosterone was affecting male and female athletes differently, depending on the event. See Eric Niler, *Testosterone Ruling for Athletes Fuels Debate Over 'Natural' Ability*, WIRED (May 1, 2018), available at <https://www.wired.com/story/testosterone-ruling-for-athletes-fuels-debate-over-natural-ability/> (last visited Mar. 6, 2019).

128. BAVINGTON, *supra* note 3, at 97 ("The IAAF Medical Manager may initiate a confidential investigation of any female athletes if he/she has reasonable grounds for believing that a case of hyperandrogenism may exist. The IAAF Medical Manager's reasonable grounds for belief in a case may be derived from any reliable source.")

129. See WORLD ATHLETICS, *supra* note 34.

130. *IAAF Rules to Limit Testosterone Levels for Female Runners*, U.S. NEWS (Apr. 26, 2018), available at <https://www.usnews.com/news/sports/articles/2018-04-26/iaaf-rules-to-limit-testosterone-levels-for-female-runners> (last visited Jan. 29, 2019).

131. BAVINGTON, *supra* note 3, at 84.

declare the regulation invalid.¹³² Here, the arguments that follow discuss how the regulations are in direct violation of the Olympic charter and therefore should be invalidated.

B. The Hyperandrogenism Regulations Violate the Olympic Charter and Should Be Declared Void.

The issue is whether the 2018 IAAF regulations are inconsistent with the Olympic charter, a higher-ranking legal rule. The relevant fundamental principles of Olympism in the Olympic charter provide: the goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity; the practice of sport is a human right.¹³³ Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play; the enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, color, sex, sexual orientation, language religion, political or other opinion, national or social origin, property, birth or other status.¹³⁴

The practice of sport is a human right, yet this right is infringed upon while undergoing investigation by the IAAF. Here, without conclusive evidence of her having done anything wrong, Semenya was banned from further competition for almost a year, simply because her testosterone levels and outward appearance did not fit into society's ideal of feminism.¹³⁵ Therefore, she was denied access to an established human right. In addition, one of the stated goals of the Olympic charter is to preserve human dignity, but the actions taken by the IAAF when handling Semenya's case directly contradict that.¹³⁶ After recording record breaking times at national events, the IAAF made Semenya take a sexual verification test, which in and of itself is already degrading, as

132. See *Football Fed'n Iran (IRIFF) v. Féd'n Int'l de Football Ass'n (FIFA)*, Award, Nov. 4, 2009, CAS 2008/A/1708; see also *United States Olympic Committee (USOC) v. Int'l Olympic Comm. (IOC)*, Award, Oct. 4, 2011, CAS 2011/O/2422.

133. *Olympic Charter*, *supra* note 13.

134. *Id.*

135. The IAAF initially banned Semenya from further competition, and it only cleared Semenya for future competition after an eleven-month ordeal and countless tests intended to provide guidance that would ultimately allow the IAAF to check a single box with satisfaction: female. *Athlete Semenya Cleared to Compete After Gender Test Controversy*, CNN (July 6, 2016), available at <http://www.cnn.com/2010/SPORT/07/06/athletics.semenya.cleared.to.run/> (last visited Feb. 28, 2019).

136. See *Olympic Charter*, *supra* note 13.

your sex is being questioned. Tests such as this are to be kept confidential, nevertheless, this was revealed to the media in 2009.¹³⁷

Furthermore, Caster Semenya is subjected to testing and scrutiny under these regulations, because she is a woman and no such scrutiny, testing, or regulation exists for men.¹³⁸ There is no objective procedure to determine whether an athlete does in fact have hyperandrogenism, these athletes are simply picked out to receive testing if they essentially look suspicious or have a masculine physique. As a result, this directly violates the principles set forth in the Olympic Charter that allow for all athletes to enjoy the freedoms and rights under this charter without discrimination of any kind, as this targets athletes' sex. Therefore, the 2018 regulations are inconsistent with the Olympic charter, a higher-ranking legal rule than an IAAF regulation and should thus be declared void.

C. The Regulations Target Female Athletes and Thus Are Discriminatory and Violate the IAAF Constitution.

Article 3 of the IAAF constitution sets out the objectives of the IAAF.¹³⁹ The applicable objectives in relation to discrimination and equal protection are: (1) to promote the sport of athletics and its ethical values as an educational subject and life affirming and life enhancing activity; (2) to encourage participation in athletics at all levels throughout the world regardless of age, gender, or race (3) to strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist or is allowed to develop in athletics in any form, and that all may participate in athletics regardless of their gender, race, religious or political views or any other irrelevant factor.¹⁴⁰

Establishing fair competition does not necessarily mean making athletes equal in every imaginable respect. The fact that certain females have higher testosterone levels can be argued as an irrelevant factor, which is stated in number 3 of the IAAF Constitution. All may participate in athletics regardless of their gender it states, unless you are Caster Semenya, a powerful athlete from a non-western country with slightly elevated testosterone levels. Here, Caster Semenya is being targeted

137. Phillips, *supra* note 82.

138. Jeré Longman, *Understanding the Controversy Over Caster Semenya*, N.Y. TIMES (Aug. 18, 2016), available at <https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html> (last visited Mar. 6, 2019).

139. Chand, *supra* note 1, ¶ 40.

140. *Id.*

because she enjoys a slight advantage from her natural genetic make-up, which should not be viewed differently from other natural advantages derived from exceptional biological variation.¹⁴¹ The 2018 regulations directly permit unfair discrimination against women athletes, as it is known that other male athletes are genetically different due to birth, yet their biological differences are celebrated, while female athletes are scrutinized and punished for being born different.

For example, Usain Bolt, an Olympic sprinter, has a genetic predisposition known as the fast twitch muscle and is significantly taller than all of his opponents.¹⁴² Due to the significant height difference, Bolt takes longer strides. More specifically, he takes 41 steps over an entire 100m race which allows him to leave his opponents, who take 43-50 steps throughout an entire race, in the dust.¹⁴³ Regardless, he is glorified for these differences that are advantageous to his performance, while female athletes like Caster Semenya are vilified as a result of her dominance. In fact, even with these known advantageous physical characteristics, Usain Bolt is classified as arguably the most naturally gifted athlete the world has ever seen.¹⁴⁴ This is due to his dominance in the 100m, 200m, and 4x100m relay race.¹⁴⁵ It is known that both Michael Phelps, a US swimmer, and Usain Bolt have some genetic predisposition that contributed to their success, yet they are celebrated and there are no such regulations that limit their abilities to compete in the sport.¹⁴⁶ In addition, Olympic swimmer Casey Legler admits to having a degenerative condition of connective tissue, which has symptoms such as long arms, big hands and large feet, all of which, coupled with discipline have contributed to her success as an Olympic swimmer. However, this has never been an issue that disallowed her from competition.¹⁴⁷

141. See Chand, *supra* note 1, ¶ 113, 116; see also BAVINGTON, *supra* note 3, at 79.

142. See Murray, *supra* note 106.

143. *Id.*

144. See *Usain Bolt Biography*, available at <http://usainbolt.com/bio/> (last visited Mar. 6, 2019).

145. See *id.*

146. Like other athletes who can slam dunk, play soccer like they are dancing, and win a record-breaking 28 gold medals, Semenya has elevated the bar of speed toward which all women runners can gaze, and hope to one day beat. Casey Legler, *Some Of Us Are Born This Way: Female Athletes and Testosterone Limits*, THE CUT (May 3, 2019), available at <https://www.thecut.com/2019/05/the-hypocritical-policing-of-caster-semenyas-body.html> (last visited July 5, 2019).

147. "These genetic advantages, coupled with discipline and hard work, made me unstoppable in the water. Michael Phelps has a similar naturally occurring advantage, and Ian Thorpe here in Australia was so well known and celebrated for how disproportionately big his feet were that his nickname was 'Flippers.' All of us, even me as an unruly, irreverent

Furthermore, male athletes with testosterone levels notably above the upper limit of the "normal" range of male testosterone are permitted to compete without having to satisfy any medical criteria, undergo any medical examination, or undergo treatment as a precondition to eligibility.¹⁴⁸

Here, however, female athletes exhibiting levels of testosterone that are not "normal" and present minimal advantage, are prohibited from competition by these regulations. As a result, these regulations are contrary to the IAAF constitution, and in no way encourage participation in the sport by females with this condition. In fact, the regulations are the opposite, and specifically discriminate against only woman athletes who uncoincidentally belong to non-western countries, therefore violating the IAAF constitution. The objective of the regulations is to create a level playing field yet, there has not been a rational connection made between the regulations and that objective since men are allowed to have naturally occurring characteristics that provide a competitive advantage without restrictions. Thus, only women athletes are being targeted because of their gender and these regulations are violative of the IAAF constitution and should be declared void.

D. The Regulations Violate Article 2 of the Universal Declaration of Human Rights

Article 2 states,

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.¹⁴⁹

Because there are no objective procedures to determine which athletes to subject to hyperandrogenism testing, this allows the IAAF to target specific female athletes.¹⁵⁰ "This regulation is about targeting and impeding a few exceptional women of color from the global south,

athlete, were celebrated. One difference I cannot help but notice between myself, Phelps, and Thorpe versus Caster, is whiteness." *Id.*

148. *Chand*, *supra* note 1, ¶ 114.

149. Universal Declaration of Human Rights, G.A. RES. 217A (III) U.N. DOC. A/810, AT ART. 2 (1948) (emphasis added).

150. See BAVINGTON, *supra* note 3, 148-49, 158.

especially Caster Semenya.”¹⁵¹ Because of society’s flawed ideal of what a woman should be and what characteristics she should possess, Caster Semenya is de-feminized to the point where the only explanation for her successes is that she is a man.

The IAAF chose to believe Semenya, a female runner from South Africa, could only improve her times as rapidly as she did, with an advantage, and the fact that she trained and worked hard could not be the answer.¹⁵² To the IAAF, these accomplishments by Semenya were so illogical that they jumped to the conclusion that she cannot be a woman and that she needed to undergo sex testing.¹⁵³ This is supported by the IAAF drafting the 2018 regulations to include hyperandrogenism testing and prohibitions on every event Caster Semenya participates in, even if their own flawed study did not concur.

On the other hand, Caucasian female athletes in other competitive sporting events, who dominate events similarly to Semenya, have not been subjected to degrading treatment that Semenya or Chand face. For example, Katie Ledecky, an Olympic swimmer from the U.S who is Caucasian, wins races by a larger margin than Semenya, and even produces times that would be competitive for elite men.¹⁵⁴ But Ledecky’s gender is never being scrutinized on international platforms, and there are no headlines classifying her as too “muscular” or stating “she is not a woman.”¹⁵⁵ Yet, here we are dealing with women from non-western countries dominating in their event similar to Ledecky, but are being heavily regulated and even prohibited from competition. Semenya’s coach John Irven stated in an interview that “as much as she needs athletics, South African Sports need her more,” and of course the IAAF

151. See Katrina Karkazis & Rebecca Jordan-Young, *The treatment of Caster Semenya shows athletics’ bias against women of colour*, THE GUARDIAN (Apr. 26, 2018), available at <https://www.theguardian.com/commentisfree/2018/apr/26/testosterone-ruling-women-athletes-caster-semenya-global-south> (last visited Jan. 29, 2019); see also Huber, *supra* note 46.

152. The decade in the making legal standard announced boils down to Caster Semenya can’t run because she has the characteristics of Caster Semenya. In other words, she’s just too good, so she must be stopped in some way. Dennis Young, *The Only Point Of Track’s Dumb New Testosterone Rules Is To Make It Illegal To Be Caster Semenya*, DEADSPIN (Apr. 26, 2018), available at <https://deadspin.com/the-only-point-of-track-s-dumb-new-testosterone-rules-i-1825546141> (last visited Mar. 3, 2019).

153. SAMUELS, *supra* note 63.

154. Emma Gray, *Stop Attributing The Success Of Women Olympians To Men*, HUFF POST (Aug. 8, 2016), available at https://www.huffingtonpost.com/entry/women-olympians-dont-need-men-to-be-badass_us_57a87489e4b03ba68012ccbb (last visited Mar. 3, 2019).

155. *Id.*

could not have such an athlete from a nonwestern country dominating.¹⁵⁶

The IAAF is no stranger to targeting successful female runners from non-western countries.¹⁵⁷ For example, Dutee Chand, the first runner to challenge these discriminatory regulations, is an Indian runner who grew up below the poverty line, and at age eighteen became the face of India as it related to women's track and field.¹⁵⁸ In addition, Semenya was an unknown runner from a rural village in South Africa which is referred to as "nowhere."¹⁵⁹ She ran with a rural running club that was impoverished and could not provide equipment or even shoes to its runners. Certainly, athletes from countries such as the United States or Germany would not be practicing under these conditions or running into these types of issues. The logical conclusion is that runners from Western countries with access to better opportunities have their athletes come out on top every time, yet these women completely shatter that notion.¹⁶⁰ Nevertheless, within a year of official racing Semenya became a powerhouse and put South African track on the map, by winning a gold medal in the 800m at the 2009 Berlin games.¹⁶¹

Specifically, South African runner Semenya and Indian runner Chand are both female athletes from non-western countries who were chosen to be subjected to these tests through speculative observations. Both runners are young talented women who burst into the international spotlight by winning events that they were not expected to at such a young age, representing countries that are not usually standing on the winning podiums at these competitions.¹⁶² After winning a gold medal

156. Ben Smith, *Caster Semenya: 'What I Dream of is to become Olympic Champion'*, BBC (May 19, 2015), available at <https://www.bbc.com/sport/athletics/32805695> (last visited July 24, 2019).

157. Santhi Soundarajan, was a 25-year-old Track and Field runner from southern India. In 2010, she dominated in the 800m and the media noted her success was even more impressive given her roots as a member of India's impoverished "untouchable caste." The media noted that she wasn't just fast; she also had a deep voice and a flat chest. As a result, the athlete was subjected to a sex testing after her win, and her failed results were leaked to the media. She was subsequently rejected by the local sports federations, stripped of her silver medal, tormented by ongoing scrutiny and unbearably embarrassed, so she attempted suicide. Padawer, *supra* note 4.

158. *Id.*

159. Greene, *supra* note 10.

160. See Wilde, *supra* note 41; see also Schweinbenz, *supra* note 41; see also Minichino, *supra* note 41.

161. Greene, *supra* note 10.

162. Faith Karimi, *South Africa's Semenya makes Olympics debut 3 years after gender firestorm*, CNN (Aug. 8, 2012), available at <https://www.cnn.com/2012/08/08/world/europe/olympics-semenya-debut/index.html> (last visited Mar. 3, 2019).

in the women's 800m at the 2009 world championship, complaints arose regarding Semenya's masculine physique. A comment was also made stating "these kinds of people should not run with us... For me, she is not a woman. She is a man."¹⁶³ This hatred towards female athletes that do not fit into the societal definition of what a woman is, which is perpetuated even by other women, contributes to the stigma that female athletes have to be and look a certain way. This shows that she is being targeted directly because of her gender and possibly because of where she is from, and the IAAF feeds into these stereotypes through subjecting these females to discriminatory regulations.

The area in which Semenya is from is a poor rural community where she would not have access to qualified doctors to enhance her performance by changing her gender identity, nor would they be able to subject her to testing to decrease testosterone and bring it within the range of the IAAF regulations.¹⁶⁴ In addition, when these regulations were first published in 2011, it was reported that the only athletes impacted by these testosterone regulations were four female athletes ages eighteen to twenty-one that were from rural regions developing countries.¹⁶⁵ These women were taken away to France for invasive evaluations.¹⁶⁶

However, the only two women who have challenged these regulations were Chand and Semenya.¹⁶⁷ Semenya and Chand are not the only successful female runners from non-western countries who are experiencing issues because of these discriminatory regulations.¹⁶⁸ Once Chand found out about Semenya she stated, overwhelmed with emo-

163. Ariel Levy, *Either/Or: Sports, sex, and the case of Caster Semenya*, NEW YORKER (Nov. 30, 2009), available at <https://www.newyorker.com/magazine/2009/11/30/eitheror> (last visited Feb. 2, 2019); see White, *supra* note 47.

164. TSHISALIVE, *When I pee, I pee like a woman, says Caster Semenya*, TIMES LIVE (July 25, 2017), available at <https://www.timeslive.co.za/tshisa-live/tshisa-live/2017-07-25-when-i-pee-i-pee-like-a-woman-says-caster-semenya/> (last visited Feb. 3, 2019).

165. *Id.*

166. Juliet Macur, *Fighting for the Body She Was Born With*, N.Y. TIMES (Oct. 6, 2014), available at <https://www.nytimes.com/2014/10/07/sports/sprinter-dutee-chand-fights-ban-over-her-testosterone-level.html> (last visited Feb. 3, 2019).

167. Much of the debate about female athletes and hyperandrogenism has focused on Semenya, winner of the 800m at the 2012 and 2016 Summer Olympics. See Longman, *supra* note 138.

168. Young, *supra* note 152. At the London Olympics, four female athletes all eighteen to twenty-one years old and from rural areas of developing countries, were flagged for high levels of natural testosterone. Each of them subsequently had surgery to remove internal testes, which produce testosterone, as well as procedures such as feminizing vaginoplasty, estrogen replacement therapy and a reduction in size of the clitoris.

tions, "Look, I'm not alone. There are other people like me."¹⁶⁹ Unfortunately, the fact that there are others like Chand seems to be the problem, and the IAAF as well as the IOC stated it as such.¹⁷⁰ They fear that nations will go out and find 'these women' that are like Caster Semenya, muscular and powerful that do not fit in with western societies feminine ideal where women are supposed to be dainty and petite.¹⁷¹ Furthermore, the regulations have only impacted the careers of two female athletes from non-western countries, and the 2018 regulations specifically were drafted to target Caster Semenya, and prevent her from running the 400, 800, and 1500m.¹⁷² As previously stated the science indicates that the category of hammer throw, which is dominated by throwers of a western country, provides the most competitive advantage for females with hyperandrogenism, yet these events are not regulated. On the contrary, here, Semenya's main events show that females with hyperandrogenism have very minimal competitive advantages but are extensively regulated.

These regulations make a distinction between female and male athletes, specifically only targeting female athletes for a naturally occurring difference, as well as target runners succeeding from non-western spaces and thus is violative of Article 2 of the universal declaration of human rights. As a result, the regulation should be declared void.

VI. THE REGULATIONS SUBJECT CASTER SEMENYA TO INHUMAN¹⁷³ AND DEGRADING TREATMENT AND VIOLATE ARTICLE 5 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁷⁴ To degrade is to cause a loss of self-respect or to humiliate, both of which happened to Dutee Chand as well

169. Macur, *supra* note 166.

170. See Conference on the Eligibility to Participate in Women's Sports, available at https://www.up.ac.za/tukssport/news/post_2723776-invitation-to-a-conference-on-eligibility-to-participate-in-womens-sport (last visited Aug. 1, 2019).

171. See *id.*

172. Niler, *supra* note 127.

173. "I will not allow the IAAF to use my body again. The IAAF used me in the past like a human guinea pig to experiment with how the medication they required me to take would affect my testosterone levels." Kate Seamons, *Caster Semenya: They Used Me Like A 'Guinea Pig.'* NEWSER (June 18, 2019), available at <https://www.newser.com/story/276703/caster-semenya-they-used-me-like-a-guinea-pig.html> (last visited Aug. 1, 2019).

174. Universal Declaration of Human Rights, *supra* note 149.

as Caster Semenya at the hands of the IAAF.¹⁷⁵ For example, news that Semenya was required to take a sex verification test was revealed immediately after she won gold at the World Athletics Championship.¹⁷⁶ The IAAF said it had ordered gender tests because of Semenya's muscular build and rapid improvement in times which prompted doping concerns.¹⁷⁷

The IAAF stated that the tests were required not because of doping concerns but because the sporting body wanted to determine whether she had an "unfair advantage."¹⁷⁸ As a result, instead of attending what is normally the celebratory news conference after such an incredible feat, Semenya was forced into hiding, as fellow athletes, and various commenters on social media had a field day questioning her gender.¹⁷⁹ Because of the leaked test results, Semenya was highly scrutinized and criticized across an international platform. Comments were made regarding her body, muscular physique, her deep voice, her flexed biceps pose, and her choice in wearing long shorts to run in, instead of the sexist bikini shorts traditional women runners are supposed to compete in.¹⁸⁰ Furthermore, media outlets wrote stories with headlines such as "Could This Women's World Champ Be A Man?"¹⁸¹

In addition, after being subjected to invasive sex testing by doctors, Chand faced immense pressure to either change her body to conform to the rules or quit the sport.¹⁸² "I cried for three straight days after reading what people were saying about me. They were saying, 'Dutee: Boy or girl.'"¹⁸³

In turn, this contributes to their athletic experiences' amounting to failures because they didn't conform to traditional notions of femininity that are expected of female athletes.¹⁸⁴ This psychological and physical disturbance all being pushed upon seventeen year-old Chand, a young Olympian simply trying to put her country on the athletic map as well as

175. See Macur, *supra* note 166; see Padawer, *supra* note 4.

176. Padawer, *supra* note 4.

177. *Id.*

178. *See id.*

179. *Id.*

180. *Id.*; Jackson, *supra* note 29.

181. Padawer, *supra* note 4.

182. *See id.*

183. Macur, *supra* note 166.

184. Greene, *supra* note 10.

do what she loves.¹⁸⁵ “It’s been eight years since Caster Semenya was subjected to gender verification tests that made international headlines, but for the athlete, the pain and humiliation is etched in her memory.”¹⁸⁶ In fact, Semenya spoke out and stated during this process that “I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being.”¹⁸⁷ In addition, at the London Olympics in 2012, an opponent of Semenya’s, Mariya Savinova, questioned Semenya’s gender with a dismissive, “[j]ust look at her.”¹⁸⁸

The IAAF regulations regarding hyperandrogenism spell out the process of assessment for hyperandrogenism in meticulous detail, emphasizing confidentiality and professionalism at every step.¹⁸⁹ However, it is clear that from the IAAF’s breach of confidentiality regarding the athletes’ being subjected to sex tests contributed to the loss of respect from their competitors as well as deep humiliation.¹⁹⁰ Furthermore, the degradation did not just stem from Semenya’s competitors, but she was also forced to take heat from commentators who have commented things like she has a “package” swinging between her legs, or even going so far as to call Semenya an “it” or “he.”¹⁹¹ This is extremely cruel and degrading as well as damaging to Semenya’s career.

After it was revealed that Semenya would have to undergo sex testing, media outlets sensationalized this story. Some media outlets tried to “recuperate” Semenya by photoshopping here in more feminine clothes. For example, Semenya was featured in a cover story for the popular South African magazine *You*, in which they photoshopped her in a dress with makeup on and added various quotations regarding fem-

185. *Gender Tests To Remain Private Matter*, ESPN (Nov. 19, 2009), available at <http://www.espn.com/espnw/news-commentary/article/4669920/caster-semenya-keep-gold-gender-tests-remain-confidential> (last visited Feb. 2, 2019).

186. TSHISALIVE, *supra* note 164.

187. Padawer, *supra* note 4.

188. Andrew, *supra* note 62.

189. SAMUELS, *supra* note 63.

190. Semenya’s private life was headlining news for weeks after winning the 800m race in August 2009. She underwent gender- verification tests to prove she is a woman, and medical professionals leaked those results to the public. The International Association of Athletics Federation has invaded her privacy, broken confidentiality, and challenged her identity. Emily Cooper, *Gender Testing in Athletic Competition— Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. GENDER RACE & JUST. 233 (2010-2011).

191. Commentors have declared, “She looks like a bloke, sounds like a bloke, has more muscles than any female runner since the days of the East Germans and even seems to have a package swinging between her legs when ‘she’ runs.” See SAMUELS, *supra* note 63, at 201.

inity that Semenya had supposedly spoken as a reaction to the photo.¹⁹² For example, “I’d like to dress up more often and wear dresses, but I never get the chance; “I’d also like to learn to do my own makeup”; and “Now that I know what I can look like, I’d like to dress like this more often.”¹⁹³

It was never confirmed whether Semenya agreed to this, said any of these things, or actually felt that way, but it can be argued that this was done by a magazine from her home Country to combat the idea of her being a man, and to familiarize the world with a more feminine side of Caster Semenya. Contrarily, other media outlets focused on headlining photos of Semenya in baggy “boys” sporting clothes, no makeup, and cornrows.¹⁹⁴ To have your gender identity and sense of self questioned solely for being born with natural traits is truly degrading, humiliating and disheartening.¹⁹⁵ Even more so when you have to defend your sex on a global scale. In fact, Caster Semenya stated “it felt like the entire world had seen her stripped naked.”¹⁹⁶ All of this treatment, results from the implementation of these discriminatory regulations, and negates the purpose of the sport.

The only way around competing with hyperandrogenism was if they took hormone-suppressing drugs or had surgery to limit the amount of testosterone their bodies produced.¹⁹⁷ In an interview, Caster states “I was born like this and I don’t want any changes,” which makes it clear that these regulations are forcing her to change the way in which she was born.¹⁹⁸ While the Universal Declaration of Human Rights states that “No one shall be subjected to torture or to cruel, inhuman

192. *Id.* at 200.

193. *Id.*

194. Cornrows are an ancient traditional African style of hair grooming, in which the hair is braided very close to the scalp. It is a hairstyle traditionally worn by men, however depending on what part of the country you are in, it’s a style worn by men and women.

195. SAMUELS, *supra* note 63, at 200 (A story in 2009 asserting that leaked medical results showed that Semenya had “male sex organs and no womb or ovaries.”).

196. TSHISALIVE, *supra* note 164.

197. Caster and others have argued that the I.A.A.F.’s rules will force some women to undergo hormone therapy that could adversely affect their health; will be humiliating; will disproportionately affect women from developing nations who do not conform to Western standards of femininity; and will ultimately lead to some elite women quitting the sport.” Jeré Longman, *Track’s New Gender Rules Could Exclude Some Female Athletes*, N.Y. TIMES (Apr. 25, 2018), available at <https://www.nytimes.com/2018/04/25/sports/caster-semenya.html> (last visited Aug. 1, 2019).

198. *Caster Semenya Q & A: Who is she; what is DSD; why is her case important*, BBC (May 1, 2019), available at <https://www.bbc.com/sport/athletics/48114137> (last visited Aug. 1, 2019).

treatment or punishment”, here, the regulations require women who have a naturally occurring blood testosterone level higher than five nmol/L to have medically unnecessary hormone therapy to reduce their testosterone levels if they want to be eligible to compete in the female category.¹⁹⁹

More specifically, female athletes affected must take medication for six months before they can compete, then they must maintain a lower testosterone level.²⁰⁰ If women refuse to be tested or have hormone therapy, the regulations state that they may only compete in the male category or in a hypothetical, not-yet-created intersex category – both of which would expose women’s private sex characteristics to the global public.²⁰¹ Female athletes with elevated testosterone levels will essentially face a “choice of no choice.”²⁰² But to force them to take hormone suppressing drugs infringes on these athlete’s physical integrity, their rights to economic freedoms and goes against the respect that should be had for one’s human dignity.²⁰³ Furthermore, it can potentially be medically unsafe to medicate someone who is not in need of medication. Semenya felt the effects of the unnecessary medication and stated “I was constantly sick” as she was forced to take an avoidable drug that was not needed to function in her everyday life.²⁰⁴ “A medical treatment is only justified when there is a medical need, and the mere existence of an intersex condition, without the person indicating suffering and expressing the desire for an adequate treatment, does not constitute a medical indication.”²⁰⁵ It is ethically, morally and scientifically unacceptable and should be impermissible to force female athletes to alter their bodies with drugs, particularly when drug usage is explicitly banned from the sport.²⁰⁶ It has been declared that the practice of sport is a human right, and being forced to undergo medically invasive treatments in order to participate in this sport, is a violation of Article 5 of

199. Universal Declaration of Human Rights, *supra* note 149.

200. See Laurel Wamsley, *Court Rules Against Caster Semnya, Says She Must Lower Testosterone to Compete*, NPR (May 1, 2019), available at <https://www.npr.org/2019/05/01/719119864/court-rules-against-caster-semenya-says-she-must-lower-testosterone-to-compete> (last visited Aug. 1, 2019).

201. Longman, *supra* note 138.

202. *See id.*

203. *S. African Athlete Semenya Appeals Testosterone Ruling*, VOA (May 29, 2019), available at <https://www.voanews.com/arts-culture/s-african-athlete-semenya-appeals-testosterone-ruling> (last visited Aug. 1, 2019).

204. Seamons, *supra* note 173.

205. *Id.*

206. *See id.*

the universal declaration of human rights.²⁰⁷ As a result, the regulations should be declared void.

A. The IAAF Regulations Arbitrarily Interfered with Caster Semenya's Privacy and Violate Article 12 of the Universal Declaration of Human Rights

The issue is whether 2018 hyperandrogenism regulations violate Article 12 of the universal declaration of human rights. "No one shall be subjected to *arbitrary interference with his privacy*, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."²⁰⁸ The IAAF has regulations that allow for its members to subject female athletes to testing based on "reasonable grounds" which leaves the organization free reign to discriminate against these female athletes solely because they are not fitting into society's requirements of femininity.²⁰⁹ In fact, the IAAF regulations relied on deeply problematic stereotypes such as having a "deep voice" to identify athletes with intersex variations, and the 2018 regulations make no mention of criteria for identifying these athletes.²¹⁰ Women that have hyperandrogenism, which means they have higher testosterone levels, have characteristics that are not socially and culturally accepted as feminine. Although the IAAF wanted the world to believe that Semenya was being tested due to her rapid progression within a short amount of time, it is known that there is a specific ideal for appearance of a female athlete. Drug testing regulations focusing on testosterone levels leave women with high testosterone levels that result in "male like" characteristics as targets of suspicion.²¹¹ Here, complaints were raised regarding Semenya because of her "masculine appearance" and this triggered her being subjected to sex testing that proved she had hyperandrogenism.²¹²

207. See Longman, *supra* note 138; see also *Olympic Charter*, *supra* note 13.

208. Universal Declaration of Human Rights, *supra* note 149 (emphasis added).

209. BAVINGTON *supra* note 3, at 9.

210. *Revoke Discriminatory Athletics Gender Regulations: New Athletics Federation Rules Force Women With Intersex Variations Out of Competition*, HRW (July 26, 2018), available at <https://www.hrw.org/news/2018/07/26/revoke-discriminatory-athletics-gender-regulations> (last visited Mar. 3, 2019).

211. Olsen-Acre, *supra* note 15; see Cooky, *supra* note 23.

212. It was made quite from the outset that Semenya's "masculine" appearance was the main reason that she was challenged. Press coverage included many pictures of her at competitions, and her "deep voice and masculine physique," were widely discussed in the media and the blogosphere. Samuels, *supra* note 63; see also White, *supra* note 47.

There is no objective procedure for determining which female athletes to subject to hormone testing. Relying on stereotypes and visual observations to determine which runners should be subjected to these tests is in and of itself arbitrary and violative of Article 12 of the Universal Declaration of Human Rights. In addition, Dutee Chand was pulled from the Commonwealth games at the last minute, because a competitor at the Asian Junior Athletics championship where Chand had won two gold medals requested that she be tested because of her recent success and masculine physique.²¹³

It was only after she was arbitrarily subjected to a blood exam upon many other invasive tests, was it determined that Chand did in fact have hyperandrogenism.²¹⁴ Similarly, here, it was only after Semenya was arbitrarily subjected to testing and gender verification that it was confirmed she had hyperandrogenism. As previously stated, it was leaked that the reason the IAAF had ordered gender tests for Caster Semenya was because of her muscular build.²¹⁵ In fact, details about the testing procedures and purported results were usually reported in the media before they were even communicated to Semenya.²¹⁶ Not only was her identity as a women analyzed and scrutinized on international platforms, but to top it off, while her reputation is being dragged through the mud, communication between the IAAF and Semenya was slim to none, often leaving Semenya's focus glued to the television to determine what was going on with the testing status.²¹⁷ The fact that the information regarding the investigation into her gender identity was made public, especially since the results had not yet concluded, subjected her to public humiliation, and constitutes an arbitrary interference with her privacy, as well as a direct attack on her honor and reputation, as the tests were only requested due to subjective comments made about her.²¹⁸ Therefore, violating Article 12 of the Universal Declaration of Human rights, and the regulations should be declared invalid.

213. *See Macur, supra* note 166.

214. *Id.* Unlike in any previous sex testing, the fact of the testing was made public at the outset, and for the next year Semenya's story unfolded worldwide in excruciating detail. *See also SAMUELS, supra* note 63.

214. *Id.*

215. *See Macur, supra* note 166.

216. The day before the Berlin championship, Semenya was found glued to the television's coverage about the announced sex tests: "and they were talking about her and she's trying to understand what they're saying. Because nobody has spoken to her, to tell her, look this is what these tests might mean.") SAMUELS, *supra* note 63.

217. *Id.*

218. Hutchinson, *supra* note 44; Andrew, *supra* note 62.

VII. THE IAAF SUCCOMBS TO SOCIETAL PRESSURES OF REGULATING THE FEMALE BODY BY ALLOWING FOR THE IMPLEMENTATION OF DISCRIMINATORY PRACTICES²¹⁹

On May 1, 2019 the IAAF ruled that Caster Semenya would have to take hormones that would lower her naturally occurring testosterone levels in order to “ensure fair competition in women’s sports.”²²⁰ If she declines, the suppressants she cannot compete in the 800m race at the Olympics as well as other international competitions. Although CAS ruled in favor of the IAAF, it expressed obvious and significant concerns with the implementation of such an unfair and blatantly discriminatory regulation. CAS conveyed concerns about the practical application of the regulations as the implementation of such discriminatory regulations is on its face unfair. CAS explicitly expressed its worries that athletes might unintentionally break the strict testosterone levels set by the IAAF; questions about the advantage higher testosterone gives athletes over 1500m and the mile and the practicalities for athletes of complying with the new rules.²²¹ In fact, CAS suggested that the IAAF postpone the implementation of the regulations for the 1500m and mile run, as the science the IAAF relied on to pass this regulation is significantly flawed, so flawed other scientists called for the statistics to be retracted.²²² Furthermore, the World Medical Association stands firm against any practice requiring physicians to use their competence and skills for any other purpose than providing medical care in the best interest of their patients and in respect of their dignity,” and is in opposition of these regulations.²²³ As a result of the IAAF’s disregard of the lack of scientific confirmation, and the concerns CAS has expressed regarding the implementation of these regulations, it becomes clear that the IAAF is acting with discriminatory intent and targeting women from non-western countries. The IAAF continues to hide behind the notion that this discrimination is necessary and proportionate to protect fairness in women’s sports, however, in the absence of really compelling evidence, something discriminatory can in no way be justifiable.²²⁴ In ad-

219. Legler, *supra* note 146.

220. *Id.*

221. *See id.*

222. Jackson, *supra* note 29.

223. *Physician Leaders Reaffirm Opposition to IAAF Rules*, WORLD MED. ASS’N (May 15, 2019), available at <https://www.wma.net/news-post/physician-leaders-reaffirm-opposition-to-iaaf-rules/> (last visited July 24, 2019).

224. *AP Explains: Ruling Against Olympian Caster Semenya*, VOA (May 1, 2019) available at <https://www.voanews.com/arts-culture/ap-explains-ruling-against-olympian-caster-semenya> (last visited July 24, 2019).

dition, the makeup of the board determining these decisions suggests that the IAAF is acting based on discriminatory motives. The fact of the matter is the makeup of the council is not representative of the diverse group of athletes the IAAF is making decisions about.²²⁵

A. The IAAF's Discriminatory Regulations Continue to Target Female Runners from Non-Western Countries

Thus far, these hyperandrogenism regulations have only impacted rising female athletes from nonwestern countries. Most recently, Burundi's Francine Niyonsaba, and Kenya's Margaret Wambui have come under scrutiny after winning silver and bronze behind Caster Semenya in the 2016 Olympics.²²⁶ The fact of the matter is, Wambui and Niyonsaba both have hyperandrogenism, but only after their dominating performances are their bodies being scrutinized.²²⁷ Francine Niyonsaba put Burundi on the map, by finishing second behind Caster Semenya's record breaking times in the 800m at the world championships in 2016 and 2017. Niyonsaba's times and dominating performances slate her as Caster Semenya's closest rival.²²⁸ Again the argument that forcing some women with naturally occurring conditions to take medication, or undergo surgery is not done to ensure fairness in sport, but rather is a tactic used to allow blatant discrimination against female runners from non-western countries. Ironically, no Caucasian female athletes have come under scrutiny since the proposal of these hyperandrogenic regulations. Or are there cases that the IAAF has chosen to ignore? The IAAF has records that show numerous athletes who have this condition but has never identified them because confidential medical details are involved. However, we know that the IAAF has made clear that they actually do not care about confidentiality when it comes to medical records, as shown by their actions in leaking Caster Semenya's "confiden-

225. The ruling party of the CAS (the body that litigates grievances brought by athletes to the IAAF and who submitted the final ruling) has 19 members, nine women, only one of whom is a black woman. The majority of the judges are from the global north, almost all of whom have been educated in a former colonial empire like the U.K.

226. Morgan, *supra* note 87.

227. This ruling is very unfair," she said. "I have grown up knowing that I want to do athletics as a career and achieve a lot through it. Why wait for me to establish myself as an 800-meter athlete then tell me that I need to take medication to compete in the same event? *Another female Olympic athlete slams testosterone rules, refuses medication*, NBC (May 22, 2019), available at <https://www.nbcnews.com/news/sports/another-female-olympic-athlete-slams-testosterone-rules-refuses-medication-n1008691> (last visited July 24, 2019).

228. *Burundi's Francine Niyonsaba reveals she has 'hyperandrogenism,' REGION WEEK* (Apr. 18, 2019), available at <https://regionweek.com/burundis-francine-niyonsaba-reveals-she-has-hyperandrogenism/> (last visited Aug. 1, 2019).

tial” medical details. What evidence is there to dispute the clear racial argument to be made here; which is that the IAAF may be keeping these records confidential in order to protect white female runners from western countries? This argument is based on the direct actions of the IAAF which show that leveling the playing field is not the primary concern, and in fact these regulations hold a discriminatory intent.

VIII. RULING SUSPENDED

As a result, on June 3, 2019, the federal supreme court of Switzerland ordered the IAAF to immediately suspend the implementation of the eligibility regulation against Caster Semenya, allowing her to compete without restriction in the female category while her appeal is pending.²²⁹ This temporary ruling will stand until the IAAF makes submissions to the court on why the regulations should be kept in place.²³⁰ Semenya has appealed to the Supreme court to permanently overturn the rules, but there has not yet been a date set for this hearing.²³¹

IX. CONCLUSION: THE 2018 HYPERANDROGENISM REGULATIONS ARE DISCRIMINATORY ON THEIR FACE AND IN EFFECT, AND THUS SHOULD BE INVALIDATED

Because of society’s narrow definition for what is “normal” for the female body, women like Caster Semenya, who do not exhibit characteristics that fit this definition are severely scrutinized. The IAAF intentionally targeted not only Indian runner Dutee Chand in 2015, but also South African 800m runner Caster Semenya for discriminatory reasons focused on their masculine physique as female athletes, as well as the non- western countries they represent.²³² The IAAF relies merely on stereotypes and profiling when identifying which athletes may potentially have hyperandrogenism, and thus in effect, these regulations are discriminatory in nature and a violation of international human rights. Protecting the fairness within the sport is an important and legitimate objective, but it cannot be achieved through the discriminatory means of these regulations the IAAF has implemented. These regulations, as

229. *Caster Semenya IAAF ruling suspended*, eNCA (June 3, 2019), available at <https://www.enca.com/news/caster-semenya-iaaf-ruling-suspended> (last visited Aug. 1, 2019).

230. *Semenya lawyers: IAAF ordered to suspend testosterone rules* (June 3, 2019), available at <https://www.foxnews.com/world/semenya-lawyers-iaaf-ordered-to-suspend-testosterone-rules> (last visited July 31, 2019).

231. *Id.*

232. The questioning of Semenya’s gender is based on stereotypic views of the physical features and abilities attributable to women. Such stereotypes demonstrate the extend of patriarchy within the world’s sporting community. Cooper, *supra* note 190.

written and in application, single out and punish women simply because they were born different; they punish these athletes for something they cannot control and will only allow them to compete if they undergo medically invasive treatment, none of which are fair options. Furthermore, there are no such standards for men, which directly corroborates the IAAF's discriminatory intent to target Caster Semenya, a non-western runner who doesn't fit into society's feminine ideal. As a result, the 2018 Hyperandrogenism regulations are discriminatory and should be declared invalid.