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Equal Protection for Equal Play: A Constitutional Solution to Gender Discrimination in International Sports

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Equal Protection for Equal Play: A Constitutional Solution to Gender Discrimination in International Sports

ABSTRACT

This Note considers the extent of gender discrimination in international sports, providing an overview of gender discrimination in sports and detailing the inadequacies of current statutory remedies. Additionally, this Note describes why constitutional remedies are unavailable for these athletes, highlighting a 1987 Supreme Court case holding that sports governing bodies are not state actors. This Note proposes overruling that case to hold instead that international sports governing bodies are state actors and are, therefore, subject to the provisions in the US Constitution. Under this solution, international athletes could bring gender discrimination claims against these bodies under an equal protection rationale.

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Megan Rapinoe is one of the most elite women's soccer players in the world. In addition to being named to the US Women's National Team (USWNT) roster for over ten years, she was also a key part of the team that won the FIFA Women's World Cup title in 2015, the most prestigious title in women's soccer.¹ However, just months after this historic win for the US team, Rapinoe suffered a serious injury—a tear of her ACL in her right knee—that sidelined her from the game for months.² She suffered the injury due to a subpar training field with poorly maintained grass and dangerous conditions all along the pitch.³ The team was scheduled to play a match two days later; however, they decided to cancel because of player safety concerns.⁴ In the stadium where the game was to be held, there were sharp rocks lining the field and the turf was pulling up from the ground.⁵ In a tough decision, the team decided to forfeit the game to avoid the risk of losing another elite player like Rapinoe.⁶

Rapinoe's injury would not have happened if she were male—male players also suffer ACL injuries, but they are not attributable to subpar or dangerous playing conditions. While men's teams are never forced to play on turf—an inherently rougher surface than grass, leading to more injuries—women frequently play games on turf fields.⁷ Even for the biggest tournament in women's soccer, the World Cup, the women played every game on turf surfaces.⁸

Unequal playing conditions are only the start of the unequal treatment the US women's soccer team faces compared to the men's team. The organization does not afford the women the same travel accommodations as the men—the men fly business class and stay at luxury hotels, while the women fly coach and rent much cheaper

1. See *Megan Rapinoe*, U.S. SOCCER, <https://www.ussoccer.com/players/r/megan-rapinoe#tab-2> [<https://perma.cc/886Z-3DZU>] (last visited Dec. 20, 2017); see also *Megan Rapinoe*, TEAM USA, <https://www.teamusa.org/us-soccer/athletes/Megan-Rapinoe> [<https://perma.cc/VGQ4-QFWR>] (last visited Dec. 20, 2017).

2. *Megan Rapinoe Tears ACL During Training; No Time Frame for Recovery*, ESPN (Dec. 5, 2015), <http://www.espn.com/espnw/news-commentary/article/14295384/midfielder-megan-rapinoe-tears-acl-right-knee> [<https://perma.cc/C564-KH5C>].

3. USWNT, *Equal Footing*, PLAYERS' TRIBUNE (Dec. 7, 2015), <http://www.theplayertribune.com/uswnt-match-canceled-field-conditions/> [<https://perma.cc/Q8YA-DNVF>].

4. *Id.*

5. *Id.*

6. See *id.*

7. Eliana Dockterman, *U.S. Women's Soccer Team Refuses to Play on Turf*, TIME (Dec. 8, 2015), <http://time.com/4140786/womens-soccer-team-turf/> [<http://perma.cc/9PQA-P35F>].

8. See *U.S. Women's Team Files Wage-Discrimination Action vs. U.S. Soccer*, ESPN (Apr. 1, 2016), <http://www.espn.com/espnw/sports/article/15102506/women-national-team-files-wage-discrimination-action-vs-us-soccer-federation> [<http://perma.cc/99XX-E2MP>].

lodgings.⁹ Perhaps the largest indicator of the inequity the women's team faces is pay disparity.¹⁰ While the women only earn money (around \$1,350 per player) if they win a match, the men make \$5,000 per player when they *lose* and upwards of \$17,000 for a win.¹¹ When the women's team won the World Cup in 2015, the entire team received \$2 million; the US men's team, who finished in eleventh place in the Men's World Cup, received \$9 million.¹²

The US Soccer Federation (US Soccer)¹³ and others try to justify the disparate treatment by claiming that the women's team does not bring in as many viewers or as much revenue as the men's team.¹⁴ However, the Women's World Cup final averaged 25.4 million viewers in the United States, the most for *any* soccer game, male or female, in the country.¹⁵ As for profits, in 2015, the women's team earned US Soccer \$6.6 million while the men's team earned less than \$2 million.¹⁶ In 2016, US Soccer projected the women's team would draw a profit of over \$5 million while the men's team was projected to *lose* \$1 million.¹⁷

In March 2016, five members of the USWNT filed a complaint against US Soccer seeking equal pay and an investigation into

9. Chloe Schama, *Women's Soccer Is Done Playing Nice*, ELLE (July 6, 2016), <http://www.elle.com/culture/career-politics/a37386/womens-soccer-equal-pay> [<http://perma.cc/9U34-STB7>].

10. See Grant Wahl, *USWNT Stars Accuse U.S. Soccer of Wage Discrimination in EEOC Filing*, SPORTS ILLUSTRATED (Mar. 30, 2016), <http://www.si.com/planet-futbol/2016/03/31/uswnt-eoec-wage-discrimination-equal-pay> [<http://perma.cc/76KX-SCLS>].

11. See *id.*

12. Kerry Close, *Here's How Poorly Female Soccer Players Are Paid Compared to Men*, TIME: MONEY (Mar. 31, 2016), <http://time.com/money/4277843/us-womens-soccer-equal-pay/> [<http://perma.cc/E573-V62H>].

13. US Soccer is "the governing body of soccer in all its forms in the United States," including both the women's and men's national teams. *U.S. Soccer Reaching New Heights*, U.S. SOCCER, <http://www.ussoccer.com/about/about-us-soccer> [<http://perma.cc/XYV6-D4E9>] (last visited Dec. 21, 2017).

14. Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), <http://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-loyd-alex-morgan-hope-solo-complain.html> [<http://perma.cc/4GKF-XL5K>].

15. Richard Deitsch, *USA-Japan Women's World Cup Final Shatters American TV Ratings Record*, SPORTS ILLUSTRATED (July 6, 2015), <http://www.si.com/planet-futbol/2015/07/06/usa-japan-womens-world-cup-tv-ratings-record> [<https://perma.cc/9KX9-MKNK>].

16. Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html?mcubz=2> [<http://perma.cc/D9KM-46C6>].

17. *Id.*

discriminatory actions.¹⁸ While the complaint filed by members of the USWNT provides a good example highlighting the issues, discrimination against female athletes occurs across a broad range of sports.¹⁹ Most troubling is that these women cannot turn to the US Constitution for relief because the perpetrators of the discrimination are organizations the Supreme Court has deemed to be private actors.²⁰ In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, the Court held that US sports governing bodies (in that case, the US Olympic Committee) are not “state actors” and are, accordingly, not governed by the restrictions in the Constitution.²¹ Rather, these governing bodies are private actors subject only to restrictions in federal and state statutes.²²

It is hypocritical that the United States holds these athletes out as representatives, yet the athletes cannot turn to the country’s founding document for relief when they are unfairly discriminated against because of their gender. Dissenting in *San Francisco Arts & Athletics*, Justice Brennan argued that an entity that is endowed by the state with functions governmental in nature should be classified as a state actor.²³ His argument centered around the fact that US sports governing bodies portray themselves as representatives of our nation and, thus, perform a traditional government function.²⁴ If classified as state actors, these governing bodies would be subject to the restrictions of the Constitution.²⁵

One of the most important protections of the Constitution that would affect sports governing bodies is the Equal Protection Clause of the Fourteenth Amendment and the corresponding equal protection

18. Juliet Spies-Gans, *USWNT Files Lawsuit Against U.S. Soccer in Fight for Equal Pay*, HUFFINGTON POST (Apr. 1, 2016), http://www.huffingtonpost.com/entry/uswnt-wage-discriminatory-suit-us-soccer_us_56fd33c3e4b0a06d5804ecac [<http://perma.cc/E57F-QL42>].

19. See, e.g., Michele Morris, *Olympic Gender Discrimination*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/michele-morris/olympic-gender-discrimina_b_461592.html [<http://perma.cc/S9D3-EKVF>] (discussing discrimination in the Olympics); *Serena Williams Slams Inequality and Discrimination in Open Letter*, CNN (Nov. 30, 2016, 6:37 AM), <http://www.cnn.com/2016/11/30/tennis/serena-williams-tennis-letter-equal-pay-discrimination/index.html> [<http://perma.cc/UD4Z-D2EN>] (discussing discrimination faced by Serena Williams in professional women’s tennis); Jill Martin Wrenn, *Women’s Athletics a Battle for Respect*, CNN (Feb. 7, 2013, 11:28 AM), <http://www.cnn.com/2013/02/06/living/women-in-sports/index.html> [<http://perma.cc/CX7M-YWJG>] (highlighting discrimination in women’s basketball).

20. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543–47 (1987).

21. *Id.* at 542–43, 547.

22. See *id.*

23. *Id.* at 548–49 (Brennan, J., dissenting).

24. *Id.* at 550.

25. *Id.* at 549, 556, 560.

component of the Fifth Amendment's Due Process Clause.²⁶ Specifically, these governing bodies could be subject to gender discrimination claims brought by female athletes as a violation of their right to equal protection of the laws. Women need to have this protection to remedy discrimination because the current venues for relief for a gender discrimination claim in sports are inadequate.

Part I of this Note discusses the history of gender discrimination within sports and current venues for relief, using the USWNT's current lawsuit to exemplify these concepts. Part II discusses why those current venues for relief are inadequate and how new venues could arise if the Court classified international sports governing bodies as state actors. Part III proposes overruling *San Francisco Arts & Athletics* and classifying US sports governing bodies as state actors so that athletes who are discriminated against because of their gender may bring equal protection claims under the Constitution.

I. BACKGROUND

A. *History of Women's Participation in Sports and Gender Discrimination*

Athletic competitions began as traditionally all-male with women excluded entirely.²⁷ In the late 1800s and early 1900s—as women's rights began to progress—women began to participate in baseball, basketball, and gymnastics competitions but still to a much lesser degree than their male counterparts.²⁸ The first significant development for women in professional sports came in 1943 with the adoption of the All-American Girls Softball League.²⁹ Created to fill the void from men leaving to fight in World War II, the league eventually transformed into the All-American Girls Professional

26. See U.S. CONST. amends. V, XIV, § 1. Whether the challenged action falls into the Fifth or Fourteenth Amendment depends on whether the discrimination was perpetuated by a state or federal actor. See *id.*; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). While the Fifth Amendment does not explicitly address equal protection, the Supreme Court has held that the federal government is subject to the same equal protection standard under the Fifth Amendment as the states are through the Fourteenth Amendment. See *Bolling*, 347 U.S. at 499–500. For further discussion, see *infra* Part II.B.

27. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J. (Mar. 14, 2008), <http://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/> [http://perma.cc/L4M5-GEXX].

28. See *Timeline: A Brief History of Women's Team Sports in America*, PBS (July 17, 2001) [hereinafter *Timeline*], <http://www.pbs.org/pov/trueheartedvixens/timeline/> [http://perma.cc/VSQ7-VVDD].

29. *Id.*

Baseball League and was the sole source of baseball during a time when most of the male players were deployed.³⁰ The league seemed to be a substantial step for the women's sports movement, as it put female athletes at the forefront of a major sport; however, the league disbanded in 1954 after the war ended and the men returned.³¹

While the disbandment of the baseball league represented a setback for women's sports, the 1950s and 1960s saw the feminist movement take off.³² The movement motivated women to actively seek participation in arenas that were traditionally male dominated, including sports.³³ The push for equality in sports began at the collegiate level with women seeking equal access to participate and athletic programs that mirrored those offered to men.³⁴ In 1972, Title IX of the Education Amendments was passed.³⁵ Title IX prohibited discrimination or exclusion on the basis of sex by any educational program, including athletics, that received federal financial assistance.³⁶ At the collegiate level, this required any college or university receiving such funding to provide equal athletic opportunities to women.³⁷ While Title IX mandated equality in collegiate athletics, many colleges and universities questioned how to implement the requirements, and compliance was slow.³⁸ However, there was eventually progress stemming from Title IX, and in 1977, Brown University formed the first varsity women's soccer program.³⁹

The push for equality at the collegiate level helped open the door for women seeking the same equality and opportunities at the professional level.⁴⁰ In 1988, the American Women's Baseball Association formed in Chicago, boasting four teams.⁴¹ In 1991, China hosted the first FIFA Women's World Cup, where the US team won and sparked a new interest in the women's game.⁴² In 1996, there were two major steps for women's professional sports: (1) the debut of

30. Bell, *supra* note 27; *Timeline*, *supra* note 28.

31. See Bell, *supra* note 27; *Timeline*, *supra* note 28.

32. See Bell, *supra* note 27.

33. See *id.*

34. See *id.*

35. *Id.*; see also Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-88 (2012)).

36. See 20 U.S.C. § 1681(a) (2012).

37. See *Athletics*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/issue/athletics/> [http://perma.cc/ALG5-R8V2] (last visited Sep. 9, 2017).

38. *Id.*

39. *Timeline*, *supra* note 28.

40. See *id.*

41. *Id.*

42. *Id.*

women's soccer at the Olympic Games in Atlanta, Georgia, and (2) the formation of the Women's National Basketball Association (WNBA).⁴³ While these represented significant strides in the evolution of women's professional sports, discrimination against female athletes persisted as they were continuously viewed as inferior to their male counterparts.⁴⁴

One of the main reasons for this view of women as inferior in sports is the historically masculine nature of athletics.⁴⁵ Society deemed masculinity and toughness—thought to be attributable only to men—to be required qualities to participate in sports.⁴⁶ Traditional gender norms indicated that women who wanted to play sports were intruding in a world where they did not belong.⁴⁷ These restrictive gender norms expected women to have “beauty and grace” rather than athleticism or physical skill, and those who played sports were seen as defying gender roles that permeated society for centuries.⁴⁸

These gendered stereotypes translated into discrimination through less media coverage, poorer playing conditions, and pay inequalities. The media covers women's sports significantly less than it covers men's.⁴⁹ In a 2015 update to a twenty-five-year study of Los Angeles news stations conducted in 2014, thirty-two segments featured women's sports while 880 featured men's sports.⁵⁰ That same study found that “SportsCenter,” one of the most prominent segments for sports news, featured 376 stories on men's sports and only thirteen stories on women's sports.⁵¹ In that study, researchers stated that women's sports continue “to be covered in ways that convey the message to audiences that women's sport is less important, less exciting, and, therefore, less valued than men's sports.”⁵²

43. *Id.*

44. Joshua A. Senne, *Examination of Gender Equity and Female Participation in Sport*, SPORT J. (Feb. 26, 2016), <http://thesportjournal.org/article/examination-of-gender-equity-and-female-participation-in-sport/> [<http://perma.cc/AQD4-KZJK>].

45. *See id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Cheryl Cooky, Michael A. Messner & Michela Musto, “It’s Dude Time!”: A Quarter Century of Excluding Women’s Sports in Televised News and Highlight Shows, 3 COMM. & SPORT 261, 263–64, 267 (2015), cited in Catherine Taibi, *TV Ignores Women’s Sports Now More Than It Did 25 Years Ago*, HUFFINGTON POST (June 9, 2015), https://www.huffingtonpost.com/2015/06/08/womens-sports-tv_n_7535766.html [<http://perma.cc/HTQ9-5CNL>].

51. *Id.* at 267.

52. *Id.* at 264.

The amount of media coverage is not the only problem—there is also the issue of *how* the media portrays women in sports.⁵³ Although the coverage is rare, what does get covered often focuses on gendered stereotypes.⁵⁴ Media coverage frequently sexualizes women's sports with commentators focusing on athletes' appearance more than their athletic skill or ability.⁵⁵ One prominent example is the sexualization faced by Serena Williams, one of the most elite women's tennis players in the world.⁵⁶ After she won her sixth Wimbledon title, social media focused on her body, commenting that she was not feminine enough.⁵⁷ As she competed in the semifinals for yet another Wimbledon title the following year, the media focused on her outfit, claiming it was too tight and revealing.⁵⁸ Studies show that print references to female athletes comment on makeup, hair, or body shape while print journalists almost never make similar comments about male athletes.⁵⁹

Additionally, poorer treatment is evidence of discrimination against women in sports. Women are forced to play in venues inferior to the ones where men play.⁶⁰ Further, women's teams are not given the same treatment when it comes to publicity, travel, and other important expenditures.⁶¹ For example, female players for the US hockey team indicated that USA Hockey, the governing body, spends

53. Senne, *supra* note 44.

54. *Id.*

55. *Id.*

56. See Elizabeth Newman, *No Room for Body Image Criticism in Serena Williams' Grand Slam Chase*, SPORTS ILLUSTRATED (July 14, 2015), <http://www.si.com/tennis/2015/07/14/serena-williams-body-image-wta-tennis> [<http://perma.cc/57D6-XEW7>].

57. *Id.* Discussions focused on the fact that Williams is not white, skinny, and blonde like other female tennis greats such as Maria Sharapova or Caroline Wozniacki. *Id.*

58. Sabrina R. Perkins, *Serena Williams Facing Body-Shaming with Nike Outfit at Wimbledon*, ESSENCE (July 8, 2016), <http://www.essence.com/2016/07/08/serena-williams-facing-body-shaming-nike-outfit-wimbledon> [<http://perma.cc/B5P9-9VAK>].

59. Senne, *supra* note 44.

60. See, e.g., Laurent Dubois, *Artificial Turf Controversy a Constant in Backdrop of Women's World Cup*, SPORTS ILLUSTRATED (June 23, 2015), <http://www.si.com/planet-futbol/2015/06/23/womens-world-cup-artificial-turf-canada> [<http://perma.cc/X9YD-UVXP>]. The 2015 FIFA Women's World Cup was played on turf while the Men's World Cup tournament was played on grass. *Id.* Turf changes the way the game is played by changing the way the ball bounces, the speed of play, and often leads to more injuries than grass. Julie Foudy, *Sydney Leroux: Why Turf Is Terrible for Soccer Players*, ESPN (Nov. 13, 2014), <http://www.espn.com/espnw/news-commentary/article/11868149/sydney-leroux-explains-why-turf-terrible-soccer-players> [<https://perma.cc/GX5J-9QR5>].

61. See Jackie Wattles & Ahiza Garcia, *Pay Fight Between USA Hockey and Women's Players Intensifies*, CNNMONEY (Mar. 18, 2017, 6:42 PM), <http://money.cnn.com/2017/03/18/news/usa-womens-hockey-equal-pay/> [<http://perma.cc/7K7X-MBA9>].

\$3.5 million per year developing boys' hockey programs without spending nearly as much on girls' youth hockey.⁶²

While media coverage and poor treatment are indicative, the most obvious signal of gender discrimination in sports today is pay inequality.⁶³ In golf, the prize money for women's tournaments in 2014 was five times less than the prize money allocated for men's tournaments.⁶⁴ During the 2015 season, players in the WNBA had minimum and maximum salary requirements of \$38,000 and \$109,500, respectively; meanwhile, the National Basketball Association (NBA), the all-male league, had minimum and maximum salary requirements of \$525,093 and \$16.4 million, respectively, for the same season.⁶⁵ Even in sports where women's earnings come closer to those of their male counterparts than in golf and basketball, most of those earnings come from endorsements rather than salary.⁶⁶

Members of the USWNT recently filed a lawsuit challenging the discrimination they face through disparities in pay.⁶⁷ Five players filed the lawsuit on behalf of the entire team and focused on the wage discrimination they experience in relation to their male counterparts, the US Men's National Soccer Team.⁶⁸ For winning games, members of the USWNT earn thirty-seven cents to every dollar the men make for the same feat.⁶⁹ In 2016, the women's team would make less money if they won every single match than the men would make if they lost all of theirs.⁷⁰ In addition to wage disparity, the women also "earn less than the men for sponsorship appearances, have a smaller

62. *Id.* When asked, USA Hockey declined to specify exactly how much is spent on girls' programs. *Id.*

63. See Andrew Brennan, *Which Sports Have the Largest and Smallest Pay Gaps?*, FORBES (May 5, 2016, 2:09 AM), <http://www.forbes.com/sites/andrewbrennan/2016/05/05/the-pay-discrimination-in-sports-we-wish-didnt-exist-will-only-dissipate-with-womens-leadership/#77fa887d41d6> [https://perma.cc/Z8ZU-BAC2] (stating that prize money for the men's 2014 Professional Golfers' Association of America (PGA) golf tournament totaled \$340 million, while prize money for the women's 2015 Ladies Professional Golf Association (LPGA) tournament was only \$61.6 million).

64. *Id.*

65. *Id.*

66. *Id.* While the majority of sports have pay disparities, it is important to note that several, including tennis, marathon running, and surfing, offer equal prize money in some tournaments to both female and male contestants. See *id.*

67. Louisa Thomas, *Equal Pay for Equal Play: The Case for the Women's Soccer Team*, NEW YORKER (May 27, 2016), <http://www.newyorker.com/culture/cultural-comment/the-case-for-equal-pay-in-womens-sports> [https://perma.cc/8A9M-QDGQ].

68. *Id.*

69. Justin Block, *U.S. Women's Soccer Doesn't Deserve Equal Pay—They Deserve More*, HUFFINGTON POST (Mar. 31, 2016, 1:12 PM), http://www.huffingtonpost.com/entry/united-states-womens-soccer-equal-pay_us_56fd37e3e4b0daf53ae5d7 [https://perma.cc/9ZVM-9GYE].

70. *Id.*

per diem while with the national team, and receive a smaller share of ticket revenue bonuses.”⁷¹ The recent lawsuit highlights the gender discrimination issues that currently permeate all of women’s sports today.⁷²

B. Current Venues for Relief for a Gender Discrimination Claim in International Sports

If a professional athlete wishes to bring a gender discrimination claim, there are currently two federal statutes that could provide relief—the Equal Pay Act of 1963⁷³ and Title VII of the Civil Rights Act (Title VII).⁷⁴ First, the Equal Pay Act of 1963 states, in relevant part, that:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . .⁷⁵

Several exceptions supplement this general prohibition.⁷⁶ An instance of permissible pay inequality under this Act includes a payment made “pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”⁷⁷

In order to have a *prima facie* case under the Equal Pay Act, the plaintiff has the burden of proving that (1) the jobs held by male and female employees are substantially similar, and (2) the employer is paying different wages to those engaged in this similar work.⁷⁸ The plaintiff need not prove that the skills and qualifications of a particular employee are similar to another employee; rather, the job

71. *Id.*

72. *See id.*

73. Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 57 (1963) (codified as amended at 29 U.S.C. § 206(d) (2012)).

74. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–16, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)). While Title IX does relate to discrimination in sports and could be thought to provide a third venue for relief, it does not have regulatory power over professional sports leagues. Tanya E. Dennis, Note, *Why Is Your Grass Greener Than Mine?: The Need for Legal Reform to Combat Gender Discrimination in Professional Sports*, 50 NEW ENG. L. REV. 347, 363 (2016).

75. 29 U.S.C. § 206(d)(1) (2012).

76. *See id.*

77. *Id.*

78. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)).

itself must be substantially similar.⁷⁹ An ideal case under the Equal Pay Act would require a plaintiff who performs “the same job, for the same employer, with the same responsibilities, having the same experience” as a male counterpart.⁸⁰ In order to rebut a claim of discrimination under the Act, a defendant must show that these conditions are not met or prove that the difference is justified by one of the four listed exceptions.⁸¹ It is then up to the court to determine if gender discrimination exists.⁸²

The second statute that provides a cause of action for gender discrimination claims is Title VII, which states, in relevant part:

It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[.]⁸³

Similar to the Equal Pay Act, Title VII provides several exceptions to pay disparity.⁸⁴ Specifically, it is not unlawful under Title VII to provide different compensation or different terms, conditions, or privileges of employment if done pursuant to a seniority system, a merit system, or a system that measures earnings by quantity or quality of production.⁸⁵

If a plaintiff wishes to bring a cause of action for gender discrimination under Title VII, she cannot go directly to court as the Act does not provide an automatic private right of action.⁸⁶ Rather, a plaintiff must first file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discrimination.⁸⁷ After the claim is filed, the EEOC must investigate and determine whether it believes a violation occurred.⁸⁸ If the EEOC believes a violation occurred, it may attempt conciliation or file a civil claim against the private employer.⁸⁹ However, if the EEOC believes

79. *See id.*

80. Gregory Szul, Note, *Sex Discrimination and the Equal Pay Act in Athletic Coaching*, 5 DEPAUL-LCA J. ART & ENT. L. 161, 164 (1995).

81. *Id.* at 163.

82. *Id.* at 164.

83. 42 U.S.C. § 2000e-2(a) (2012).

84. *Id.* § 2000e-2(h).

85. *Id.*

86. Jordan J. Feist, Comment, *Discrimination, Retaliation, and the EEOC: The Circuit Split over the Administrative Exhaustion Requirement in Title VII Claims*, 118 PENN ST. L. REV. 169, 171 (2013).

87. *Id.* at 173.

88. *See id.* (quoting 42 U.S.C. § 2000e-5(b)).

89. *Id.* at 173–74.

no violation occurred or decides not to pursue litigation, the EEOC must notify the aggrieved party, who has ninety days to file a civil lawsuit on her own.⁹⁰

II. ANALYSIS

Although the Equal Pay Act and Title VII theoretically could provide relief for claims of gender discrimination in sports, their broad exceptions allow defendants to rebut claims too easily.⁹¹ An alternative claim for relief could come from the equal protection rights of either the Fifth or Fourteenth Amendment to the Constitution if the law classified US sports governing bodies as state actors. A claim using an equal protection analysis would provide the adequate relief lacking from the two statutes currently available because it is subject to a higher level of scrutiny and devoid of the exceptions that make the statutes inadequate.

A. Current Venues for Relief for a Gender Discrimination Claim in International Sports Are Inadequate

The Equal Pay Act is inadequate because the listed exceptions, specifically those related to quantity or quality of work and skill, provide a defense to almost every gender discrimination claim in the athletic context.⁹² At first glance, female athletes may appear to have a strong prima facie case of gender discrimination under the Equal Pay Act.⁹³ Both female and male athletes perform substantially similar work, yet female athletes receive compensation at much lower wages than male athletes. In the case of soccer, both the women's and men's teams perform the same job—playing professional soccer—for the same employer, US Soccer.⁹⁴ They also have many of the same responsibilities and experiences, performing in friendly matches throughout the year and comparable tournaments such as the FIFA Women's and Men's World Cups.⁹⁵ However, the women receive much lower pay, only being compensated when they win and receiving less for winning the World Cup than the men received for placing

90. *Id.* at 174.

91. *See* 29 U.S.C. § 206(d)(1) (2012); 42 U.S.C. § 2000e-2.

92. *See* 29 U.S.C. § 206(d)(1); Dennis, *supra* note 74, at 369.

93. *See, e.g.,* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (describing a prima facie case under the Equal Pay Act).

94. *See U.S. Soccer Reaching New Heights, supra* note 13.

95. *See U.S. Women's Team Files Wage-Discrimination Action vs. U.S. Soccer, supra* note 8.

eleventh.⁹⁶ These factors would seem to make out a strong prima facie case for gender discrimination under the Equal Pay Act; however, the exceptions included make it easy for a defendant, such as US Soccer, to rebut this claim.⁹⁷

The first exceptions under the Equal Pay Act that could rebut a claim of gender discrimination are the exceptions for seniority, merit, quantity of production, and factors other than sex.⁹⁸ Included within these groups of exceptions are “market conditions, previous salary, exceptional experience, education,” and, most important in athletics, skill.⁹⁹ With regard to previous salary, male athletes consistently earn more than female athletes.¹⁰⁰ However, this is likely due in part to the fact that male athletes have had the opportunity to participate in professional sports for a much longer period of time than female athletes.¹⁰¹ This longer participation leads to higher salary expectations and greater levels of experience that contribute to rebuttals of gender discrimination claims.¹⁰² Additionally, the exception for “factors other than sex,” including skill, provides a strong rebuttal because it can be argued that male and female sports require a different skill level based on physical and biological differences.¹⁰³ Therefore, these exceptions provide the opportunity for an employer to rebut a female athlete’s prima facie case of gender discrimination under the Equal Pay Act.¹⁰⁴

In addition, the exception based on quality of work provides a strong rebuttal for a claim of gender discrimination.¹⁰⁵ This exception is similar to that of a skill exception under the “factors other than sex” category: it compares employees based on skills, effort, responsibility, and working conditions.¹⁰⁶ Although it is unclear how to measure skills and effort, they are often measured against a scale that uses male athletes’ skills as the baseline.¹⁰⁷ In comparing the two, it is often the case that female athletics appear to require less skill and effort than male athletics because of biological differences, including

96. Close, *supra* note 12.

97. See 29 U.S.C. § 206(d)(1).

98. *Id.*

99. Dennis, *supra* note 74, at 369–70.

100. Brennan, *supra* note 63.

101. Dennis, *supra* note 74, at 370.

102. See *id.*

103. *Id.* at 370–71.

104. See 29 U.S.C. § 206(d)(1) (2012).

105. See Dennis, *supra* note 74, at 370–71.

106. See 29 U.S.C. § 206(d)(1).

107. Dennis, *supra* note 74, at 370–71.

differences in body shape and strength capabilities.¹⁰⁸ Additionally, defendants could argue that male athletes face harsher competition because their opponents possess more skill, therefore requiring greater preparation than female athletes.¹⁰⁹ Based on these gendered, stereotyped conceptions, an employer can also use the quality of work exception to rebut a claim of gender discrimination under the Equal Pay Act.¹¹⁰

If an employer, such as US Soccer, is able to fit its conduct into one of these listed exceptions, the athlete's claim of gender discrimination will fail regardless of the strength of her *prima facie* case.¹¹¹ Therefore, the Equal Pay Act is an inadequate venue for relief for a claim of gender discrimination in sports.

Similarly, Title VII is inadequate because it prevents access to the court system and contains many of the same exceptions as the Equal Pay Act that make it relatively easy for a defendant to rebut a claim of gender discrimination.¹¹² Title VII prevents access to the courts because it does not confer a private right of action; rather, an aggrieved party must first file a claim with the EEOC, which has the initial authority to determine whether to file a case.¹¹³ While it is true that a party may still bring a suit should the EEOC decide not to, there is the potential for a long time to pass before the agency makes a decision, during which the gender discrimination continues.¹¹⁴ For example, members of the USWNT filed their complaint with the EEOC in March 2016, but nearly two years later, the EEOC has yet to make a decision or take action relating to the complaint.¹¹⁵ Preventing athletes' access to the court system restricts access to injunctive relief and monetary damages that should be available.

In addition to preventing access to the courts, Title VII contains similar exceptions to those contained within the Equal Pay Act, which likewise makes it inadequate as an avenue for relief for gender discrimination in sports.¹¹⁶ Specifically, the quantity or quality of production exception in Title VII is identical to the exception

108. *Id.* at 370–71 & n.201.

109. *See id.* at 370–71.

110. *See* 29 U.S.C. § 206(d)(1).

111. *See id.*

112. *See* 42 U.S.C. § 2000e-2 (2012); Dennis, *supra* note 74, at 359.

113. 42 U.S.C. § 2000e-2.

114. *See* Meg Linehan, *A Timeline of the USWNT's Legal Fights*, EXCELLE SPORTS (June 6, 2016), <http://www.excellesports.com/news/timeline-uswnt-fight-equality-cba-eeoc/> [<http://perma.cc/U7S6-8F6S>].

115. *Id.* As of the publication of this Note, there are no updates to the status of this claim.

116. *See* 42 U.S.C. § 2000e-2.

in the Equal Pay Act.¹¹⁷ An employer may rebut a claim of gender discrimination under Title VII by claiming that male athletes require a higher quality of production than female athletes, regardless of whether this premise is based on biological and sociological differences that female athletes cannot prevent or change.¹¹⁸ Therefore, Title VII fails to provide adequate relief for a claim of gender discrimination in sports.

B. If Classified as State Actors, Sports Governing Bodies Would Be Subject to the Constitution.

In order to be subject to the equal protection provisions in the Constitution, sports governing bodies would have to be classified as state actors.¹¹⁹ The Supreme Court finds state action when a private party performs a public function or when there is a sufficiently close nexus between the private party and the government.¹²⁰

The first prong of the inquiry in which the Court analyzes state action is whether a private party performs a public or governmental function.¹²¹ In *Smith v. Allwright*, the Court found state action and a constitutional violation when the Democratic Party of Texas—a private entity—excluded African Americans from participating in a primary election, a public function.¹²² However, the fact that an entity performs a function that serves the public does not automatically classify that entity as a state actor; such a definition would be so broad as to cover any business providing essential goods and services.¹²³ Rather, “when private individuals or groups *are endowed by the State* with powers or functions *governmental* in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.”¹²⁴

The second prong of the state action inquiry focuses on whether there is a sufficiently close nexus between the private action and the

117. See 29 U.S.C. § 206(d)(1) (2012); 42 U.S.C. § 2000e-2.

118. See 42 U.S.C. § 2000e-2.

119. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

120. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548–49 (1987) (Brennan, J., dissenting). When either prong (public function or close nexus) is satisfied, the state action requirement is met. See *id.* at 548 (“For two *independent* reasons, the action challenged here constitutes Government action.” (emphasis added)).

121. See *Smith v. Allwright*, 321 U.S. 649, 663 (1944).

122. *Id.* at 662–65.

123. *S.F. Arts & Athletics*, 483 U.S. at 549 (Brennan, J., dissenting).

124. *Evans v. Newton*, 382 U.S. 296, 299 (1996) (emphasis added), *quoted in S.F. Arts & Athletics*, 483 U.S. at 549.

government.¹²⁵ In *Burton v. Wilmington Parking Authority*, a private company leased space in a public parking facility for its restaurant and then refused to serve African American patrons.¹²⁶ The Court found that, even though a purely private entity perpetrated the discrimination, there was a sufficiently close nexus to the government through the lease of the public parking facility.¹²⁷ This close nexus allows the private party's actions to "be fairly treated as that of the State itself."¹²⁸

In order to be classified as state actors, it must be shown that sports governing bodies, while private actors, perform public functions or have a sufficiently close nexus to the government so their conduct can be treated as that of the government itself.¹²⁹

Once a sports governing body is classified as a state actor, an opposing party may bring a gender discrimination claim under the Fifth or Fourteenth Amendment. The Fourteenth Amendment explicitly discusses equal protection, stating that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹³⁰ However, as the text indicates, this Amendment is only applicable to the states and not to the federal government. The Fifth Amendment, on the other hand, applies to the federal government. It demands that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."¹³¹ While it speaks of due process, the Fifth Amendment does not include any language addressing the equal protection of the laws.

Despite this lack of explicit language, the Supreme Court interpreted the Fifth Amendment's Due Process Clause as including a component of equal protection, making it practically identical to the provision applicable to the states through the Fourteenth Amendment.¹³² While recognizing that the two terms are not always interchangeable, the Court determined that both due process and equal protection stem from an "American ideal of fairness" and are, therefore, "not mutually exclusive."¹³³ The Court further clarified that "discrimination may be so unjustifiable as to be violative of due

125. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

126. *Id.* at 716-18.

127. *Id.* at 723-26.

128. *S.F. Arts & Athletics*, 483 U.S. at 556 (Brennan, J., dissenting).

129. See *id.* at 548-48.

130. U.S. CONST. amend. XIV, § 1.

131. U.S. CONST. amend. V.

132. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

133. *Id.*

process,” thereby linking the concept of equal protection to the Fifth Amendment’s Due Process Clause.¹³⁴ Therefore, regardless of whether a state or federal actor practices discriminatory behavior, it must comply with the restrictions in the Constitution under the Fifth and Fourteenth Amendments.¹³⁵

A claim of gender discrimination is subject to intermediate scrutiny.¹³⁶ The Supreme Court has articulated three tiers of scrutiny for constitutional claims: strict scrutiny,¹³⁷ intermediate scrutiny,¹³⁸ and rational basis review.¹³⁹ Strict scrutiny is the most stringent standard of review, requiring the government to have a compelling interest behind the challenged conduct.¹⁴⁰ Additionally, to survive strict scrutiny, the government must prove that it employed narrowly tailored means to reach that compelling interest.¹⁴¹ The Court applies strict scrutiny as the standard of review for discrimination based on racial classifications.¹⁴²

At the other end of the spectrum, rational basis review is the least stringent standard of review.¹⁴³ Rational basis requires the government have a legitimate interest accomplished through means rationally related to that interest.¹⁴⁴ Rational basis review is the default standard when heightened scrutiny is not required due to a suspect classification.¹⁴⁵

The Court determined that discrimination based on gender is one situation in which a heightened level of scrutiny is necessary; however, the Court declined to apply such a high standard as strict scrutiny to gender classifications. Rather, for classifications based on gender, the Court created a third standard that falls in between strict scrutiny and rational basis review: intermediate scrutiny.¹⁴⁶

134. *Id.*

135. *See* U.S. CONST. amends. V, XIV, § 1.

136. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *see also id.* at 218 (Rehnquist, J., dissenting).

137. *See, e.g.,* Johnson v. California, 543 U.S. 499, 505 (2005); Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

138. *See, e.g.,* Reed v. Reed, 404 U.S. 71, 75 (1971); *see also* United States v. Virginia, 518 U.S. 515, 532–33 (1996); J.E.B. v. Alabama, 511 U.S. 127, 136 (1994); Orr v. Orr, 440 U.S. 268, 279 (1979).

139. *See, e.g.,* FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993).

140. *Johnson*, 543 U.S. at 505.

141. *Id.*

142. *See, e.g.,* *Korematsu*, 323 U.S. at 216.

143. *See, e.g.,* *Beach Commc’ns*, 508 U.S. at 314–16.

144. *See id.* at 314 n.6.

145. *See id.* at 313.

146. *Reed v. Reed*, 404 U.S. 71, 75, 76–77 (1971); *see also* Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting).

Intermediate scrutiny requires the government to prove there is an important interest accomplished by means that are substantially related to that interest.¹⁴⁷

In determining what constitutes an important state interest in gender discrimination claims, the Court rejected objectives that rely on overly broad generalizations about differences in talent or the roles of men and women.¹⁴⁸ In *Orr v. Orr*, the Court struck down a law that imposed alimony obligations on husbands but not on wives because it relied on and reinforced the outdated notion that the wife is always the dependent.¹⁴⁹ Additionally, the important interest may not be based on unfounded assumptions about gender.¹⁵⁰ In *United States v. Virginia*, the Court did not accept the argument that women should be excluded from an all-male military academy because their admittance would destroy the academy's self-described adversative method when there was no proof of this assertion.¹⁵¹

In determining whether the means substantially relate to the important interest, the Court held that the government must not resort to gender discrimination if gender-neutral means are available as an alternative.¹⁵² In *J.E.B. v. Alabama*, the Court held that, for a gender classification to survive intermediate scrutiny, it must be shown that "gender alone is an accurate predictor" of the issue in question.¹⁵³ Further, even if a gender classification passes this part of the test, the separate treatment must be equal.¹⁵⁴ In *United States v. Virginia*, the Court found that, even though there was a separate military school for women to attend, the two schools were different in kind as well as unequal in both tangible and intangible facilities.¹⁵⁵

147. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); see also *Reed*, 404 U.S. at 75-76.

148. See *Orr v. Orr*, 440 U.S. 268, 283 (1979).

149. *Id.* at 282-83.

150. See *United States v. Virginia*, 518 U.S. 515, 541, 550 (1996) ("State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.' . . . [G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." (emphasis in original) (quoting *Miss. Univ. for Women*, 458 U.S. at 725)).

151. See *id.* at 542-43.

152. See *J.E.B. v. Alabama*, 511 U.S. 127, 138-40, 146 (1994).

153. *Id.* at 138-40.

154. *Virginia*, 518 U.S. at 547.

155. *Id.* at 547-48.

C. Sports Governing Bodies Are Currently Not Classified as State Actors

The Supreme Court heard a case in 1987 that addressed whether or not sports governing bodies qualified as state actors.¹⁵⁶ In *San Francisco Arts & Athletics, Inc.*, *San Francisco Arts & Athletics, Inc.* (SFAA), a nonprofit California corporation, attempted to promote a proposed “Gay Olympic Games” in order to make a “political statement about the status of homosexuals in society.”¹⁵⁷ The United States Olympic Committee (USOC) objected to the use of the term “Olympic,” for the Amateur Sports Act granted the USOC “the right to prohibit certain commercial and promotional uses of the word.”¹⁵⁸ Despite the USOC requesting the SFAA remove the word “Olympic” from all material, the SFAA persisted in its use and the USOC brought suit to enjoin further use.¹⁵⁹

As part of its defense, the SFAA claimed that even if the USOC has the exclusive right to the word “Olympic,” the organization exercised the enforcement of that right in a discriminatory manner in violation of the Fifth Amendment.¹⁶⁰ Regarding this claim, the Court stated that “the fundamental inquiry is whether the USOC is a governmental actor to whom the prohibitions of the Constitution apply.”¹⁶¹ A majority of the Court held that the USOC did not qualify as a governmental actor because it did not meet either of the tests for finding state action.¹⁶²

First, the majority found that a congressional grant for a corporate charter does not alone cause a corporation to lose its essentially private character.¹⁶³ The USOC was a private organization established under a federal statute.¹⁶⁴ Under the statute, Congress granted the USOC a corporate charter while imposing certain requirements and providing for funding through exclusive use of

156. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 (1987). The following year, the Supreme Court decided that actions by a collegiate athletic association (the National Collegiate Athletic Association, or NCAA) also did not constitute state action; however, this Note is only focused on international sports governing bodies. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 182 (1988).

157. *S.F. Arts & Athletics*, 483 U.S. at 525, 535.

158. *Id.* at 526–27.

159. *Id.* at 527.

160. *Id.* at 542.

161. *Id.*

162. See *id.* at 547.

163. *Id.* at 543–44.

164. *Id.* at 542–43.

Olympic words and symbols along with direct grants.¹⁶⁵ However, the majority noted that all corporations act under some form of a government charter, meaning that fact alone cannot confer state action.¹⁶⁶ Further, the majority found that because the government creates all trademark rights and subsidizes many private entities, those additional facts failed to convert the private action into that of the government.¹⁶⁷

Second, the majority found that there could be governmental action when the “challenged entity performs functions that have been ‘traditionally the *exclusive prerogative*’ of the Federal Government.”¹⁶⁸ While recognizing that the USOC’s activities served a national interest, the majority nonetheless held that a private corporation must do more than serve the public to constitute state action, without specifying *how much* more would constitute state action.¹⁶⁹

Finally, the majority found that “a government ‘normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].’”¹⁷⁰ The majority found that the USOC’s choice of how to enforce the exclusive right to the word “Olympic” was not a governmental decision and there was no evidence of governmental coercion in how to apply this right.¹⁷¹ In conclusion, the Court held that, because there was not enough to make the USOC’s action that of the government, the SFAA’s claim that the USOC enforced the right in a discriminatory manner did not rise to a Fifth Amendment violation.¹⁷²

Disagreeing with the majority’s characterization of state action, Justice Brennan wrote in dissent, joined in full by Justice Marshall—with Justices Blackmun and O’Connor agreeing on the state action issue.¹⁷³ The dissenters found two distinct reasons why

165. *Id.* at 543.

166. *Id.* at 543–44.

167. *Id.* at 544.

168. *Id.* (emphasis in original) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

169. *See id.* at 544–45.

170. *Id.* at 546 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

171. *Id.* at 547.

172. *Id.*

173. *Id.* at 548 (O’Connor, J., concurring); *id.* (Brennan, J., dissenting). In a separate opinion, Justices O’Connor and Blackmun dissented in part from the majority’s opinion, stating that

the United States Olympic Committee and the United States are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment. Accordingly, I would reverse the Court of Appeals’ finding of no

the action at issue should have been classified as state action.¹⁷⁴ First, the USOC should have been considered a governmental actor because it performed important governmental functions.¹⁷⁵ Second, the USOC should have been considered a governmental actor because there was “a sufficiently close nexus between the government and the challenged action’ of the USOC that ‘the action of the latter may fairly be treated as that of the [Government] itself.’”¹⁷⁶

The dissent’s first distinction—performing important governmental functions—expands on the majority’s notion of serving the public.¹⁷⁷ While Justice Brennan did not disagree that something more than serving the public is necessary to classify an action as governmental, he defined the threshold, whereas the majority was silent on the issue.¹⁷⁸ Relying on precedent, Justice Brennan stated that “when private individuals or groups *are endowed by the State* with powers or functions *governmental* in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.”¹⁷⁹ Further, precedent showed that “a finding of governmental action is particularly appropriate when the function performed is ‘traditionally the exclusive prerogative’ of government.”¹⁸⁰

The dissenters felt the USOC’s conduct met the standard for government action based on these precedents because Congress endowed the USOC with a function traditionally given to the government—it represented the United States to the international community.¹⁸¹ Congress placed the responsibility exclusively on the USOC of representing the United States to the International Olympic Committee and to the world at the Olympic Games, an international event.¹⁸² Therefore, unlike entities which simply provide public

Government action and remand the case for determination of petitioners’ claim of discriminatory enforcement.

Id. at 548 (O’Connor, J., concurring).

174. *Id.* at 548 (Brennan, J., dissenting).

175. *Id.*

176. *Id.* at 548–49 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

177. *See id.* at 548.

178. *See id.* at 549.

179. *Id.* (emphasis in original) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)). For other examples of private entities carrying out state action, see also *Terry v. Adams*, 345 U.S. 461, 470 (1953) (holding that a private political association and its elections constitute state action); and *Marsh v. Alabama*, 326 U.S. 501, 509–10 (1946) (holding that a privately owned “company town” is a state actor).

180. *S.F. Arts & Athletics*, 483 U.S. at 549 (Brennan, J., dissenting) (quoting *Jackson*, 419 U.S. at 353).

181. *Id.* at 550.

182. *Id.*

services but remain inherently private in nature, the USOC had “the exclusive power to serve a unique national, administrative, adjudicative, and representational role.”¹⁸³ Because the government bestowed upon the USOC functions that are traditionally the exclusive prerogative of the government, the dissent believed that its actions, like those of the government, “ought to be subject to constitutional limits.”¹⁸⁴

The dissent’s second distinction was that the Government had “so far insinuated itself into a position of interdependence with [the USOC] that it must be recognized as a joint participant in the challenged activity.”¹⁸⁵ The relationship between the government and the USOC conferred mutual benefits, and the authorizing statute gave the USOC exclusive authority and responsibilities not given to any other private organization.¹⁸⁶ Additionally, in the eyes of the public, the connection between the US government and the USOC was profound.¹⁸⁷ For example, the US flag flies to identify the US Olympic Team, and the Olympic athletes compete as representatives of the United States, not the USOC.¹⁸⁸

Therefore, because the USOC performs a government function and because the challenged action is inextricably intertwined with the government, Justice Brennan would have found state action in *San Francisco Arts & Athletics*.¹⁸⁹ However, because the majority opinion is the controlling law, international sports governing bodies are not considered state actors and international athletes do not have the protections of the Constitution.

III. SOLUTION

If female athletes performing in international competition wish to bring a claim of gender discrimination, as the USWNT athletes recently did, they may only rely on statutory provisions for relief. However, these statutes provide inadequate relief due to the numerous exceptions which allow a defendant great leeway to rebut a gender discrimination claim. These athletes represent the United States in international competition; therefore, they should be subject to and protected by the provisions of the Constitution. In order to

183. *Id.* at 555–56.

184. *Id.* at 556.

185. *Id.* (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

186. *Id.* at 557.

187. *Id.*

188. *Id.* at 557–58.

189. *Id.* at 560.

extend the Constitution's protections, the Court should overrule *San Francisco Arts & Athletics* and hold that US-sponsored sports governing bodies are state actors. Once the Court classifies these bodies as state actors, female athletes could bring meritorious claims of gender discrimination under the Fifth or Fourteenth Amendments. These claims would be subject to intermediate scrutiny, and in the case of a claim such as the USWNT's current lawsuit, the discrimination would likely be found unconstitutional.

In order for US sports governing bodies to be considered state actors, the Supreme Court would have to overrule its prior decision in *San Francisco Arts & Athletics*, which reached the opposite conclusion.¹⁹⁰ Although *stare decisis* is a strong justification for the Court to uphold its prior decisions, the Court has also held that it is not an inexorable command.¹⁹¹ In determining when to overrule its prior precedent, the Court developed a test in *Planned Parenthood of Southeastern Pennsylvania v. Casey* with four inquiries that would justify abandoning *stare decisis*.¹⁹² The first is whether the rule is practically workable.¹⁹³ The second is whether the rule has engendered such reliance that it would lead to hardships if overruled.¹⁹⁴ The third is whether related principles of law have developed over time, making the rule "a remnant of abandoned doctrine."¹⁹⁵ Finally, the fourth is whether facts changed or have come to be seen so differently that the rule has lost "significant application or justification."¹⁹⁶

In determining whether to overrule *San Francisco Arts & Athletics*, the first and third inquiries of this test are largely unhelpful.¹⁹⁷ The first inquiry is inapplicable because there is no evidence that the current rule, finding sports governing bodies are not state actors, has been unworkable in practice. While there are disagreements over the correctness of this rule, it is clearly workable as it simply makes the equal protection provisions of the Constitution

190. *See id.* at 547 (majority opinion).

191. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

192. *Id.* at 854–55. While these four inquiries are helpful to the Court in deciding when to abandon *stare decisis*, they are not dispositive. *See id.* at 854 ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, *we may ask . . .*" (emphasis added)).

193. *Id.* at 854.

194. *Id.*

195. *Id.* at 855.

196. *Id.*

197. *See id.* at 854–55.

inapplicable in these cases, forcing athletes to turn to statutory provisions for requested relief.¹⁹⁸ Additionally, the third inquiry is inapplicable because there have been no developments in constitutional law that would make the current rule abandoned doctrine.¹⁹⁹ Therefore, if the Court is to overrule *San Francisco Arts & Athletics*, it will have to rely on the second and fourth inquiries in the *Casey* test by determining that they outweigh the first and third inquiries.

The second factor in the *Casey* test, focusing on reliance, supports the argument that the state action component of *San Francisco Arts & Athletics* should be overruled. While other portions of the case are significantly relied upon, subsequent case law rarely cites the case's proposition that sports governing bodies are not state actors.²⁰⁰ When cited, the cases often deal with sports governing bodies that do not participate in international competitions, distinguishing them from the subject of this Note.²⁰¹ Therefore, the second inquiry weighs in favor of overruling the state action holding as applied to US sports governing bodies participating in international competition.

The fourth inquiry of the *Casey* test is the strongest argument for overruling the state action portion of *San Francisco Arts & Athletics*. The fourth inquiry asks whether facts changed significantly or are seen so differently that the rule has lost application or justification.²⁰² The Court decided *San Francisco Arts & Athletics* in 1987, over thirty years ago.²⁰³ The case focused on state action regarding the USOC based on a trademark claim without addressing the implications of the ruling for sports in general, including gender discrimination claims.²⁰⁴ Women's sports changed significantly since 1987—importantly, most of the major developments in women's sports did not occur until after this date.²⁰⁵ Not only have sports changed

198. See *supra* Part I.B.

199. See *Casey*, 505 U.S. at 855.

200. See SHEPARD'S®: SAN FRANCISCO ARTS & ATHLETICS, INC. V. UNITED STATES OLYMPIC COMMITTEE, 483 U.S. 522: CITING DECISIONS, LEXIS, <https://advance.lexis.com/api/permalink/9b767953-5320-4718-853e-03120b90ccdc/?context=1000516> (last visited Jan. 26, 2018).

201. See, e.g., Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 180–82 (1988) (addressing the applicability of the state action doctrine to collegiate sports governing bodies); Perkins v. Londonberry Basketball Club, 196 F.3d 13, 16 (1st Cir. 1999) (addressing the applicability of the state action doctrine to a youth basketball league).

202. *Casey*, 505 U.S. at 855.

203. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 522 (1987).

204. See *id.* at 524, 547.

205. See *Timeline*, *supra* note 28.

significantly in the past thirty years, but also women's rights and gender discrimination doctrine have evolved significantly since this ruling.²⁰⁶ With these changing facts and differing landscapes in sports and women's rights, the fourth inquiry under *Casey* is satisfied and supports overruling *San Francisco Arts & Athletics*.

In addition to the two factors from *Casey* supporting a departure from *stare decisis*, it is also relevant that *San Francisco Arts & Athletics* had four dissenters on the issue of state action.²⁰⁷ The dissenters presented a strong argument for state action in the case of US-sponsored sports governing bodies—when an organization is tasked with representing the United States on an international stage, a function that is traditionally the exclusive prerogative of the government, it becomes a state actor subject to the provisions of the Constitution.²⁰⁸ Indeed, it seems hypocritical to tell athletes that they represent the United States on an international, professional platform, yet they cannot rely on the protections of their country's founding document. The strength of this argument and the support from four out of nine members of the Court provide the current Court with strong arguments for overruling the prior decision.

IV. CONCLUSION

Discrimination against women is not unique to sports; rather, it is a concept that has been challenged and fought against for years as women attempt to be seen as equal to men.²⁰⁹ However, the sports context heightens this problem because it is a field that is traditionally male and dominated by masculine concepts.²¹⁰ It is hard to imagine a male athlete participating in international competition ever suffering an injury like Megan Rapinoe's—an injury caused by subpar training conditions.²¹¹ That male athlete would never be subjected to the conditions that caused the injury, simply by virtue of

206. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 138–40, 146 (1994) (holding that the government may not discriminate based on gender if gender-neutral alternatives are available); *United States v. Virginia*, 518 U.S. 515, 532–34 (1996) (finding unconstitutional gender discrimination when female students were not allowed to attend an all-male military academy).

207. *S.F. Arts & Athletics*, 483 U.S. at 548 (O'Connor, concurring in part and dissenting in part); *id.* at 548–73 (Brennan, J., dissenting).

208. *Id.* at 549–50 (Brennan, J., dissenting).

209. See *Timeline of Legal History of Women in the United States*, NAT'L WOMEN'S HIST. PROJECT, <http://www.nwhp.org/resources/womens-rights-movement/detailed-timeline/> [<http://perma.cc/P8ME-Y9M8>] (last visited Jan. 5, 2018).

210. See Senne, *supra* note 44.

211. See USWNT, *supra* note 3.

being male. This unacceptable gender discrimination in the sports context, which reaches millions of Americans, needs to be remedied.

The current avenues for relief for a claim of gender discrimination in sports consist of bringing a claim under either the Equal Pay Act²¹² or Title VII.²¹³ However, these venues are inadequate because they both contain exceptions, most notably for skill, that allow an employer relying on traditional gender norms to fairly easily rebut a claim of discrimination in sports.²¹⁴ In order for female athletes to adequately seek a remedy for the gender discrimination they face, they need to be able to turn to the protections of the Constitution: the legal cornerstone of the country they represent.

In order for female athletes to utilize the protections of the Constitution, sports governing bodies participating in international competition need to be classified as state actors. However, in *San Francisco Arts & Athletics*, the Supreme Court held the opposite—that a sports governing body was not a state actor and therefore was not subject to the provisions of the Constitution.²¹⁵ Thus, in order to obtain this much-needed relief, the Supreme Court needs to overrule that case. The reasons in favor of overturning the decision follow logically from Justice Brennan's arguments in dissent.²¹⁶ While *stare decisis* generally counsels against overruling Supreme Court precedent, the second and fourth inquiries²¹⁷ from the *Casey* test outweigh all other considerations.

Once the Court decides to overrule *San Francisco Arts & Athletics*, female athletes could argue gender discrimination violates their rights under equal protection. In order to rebut such a claim, an employer must show the discrimination is pursuant to an important interest and that the means chosen to discriminate (such as lower pay and poorer treatment) are substantially related to the achievement of that interest.²¹⁸

When female athletes bring in greater revenue for an organization than their male counterparts, there is simply no viable important interest served by discriminating against them through unequal pay or poorer playing conditions. Even when female athletes

212. 29 U.S.C. § 206(d) (2012).

213. 42 U.S.C. § 2000e (2012).

214. See 29 U.S.C. § 206(d); 42 U.S.C. § 2000e-2.

215. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987).

216. *Id.* at 548–49, 550, 556, 560 (Brennan, J., dissenting).

217. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992).

218. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); see also *Reed v. Reed*, 404 U.S. 71, 75–76 (1971).

bring in the same or less revenue than their male counterparts, there is still no important interest to be served by subjecting them to poorer conditions than the men. Therefore, with the equal protection guarantee of the Constitution behind the claims of female athletes subjected to discriminatory behavior, gender discrimination in sports could begin to be remedied.

Female athletes who represent the United States in international competition should be able to rely on the US Constitution for relief when they are unfairly discriminated against based on their gender. Governing bodies, like US Soccer, should not be able to hide behind overly broad statutory provisions in order to enable them to pay women less and subject them to poorer conditions. Women have been making immense strides in the world of sports, and it is time for a new achievement: eradicating gender discrimination.

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