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## Torching Athlete Rights: Examining the Fiduciary Duties of the United States Olympic and Paralympic Committee Board of Directors

Anne Hart

*Boston College Law School*, [anne.hart@bc.edu](mailto:anne.hart@bc.edu)

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# TORCHING ATHLETE RIGHTS: EXAMINING THE FIDUCIARY DUTIES OF THE UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE BOARD OF DIRECTORS

**Abstract:** The United States Olympic and Paralympic Committee (USOPC) is a uniquely situated nonprofit corporation. As a federally incorporated nonprofit corporation, the USOPC's vast powers derive from an act of Congress. The USOPC possesses exclusive jurisdiction over Olympic and Paralympic representation within the United States, has the sole power to recognize National Governing Bodies (NGBs), which in turn control individual athletes within each sport, and must develop interest within the United States for physical activity. Despite this sweeping scope, there has been to date little accountability for the USOPC board of directors (USOPC Board). Fiduciary duties bind all nonprofit directors. When directors breach these fiduciary duties, law and public policy demand that directors be held responsible. This Note examines three recent decisions of the USOPC Board through a fiduciary duty lens: (1) amending its Bylaws to replace the American Arbitration Association with an arbitral organization of its choosing; (2) altering its mission statement to narrow the definition of athletes it considers itself responsible for; and (3) dispersing grants to NGBs based on a "results oriented resource allocation process." This Note concludes not only that the USOPC Board breached its fiduciary duties to the United States, NGBs, and amateur athletes, but also that the U.S. Attorney General should enforce these duties and swiftly move to hold the USOPC Board accountable.

## INTRODUCTION

In 1908, Ethelbert Talbot, the Bishop of Pennsylvania, provided the inspiration for the Olympic Creed during a sermon in advance of the London Games: "The important thing in life is not the triumph, but the fight; the essential thing is not to have won, but to have fought well."<sup>1</sup> This guiding light tracks the purposes for which the United States Congress chartered the United States Olympic and Paralympic Committee (USOPC), a federally incorporated

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<sup>1</sup> *The Olympic Motto*, INT'L OLYMPIC COMMITTEE, <https://www.olympic.org/the-olympic-motto> [<https://perma.cc/YLZ8-TB5F>]. Ethelbert Talbot served as a bishop of Pennsylvania for the Episcopal Church from 1898 until his death in 1928. *Ethelbert Talbot*, EPISCOPAL CHURCH, <https://episcopalchurch.org/library/glossary/talbot-ethelbert> [<https://perma.cc/6W92-CEKZ>]. Pierre de Coubertin, the founder of the International Olympic Committee (IOC), adopted Bishop Talbot's phrase in 1908 as the Olympic motto. *The Olympic Motto*, *supra*; *What Is the Olympic Creed?*, INT'L OLYMPIC COMMITTEE, <https://www.olympic.org/faq/olympic-rings-and-other-olympic-marks/what-is-the-olympic-creed> [<https://perma.cc/T8BQ-RXSS>].

nonprofit corporation.<sup>2</sup> President Gerald Ford observed that the United States was falling behind the rest of the world both in its achievement at the top echelons of sport, as well as in providing opportunities for younger athletes.<sup>3</sup> To remedy these shortcomings, Congress passed the Ted Stevens Olympic and Amateur Sports Act (the Ted Stevens Act), and enacted a vertical structure of governance entrusting the USOPC with protecting athlete rights and opportunities.<sup>4</sup> The USOPC has sole jurisdiction over all matters related to the Olympics and Paralympics, and the unique authority to coordinate and fund United States representation in Olympic and Paralympic events.<sup>5</sup>

Somewhere along the way, the Olympic Creed stopped guiding the USOPC; while the Olympic Creed emphasizes participating over winning, the USOPC focuses on “money and medals.”<sup>6</sup> United States gymnasts cite this focus as one of a multitude of factors that led to the years long sexual abuse of hundreds of gymnasts by United States of America Gymnastics (USA Gymnastics) team trainer Larry Nassar.<sup>7</sup> The gymnasts brought sixteen separate claims against the USOPC and its board of directors arising from the systemic abuse.<sup>8</sup>

Entertainment and Sports Network (ESPN) reported on February 22, 2020 that USA Gymnastics proposed a structured system of payouts in a settlement offer to the gymnasts.<sup>9</sup> ESPN reported that the settlement offered athletes abused by Nassar at elite competitions and training camps \$1,250,707.<sup>10</sup> In contrast, the settlement offered athletes abused by Nassar at other sanctioned events \$508,670.<sup>11</sup> The Washington Post reported that USA Gymnastics condi-

<sup>2</sup> 36 U.S.C. § 220502(a) (2018) (stating that the United States Olympic and Paralympic Committee (USOPC) is “a federally chartered corporation”); S. REP. NO. 95-770, at 2 (1978).

<sup>3</sup> S. REP. NO. 95-770, at 3.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> 36 U.S.C. §§ 220503(3), 220505(c)(3).

<sup>6</sup> See JAMES DOWDEN & JOAN MCPHEE, ROPES & GRAY, REPORT OF THE INDEPENDENT INVESTIGATION: THE CONSTELLATION OF FACTORS UNDERLYING LARRY NASSAR’S ABUSE OF ATHLETES 144 (2018) (quoting unnamed executive as saying “‘money and medals’ were probably uttered at every staff meeting . . . with the effect of marginalizing other topics such as athlete programming”).

<sup>7</sup> Complaint & Jury Demand at 17, *Doe v. U.S. Olympic Comm.*, No. 1:19-cv-00737-KMT (D. Colo. July 9, 2019).

<sup>8</sup> *Id.* at 104–31. These claims were: Title IX Violations, Sex Discrimination under the Patient Protection and Affordable Care Act, Violation of Bodily Integrity under 42 U.S.C. § 1983, Failure to Train and Supervise under 42 U.S.C. § 1983, Responsible Corporate Officer Doctrine, Violation of the Safe Sport Act under 18 U.S.C. § 2255, Gross Negligence, Negligence, Vicarious Liability, Express/Implied Agency, Negligent Supervision, Negligent Failure to Warn or Protect, Negligent Failure to Train or Educate, Negligent Retention, Negligent Infliction of Emotional Distress, and Fraud and Misrepresentation. *Id.*

<sup>9</sup> *USA Gymnastics’ Proposal to Sexual Assault Survivors Ranges from \$83K to \$1.25M*, ESPN (Feb. 22, 2020), [https://www.espn.com/olympics/story/\\_/id/28757570/usa-gymnastics-proposal-sexual-assault-survivors-ranges-83k-125m](https://www.espn.com/olympics/story/_/id/28757570/usa-gymnastics-proposal-sexual-assault-survivors-ranges-83k-125m) [<https://perma.cc/G9XT-XKKX>] [hereinafter *Proposal to Survivors*].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Additionally, the settlement offered athletes Nassar harmed “at non-USA Gymnastics locations” \$174,401 and “individuals with ‘derivative claims’” \$82,550. *Id.*

tioned the settlement on a release of claims against former USOPC and USA Gymnastics officials.<sup>12</sup> An attorney for some of the gymnasts noted with disdain that the offer releases USOPC defendants from claims without the USOPC itself paying anything, and without any discovery regarding the alleged role of the USOPC in the abuse.<sup>13</sup>

Responding to the settlement offer, four-time Olympic gold medalist Simone Biles tweeted, “Shouldn’t people be held accountable?”<sup>14</sup> To answer Biles’s tweet: yes.<sup>15</sup>

This Note offers an alternative path to holding the USOPC board of directors (USOPC Board) accountable.<sup>16</sup> The USOPC Board can escape tort liability, but it cannot hide from its fiduciary duties.<sup>17</sup> This Note provides a framework for how athletes can ask the U.S. Attorney General to enforce the USOPC Board’s fiduciary duties.<sup>18</sup>

This Note begins by closely examining the updated Bylaws of the USOPC.<sup>19</sup> A comparison of the updated USOPC Bylaws with the Ted Stevens Act reveals numerous instances where the Bylaws materially diverge from the Ted Stevens Act.<sup>20</sup> Therefore, this Note argues that the USOPC Board breached its fiduciary duties by adopting Bylaws in direct contradiction to the

<sup>12</sup> Liz Clarke, *Simone Biles Blasts USA Gymnastics’ Settlement Proposal; Aly Raisman Assails ‘Massive Cover Up,’* WASH. POST (Feb. 29, 2020), <https://www.washingtonpost.com/sports/2020/02/29/simone-biles-aly-raisman-blast-usa-gymnastics-settlement-proposal/> [<https://perma.cc/SBE4-94LP>].

<sup>13</sup> *Proposal to Survivors*, *supra* note 9. *Entertainment and Sports Network* (ESPN) quoted attorney Mick Grewal: “[The USOPC is] trying to get out of this without providing any information, without any transparency and without any accountability . . . . Their failure to provide adequate information is going to continue to further traumatize our clients.” *Id.* Additionally, *The Washington Post* quoted one of the defenses provided by United States of America Gymnastics (USA Gymnastics) in its settlement offer: “Most fundamentally, all of the abuse claims are subject to dismissal on the basis that the Debtor did not have a legal duty to the Claimant.” Sally Jenkins, *Larry Nassar Victims Want Accountability. Olympic Officials Offered Cash and Veiled Threats*, WASH. POST (Mar. 4, 2020), [https://www.washingtonpost.com/sports/olympics/larry-nassar-victims-want-accountability-usa-gymnastics-offered-cash-and-veiled-threats/2020/03/03/41e14208-5da8-11ea-b014-4fafa866bb81\\_story.html](https://www.washingtonpost.com/sports/olympics/larry-nassar-victims-want-accountability-usa-gymnastics-offered-cash-and-veiled-threats/2020/03/03/41e14208-5da8-11ea-b014-4fafa866bb81_story.html) [<https://perma.cc/ZEU8-LSBD>].

<sup>14</sup> Simone Biles (@Simone\_Biles), TWITTER (Feb. 29, 2020, 9:38 AM), [https://twitter.com/Simone\\_Biles/status/1233763542978977793](https://twitter.com/Simone_Biles/status/1233763542978977793) [[https://web.archive.org/web/20200229163938if\\_/https://twitter.com/Simone\\_Biles/status/1233763542978977793](https://web.archive.org/web/20200229163938if_/https://twitter.com/Simone_Biles/status/1233763542978977793)].

<sup>15</sup> See *infra* notes 304–349 and accompanying text.

<sup>16</sup> See *infra* notes 304–349 and accompanying text.

<sup>17</sup> See Thomas L. Hazen & Lisa L. Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors’ Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 349 (2012) (“Members of [nonprofit] governing boards are regarded as fiduciaries.”).

<sup>18</sup> See *infra* notes 275–349 and accompanying text.

<sup>19</sup> USOPC, 2020 BYLAWS § 3.1 (June 18, 2020), <https://www.teamusa.org/Footer/Legal/Governance-Documents.aspx> [<https://perma.cc/XC67-RHPJ>] [hereinafter 2020 BYLAWS] (stating that the USOPC board of directors (USOPC Board) manages the USOPC’s “business and affairs”). This Note is current through the June 18, 2020 USOPC Bylaws. The June Bylaws themselves incorporate edits made to the January 1, 2020 Bylaws. See USOPC, 2020 BYLAWS (Jan. 1, 2020) [<https://perma.cc/VLE5-G82E>].

<sup>20</sup> See *infra* notes 196–263 and accompanying text.

Ted Stevens Act.<sup>21</sup> Research has not unearthed an action challenging the USOPC Board's fiduciary duties, but this must change.<sup>22</sup>

Part I of this Note first looks at the USOPC's incorporating statute and updated Bylaws.<sup>23</sup> Additionally, Part I examines the fiduciary duties of non-profit directors generally, as well as various mechanisms for enforcing these duties.<sup>24</sup> Part II discusses three actions that implicate the USOPC Board's fiduciary duties: (1) replacing "American Arbitration Association" with "an arbitral association" that the USPOC designates in dispute resolution provisions; (2) altering its mission statement to focus on "Team USA Athletes"; and (3) establishing the method of USOPC grant dispersal to various sports' national governing bodies.<sup>25</sup> Part III argues that the Department of Justice, represented by the U.S. Attorney General, is the proper party for enforcing the USOPC Board's fiduciary duties, and the Attorney General should protect the public by enforcing the USOPC Board's fiduciary obligations.<sup>26</sup>

## I. BACKGROUND

The purpose of this Note is to provide a mechanism for challenging the USOPC Board's breaches of its fiduciary duties, which requires an initial understanding of several areas of law.<sup>27</sup> Section A explains the characteristics of federally chartered corporations.<sup>28</sup> Section B overviews the USOPC and its history, governance, and legal issues.<sup>29</sup> Section C turns to the fiduciary duties of nonprofit directors.<sup>30</sup> Finally, Section D outlines the mechanics of enforcement proceedings involving nonprofit corporations.<sup>31</sup>

### A. Title 36 Corporations

Title 36 of the United States Code provides federal charters for more than ninety organizations.<sup>32</sup> These organizations fall into three groups: (1) Patriotic and National Observances and Ceremonies; (2) Patriotic and National Organi-

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<sup>21</sup> See *infra* notes 264–349 and accompanying text.

<sup>22</sup> See *infra* notes 264–274 and accompanying text.

<sup>23</sup> See *infra* notes 32–107 and accompanying text.

<sup>24</sup> See *infra* notes 108–178 and accompanying text.

<sup>25</sup> See *infra* notes 179–263 and accompanying text.

<sup>26</sup> See *infra* notes 264–349 and accompanying text.

<sup>27</sup> See *infra* notes 264–349 and accompanying text.

<sup>28</sup> See *infra* notes 32–49 and accompanying text.

<sup>29</sup> See *infra* notes 50–107 and accompanying text.

<sup>30</sup> See *infra* notes 108–162 and accompanying text.

<sup>31</sup> See *infra* notes 163–178 and accompanying text.

<sup>32</sup> 36 U.S.C. §§ 2101–300101. The 104th Congress officially ceased the practice of chartering due to potential confusion surrounding the relationship between the United States government and federally chartered corporations. Ronald C. Moe, *Congressionally Chartered Corporate Organizations (Title 36 Corporations)*, 46 FED. LAW. 35, 36 (1999).

zations, like the USOPC; and (3) Treaty Obligation Organizations.<sup>33</sup> Title 36 organizations are not government agencies, and each organization's charter outlines its purposes, powers, and overall-governance structure, including membership.<sup>34</sup>

Much of the legal scholarship concerning Title 36 organizations focuses on jurisdictional issues when the organizations sue or are sued.<sup>35</sup> An organization's federally chartered status does not automatically admit it into federal court for dispute resolution.<sup>36</sup> When a federally chartered organization's enabling statute expressly states that it has the capacity to be sued in federal court, however, federal question jurisdiction does exist.<sup>37</sup>

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<sup>33</sup> 36 U.S.C. §§ 2101–300101. The organizations chartered to facilitate observances and ceremonies are the American Battle Monuments Commission, the United States Holocaust Memorial Museum, and the President's Committee on Employment of People with Disabilities. *Id.* §§ 2101–2502. The bulk of Title 36 corporations are patriotic and national organizations, and include well known entities such as the USOPC, the American Legion, Big Brothers-Big Sisters of America, the Boy and Girl Scouts of the United States of America (separate organizations), and the Veterans' Association. *Id.* §§ 20101–240112. The American National Red Cross (Red Cross) is the sole organization recognized under the third category, Treaty Obligation Organizations. *Id.* §§ 300101–300113. Title 36 organizations are distinct from federally chartered "government business corporations" such as the Federal Deposit Insurance Corporation. 12 U.S.C. § 1811 (2018); Christina Maistrellis, *American National Red Cross v. S.G. & A.E.: An Open Door to the Federal Courts for Federally Chartered Corporations*, 45 EMORY L.J. 771, 773 (1996).

<sup>34</sup> See Maistrellis, *supra* note 33, at 774 (noting that it is the organization's chartering statute that controls its liability); Moe, *supra* note 32, at 37 (stating that organizations are not "agencies of the United States"). The Supreme Court made clear in *San Francisco Arts & Athletics v. United States Olympic Committee (SFAA)* that federally chartered corporations are private, not governmental, actors. 483 U.S. 522, 543 (1987). The Court noted the policy reasons for this classification, primarily an unpalatable liability expansion. *Id.* at 543 n.23.

<sup>35</sup> See, e.g., Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317, 330–37 (2009) (discussing the jurisdictional implications of being a federally incorporated nonprofit corporation).

<sup>36</sup> *Id.* at 333. When a federal court has automatic jurisdiction over a case because of the type of claim asserted then there is "federal question jurisdiction." See *Federal-Question Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The exercise of federal-court power over claims arising under the U.S. Constitution, an act of Congress, or a treaty.").

<sup>37</sup> Lund, *supra* note 35, at 334–35. The Supreme Court observed such language in *American National Red Cross v. S.G.* 505 U.S. 247, 248 (1992). The Red Cross's chartering statute provides that it can "sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." 36 U.S.C. § 300105(a)(5). This differs from Little League Baseball, Inc., a federally chartered organization with only the power to "sue and be sued." 36 U.S.C. § 130505(9). Where a corporation has capital stock, federal question jurisdiction exists if the United States owns a majority of the capital stock. Lund, *supra* note 35, at 334; see *Capital Stock*, BLACK'S LAW DICTIONARY, *supra* note 36 ("The total number of shares of stock that a corporation may issue under its charter or articles of incorporation, including both common stock and preferred stock."). Even if an organization does not have capital stock, if the United States solely owns that organization, federal question jurisdiction exists. See *Jackson v. Tenn. Valley Auth.*, 462 F. Supp. 45, 50 (M.D. Tenn. 1978) (holding that because the federally chartered Tennessee Valley Authority is a "wholly owned federal corporation," federal courts possessed subject matter jurisdiction (citing 28 U.S.C. § 1331 (2018))).

Federally chartered organizations also complicate a second avenue into federal court: through diversity of citizenship.<sup>38</sup> Although courts typically consider corporations citizens of their states of incorporation or their principal place of business, federally chartered corporations do not neatly satisfy these requirements.<sup>39</sup> A federally chartered nonprofit corporation can have either nationalized or localized citizenship.<sup>40</sup> Diversity of citizenship cannot exist when a federally chartered nonprofit corporation has nationalized citizenship.<sup>41</sup> Therefore, to determine whether there is diversity of citizenship, courts ascertain whether the federally chartered corporation is sufficiently “localized.”<sup>42</sup> The localized exception turns on whether a federally chartered corporation operates in more than one state.<sup>43</sup> This inquiry focuses on both the corporation’s actual actions as well as Congress’s intent.<sup>44</sup> Additionally, Congress may expressly designate a federally incorporated nonprofit corporation as having state citizenship, even if it is otherwise national in character.<sup>45</sup>

The government provides little oversight of federally incorporated corporations.<sup>46</sup> Each organization must comply with audit requirements as dictated by its chartering statute.<sup>47</sup> For example, the USOPC’s statute requires it to submit a report to Congress and the President every four years, and to make it

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<sup>38</sup> Maistrellis, *supra* note 33, at 775.

<sup>39</sup> See 28 U.S.C. § 1332(c) (stating that, for purposes of determining diversity, a corporation is a citizen of the state of its incorporation or “principal place of business”); *Bankers Tr. Co. v. Tex. & Pac. Ry. Co.*, 241 U.S. 295, 309–10 (1916) (finding no diversity of citizenship in part because the act of Congress incorporating Texas & Pacific Co. makes it a citizen of the United States, but not of Texas); Maistrellis, *supra* note 33, at 775–76 (describing the relationship between federally chartered corporations and diversity of citizenship).

<sup>40</sup> Lund, *supra* note 35, at 318–19.

<sup>41</sup> *Id.* at 318.

<sup>42</sup> See *Burton v. U.S. Olympic Comm.*, 574 F. Supp. 517, 519 (C.D. Cal. 1983) (explaining the “localized” test for federally chartered corporations); Maistrellis, *supra* note 33, at 776 (same).

<sup>43</sup> Lund, *supra* note 35, at 319.

<sup>44</sup> See *Burton*, 574 F. Supp. at 521 (holding that the USOPC possessed national citizenship because of legislative history indicating Congress’s intention and the USOPC’s actual widespread multi-state activities). Courts scrutinize “localized” assertions, and are careful not to let the localized exception swallow the general nationalized rule. See Maistrellis, *supra* note 33, at 776 (explaining the narrowness and stringency of a “localized” finding).

<sup>45</sup> See 28 U.S.C. § 1348 (“All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.”); 36 U.S.C. § 300101 (stating that “[t]he American National Red Cross is a . . . body corporate and politic in the District of Columbia”); *Bankers Tr. Co.*, 241 U.S. at 310 (recognizing congressional power to grant federally chartered corporation’s state citizenship).

<sup>46</sup> Moe, *supra* note 32, at 38. 36 U.S.C. § 10101 requires an annual audit of federally chartered organizations, unless Congress has laid out different requirements. 36 U.S.C. § 10101. In addition to financial statements, § 10101(b) details supplemental statements the organizations must compile in a non-public report, except for reports of organizations related to veterans, which are public. *Id.* § 10101(b); 44 U.S.C. § 1332 (2018).

<sup>47</sup> See, e.g., 36 U.S.C. § 220511 (laying out reporting requirements for the USOPC).

publicly available to individuals at a reasonable cost.<sup>48</sup> By comparison, the Boy Scouts of America, another Title 36 corporation, must file an annual report with Congress.<sup>49</sup>

### *B. The United States Olympic and Paralympic Committee*

Congress incorporated the USOPC<sup>50</sup> as a nonprofit corporation, and subsequently amended the original charter with the adoption of the Ted Stevens Act, which this Section discusses in relevant detail.<sup>51</sup> Subsection 1 of this Section provides an overview of the congressional history of the Ted Stevens Act, paying special attention to the substantial amendments of 1978 and 1998.<sup>52</sup> Subsection 2 discusses the June 18, 2020 updated USOPC Bylaws, as well as disputes centered around the Bylaws.<sup>53</sup>

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<sup>48</sup> *Id.* Until Congress amended the statute in 1998, the statute required the USOPC to file an annual report. Compare *id.* (requiring, after June 2001, a report every four years), with 36 U.S.C. § 220511 (1996) (requiring an annual report). See also 2020 BYLAWS, *supra* note 19, § 2.4 (providing that the USOPC will provide reports to Congress as required by the Ted Stevens Olympic and Amateur Sports Act (the Ted Stevens Act)).

<sup>49</sup> 36 U.S.C. § 30908. Other federally chartered organizations that must file annual reports include the Disabled American Veterans (36 U.S.C. § 50308) and the American Legion (36 U.S.C. § 21708). 36 U.S.C. §§ 21708, 50308.

<sup>50</sup> The United States Olympic Committee is as of January 1, 2020 called the United States Olympic and Paralympic Committee. 2020 BYLAWS, *supra* note 19. The Ted Stevens Act has not been updated to reflect this change, but this Note will refer to the corporation as the USOPC. See 36 U.S.C. §§ 220501–220543; 2020 BYLAWS, *supra* note 19.

<sup>51</sup> See *infra* notes 52–107 and accompanying text.

<sup>52</sup> See *infra* notes 54–82 and accompanying text.

<sup>53</sup> See *infra* notes 83–107 and accompanying text.



## 1. The Ted Stevens Act and the USOPC<sup>54</sup>

Congress incorporated what would become the USOPC in 1950, although its present structure dates to significant amendments in both 1978 and 1998.<sup>55</sup> The 1978 changes resulted from the passage of the Amateur Sports Act, a response to President Gerald Ford's desire to field a more competitive Olympic Team.<sup>56</sup> The purpose of the amendment was to motivate U.S. citizens to pursue

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<sup>54</sup> There is currently legislation engrossed in the Senate on August 4, 2020 and, as of September 25, 2020, held at the desk of the House of Representatives amending the Ted Stevens Act. S. 2330, 116th Cong. (2020) (as engrossed by Senate, Aug. 4, 2020); see S. 2330—*Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020*, LIBR. OF CONGRESS (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/2330> [<https://perma.cc/LZE2-A TEC>] (providing status update for Senate Act 2330). The legislation makes a number of changes to the Ted Stevens Act, some of them pertinent to this Note's discussion and analysis and also impacting the statute's numbering in some instances. See Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. §§ 220501–220543 (the text of the Ted Stevens Act, as of Sept. 25, 2020, is available at <https://perma.cc/C37D-JMAE>). Most significantly for this Note, the proposed amendment to the Ted Stevens Act removes reference to the American Arbitration Association (AAA) in 36 U.S.C. § 220529(a). Compare *id.* § 220529(a) (explicitly referencing the AAA), with S. 2330 § 7(b), (e) (removing reference to the AAA). As of September 25, 2020 the Ted Stevens Act provides that “[a] party aggrieved by a determination of the corporation under section 220527 or 220528 of this title may obtain review by any regional office of the [AAA].” 36 U.S.C. § 220529(a). The proposed bill amendment would remove reference to the AAA, adopt language like that of the USOPC's 2020 Bylaws, as well as give the aggrieved party the right to review by “the arbitration and mediation provider designated by the corporation under section 220522(a)(4).” S. 2330 § 7(e). Similarly, the proposed legislation removes reference to the AAA in 36 U.S.C. § 220522(a)(4)(B) and instead would provide for arbitration of certain decisions “in accordance with the standard commercial arbitration rules of an established major national provider of arbitration and mediation services based in the United States and designated by the corporation with the concurrence of the Athletes' Advisory Council and the National Governing Bodies' Council.” *Id.* § 7(b). This Note's discussion of the USOPC Board's fiduciary duties and the AAA provisions in the USOPC Bylaws and the Ted Stevens Act consider the Ted Stevens Act as referencing the AAA. See *infra* notes 95, 99–101, 104–105, 196–236, 315–349 and accompanying text (discussing the AAA, the Ted Stevens Act, and the USOPC Bylaws). If this amendment passes, some of the statutory language this Note relies on will no longer exist. See S. 2330 § 7(b), (e). Nevertheless, four points remain true. First, as argued later in this Note, the USOPC Board still adopted the Bylaws in violation of their fiduciary duties because, at the time of adoption and since January 1, 2020, the approved Bylaws were contrary to law. See *infra* notes 196–236, 315–329 and accompanying text. Second, a federally chartered nonprofit corporation should not possess the power to change its Bylaws and then have Congress change the statutory language. See 36 U.S.C. § 220502(a) (identifying the USOPC as a federally chartered corporation, and by necessity identifying that Congress controls the USOPC, not the other way around). Third, as a policy matter and as later discussed, it makes little sense to remove the AAA as the forum for dispute resolution. See *infra* notes 315–329 and accompanying text. Fourth, this Note's ultimate purpose—providing an avenue for holding the USOPC Board accountable for their actions through the U.S. Attorney General's enforcement of the USOPC Board's fiduciary duties—remains unaffected. See *infra* notes 275–349 and accompanying text. This Note will indicate other areas where the proposed legislation alters language in the Ted Stevens Act.

<sup>55</sup> See U.S. Olympic Association Incorporation, ch. 975, 64 Stat. 899 (1950) (incorporating what was then called the U.S. Olympic Association); S. REP. NO. 105-325, at 1 (1998); S. REP. NO. 95-770, at 4–5.

<sup>56</sup> S. REP. NO. 95-770, at 2–3. The Amateur Sports Act is also known as the Ted Stevens Act, after Senator Ted Stevens who served as a commissioner on the President's Commission on Olympic Sports (PCOS). *Id.* at 2. To eradicate the unorganized and “factional disputes” that plagued competing

amateur athletics. The 1978 amendment empowered the USOPC to recognize and coordinate sports' National Governing Bodies (NGBs).<sup>57</sup> Each sport has an NGB that develops athletes within the sport, coordinates competitions, and works to increase participation.<sup>58</sup> The Ted Stevens Act, by empowering the USOPC to recognize NGBs, allowed the USOPC to delegate much of the daily development and management of amateur athletes to such athletes' NGBs.<sup>59</sup> The 1978 bill marked the first time athletes had a statutory right to participate in amateur athletic competitions, although more exhaustive substantive rights were compromised out of the bill and into the USOPC's Bylaws.<sup>60</sup> Finally, the 1978 amendment put the USOPC in charge of resolving disputes about qualification and competing in protected competitions between NGBs and, among other parties, amateur athletes.<sup>61</sup>

The 1998 amendment sought to bring the Ted Stevens Act in line with the modern Olympic reality.<sup>62</sup> It changed the official name of the Ted Stevens Act

organizations within the same sport, the PCOS recommended a hierarchical structuring of Olympic sports in the United States, with the USOPC acting as a "coordinating body" that both recognized—and to a degree controlled—National Governing Bodies (NGBs) of different Olympic sports. *See SFAA*, 483 U.S. at 544 (describing inspiration for the Ted Stevens Act); S. REP. NO. 95-770, at 3 (remarking that the USOPC now had the power to set requirements NGBs must satisfy to be officially recognized); Dionne L. Koller, *A Twenty-First-Century Olympic and Amateur Sports Act*, 20 VAND. J. ENT. & TECH. L. 1027, 1047 (2018). At the extreme, the 1978 amendment allowed the USOPC to "suspend" or "revoke" an NGB's membership in the USOPC for non-compliance with USOPC standards. S. REP. NO. 95-770, at 8. An additional revision was the introduction of arbitration to resolve specified disputes when two bodies are competing for NGB status. *Id.* at 9.

<sup>57</sup> S. REP. NO. 95-770, at 6 (empowering the USOPC to recognize NGBs).

<sup>58</sup> *Structure: National Governing Bodies*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/About-the-USOPC/Structure> [<https://perma.cc/PX76-TGAY>] (explaining role of NGBs in the U.S. Olympic and Paralympic structure). The USOPC notes that there are thirty-seven NGBs for summer Olympic sports and eight for winter Olympic sports. *Id.* Each of these NGBs are "responsible for training, competition and development for their sports, as well as nominating athletes" to Olympic and Paralympic teams. *Id.*

<sup>59</sup> Koller, *supra* note 56, at 1049. The USOPC has the sole authority to recognize NGBs, which in turn manage amateur membership in their sport. H. R. REP. NO. 95-1627, at 11 (1978) (emphasizing the novelty of the USOPC possessing the sole power to recognize a sport's NGB); S. REP. NO. 95-770, at 3, 6. Additionally, the 1978 amendments identified women and handicapped athletes as needing enhanced attention and protection by the USOPC and NGBs. S. REP. NO. 95-770, at 5. These enhanced powers sought to "bring order to the amateur sports community" to reach "mutual goals and priorities" of the USOPC and NGBs. *Id.* at 4. The PCOS also noted the important role the USOPC plays in "promot[ing] and encourag[ing] physical fitness and public participation in sports." *Id.* at 4-5. The 1978 amendment also granted the USOPC \$30 million to implement the changes, a one-time injection of federal government financial assistance. H. R. REP. NO. 95-1627, at 11.

<sup>60</sup> S. REP. NO. 95-770, at 5-6; *see* 2020 BYLAWS, *supra* note 19, § 9 ("Athletes' Rights").

<sup>61</sup> H. R. REP. NO. 95-1627, at 14. Subsequent amendments maintain the substance of this language, and can now be found at 36 U.S.C. § 220503(8). 36 U.S.C. § 220503(8) (stating that a purpose of the USOPC is "to provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete . . . to participate in amateur athletic competition").

<sup>62</sup> S. REP. NO. 105-325, at 1. The Senate Report expressly noted four changes: (1) Olympic events now occur every two years instead of every four years; (2) professional athletes are now allowed to

to the “Olympic and Amateur Sports Act,” increased protections for an “athletes’ right to compete,” improved the efficiency and effectiveness of USOPC involvement in dispute resolution, and more completely incorporated the Paralympics.<sup>63</sup> The 1998 amendment introduced an Athlete Ombudsman to assist with dispute resolution, and required an Athletes’ Advisory Council to increase athlete representation in USOPC decisions.<sup>64</sup>

Currently, the Ted Stevens Act is split into four subchapters: (1) Corporation; (2) National Governing Bodies; (3) Grant to Keep Young Athletes Safe; and (4) United States Center for Safe Sport.<sup>65</sup>

The “Corporation,” the first subchapter, outlines the USOPC’s purposes, powers, dispute resolution functions, membership standards, and reporting requirements, as well as grants the USOPC exclusive use of the word “Olympic,” and a handful of other specified words.<sup>66</sup> The USOPC has fifteen enumerated purposes, including general encouragement of athletics in the United States, obtaining the “most competent amateur representation possible in each event of the Olympic Games,” providing resolutions of disputes between athletes and NGBs, and helping women in amateur athletics.<sup>67</sup> The USOPC’s powers are divided between those stated in its Bylaws, general corporate powers, and powers related to amateur athletics and the Olympic Games.<sup>68</sup> Its general corporate powers include the capacity to litigate, with an express allowance for removal to federal court in civil suits alleging claims involving the USOPC’s statutorily granted authority.<sup>69</sup> The Ted Stevens Act also grants the

compete in Olympic events; (3) athletes have increased financial opportunity associated with sport; and (4) the Paralympics has increased in size. *Id.* at 2.

<sup>63</sup> *Id.* This name change reflected the change in athlete status from allowing only amateur athletes to allowing professional athletes to compete. *Id.*

<sup>64</sup> Koller, *supra* note 56, at 1051. The Athlete Ombudsman must aid all athlete members of NGBs on their rights and protections. 2020 BYLAWS, *supra* note 19, § 13. There is currently one Athlete Ombudsman and two assistant Athlete Ombudsmen. *Athlete Ombuds*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/Athlete-Ombudsman> [<https://perma.cc/WDH9-XFFM>]. Additionally, the 1998 amendment changed the reporting requirements of the USOPC from an annual report to a once-every-four-years report. 36 U.S.C. § 220511(a); S. REP. NO. 105-325, at 6.

<sup>65</sup> 36 U.S.C. §§ 220501–220543.

<sup>66</sup> *Id.* §§ 220501–220512.

<sup>67</sup> *Id.* § 220503. Despite these broad purposes, several articles and reports note the USOPC’s laser focus on Olympic medal success. *See, e.g.*, DOWDEN & MCPHEE, *supra* note 6, at 136 (quoting former USOPC chief executive officer (CEO) Scott Blackmun: “We are in the medal business.”); Koller *supra* note 56, at 1044 (suggesting that the USOPC in reality focuses solely on “producing winning Olympic teams”). The USOPC Board subcommittee hired Ropes & Gray LLP to investigate the abuse of USA gymnasts by former team doctor Larry Nassar. DOWDEN & MCPHEE, *supra* note 6, at 12. The Ropes Report noted that the USOPC Board primarily considers whether an NGB has athletes winning medals when dividing money between NGBs. *Id.* at 144. It also quoted an unnamed USOPC executive remarking that “‘money and medals’ were probably uttered at every staff meeting . . . with the effect of marginalizing other topics such as athlete programming.” *Id.*

<sup>68</sup> *See* 36 U.S.C. § 220505 (delineating the USOPC’s powers); 2020 BYLAWS, *supra* note 19.

<sup>69</sup> 36 U.S.C. § 220505(b)(9).

USOPC authority to control athlete representation at the Olympics and Paralympics by way of NGB athlete nomination to those competitions.<sup>70</sup> The charter tasks the USOPC with resolving conflicts that originate with disputes concerning “eligibility and participation” in the Olympics and Paralympics.<sup>71</sup>

The second subchapter addresses NGBs.<sup>72</sup> For the USOPC to recognize an NGB as a sport’s governing body, an NGB must comply with fifteen explicit requirements.<sup>73</sup> A central provision requires NGBs to “provide[] an equal opportunity to amateur athletes . . . to participate in amateur athletic competition, without discrimination on the basis of race, religion, sex, age, or national origin . . . .”<sup>74</sup> The second subchapter allows NGBs to manage most of the day-to-day business of individual sports.<sup>75</sup> The extent of the USOPC’s delegation of daily business to NGBs, and the amount of oversight the USOPC should provide over NGBs, is unclear.<sup>76</sup> In any event, if NGB members believe an

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<sup>70</sup> *Id.* § 220505(c)(3). Section 220505(c) additionally grants the USOPC the authority to identify an NGB for each individual sport. *Id.* § 220505(c)(4).

<sup>71</sup> 36 U.S.C. §§ 220505(c)(5), 220509(a). Accompanying its duty to resolve disputes, the USOPC must also provide an Athlete Ombudsman, free of cost, to all amateur athletes to explain the effects of the Ted Stevens Act and the USOPC’s Bylaws. *Id.* § 220509(b). Additionally, this subchapter addresses the issue of taking complete teams to Olympic Games in a section fittingly titled “Complete teams.” *See id.* § 220512 (stating that the USOPC has discretion to select less than a complete team for a protected competition, such as the Olympics, if an insufficient number of athletes have met qualifying standards). If one applies the “negative-implication” canon, the statute’s explicit identification of times when it permits an unfilled roster (when not enough eligible athletes exist) suggests that at all other times (when enough eligible athletes exist), the USOPC must name a full roster of such eligible athletes. *See id.* (addressing complete teams); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107–11 (2012) (describing the “negative-implication” canon, wherein “[t]he expression of one thing implies the exclusion of others”). At first blush this interpretation appears to be in tension with the District Court for the District of Columbia’s ruling in *DeFrantz v. United States Olympic Committee* that the Ted Stevens Act did not require the USOPC to name an Olympic Team for the 1980 Moscow Games. 492 F. Supp. 1181, 1189 (D.D.C. 1980). Congress added the “complete teams” provision, however, in its 1998 amendment, after the *DeFrantz* ruling. *See* S. REP. NO. 105-325, at 7 (adding a complete teams provision in a 1998 amendment). Further complicating the picture is USOPC Bylaw § 3.21, which requires a three-fourths majority of the USOPC Board to vote in favor of non-participation in the Olympics, among other events. 2020 BYLAWS, *supra* note 19, § 3.21. Harmonizing these seemingly conflicting provisions suggests that although the USOPC can elect to send *no* athletes, when it does send a contingent, unless there are not enough eligible athletes, it must name a full team. *See* 36 U.S.C. § 220512 (addressing complete teams). In setting criteria for Olympic qualification, an NGB may not set more stringent standards for Olympic team eligibility than the governing international body for its sport. *Id.* § 220522(14).

<sup>72</sup> 36 U.S.C. §§ 220521–220530.

<sup>73</sup> *Id.* § 220522(a)(1)–(15).

<sup>74</sup> *Id.* § 220522(a)(8).

<sup>75</sup> *See id.* §§ 220523–220524 (describing authority and duties of NGBs); Koller, *supra* note 56, at 1049–50 (outlining different duties of NGBs in organizing their sports). The USOPC cited this delegation as a defense when it faced accusations that it should have prevented child abuse within an NGB. Koller, *supra* note 56, at 1050.

<sup>76</sup> DOWDEN & MCPHEE, *supra* note 6, at 149–50. Ropes’s Report characterized the USOPC’s relationship with NGBs as a “service-oriented” relationship, in which the USOPC “provide[d] resources without accompanying oversight.” *Id.* at 149. The USOPC’s acting CEO in 2018 reported

NGB is violating its statutory duty, the Ted Stevens Act provides an individual enforcement mechanism.<sup>77</sup>

The final two subchapters, added in 2018, authorize the U.S. Attorney General to provide grants to organizations that seek to aid the USOPC and NGBs with preventing different forms of abuse and establish a United States Center for Safe Sport (the Center).<sup>78</sup> The statute tasks the Center with aiding NGBs to implement practices protecting amateur athletes from abuse.<sup>79</sup>

The Ted Stevens Act does not create a private right of action, and courts have not construed the Ted Stevens Act as providing what amounts to an “athlete’s bill of rights.”<sup>80</sup> Courts support this proposition by noting Congress’s decision to move a proposed section on athlete rights to the USOPC Bylaws.<sup>81</sup>

before Congress that she believed “the [USOPC] ‘did not exercise the authority that I think the act gives us.’” *Id.* at 150. Ropes’s Report attributes some of this confusion to the “vagueness of the Ted Stevens Act.” *Id.*

<sup>77</sup> 36 U.S.C. § 220527. Individual members of NGBs, or those eligible to belong to such NGBs, may file these complaints against NGBs after depleting all remedies within the NGB. *Id.* § 220527(b). The USOPC, if satisfied that the complainant exhausted all alternatives, holds a hearing. *Id.* § 220527(c). If the USOPC finds that the NGB violated the statute, it provides the NGB 180 days to make necessary changes or it will derecognize the NGB. *Id.* § 220527(d)(2)(A). If the USOPC finds in favor of the NGB, then the complainant may seek arbitration. *Id.* § 220529. For further explanation of the arbitration of disputes arising within the Ted Stevens Act, see Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 92–94 (2008). There is proposed legislation removing the exhaustion requirement from 36 U.S.C. § 220527. S. 2330 § 7(d).

<sup>78</sup> 36 U.S.C. §§ 220531, 220541–220543. For further discussion of these provisions, see Koller, *supra* note 56, at 1053–54.

<sup>79</sup> 36 U.S.C. § 220542(1). The addition “is to clarify that a central purpose of the [USOPC] is to promote a safe environment in sports that is free from abuse, including emotional, physical, and sexual abuse, of any amateur athlete.” S. REP. NO. 115-443, at 1 (2018). Increased attention on widespread sexual abuse in NGBs “raise[d] serious concerns about the extent to which the [USOPC] perceives and is acting upon its obligation to protect the health and safety of athletes” and provided the impetus for the amendments. *Id.* at 2.

<sup>80</sup> See *DeFrantz*, 492 F. Supp. at 1191–92. Athletes in *DeFrantz* argued that the USOPC violated their right to compete in the 1980 Olympic Games. *Id.* at 1190. The *DeFrantz* court rejected the contention that athletes had any statutory right to compete in the Olympic Games, noting that it was up to the USOPC to decide whether to compete at all in the Olympics. *Id.* at 1191. Because the court observed no right to compete, it reasoned that the Ted Stevens Act did not encompass an “implied private cause of action.” *Id.* at 1192. According to Judge Posner of the Seventh Circuit, this result arises from the policy position “that there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.” *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring).

<sup>81</sup> *Michels*, 741 F.2d at 158; see 2020 BYLAWS, *supra* note 19, § 9; Mitten & Davis, *supra* note 77, at 94–95 (listing cases that found that the Ted Stevens Act created no “substantive athletic participation rights” enforceable by athletes via private action). Indeed, the 1998 amendment to the Ted Stevens Act confirms courts’ interpretations and provides that the statute does not “create a private right of action.” 36 U.S.C. § 220505(b)(9). As a result, the Ted Stevens Act preempts claims that deal with qualification or eligibility for protected competitions, unless “extraordinary circumstances” arise. *Lee v. U.S. Taekwondo Union*, 331 F.2d 1252, 1256–58 (D. Haw. 2004) (citing *Harding v. U.S. Figure Skating Ass’n*, 851 F. Supp. 1476, 1479 (D. Or. 1994) (finding “extraordinary circumstances”

In line with the prohibition on private rights of action, an arbitrator decides the outcome of the vast majority of athlete grievances against NGBs and the USOPC.<sup>82</sup>

## 2. USOPC Governance and Structure

The USOPC's Bylaws underwent significant changes in 2020.<sup>83</sup> Its updated mission statement provides that the USOPC's mission "is to empower Team USA athletes to achieve sustained competitive excellence and well-being."<sup>84</sup> By comparison, the prior mission statement aimed "[t]o support U.S. Olympic and Paralympic athletes in achieving sustained competitive excellence while demonstrating the values of the Olympic movement, thereby inspiring all Americans."<sup>85</sup>

Section Three of the USOPC Bylaws details the powers and composition of, and voting for, the USOPC Board.<sup>86</sup> The USOPC Board oversees the "business and affairs" of the USOPC.<sup>87</sup> The USOPC Board currently consists of fourteen individuals, and its composition must include representatives from a number of different councils and committees.<sup>88</sup> Board members do not re-

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where the plaintiff pursued internal remedies and U.S. Figure Skating violated its rules, which collectively led to a "serious and irreparable injury"). In *Lee*, the District Court for the District of Hawaii dismissed Lee's claims because he failed to fully pursue available internal remedies. 331 F.2d at 1259.

<sup>82</sup> See *infra* notes 97–103 and accompanying text (outlining arbitration procedures).

<sup>83</sup> 2020 BYLAWS, *supra* note 19.

<sup>84</sup> *Id.* § 2.1. The mission statement includes supplementary "Core Principles," such as to "promote and protect athletes' rights, safety, and wellness," and "set clear standards of organizational excellence and hold ourselves and all member organizations accountable," while still respecting the "role of our member organizations." *Id.* Section 2.3 of the USOPC Bylaws purport to annually review and prioritize the purposes of the USOPC. *Id.* § 2.3. In the past, the USOPC expressed frustration with its dual obligations to elite-level athletes and "grassroots sports development," but the Ted Stevens Act encompasses both duties and does not indicate any prioritization of such duties. See 36 U.S.C. § 220503(6) (establishing that one of the USOPC's purposes is to "promote and encourage physical fitness and public participation in amateur athletic activities"); Koller, *supra* note 56, at 1052–53 (chronicling the Senate hearing on the USOPC's views and obligations concerning non-elite level athletes).

<sup>85</sup> USOPC, 2019 BYLAWS § 2.1 (2019) [<https://perma.cc/6EZ7-XNUE>] [hereinafter 2019 BYLAWS].

<sup>86</sup> 2020 BYLAWS, *supra* note 19, § 3.

<sup>87</sup> *Id.* § 3.1. These activities include electing members of the USOPC Board, admitting, overseeing, and removing NGBs as members of the USOPC, "hir[ing], fir[ing], evaluat[ing] and set[ting] the compensation for the CEO," and "achiev[ing] as much transparency in the operation of the corporation as is reasonably achievable." *Id.* § 3.1(d), (j).

<sup>88</sup> *Id.* § 3.2. The USOPC Board consists of five independent directors selected by the USOPC Board from individuals the Nominating and Governance Committee suggests, three members elected by the USOPC's National Governing Body Council, three members elected by the USOPC's Athlete Advisory Committee, two members elected by the USOPC's U.S. Olympians and Paralympians Association, the United States members of the IOC, the International Paralympic Committee governing board (*ex officio* as a result of their IOC membership), the chair of the U.S. Olympic and Paralympic Foundation, and the USOPC CEO, both as non-voting *ex officio* members. *Id.* The Bylaws lay out

ceive compensation by virtue of being a director.<sup>89</sup> The Bylaws permit the USOPC Board to establish committees to aid in its functioning.<sup>90</sup>

Section Eight of the Bylaws establishes the USOPC Board's authority to recognize, as well as rescind recognition of, NGBs.<sup>91</sup> To be a member of the USOPC as an "Olympic Sport Organization," such organization must be an NGB.<sup>92</sup> To satisfy membership requirements, NGBs must comply with the USOPC's "NGB Certification Program."<sup>93</sup> This program mandates that an NGB announce "clear" qualification procedures for protected competitions approved by a committee within the NGB, as well as the USOPC.<sup>94</sup> Addition-

specific voting procedures for each category of director. *Id.* A board member may serve for a maximum of two, four-year terms unless a board member's position is *ex officio*. *Id.* § 3.6.1. The 2020 update establishes an amended board staggering provision. *Id.* § 3.6.2. Section Fourteen extrapolates on the duties, composition, voting, and other matters related to the Athlete's Advisory Council, and Section Fifteen does the same for the National Governing Bodies Council. *Id.* §§ 14–15.

<sup>89</sup> *Id.* § 3.18.

<sup>90</sup> *Id.* § 5. The Bylaws expressly note, however, that the USOPC Board does not eliminate its liability by delegating tasks to a committee. *Id.* § 5.1. The committees include an "Athlete and NGB Engagement Committee" (Engagement Committee), an "Appointment and Composition" Committee, a "Compensation Committee," an "Ethics Committee," and a "Nominating and Governance Committee." *Id.* § 5. Each of these committees has its own requirements, purposes, and procedures. *Id.* The Engagement Committee is responsible for aiding the USOPC Board's supervision of "NGBs' compliance with the Act, [the] Bylaws, and agreements with the USOPC." *Id.* § 5.3.3(b).

<sup>91</sup> *Id.* § 8.1. The Bylaws recognize that other organizations, in addition to NGBs, may be eligible for membership, if they "take some active part" in Olympic sports. *Id.* § 8.2.

<sup>92</sup> *Id.* § 8.3. There can only be one recognized "Olympic Sport Organization" per sport. *Id.* Paralympic Sport Organizations track the same membership requirements as "Olympic Sports Organization[s]." *See id.* § 8.6 (detailing requirements for membership as a Paralympic Sport Organization). The USOPC Bylaws outline requirements for organizations that do not facilitate Olympic, Pan American, or Paralympic sports. *Id.* §§ 8.12–13.

<sup>93</sup> *Id.* § 8.7. The 2020 amendment made significant alterations to Section Eight of the Bylaws. *Compare* 2020 BYLAWS, *supra* note 19, § 8, *with* 2019 BYLAWS, *supra* note 85, § 8 (updating the Member Section of the Bylaws). An NGB must "fulfill all responsibilities as an NGB as set forth in the Act." 2020 BYLAWS, *supra* note 19, § 8.7.1(a)(i). Twenty percent of an NGB's board and/or committees must consist of athlete representatives. *Id.* §§ 8.8.1, 8.8.2 (defining who qualifies as an athlete representative and requiring fellow athletes to elect athlete representatives).

<sup>94</sup> BYLAWS, *supra* note 19, § 8.7.1(d)(ii). The 2020 Bylaws added the requirement that selection procedures be "clear," but eliminated the requirement that the procedures "fairly select athletes" for Olympic Games. *Compare id.* (stating that NGB must establish "clear . . . selection procedures" approved by the USOPC), *with* 2019 BYLAWS, *supra* note 85, § 8.7(g) (requiring a written and fair selection procedure). This provision often comes into play, along with Section Nine, in arbitrations concerning team selection. *See, e.g.,* *Keter v. U.S. Track & Field*, Case No. 01-19-0002-0105, at 11–12 (Am. Arbitration Ass'n July 2, 2019) (Mitten, Arb.) (finding that where U.S. Track and Field (USATF) relied on results outside the published time frame for considered results, USATF denied athletes a fair opportunity for team selection). Even before the 2020 "clear" addition, arbitrators often examined the use of ambiguous discretionary selection procedures. *See Rivera v. USA Cycling, Inc.*, Case No. 01-16-0002-6302, ¶ 13 (Am. Arbitration Ass'n July 26, 2016) (Oliveau, Arb.) (stating that discretionary selection must stem from objective factors because "[c]learly defined criteria are necessary to provide guidance to athletes"); *Small v. USA Cycling, Inc.*, Case No. 01-16-0002-6766, ¶ 73 (Am. Arbitration Ass'n July 26, 2016) (Oliveau, Arb.) (noting the "circular logic" in using medal winning capacity in U.S. Cycling, Inc. selection procedures); *Marable v. USA Wrestling Ass'n*, Case

ally, the NGB must commit to binding arbitration involving (1) its recognition as an NGB and (2) the opportunity of athletes, among other groups, “to participate in amateur athletic competition” pursuant to the commercial rules of the American Arbitration Association (AAA).<sup>95</sup>

The Bylaws provide express athlete rights in Section Nine.<sup>96</sup> Section 9.1 prohibits USOPC members from preventing or threatening to prevent an athlete from participating in any protected event.<sup>97</sup> The USOPC “will, by all reasonable means, protect the opportunity of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any” protected competition.<sup>98</sup> If an athlete alleges that an NGB failed to protect that athlete’s opportunity to participate, and the internal USOPC decision does not satisfy the claimant athlete, such athlete may bring the claim to arbitration.<sup>99</sup>

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No. 01-15-0004-1998, ¶ 43 (Am. Arbitration Ass’n July 17, 2015) (Oliveau, Arb.) (finding that a qualification procedure failed to satisfy the Ted Stevens Act requirement of an “objective basis” in its “subjective criteria,” and that the U.S. Wrestling Committee “acted in an arbitrary and capricious manner in using unknown subjective criteria to arrive at the Decision”). Although written before the 2020 amendments, the arbitrator in *West v. United States Bobsled & Skeleton Federation Inc.* noted that the Section Eight requirement for promulgating (then) written and fair procedures (now clear procedures) was to “inject as much objectivity and accountability into the selection process as is consistent with the promotion” of competitive success on the international stage. Case No. 01-19-0000-4345, ¶ 10.5 (Am. Arbitration Ass’n Mar. 19, 2019) (Myler, Arb.). There is a proposed amendment changing the selection criteria requirements. S. 2330 § 7(b). The proposed language would require selection criteria be “fair,” “clearly articulated in writing and properly communicated to athletes in a timely manner,” and “consistently applied, using objective and subjective criteria appropriate to the applicable sport.” *Id.*

<sup>95</sup> 36 U.S.C. § 220522(4). In connection with this opportunity provision, the Ted Stevens Act provides that the USOPC may alter the rules of arbitration. *Id.* § 220522(a)(4)(B). The same qualification does not exist for the other references the Ted Stevens Act makes for recourse to the AAA. *See id.* § 220529(a) (“A party aggrieved by a determination of the corporation under section 220527 or 220528 of this title may obtain review by any regional office of the [AAA].”).

<sup>96</sup> 2020 BYLAWS, *supra* note 19, § 9.1.

<sup>97</sup> *Id.* Section Nine goes on to detail the process by which an athlete files a complaint against an NGB for violating its Section Nine obligations. *Id.* §§ 9.2–10. Once an athlete files a complaint satisfying the Section Nine requirements, the “corporation’s dispute resolution team” as well as the Athlete Ombudsman seek to find an informal resolution. *Id.* §§ 9.5–6; *see id.* § 13 (outlining the responsibilities, independence, and privileges of the Athlete Ombudsman). If the athlete disagrees with the informal resolution, the athlete may move to arbitration. *Id.* § 9.7. Because Section Nine complaints impact not only the moving athlete (generally, if not always, an initially unselected athlete), but also athletes who have been selected to a team, such selected athletes (“affected parties”) must be notified of Section Nine proceedings. *Id.* § 9.8.

<sup>98</sup> *Id.* § 9.1.

<sup>99</sup> 36 U.S.C. §§ 220527(d)(1), 220529(a); 2020 BYLAWS, *supra* note 19, § 9.6. Arbitrators employ a de novo review of USOPC Bylaw Section Nine cases and engage in a fact-intensive review of selection procedures as applied to the case at hand. *Komanski v. USA Cycling, Inc.*, Case No. 01-15-0004-9907, ¶ 4.1 (Am. Arbitration Ass’n Nov. 15, 2015) (Benz, Arb.). Arbitrators acknowledge, however, the superior knowledge of NGBs in making USOPC compliant selection decisions and therefore “generally [are] deferential to an NGB’s professional judgment.” *Liu v. USA Table Tennis Ass’n*, Case No. 01-19-0001-4377, at 17 (Am. Arbitration Ass’n June 20, 2019) (Mitten, Arb.). Arbitrators



The 2020 Bylaws no longer reference the AAA and now purport to allow the USOPC to select an arbitration association.<sup>100</sup> The Ted Stevens Act, however, still unequivocally states that a party unsatisfied with a USOPC determination may seek review by the AAA.<sup>101</sup> At arbitration, the athlete bears the burden of proving that an NGB failed to comply with its Section Nine obligations.<sup>102</sup> As summarized in a 2012 arbitration, an athlete successfully bringing a Section Nine complaint must prove that an NGB “breached its approved and published Athlete Selection Procedures[,] . . . applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [an athlete], and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act).”<sup>103</sup>

Section Ten empowers members of NGBs to report potential NGB compliance issues to the USOPC and request an investigation.<sup>104</sup> Section Eleven

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will not substitute their judgement for that of an NGB in determining the best selection procedure, and will only objectively determine whether such procedures, as approved and enacted, comply with the Bylaws and the Ted Stevens Act. *Yun v. USA Taekwondo, Inc.*, Case No. 01-15-0005-7406, ¶ 89 (Am. Arbitration Ass’n Jan. 7, 2016) (Oliveau, Arb.). Arbitrators will award attorney and filing fees against an NGB, even if they find for the NGB, where qualification requirements contravene the Ted Stevens Act. *See Carr v. U.S. Speedskating*, Case No. 77-190-E-00075-13-JENF, ¶¶ 37, 48 (Am. Arbitration Ass’n Mar. 27, 2013) (Oliveau, Arb.) (finding for the NGB because all parties were equally affected by the insufficiently clear qualifying criteria but awarding athletes fees because U.S. Speedskating “failed in its duty under the [Ted Stevens] Act and as such must be responsible for the consequences”).

<sup>100</sup> Compare 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22, with 2019 BYLAWS, *supra* note 85, §§ 9.7, 10.21, 11.22 (replacing AAA with “arbitral organization designated by the Board”).

<sup>101</sup> 36 U.S.C. § 220529 (stating that “[a] party aggrieved by a determination of the corporation under section 220527 or 220528 of this title may obtain review by any regional office of the [AAA]”). Section 220522 requires NGBs to agree to arbitration in accordance with the Commercial Rules of the AAA, if a controversy arises involving “the opportunity of any amateur athlete . . . to participate in amateur athletic competition.” *Id.* § 220522(a)(4)(B). Section 220527 provides that individuals may bring complaints against NGBs when they feel the NGB has violated § 220522, which lists out an NGB’s “Eligibility Requirements” among other sections. 36 U.S.C. §§ 220522, 220527(a)(1).

<sup>102</sup> *West*, Case No. 01-19-0000-4345, ¶ 4.2. Although the athlete bears the burden of proving non-compliance, when qualifying language remains ambiguous, such ambiguity “must be construed against the drafter,” generally an NGB. *Id.* ¶ 10.13; *Lea v. USA Cycling, Inc.*, Case No. 0116-0000-8307, ¶¶ 7.4–8 (Am. Arbitration Ass’n Apr. 15, 2016) (Myler, Arb.) (finding, in a dispute over qualification for the 2016 Olympic Cycling Team, “nomination” to be an ambiguous term, and stating that USA Cycling, Inc. should have nominated the athlete to the Olympic Team); *see also Old Blue Rugby v. USA Rugby*, Case No. 01-14-0000-4003, ¶¶ 38, 40 (Am. Arbitration Ass’n May 29, 2014) (Oliveau, Arb.) (finding that when regulations are unambiguous, the drafting party must interpret such regulations on a “rational” and “reasonable basis,” and not “act[] capriciously based on assumed facts”).

<sup>103</sup> *Tibbs v. U.S. Paralympics*, Case No. 71-190-E-00406-12-JENF, at 14 (Am. Arbitration Ass’n Aug. 28, 2012) (Mitten, Arb.).

<sup>104</sup> 2020 BYLAWS, *supra* note 19, § 10. The remainder of Section Ten outlines the specifics of complaint requirements, as well as the internal process for resolution. *Id.* As *supra* note 100 describes, the amended Bylaws purportedly allow the USOPC Board to pick the arbitral organization that an unsatisfied complainant may turn to. *Id.* § 10.21. Section 220529 of the Ted Stevens Act allows the

outlines how an amateur sports organization can apply to displace an NGB.<sup>105</sup> In Section Twelve, the USOPC requires its Board to comply with a Code of Conduct for itself, its member organizations, its chief executive officer (CEO), and all associated employees.<sup>106</sup> Section Seventeen outlines the USOPC's indemnification policies.<sup>107</sup>

### C. Fiduciary Duties of Nonprofit Directors

This Section surveys the current law on the fiduciary duties of nonprofit corporation directors.<sup>108</sup> In particular, this Note reviews a nonprofit director's duties of care, loyalty, and obedience.<sup>109</sup>

Directors of nonprofit corporations, like their for-profit counterparts, owe fiduciary duties.<sup>110</sup> The two differ, however, in to *whom* each owes fiduciary duties.<sup>111</sup> For-profit corporation directors owe fiduciary duties to the corporation and by extension its stockholders, whereas nonprofit corporation directors owe duties to the nonprofit corporation, its members, or its purpose, as indicated in its incorporating documents or statute.<sup>112</sup> To whom (or what) nonprofit

USOPC to establish complaint procedures, as well as permits any party dissatisfied by the outcome of the USOPC's determination recourse to the AAA. 36 U.S.C. §§ 220527, 220529.

<sup>105</sup> 2020 BYLAWS, *supra* note 19, § 11. Replacing an existing NGB requires the proponent to demonstrate at a hearing, by a preponderance of the evidence, that the existing NGB does not meet the Ted Stevens Act's and USOPC Bylaw's criteria for NGB recognition, as well as demonstrate that the proponent "more adequately meet[s] the criteria" of the Ted Stevens Act. *Id.* § 11.18. Like Section Ten, *supra* note 104, the USOPC's amended Bylaws purport to allow the USOPC to pick the arbitral organization, whereas the Ted Stevens Act grants the unsatisfied party recourse to the AAA. 36 U.S.C. §§ 220528, 220529(a); 2020 BYLAWS, *supra* note 19, § 11.22.

<sup>106</sup> 2020 BYLAWS, *supra* note 19, § 12.1; U.S. OLYMPIC COMM., CODE OF CONDUCT POL'Y § IV (2018) (requiring all those affected to follow the Ted Stevens Act).

<sup>107</sup> 2020 BYLAWS, *supra* note 19, § 17.

<sup>108</sup> See *infra* notes 110–162 and accompanying text.

<sup>109</sup> See *infra* notes 120–162 and accompanying text.

<sup>110</sup> Hazen & Hazen, *supra* note 17, at 349; Dana Brakman Reiser, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care Systems*, 53 RUTGERS L. REV. 979, 983 (2001). Black's Law Dictionary defines "fiduciary" as "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure." *Fiduciary*, BLACK'S LAW DICTIONARY, *supra* note 36. Since *Stern v. Lucy Webb Hayes National Training School for Deaconesses & Missionaries*, nonprofit directors have been held to the lower corporate law standard of gross negligence, as opposed to the more stringent trustee standard of negligence. 381 F. Supp. 1003, 1013 (D.D.C. 1974); Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, 103, 115 (Evan J. Criddle et al. eds., 2019).

<sup>111</sup> See *infra* note 112 and accompanying text (contrasting for-profit and nonprofit beneficiaries of fiduciary duties). The question of to whom fiduciaries owe duties presented itself in *Securities & Exchange Commission v. Chenery Corp.*, when Justice Frankfurter observed that "to say that a man is a fiduciary only begins analysis . . . . To whom is he a fiduciary?" 318 U.S. 80, 85–86 (1943).

<sup>112</sup> See MODEL BUS. CORP. ACT § 8.30 cmt. (AM. BAR ASS'N 2016) (clarifying that the Model Business Corporation Act's "standards of conduct for [corporate] directors" should be interpreted as "analogous to those generally articulated by courts in evaluating director conduct, often referred to as

directors owe fiduciary duties depends on the organization's governance structure and incorporating language.<sup>113</sup> Parsing out the beneficiary of the director's fiduciary acts does not matter if the result of pursuing the nonprofit's purpose is the same as pursuing the nonprofit's interests.<sup>114</sup>

Each state's nonprofit laws define the scope of nonprofit directors' fiduciary duties.<sup>115</sup> Nonprofit fiduciary duties often track their for-profit counterparts, and this Note will discuss and rely on both established for-profit and nonprofit duties in assessing director duties within the federally chartered nonprofit corporation arena.<sup>116</sup>

Limited instances of court enforcement of nonprofit director's fiduciary duties exist, and research has not yet uncovered cases involving the enforcement of fiduciary duties of directors of federally incorporated nonprofit corporations.<sup>117</sup> This limited enforcement stems from several factors, including heightened settlement motivations in the nonprofit context, lack of specific state nonprofit law, and restricted standing to sue.<sup>118</sup> Subsection 1 addresses the fiduciary duty of care, Subsection 2 the duty of loyalty, and Subsection 3 the duty of obedience.<sup>119</sup>

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the duties of care and loyalty"); Mayer, *supra* note 110, at 105 (noting that a nonprofit's governance structure dictates to whom the directors owe fiduciary duties).

<sup>113</sup> Mayer, *supra* note 110, at 105.

<sup>114</sup> *Id.* at 108.

<sup>115</sup> See Douglas A. Berman, *Developments in the Law: Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1581–82 (1992) (observing that states take different approaches to organizing nonprofit law). The American Bar Association also puts out a Model Nonprofit Corporation Act (Model Act). MODEL NONPROFIT CORP. ACT (AM. BAR ASS'N 2008). The push towards formalizing and clarifying nonprofit law is relatively new, especially as compared to nonprofit's for-profit counterparts. Hazen & Hazen, *supra* note 17, at 351.

<sup>116</sup> See Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 CATH. U. L. REV. 701, 703–04, 713 (2008) (stating that nonprofit and for-profit governance obligations “essentially” track one another). Because of the voluntary nature of nonprofit directors, there is some pushback to holding such directors to the same standards as their for-profit counterparts. See Hazen & Hazen, *supra* note 17, at 378 (recognizing complicating factor of voluntarism in holding nonprofit directors liable for mismanagement). Furthermore, not all scholars believe corporate law transfers neatly onto nonprofit law. See, e.g., Linda Sugin, *Strengthening Charity Law: Replacing Media Oversight with Advance Rulings for Nonprofit Fiduciaries*, 89 TUL. L. REV. 869, 880 (2015) [hereinafter Sugin, *Strengthening Charity Law*] (observing that the effectiveness of “self-enforcement” in corporate law stems from market dynamics, and questioning whether “self-enforcement” in the nonprofit sector can police nonprofit directors given the absence of consumer influence).

<sup>117</sup> See Sugin, *Strengthening Charity Law*, *supra* note 116, at 871–72 n.6 (stating that, as of 2015, research uncovered only ten instances of courts concluding that nonprofit directors breached their fiduciary obligations and awarding remedies).

<sup>118</sup> See *id.* at 873, 876, 879.

<sup>119</sup> See *infra* notes 120–162 and accompanying text.

## 1. Duty of Care

Directors owe a duty of care to act as someone in their position reasonably would in a similar situation.<sup>120</sup> The duty of care focuses more on the director's decision-making process, and less on the actual substance of that decision.<sup>121</sup> Accordingly, where directors make decisions unpalatable in hindsight, liability exists only if, in coming to that decision, the director acted with gross negligence.<sup>122</sup> The Model Nonprofit Corporation Act (Model Act) and case law include in a director's duty of care the duty to oversee the corporation's functionings.<sup>123</sup> Directors may violate this duty when they do not provide sufficient oversight of the nonprofit corporation's functionings.<sup>124</sup>

As a default, the Model Act protects directors from monetary liability for a breach of their duty of care.<sup>125</sup> Accordingly, courts often dismiss claims where plaintiffs assert only that directors breached their duty of care and seek money damages.<sup>126</sup>

## 2. Duty of Loyalty

Famously articulated by the New York Court of Appeals in *Meinhard v. Salmon*, the duty of loyalty requires fiduciaries to act with "the punctilio of an honor the most sensitive."<sup>127</sup> In both the for-profit and nonprofit contexts, this

<sup>120</sup> Hazen & Hazen, *supra* note 17, at 356; see MODEL NONPROFIT CORP. ACT § 8.30(b) (establishing a standard of conduct of care for nonprofit directors).

<sup>121</sup> Hazen & Hazen, *supra* note 17, at 380–81.

<sup>122</sup> *In re Walt Disney Co. Derivative Litig.*, 907 A.2d, 693, 750 (Del. Ch. 2005).

<sup>123</sup> *In re Bridgeport Holdings, Inc.*, 338 B.R. 548, 569 (Bankr. D. Del. 2008); see MODEL NONPROFIT CORP. ACT § 8.30(b) (referencing the board's "oversight function" in the section establishing the standard of care).

<sup>124</sup> See *In re Lemington Home for the Aged*, 777 F.3d 620, 629–30 (3d Cir. 2015) (observing sufficient support for affirming a jury verdict that nonprofit directors of nursing home breached their duty of care, when directors were "responsible for the oversight of the nursing home administrator"). In *In re Lemington*, a nonprofit board of directors employed an administrator who repeatedly failed to remedy health violations in the nursing home, and contrary to the law, allowed her to continue in her role as administrator after her firing. *Id.* The Third Circuit Court of Appeals, upon review of the board's acts, concluded that the directors breached their duty of care. *Id.*; see MODEL NONPROFIT CORP. ACT § 8.31(a)(2)(iv) (ascribing liability to directors for "sustained failure . . . to devote attention to ongoing oversight of the activities and affairs of the corporation").

<sup>125</sup> See MODEL NONPROFIT CORP. ACT § 8.31(d) (removing monetary liability for breaches of duty, except for liability associated with retention of an improper benefit, an "intentional infliction of harm," unlawful distributions, and knowing violations of criminal law).

<sup>126</sup> See *Walt Disney Co.*, 907 A.2d at 752 (recognizing that when corporations have a provision in their articles of incorporation exculpating directors for violations of their duty of care, and plaintiffs seek only monetary damages, such a provision works as an "affirmative defense"); Eric C. Chaffee & Karie Davis-Nozemack, *Corporate Tax Avoidance and Honoring the Fiduciary Duties Owed to the Corporation and Its Stockholders*, 58 B.C. L. REV. 1425, 1443 (2017) (observing the limited value of a duty of care because of exculpation provisions in articles of incorporation).

<sup>127</sup> 164 N.E. 545, 546 (N.Y. 1928).

requires directors to act in the best interests of the corporation.<sup>128</sup> Boards can breach their duties of loyalty in numerous ways, with the paradigmatic example being a transaction where board members find (or place) themselves on both sides of the transaction.<sup>129</sup> The duty of loyalty encompasses the duty of good faith, expanding its reach beyond strictly financial transactions.<sup>130</sup> This Subsection will focus on two ways directors can breach their duty of loyalty not involving financial self-dealing transactions: (1) a breach of the board's duty of oversight, and (2) a breach due to violation of the law.<sup>131</sup>

A board violates its duty of loyalty by failing to implement measures to monitor a corporation's compliance with relevant laws.<sup>132</sup> A court may find a breach where the board either (1) failed to implement any reporting system, or (2) failed to oversee an implemented reporting system.<sup>133</sup> Courts rarely find facts sufficient to support a plaintiff's claim that the board breached its duty of

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<sup>128</sup> See MODEL NONPROFIT CORP. ACT § 8.30(a) (requiring directors to act "in good faith" and "in a manner the director reasonably believes to be in the best interests of the nonprofit corporation"); Hazen & Hazen, *supra* note 17, at 349 (describing the duty of loyalty).

<sup>129</sup> See *In re Capital One Derivative S'holder Litig.*, 952 F. Supp. 2d 770, 784 (E.D. Va. 2013) (acknowledging that conflicts of interest often sit at the center of loyalty claims); Hazen & Hazen, *supra* note 17, at 380–81 (recognizing the duty of loyalty's focus on "substance" over process). The duty of loyalty also prohibits directors from taking corporate opportunities, withholding material information, or aiding others in harming the corporation. Hazen & Hazen, *supra* note 17, at 381–82. *Summers v. Cherokee Children & Family Services, Inc.* describes the for-profit corporation duty of loyalty as focusing on director action with respect to the corporation's long-term success, and contrasts this with the nonprofit corporation duty of loyalty, which focuses on pursuing the nonprofit's charitable mission. 112 S.W.3d 486, 503–04 (Tenn. Ct. App. 2002); see also Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 IOWA J. CORP. L. 631, 641–42 (1997) (describing a similar difference in regards to the duty of care).

<sup>130</sup> Nat'l Sec. Counselors v. Cent. Intelligence Agency, 811 F.3d 22, 25 (D.C. Cir. 2016) (noting that Virginia law obligates nonprofit directors to act loyally, which includes acting in good faith); *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) ("[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith.").

<sup>131</sup> See *infra* notes 132–142 and accompanying text.

<sup>132</sup> *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019) (stating that a board acts in bad faith and breaches its duty of loyalty when there is an "utter failure to attempt to assure a reasonable information and reporting system exists" (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971–72 (Del. Ch. 1996))).

<sup>133</sup> *Caremark*, 698 A.2d 959, 971–72. The Delaware Court of Chancery articulated the *Caremark* standard after finding that the board of directors of Caremark International, Inc. had not knowingly violated the law. *Id.* at 971. The court moved past the knowing violation of the law because evidence indicated that the board of directors was "to some extent unaware of the activities that led to liability." *Id.* In 2006, the Delaware Supreme Court reaffirmed the standard in *Stone v. Ritter* and clarified the culpability requirement that "directors knew that they were not discharging their fiduciary obligations." See 911 A.2d at 370 (clarifying, too, that *Caremark* claims arise from directors acting in bad faith and therefore, these claims are a subsidiary of the duty of loyalty). Although Delaware courts set a high standard for *Caremark* claims, the two recently successful claims discussed *infra* note 135 demonstrate its continued recognition. See Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2025 (2019) (noting the "potential validity" of *Caremark* claims).

loyalty by failing to implement reporting systems or monitor such systems, a commonly called *Caremark* claim; however, in 2019 two plaintiffs successfully pled them.<sup>134</sup> In 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court concluded that the Bluebell Creameries board of directors did not execute any oversight system for food safety as required by Food and Drug Administration Regulations.<sup>135</sup> In 2019, in *In re Clovis Oncology, Inc. Derivative Litigation*, the Delaware Court of Chancery concluded that the board of directors failed the second prong of *Caremark* by not acting when it had knowledge that its drug testing did not comply with FDA regulations.<sup>136</sup> Essential to the claims in *Clovis* and *Marchand* was the board of directors' "conscious[] disregard[]" for "red flags" indicating regulatory noncompliance.<sup>137</sup>

A board also breaches its duty of loyalty when it engages in conduct violative of law.<sup>138</sup> When directors pursue illegal acts, courts find those acts facially ultra vires, or "beyond the powers of" fiduciaries, and as such violative of the director's duty of loyalty.<sup>139</sup> Importantly, directors do need to act in subjective bad faith to breach this duty.<sup>140</sup> For example, in the Delaware Court of Chancery's 2011 opinion, *In re Massey Energy Co.*, the court held that a director violated his duty of loyalty when he consciously caused the corporation to obtain a profit through illegal actions.<sup>141</sup> Unlike in the duty of care context,

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<sup>134</sup> See *Gubrick v. Ells*, 255 F. Supp. 3d 1119, 1130–31 (D. Colo. 2017) (differentiating between a well-pled oversight claim and an ill-advised, but nonculpable, business decision); *Caremark*, 698 A.2d at 971 (defending the high standard of oversight claims because of a benefit received by shareholders due to a standard encouraging more "qualified" board member participation); *infra* notes 135–137 and accompanying text (discussing two successfully pled *Caremark* claims in 2019).

<sup>135</sup> *Marchand*, 212 A.3d at 808–09.

<sup>136</sup> No. 2017-0222-JRS, 2019 WL 4850188, at \*1–2 (Del. Ch. Oct. 1, 2019).

<sup>137</sup> *In re Chemed Corp., S'holder Derivative Litig.*, No. 13-1854-LPS-CJB, 2019 WL 3215852, at \*24 (D. Del. Feb. 26, 2019). *Chemed* noted that repeated lawsuits against a corporation can amount to "red flags," although the inquiry then turns to whether directors consciously disregarded those flags. *Id.* at \*19.

<sup>138</sup> See *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (stating that "one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey"). The Delaware Court of Chancery distinguishes in *Oklahoma Firefighters Pension & Retirement System v. Corbat* a board of directors enabling illegal actions from a board of directors' failure of oversight. No. 12151-VCG, 2017 WL 6452240, at \*1 (Del. Ch. Dec. 18, 2017).

<sup>139</sup> See *Guttman*, 823 A.2d at 506 n.34; *Ultra Vires*, BLACK'S LAW DICTIONARY, *supra* note 36 ("Unauthorized; beyond the scope of power allowed or granted by a corporate charter or bylaw . . .").

<sup>140</sup> See *Roth v. Robertson*, 118 N.Y.S. 351, 353 (Gen. Term 1909) (concluding that an amusement park director violated his fiduciary duty when he sought to benefit the park by bribing potential complainants about illegal Sunday operations).

<sup>141</sup> No. 5430-VCS, 2011 WL 2176479, at \*20 (Del. Ch. May 31, 2011). Courts do, however, require violations of law to be knowing. See, e.g., *Capital One*, 952 F. Supp. at 784 (requiring plaintiffs to prove that directors "knowingly, consciously, or in bad faith allowed the Bank to break the law").

nonprofit corporations may not limit the liability directors face for breaches of their duty of loyalty.<sup>142</sup>

### 3. Duty of Obedience

The duty of obedience obligates a director to make the corporation act in accordance with its purpose.<sup>143</sup> The duty of obedience plays an important role in the nonprofit sector, in which a corporation's purposes are typically more limited and defined than in its for-profit cousin.<sup>144</sup> The duty of obedience underlies the duty of care and good faith requirements that directors may not violate legal norms.<sup>145</sup> Described as the “stepchild in the law of fiduciary duties,” it often arises alongside, or is entirely subsumed by, duty of loyalty or care violations.<sup>146</sup> Nevertheless, some scholars and courts approvingly argue that nonprofit law recognizes a duty of obedience distinct from the duties of care and loyalty.<sup>147</sup> The norms fall into two categories: (1) “legal norms,” which prohibit illegal acts, and (2) “charter fidelity norms,” which require a board to act within its corporate purposes.<sup>148</sup>

For example, in 2005, plaintiffs in *Consumers Union of U.S., Inc. v. New York* argued that the board of directors of Empire Blue Cross and Blue Shield (Empire) violated its duty of obedience when it sought to transform Empire from a nonprofit corporation into a for-profit one.<sup>149</sup> The Court of Appeals of

<sup>142</sup> See, e.g., F.D.I.C. *ex rel.* Co-op. Bank v. Rippy, 799 F.3d 301, 311 (4th Cir. 2015) (prohibiting a North Carolina corporation from limiting duties of loyalty and good faith); MODEL NONPROFIT CORP. ACT § 8.31 (a)(2) (permitting director liability for acts constituting a breach of such director's duty of loyalty).

<sup>143</sup> Resolution Tr. Corp. v. Hays, No. SA-92-CA-0653, 1993 WL 302150, at \*5 (W.D. Tex. Mar. 29, 1993) (locating a duty of obedience in an obligation of a director to not act ultra vires); see James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 237 (2003) (stating that a “director must follow the purposes and powers expressed in the governing legal documents” because of the duty of obedience); Hazen & Hazen, *supra* note 17, at 386 (noting the heightened importance of the duty of obedience in the nonprofit sector).

<sup>144</sup> Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 U. PITT. L. REV. 281, 309 (2016).

<sup>145</sup> Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y. L. SCH. L. REV. 457, 461 (2010). Both *Caremark* claims and the duty of obedience stem from a recognition of unassailable corporate norms. *Id.*

<sup>146</sup> Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity Symposium: Nonprofit Law, Economic Challenges, and the Future of Charities: Panel IV: The Increasing Resemblance of Nonprofit and Business Organizations Law*, 76 FORDHAM L. REV. 893, 900–01 (2007) [hereinafter Sugin, *Resisting the Corporatization*]; see Rob Atkinson, *Obedience as the Foundation Fiduciary Duty*, 34 J. CORP. L. 43, 54 (2008) (placing the duty of obedience at “the root of any fiduciary relationship”).

<sup>147</sup> See, e.g., Palmiter, *supra* note 145, at 458.

<sup>148</sup> Johnny R. Buckles, *How Deep Are the Springs of Obedience Norms That Bind the Overseers of Charities?* 62 CATH. U. L. REV. 913, 932–33 (2013). The Model Act contemplates lawsuits brought derivatively against boards for ultra vires actions. MODEL NONPROFIT CORP. ACT § 3.04.

<sup>149</sup> 840 N.E.2d 68, 88 (N.Y. 2005).

New York at least recognized that such a duty existed but concluded that the Empire board of directors had not violated it.<sup>150</sup> Additionally, in 1999, in *In re Manhattan Eye, Ear & Throat Hospital v. Spitzer*, the Supreme Court of New York found the duty of obedience's guidance essential to determining whether a nonprofit board of directors' sale of assets furthered that nonprofit's purpose.<sup>151</sup> If a nonprofit wishes to act outside of its incorporated purpose, such nonprofit may amend its articles of incorporation.<sup>152</sup>

Although the duty of obedience does not enjoy as wide-spread recognition as the duties of care and loyalty, some have argued for its resurgence.<sup>153</sup> The duty of obedience stemmed from the for-profit corporation *ultra vires* doctrine, which required corporations to act within their charter's purposes.<sup>154</sup> The *ultra vires* doctrine went out of style, yet has increasingly come back into fashion in a modern form, bringing with it (although not explicitly) the duty of obedience.<sup>155</sup> This is even more pronounced in the nonprofit context, in which

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<sup>150</sup> *Id.* The majority concluded that the board of directors' interpretation of the nonprofit's mission was "reasonable" and therefore dismissed the plaintiffs' claims. *Id.* at 88. The dissent, however, noted that the "fiduciary duties of care, loyalty, and obedience . . . are far too important to be superseded by statute without adequate justification or explanation." *Id.* at 89 (Smith, J. dissenting). In his dissent, Judge Smith noted that the New York Attorney General recognizes the duties of care, loyalty, and obedience. *Id.* at 94 n.16. Pennsylvania also recognizes a duty of obedience for nonprofit directors. *Commonwealth by Kane v. New Found., Inc.*, 182 A.3d 1059, 1068 (Pa. Commw. Ct. 2018) (citing a Pennsylvania statute requiring that a nonprofit use its nonprofit funds for its charitable purposes).

<sup>151</sup> 715 N.Y.S.2d 575, 593 (Sup. Ct. 1999). In addition to boards of directors acting outside the scope of their mission statements, duty of obedience claims arise when nonprofit boards of directors accept donations contingent on donor restrictions. *Hazen & Hazen*, *supra* note 17, at 389–90.

<sup>152</sup> Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 213 (2004) [hereinafter Brakman Reiser, *Nonprofit Accountability*]. Nonprofits altering their missions outside formal processes not only bring mission accountability into question, but also hurt the justification for the nonprofit sector's preferred tax and societal status. *Id.* at 213–14. Requiring a nonprofit board of directors to abide by its nonprofit's incorporating purpose, or amend such purpose if it wishes to act outside its purpose, enforces the credibility of the entire nonprofit sector. *Id.* at 215 (explaining that a nonprofit's duty to obey its mission statement is critical to maintaining the integrity of its "societal role").

<sup>153</sup> See *Hazen & Hazen*, *supra* note 17, at 387–88 nn.205–06 (highlighting cases that discuss the duty of obedience in for-profit and nonprofit cases); Palmiter, *supra* note 145, at 458 (advocating for a revival of the duty of obedience in light of its history and desirability for the future). Delaware does not recognize a duty of obedience. *In re Draw Another Circle*, 602 B.R. 878, 893 (Bankr. D. Del. 2019) (stating that Delaware courts do not recognize a duty of obedience). *But see* *Oberly v. Kirby*, 592 A.2d 445, 462 (Del. 1991) (noting that "because the [nonprofit] was created for a limited charitable purpose rather than a generalized business purpose, those who control it have a special duty to advance its charitable goals and protect its assets"). In 1991, the Delaware Supreme Court held in *Oberly v. Kirby* that the directors' purported bylaw amendment was "inconsistent with the overall structure of the Foundation and with the specific requirements" of its certificate of incorporation. 592 A.2d at 458.

<sup>154</sup> Palmiter, *supra* note 145, at 461.

<sup>155</sup> *Id.* at 465.



the duty of obedience remains a tenet of the board's duties to further the purpose of its corporation.<sup>156</sup>

Not all observers, however, look favorably upon recognizing a separate duty of obedience.<sup>157</sup> The Restatement of the Law of Charitable Nonprofit Organizations (Restatement) rejects the idea of a separate duty of obedience, and instead adopts a wide conception of the duty of loyalty that requires directors to ensure their nonprofit always furthers the community interest.<sup>158</sup> Nonetheless, the Restatement acknowledges a nonprofit director's liability for *ultra vires* acts.<sup>159</sup>

The Restatement does note, however, that in the charitable sector, fiduciaries must seek court approval before altering the target of their charitable funds and contributions.<sup>160</sup> Scholars call this a "strong version of the duty of obedience" and explain that it makes sense in the charitable context because individuals donate money with a specific charitable purpose in mind.<sup>161</sup> And, the Restatement considers a fiduciary's duty to apply for permission to change their nonprofit's purpose part of the duty of loyalty.<sup>162</sup>

#### *D. Enforcement of Fiduciary Duties in the Nonprofit Sector*

Unlike their for-profit counterparts, nonprofit organizations typically do not have shareholders.<sup>163</sup> This is because nonprofits operate under a non-distribution constraint that strictly prohibits any monetary distributions to indi-

<sup>156</sup> *Id.* at 466–67 (establishing the fiduciary duty "to carry out the purposes of the organization as expressed in the articles or certificate of incorporation" (quoting JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 219 (3d ed. 2006))).

<sup>157</sup> See RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 2.02 cmt. m (AM. LAW. INST., Tentative Draft No. 1, 2016) (noting that although some courts recognize a separate duty of obedience, the Restatement of the Law of Charitable Nonprofit Organizations (Restatement) does not). The Restatement technically addresses only charitable nonprofit organizations, but scholars note "shrinking operational differences" across nonprofit legal forms. Mayer, *supra* note 110, at 103–04. This Note relies on this "shrinking" and extends the Restatement's views on charitable nonprofit fiduciary duties onto the USOPC Board. See *id.* at 103 (defining, for purposes of analyzing fiduciary duties, "all organizations that are subject to the nondistribution constraint").

<sup>158</sup> RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 2.02 cmts. e, m.

<sup>159</sup> *Id.* § 2.02 cmt. n (citing to § 3.04 of the Revised Model Nonprofit Corporation Act).

<sup>160</sup> *Id.* § 2.02(c). This subset of the duty of loyalty occurs under the doctrine of *cy pres*. *Id.* § 2.02 cmt. a; Mayer, *supra* note 110, at 117 (describing the Restatement's adoption of the doctrine of *cy pres* as "somewhat controversial[]"). Regarding charities, a "rededication of assets under the doctrine of *cy pres*" would fulfill a director's duty of loyalty, in the event that such director wished to reorient the charity's purpose and would obviate the need for a separate duty of obedience. Mayer, *supra* note 110, at 117.

<sup>161</sup> Mayer, *supra* note 110, at 117.

<sup>162</sup> RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 2.02 cmt. a.

<sup>163</sup> Fishman, *supra* note 143, at 225–26 (analogizing members of nonprofit corporations to shareholders of for-profit corporations).

viduals.<sup>164</sup> Judges and legislators restrict individuals who have standing to hold nonprofit boards accountable to the board itself (in some situations), attorneys general, and, in some jurisdictions, members of a nonprofit corporation.<sup>165</sup>

First, directors of a nonprofit board or members of a nonprofit corporation may have standing to bring a derivative suit against a board for violations of fiduciary duties, depending on the jurisdiction.<sup>166</sup> The Model Act allows that members constituting the lesser of either five percent of the entire membership or fifty members may bring a derivative suit against a nonprofit corporation, subject to certain membership and demand requirements.<sup>167</sup> Even so, not all jurisdictions allow members to bring suit derivatively on behalf of the corporation.<sup>168</sup>

Second, an attorney general can bring suit against a nonprofit board under its role as an “implicit guardian of charity.”<sup>169</sup> Generally, state attorneys general bring claims against nonprofits incorporated within their state.<sup>170</sup> For example, in 2018, in *People v. Trump*, the Supreme Court of New York County allowed New York’s Attorney General to bring claims against board directors

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<sup>164</sup> Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 501 (1981).

<sup>165</sup> See, e.g., COLO. REV. STAT. § 7-123-104 (2019) (allowing a director, voting members, and the attorney general to bring suits against a nonprofit corporation challenging its “power to act”); Mead & Pollack, *supra* note 144, at 297–98.

<sup>166</sup> MODEL NONPROFIT CORP. ACT § 13.02(a)(2) (allowing “any director or member of a designated body” to bring derivative suits against a nonprofit corporation); Mead & Pollack, *supra* note 144, at 297 (recognizing that state statutes and courts dictate those with standing to bring derivative suits against a nonprofit corporation); see, e.g., Doermer v. Callen, 847 F.3d 522, 529 (7th Cir. 2017) (rejecting a non-member director’s contention that he had standing to sue a nonprofit corporation derivatively); Lundberg *ex rel.* Orient Found. v. Coleman, 60 P.3d 595, 598–99 (Wash. Ct. App. 2002) (concluding that where the controlling state statute did not allow for a minority director to sue derivatively, only the state attorney general had standing to sue).

<sup>167</sup> MODEL NONPROFIT CORP. ACT § 13.02(a)(1). The Model Act requires that suing members be members at the time of the alleged bad act and continue to be members throughout the proceeding. *Id.* § 13.02(b). Additionally, the Model Act requires any person bringing a derivative suit to demand first that the board of directors pursue the action against the nonprofit corporation itself, or otherwise provide reasons why such demand would be futile. *Id.* § 13.03.

<sup>168</sup> See, e.g., Tran v. Hoang, 481 S.W.3d 313, 316–17 (Tex. Ct. App. 2015) (citing a Texas statute as support for the conclusion that members lacked standing to derivatively sue a nonprofit’s board of directors).

<sup>169</sup> Mead & Pollack, *supra* note 144, at 297; see *Summers*, 112 S.W.3d at 506 (empowering the attorney general to “act in the public good”). For an explanation of the development of attorneys general’s roles in regulating nonprofit corporations, see Lizbeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY. L. REV. 251, 281–82 (1989); see also RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 5.01 cmt. a (AM. LAW INST., Tentative Draft No. 2, 2017) (tracing the modern attorney general power to regulate nonprofit corporations back to English common law).

<sup>170</sup> Hansmann, *supra* note 164, at 600 (recognizing a general authority of state attorneys general to police nonprofit corporations).

of the Trump Foundation for an alleged breach of their fiduciary duties.<sup>171</sup> The United States Court of Appeals for the District of Columbia has recognized that the United States, via the U.S. Attorney General, may sue on behalf of the public in the same way that state attorneys general do on behalf of their state citizens.<sup>172</sup>

This restricted standing makes nonprofit corporations notoriously difficult to regulate.<sup>173</sup> Additionally, commentators often doubt the effectiveness of attorneys general in holding nonprofits accountable, as they have limited resources and people question their political motivations in acting.<sup>174</sup> Attorneys general often investigate only nonprofit boards' financial malfeasance, and tend to investigate potential breaches of care and obedience as ancillary matters.<sup>175</sup> Scholars present alternative methods of nonprofit governance enforce-

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<sup>171</sup> 88 N.Y.S.3d 830, 838–39, 841 (Sup. Ct. 2018). The case ultimately settled, and President Donald Trump paid \$250,000 to eight different charities, totaling \$2 million. Luis Ferre-Sadurní, *Trump Pays \$2 Million to 8 Charities for Misuse of Foundation*, N.Y. TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/nyregion/trump-foundation-lawsuit-attorney-general.html> [<https://perma.cc/BTM7-S68V>]. Additionally, the settlement required President Trump to admit wrongdoing and mandated that three of the President's children, at the time members of the Trump Foundation's board of directors, participate in remedial training. *Id.*

<sup>172</sup> See *Christiansen v. Nat'l Sav. & Tr. Co.*, 683 F.2d 520, 527 (D.D.C. 1982) (distinguishing the case at bar from a case in which the United States presented as a party "suing on a public right"). The *Christiansen* court referred to *United States v. Mount Vernon Mortgage Corp.*, which held that the United States acting under the doctrine of *parens patriae* had the power to pursue a suit against a nonprofit corporation for breaching its fiduciary duties to the corporation and its "unknown beneficiaries." *Id.* (citing *United States v. Mount Vernon Mortg. Corp.*, 128 F. Supp. 629, 636 (D.D.C. 1954)).

<sup>173</sup> Brakman Reiser, *Nonprofit Accountability*, *supra* note 152, at 206. As an example, West Virginia only allows directors to bring derivative actions when they allege the directors acted ultra vires, or beyond the scope of the nonprofit's charter. *Fanning v. John A. Sheppard Mem'l Ecological Reservation, Inc.*, No. 2:18-cv-01183, 2020 WL 597422, at \*3 (S.D.W. Va. Feb. 6, 2020) (noting that the statute "should be interpreted narrowly" because the legislature did not desire broad standing to bring derivative claims).

<sup>174</sup> Hansmann, *supra* note 164, at 601 (lamenting the limited state resources put towards policing nonprofit corporations); Eileen L. Morrison, Note, *Enforcing the Duties of Nonprofit Fiduciaries: Advocating for Expanded Standing for Beneficiaries*, 96 B.U. L. REV. ANNEX 1, 5 (2016), <https://www.bu.edu/bulawreview/files/2015/11/MORRISON.pdf> [<https://perma.cc/8H3N-83HK>] (noting varied attentiveness of attorneys general across states). Additionally, unless a court requires an attorney general *sua sponte* to bring a suit, the attorney general enjoys total discretion in whether to pursue a claim at all. RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 5.01 cmt. d. In addition, attorneys general's enforcement toolkits work for financial malfeasance, but struggle to regulate effectively the non-financial duty of loyalty and obedience violations. See Brakman Reiser, *Nonprofit Accountability*, *supra* note 152, at 220 (observing that attorneys general's "existing skill sets and tools of enforcement" lend themselves to financial enforcement).

<sup>175</sup> Brakman Reiser, *Nonprofit Accountability*, *supra* note 152, at 208. Reiser identifies three areas where nonprofit boards of directors can run into trouble: (1) "financial accountability," (2) "mission accountability," and (3) "organizational accountability." *Id.* at 210–19. "Mission accountability" requires nonprofits to act within, and in furtherance of, their mission as stated in the articles of incorporation and bylaws. *Id.* at 212–13. Where directors wish to change a nonprofit corporation's purpose,

ment, including media shaming, stricter enforcement by the IRS, and adoption of forward-looking reforms encouraging directors to inquire about the fiduciary implications of board acts.<sup>176</sup> Additionally, nonprofit law increasingly focuses on disclosure requirements as enhancing accountability.<sup>177</sup> Finally, public enforcement of nonprofit corporations tends to impact not only the bad-acting nonprofit, but also causes an undesirable side effect of the public questioning the entire nonprofit sector.<sup>178</sup>

## II. SITUATING USOPC BOARD DECISIONS WITHIN THE NONPROFIT FIDUCIARY DUTY FRAMEWORK

This Part, building upon Part I's discussion of the pertinent aspects of the USOPC structure and governance as well as nonprofit fiduciary law, considers various acts by the USOPC Board in the context of nonprofit fiduciary duties.<sup>179</sup> Section A of this Part discusses to whom the USOPC Board owes fiduciary duties.<sup>180</sup> Section B compares the arbitral organizations referred to in the USOPC Bylaws with the Ted Stevens Act's references to the AAA.<sup>181</sup> Section B continues by considering whether this replacement was ultra vires, which would implicate the USOPC Board's duty of loyalty.<sup>182</sup> Section C of this Part subsequently examines the USOPC Bylaw's updated mission statement in light of the enumerated purposes provided by the Ted Stevens Act.<sup>183</sup> Section D of this Part discusses whether the USOPC Board's grant allocation process implicates its duty of obedience, and/or its duty of loyalty.<sup>184</sup>

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they must amend its articles of incorporation. *Id.* at 213. Otherwise, the "economic rationale for the sector weakens." *Id.* at 214.

<sup>176</sup> Sugin, *Strengthening Charity Law*, *supra* note 116, at 874.

<sup>177</sup> *Id.* at 881.

<sup>178</sup> See Henry Goldstein, Opinion, *Another Blow for the Public Image of Charities*, CHRON. PHILANTHROPY (May 15, 2003), [https://www.oramgroup.com/publications/2003\\_05\\_cp.html](https://www.oramgroup.com/publications/2003_05_cp.html) [<https://perma.cc/E6VC-YYEX>] (noting that a Supreme Court decision on a bad-acting nonprofit "was a major victory for the public but a significant loss for charities seeking to win back public confidence in nonprofit organizations").

<sup>179</sup> See *supra* notes 32–178 and accompanying text (outlining the USOPC, the Ted Stevens Act, nonprofit fiduciary duties and enforcement mechanisms); *infra* notes 185–263 and accompanying text.

<sup>180</sup> See *infra* notes 185–195 and accompanying text.

<sup>181</sup> See *infra* notes 196–236 and accompanying text.

<sup>182</sup> See *infra* notes 214–236 and accompanying text.

<sup>183</sup> See *infra* notes 237–252 and accompanying text.

<sup>184</sup> See *infra* notes 253–263 and accompanying text.

*A. The USOPC Board Owes Fiduciary Duties to Its Chartered Purpose, Amateur Athletes, and the U.S. Public*

For a fiduciary duty to exist there must be a fiduciary relationship.<sup>185</sup> The board of directors of a nonprofit corporation typically owes fiduciary duties to its incorporated purpose and consequently the nonprofit corporation itself.<sup>186</sup> Accordingly, there are at least four distinct beneficiaries to whom/which the USOPC Board may owe duties to: (1) the fifteen purposes laid out in the Ted Stevens Act; (2) the amateur athletes, as defined by the Ted Stevens Act, whom the fifteen enumerated purposes address; (3) the USOPC itself; and (4) the United States more generally.<sup>187</sup> Courts and scholars widely accept that a nonprofit board owes fiduciary duties to the nonprofit corporation itself, which in turn exists to fulfill its incorporating purposes.<sup>188</sup> It is therefore uncontroversial to assume that the USOPC Board owes fiduciary duties to the USOPC itself and its enumerated purposes.<sup>189</sup>

Whether the USOPC owes duties to amateur athletes or the United States more generally presents a more contested proposition, as evidenced by the fact that a USOPC lawyer in 2016 stated in a deposition that the USOPC “does not have athletes.”<sup>190</sup> Nevertheless, fiduciary relationships occur where:

- (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding discretion or power.<sup>191</sup>

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<sup>185</sup> See Mayer, *supra* note 110, at 105–06 (noting that only certain relationships “trigger a fiduciary relationship”).

<sup>186</sup> See *id.* at 105 (noting that whether fiduciaries owe a duty to the “nonprofit itself or instead with its purposes . . . generally does not alter the practical effect of that relationship”).

<sup>187</sup> 36 U.S.C. § 220503 (2018) (listing the congressionally mandated purposes of the USOPC); S. REP. NO. 95–770, at 5 (1978) (stating that the USOPC is accountable to the “amateur sports organizations and to the people of the United States for its actions”).

<sup>188</sup> Mayer, *supra* note 110, at 105.

<sup>189</sup> See *id.* at 105–06 (noting general acceptance, including from the Restatement, for the proposition that board members with “substantial powers” possess fiduciary duties vis-à-vis the nonprofit corporation they direct).

<sup>190</sup> DOWDEN & MCPHEE, *supra* note 6, at 151 (citing to Johansen Deposition, *Gatt v. USA Taekwondo*, No. BC599321 (Ca. Sup. Ct. Sept. 27, 2016)). Recently, courts have concluded that the USOPC is not vicariously liable for sexual assault claims against NGB coaches because it does not have “direct control over the conduct of coaches.” See *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 716 (Ct. App. 2019) (dismissing the USOPC from suit).

<sup>191</sup> Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 576 (2015) (quoting EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* 29–30 (2011)).

Applying this fiduciary test, the USOPC Board owes fiduciary duties to amateur athletes as well as to the U.S. public at large.<sup>192</sup> First, the USOPC has the sole power to name an Olympic Team.<sup>193</sup> Second, and in line with the first prong, an amateur athlete cannot self-appoint to an Olympic Team and accordingly the USOPC's decisions impact an amateur athlete's "practical interests."<sup>194</sup> Finally, because of the USOPC's monopoly over Olympic Team naming, an amateur athlete is "peculiarly vulnerable" and "at the mercy" of the USOPC.<sup>195</sup>

### B. Arbitration Provision

This Section addresses the divergence between the Ted Stevens Act's and the 2020 Bylaws' handling of the arbitration of USOPC decisions.<sup>196</sup> The Ted Stevens Act lays out the procedure by which athletes can bring complaints against the USOPC, the process by which the USOPC handles such complaints, and the right of a party to challenge the USOPC's determination with the AAA.<sup>197</sup> The 2020 Bylaws offer additional guidance on the arbitration of USOPC decisions, but provide that the USOPC Board has the right to determine the arbitral organization that will hear any appeal of the USOPC's decisions.<sup>198</sup>

Subject to certain eligibility requirements, an organization or person can bring a complaint compelling an NGB to abide by its duties under the Ted Stevens Act.<sup>199</sup> The Ted Stevens Act then provides that the USOPC will hold a hearing and come to a determination.<sup>200</sup> If the complaining party disagrees with the USOPC's determination, the Ted Stevens Act gives such party the opportunity to seek recourse with the AAA.<sup>201</sup> An example helps illustrate this process.<sup>202</sup>

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<sup>192</sup> S. REP. NO. 95-770, at 5 (stating that the USOPC "must be responsive . . . to the people of the United States for its actions).

<sup>193</sup> See 36 U.S.C. § 220505(c)(3) (listing the USOPC's power to "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games"); *De-Frantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1183 (D.D.C. 1980) (acknowledging that the USOPC has sole authority to name individuals to an Olympic Team).

<sup>194</sup> See 36 U.S.C. §§ 220503(3)(A), 220505(c)(3) (granting the USOPC "control" over Olympic Team naming and "exclusive jurisdiction . . . [over] representation of the United States in the games").

<sup>195</sup> *Id.* § 220503(3)(A). This monopoly extends beyond naming an Olympic Team; it also includes controlling the use of the word "Olympic." *Id.* § 220506(a)(4).

<sup>196</sup> See *infra* notes 197–236 and accompanying text.

<sup>197</sup> 36 U.S.C. §§ 220527, 220529.

<sup>198</sup> See 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22 (providing that the USOPC Board may select the arbitral organization in dispute resolution proceedings).

<sup>199</sup> 36 U.S.C. § 220527(a).

<sup>200</sup> *Id.* § 220527(c).

<sup>201</sup> *Id.* § 220529(a).

<sup>202</sup> See *infra* notes 203–211 and accompanying text (providing an example).

On January 29, 2018, Olympian Hope Solo filed a complaint against the United States Soccer Federation (USSF) alleging that the USSF violated numerous Ted Stevens Act imposed duties.<sup>203</sup> Solo's complaint asked the USOPC, under section 220527 of the Ted Stevens Act, to put the USSF on probation and force the USSF to comply with the Ted Stevens Act's requirements and the USOPC Bylaws.<sup>204</sup> In response, the USSF moved to dismiss Solo's complaint, alleging that she had not exhausted her internal remedies as required by the Ted Stevens Act.<sup>205</sup> A USOPC hearing panel convened and granted the USSF's motion to dismiss.<sup>206</sup> The USOPC hearing panel concluded that Solo did not exhaust the USSF's administrative procedures.<sup>207</sup> In the hearing panel's order, it noted that Solo could appeal to the AAA for review in accordance with section 220529 of the Ted Stevens Act.<sup>208</sup> Solo did just that, and

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<sup>203</sup> Complaint Under Section 220527 of the Ted Stevens Act at 5–6, *Solo v. U.S. Soccer Fed'n, Inc.* (U.S. Olympic Comm. Jan. 29, 2018) [hereinafter *Solo Complaint*]. Solo alleged that the U.S. Soccer Federation (USSF) violated the Ted Stevens Act by, among other things, failing to facilitate “equitable support and encouragement” for women’s sports and more broadly failing to fulfill its duties to act solely in the interests of amateur soccer players. *Id.* at 6. Solo also alleged that the USSF had no internal mechanism for dispute resolution because it relied on the AAA, and accordingly provided “no available remedies ‘within’ the USSF” to exhaust. *Id.* at 8. The Ted Stevens Act requires that before filing a complaint with the USOPC against an NGB a claimant must exhaust “all available remedies within the” NGB. 36 U.S.C. § 220527(b). Solo contended that because the USSF’s grievance procedures involved filing with the AAA, such grievance procedure did not comply with the plain language of the Ted Stevens Act requiring *internal* resolution of NGB disputes. *Solo Complaint, supra*, at 8–9. Relatedly, the Ted Stevens Act tasks the USOPC with facilitating “swift resolution of conflicts and disputes” between, among other parties, amateur athletes and NGBs. 36 U.S.C. § 220503(8).

<sup>204</sup> *Solo Complaint, supra* note 203, at 7, 36.

<sup>205</sup> Decision on Motion to Dismiss at 3–4, *Solo v. U.S. Soccer Fed'n* (U.S. Olympic Comm. July 24, 2018) [hereinafter *Solo Dismissal*]. In addition to arguing that Solo did not utilize what the USSF considered to be permissible internal grievance procedures, the USSF moved to dismiss the complaint because it failed to state a claim. *Id.*

<sup>206</sup> *Id.* at 5. Section 220527(b)(2) allows the USOPC to consider whether a complainant has pursued all internal mechanisms before deciding an issue on the merits. 36 U.S.C. § 220527(b)(2). Section 10.12 of the USOPC Bylaws reflects this statutory requirement, directing a hearing panel of individuals appointed by the USOPC CEO to make a preliminary determination on jurisdictional and procedural matters. 2020 BYLAWS, *supra* note 19, §§ 10.6, 10.12. The hearing panel must consist of one member of the USOPC Board, one member of the National Governing Body Council, and one member of the Athletes Advisory Committee. *Id.* § 10.6. The USOPC Bylaws do not require that one of these panel members be an attorney. *See id.* (outlining individuals who must be represented on the hearing panel, with no requirement that such group include an attorney). There is proposed legislation removing the exhaustion requirement from 36 U.S.C. § 220527. S. 2330, 116th Cong. § 7(d) (2020) (as engrossed by Senate, Aug. 4, 2020).

<sup>207</sup> *Solo Dismissal, supra* note 205, at 5. In coming to this conclusion, the panel agreed with the USSF that utilizing the AAA for internal dispute resolution best served the interests of the parties. *Id.* at 10. The USSF focused not so much on whether the AAA constituted an internal or external organization, but rather on whether the AAA is a “fair and impartial” body. *Id.*

<sup>208</sup> *Id.* at 7. The hearing panel also noted the availability of the AAA where a party is unsatisfied with the USOPC’s determinations in USOPC Section Nine of the USOPC Bylaws cases. *See id.* at 11 n.2 (“[P]articipation cases brought by athletes, coaches, trainers, managers, administrators and offi-

on May 28, 2019, the AAA arbitrators reversed the USOPC's hearing panel determination.<sup>209</sup> The panel of three arbitrators determined that the USSF's internal grievance procedures contravened the Ted Stevens Act and the USOPC Bylaw requirements.<sup>210</sup> The panel would not require Solo to "exhaust procedures that violate the laws of the United States."<sup>211</sup>

The USOPC Bylaws now state that "[a]ny party that considers itself aggrieved by a decision of the hearing panel . . . may . . . file a demand for arbitration with the arbitral organization designated by the [USOPC] Board."<sup>212</sup> The prior Bylaws mirrored the language used in section 220529 of the Ted Stevens Act, granting an aggrieved party the "right to review" the USOPC's decision by the AAA.<sup>213</sup>

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cial under Section [Nine] of the USOPC Bylaws are administered by the AAA and heard by AAA arbitrators.").

<sup>209</sup> Solo v. U.S. Soccer Fed'n, Case No. 01-18-003-1976, ¶ 11 (Am. Arbitration Ass'n May 28, 2019) (Peterson, Albrecht, Witherspoon, Arbs.).

<sup>210</sup> *Id.* The arbitrators noted that the USSF's utilization of "duplicate AAA arbitrations" not only subjected Solo to "unnecessary delay," but also stood "alone next to most, if not all, other NGBs that currently comply with the USOPC Bylaws." *Id.* ¶¶ 17–18. Section 8.19.1 of the USOPC Bylaws task the "NGB Compliance team" with "overseeing[ing] matters involving potential or actual failures" of NGBs to comply with the Ted Stevens Act or USOPC Bylaws. 2020 BYLAWS, *supra* note 19, § 8.19.1. This raises the question of whether, in addition to the implication of the duty of loyalty by ultra vires claims, courts could find that the USOPC Board breached its duty of oversight under a *Caremark* claim. *See In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971–72 (Del. Ch. 1996) (providing a test for oversight claims). A successful *Caremark* claim satisfies one of two prongs: (1) proving that the corporation had no reporting system in place, or (2) proving that the corporation failed to oversee an implemented reporting system. *Id.* Within the past year, plaintiff stockholders successfully pleaded *Caremark* claims where the boards of directors had and ignored a "mission critical." *See Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (concluding food safety regulations were an ice cream manufacturing board of directors' "mission critical"). Just as an ice cream corporation's board of directors' "mission critical" is food safety, the USOPC Board's "mission critical" could be the Ted Stevens Act itself. *See id.* (noting that food regulation is "the most central consumer safety and legal compliance issue facing" Blue Bell). The USOPC owes its entire existence to the Ted Stevens Act, arguably making the Ted Stevens Act its "mission critical." *See* 36 U.S.C. § 220502(a) ("The corporation is a federally chartered corporation."); *Marchand*, 212 A.3d at 824. Here, it appears that the USOPC Board had some type of reporting system in place. *See* 2020 BYLAWS, *supra* note 19, § 8.19.1 (detailing the NGB compliance team). But the USOPC Board, by approving the USSF's internal grievance procedure, one that stood "alone next to most, if not all, other NGBs," arguably failed to oversee such reporting system. *See Marchand*, 212 A.3d at 824 (identifying a board's "mission critical" as part of a successful *Caremark* claim); *Solo*, Case No. 01-18-003-1976, ¶¶ 17–18 (noting procedures that diverged from other NGBs' procedures and the procedures required by the USOPC bylaws); 2020 BYLAWS, *supra* note 19, § 8.19.1 (establishing the duty of the "NGB Compliance team" to ensure NGB compliance with Bylaw requirements).

<sup>211</sup> *Solo*, Case No. 01-18-003-1976, ¶ 11. The panel of arbitrators required the USSF to pay the administrative and legal fees of the arbitration and the arbitrators. *Id.* at 6.

<sup>212</sup> 2020 BYLAWS, *supra* note 19, § 10.21 (emphasis added).

<sup>213</sup> *Compare id.* (stating that the USOPC may designate the arbitral organization of aggrieved party's appeals of USOPC decisions), with 2019 BYLAWS, *supra* note 85, § 10.21 (allowing an aggrieved party the right to appeal an adverse decision to the AAA).



As Part I Section 3 discusses, a board of directors breaches its fiduciary duty of loyalty if it causes the nonprofit corporation to violate positive law or its incorporating documents.<sup>214</sup> The Ted Stevens Act plays the dual role of (1) incorporating the USOPC as a federally incorporated nonprofit corporation, and (2) establishing positive law that binds the USOPC Board's acts.<sup>215</sup> If the USOPC Board animates the USOPC to violate provisions of the Ted Stevens Act, it contravenes both positive law *and* its incorporating documents.<sup>216</sup> Therefore, such an act may subject the USOPC Board to viable claims that it breached its duty of loyalty.<sup>217</sup>

The USOPC Board replaced "AAA" with an "arbitral organization designated by" itself in Section 10.21, as well as Sections 9.7 and 11.22, of the 2020 Bylaws.<sup>218</sup> The USOPC Board's decision to alter this language potentially breached its duty of loyalty by causing the USOPC to violate section 220529 of the Ted Stevens Act, which expressly grants an aggrieved party the right to review by the AAA USOPC decisions.<sup>219</sup>

<sup>214</sup> *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003); MODEL NONPROFIT CORP. ACT § 3.04 (AM. BAR ASS'N 2008) (providing standing for certain individuals to challenge the nonprofit's acts as unauthorized).

<sup>215</sup> 36 U.S.C. § 220502(a); *see Solo*, Case No. 01-18-003-1976, ¶ 11 (identifying the Ted Stevens Act as a U.S. law).

<sup>216</sup> *See* 36 U.S.C. § 220502(a) (providing that the USOPC is a federally chartered nonprofit corporation); *Solo*, Case No. 01-18-003-1976, ¶ 11 (noting that the Ted Stevens Act is a U.S. law).

<sup>217</sup> *See Guttman*, 823 A.2d at 506 n.34 (stating that a director cannot act loyally if it causes the corporation to violate the law). Just as in the for-profit context, the nonprofit duty of loyalty encompasses the board of directors' obligation to act in the best interests of the nonprofit. Mayer, *supra* note 110, at 109. Violating the law, even if the director believes it to be in the best interests of the corporation, is *never* in the best interest of the corporation. *See Roth v. Robertson*, 118 N.Y.S. 351, 352–53 (Gen. Term 1909) (observing a violation of duty when a director violated the law to help the corporation).

<sup>218</sup> *Compare* 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22, *with* 2019 BYLAWS, *supra* note 85, §§ 9.7, 10.21, 11.22 (replacing AAA with "arbitral organization designated by the Board"). The 2020 Bylaws eliminate all references to the AAA, deleting it from the Bylaws's definition section. *Compare* 2020 BYLAWS, *supra* note 19, § 1.3 (providing no reference to the AAA), *with* 2019 BYLAWS, *supra* note 85, § 1.3 (defining AAA as the American Arbitration Association).

<sup>219</sup> 36 U.S.C. § 220529(a); 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22; *see Guttman*, 823 A.2d at 506 n.34 (stating that directors act disloyally when they cause the corporation to violate the law). Courts require that a viable breach of duty of loyalty claim premised on a violation of positive law involve a board's "knowing" violation of such law. *See In re Capital One Derivative S'holder Litig.*, 952 F. Supp. 2d 770, 784 (E.D. Va. 2013). A positive violation of law can include both a violation of external law and of internal law, such as a corporation's articles of incorporation. Thomas A. Uebler, *Shareholder Police Power: Shareholders' Ability to Hold Directors Accountable*, 33 DEL. J. CORP. L. 199, 210 (2008). Title 36 corporations, like the USOPC, present a unique situation where external and internal law are one and the same. *See Solo*, Case No. 01-18-003-1976, ¶ 11 (implying that actions that violate the USOPC's incorporating document—the Ted Stevens Act—also violate positive United States law). Where a board of directors unknowingly violates positive law, courts may find that the board of directors did not breach its duty of loyalty. *See Capital One*, 952 F. Supp. 2d at 784 (couching duty of loyalty claims related to positive violations of the law within "bad faith" actions, thereby requiring a knowing violation of the law); *Lebanon Cty. Emp.'s Ret. Fund & Team-*

Additionally, knowing violations of law that do not center around director self-dealing raise issues of ripeness, damages, and remedies.<sup>220</sup> This issue is particularly complex in the nonprofit arena because it is impossible to point to rising or falling share prices as indicia of damage.<sup>221</sup> In for-profit corporate law, courts observe ripe claims where a board revokes contractual rights of stockholders.<sup>222</sup> The Delaware Court of Chancery, for example, held that when a board of directors interfered with a stockholder's existing contractual rights, the stockholder's claim was ripe for review even though the stockholder had not moved to exercise the rights.<sup>223</sup>

Similarly, the USOPC Board taking away the right to review by the AAA from the aggrieved party and giving it to itself may be ripe for review.<sup>224</sup> Countering this argument is the Ted Stevens Act's legislative history which states that the Ted Stevens Act does not create substantive athlete rights.<sup>225</sup> Under this reading, an athlete never had a right the USOPC could take away because Congress did not intend to give such athlete any substantive right to arbitration by the AAA.<sup>226</sup> The USOPC Board may also argue that, even if the athlete has a right, until the USOPC Board selects an arbitral organization other than the AAA, there is no claim that it violated an athlete's right to recourse by the AAA.<sup>227</sup>

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sters Local 443 Health Servs. & Ins. Plan v. AmerisourceBergen Corp., No. 2019-0527-JTL, 2020 WL 132752, at \*21 (Del. Ch. Jan. 13, 2020) (“When directors consciously fail to prevent violations of positive law, then they act in bad faith.”).

<sup>220</sup> See Uebler, *supra* note 219, at 216–19 (discussing the issue of damages in the context of illegal board acts).

<sup>221</sup> See *id.* at 218–19 (arguing that harm should reflect whether the net loss of share price exceeds the gain in share price resulting from the illegal act).

<sup>222</sup> See Solak v. Sarowitz, 153 A.3d 729, 737–738 & n.21 (Del. Ch. 2016) (collecting cases where a court considered bylaw challenges ripe for review, especially where such bylaws had a “deterrent effect”); KLM Royal Dutch Airlines v. Checchi, 698 A.2d 380, 384 (Del. Ch. 1997) (finding a ripe claim where a bylaw provision “presently interferes with [the stockholder’s] contractual rights”).

<sup>223</sup> *KLM Royal Dutch Airlines*, 698 A.2d at 384. In 1997, in *KLM Royal Dutch Airlines*, the plaintiff stockholder, KLM Royal Dutch Airlines (KLM), alleged that the defendant, the board of directors of Northwest Airlines (Northwest Board), violated its fiduciary duty by adopting a takeover defense mechanism (a commonly called “poison pill”) that essentially caused Northwest Airlines to violate existing contractual obligations. *Id.* at 381–82. The Northwest Board argued that KLM’s claim was unripe because it did not know whether it would ever exercise the poison pill and thereby breach its contract with KLM. *Id.* at 382. The Delaware Court of Chancery rejected the Northwest Board’s claim because its adoption of the poison pill “presently interfer[ed] with [KLM’s] contractual rights to exercise the option in the future.” *Id.* at 384.

<sup>224</sup> See *id.* at 384 (finding a claim ripe for review where the board breached its fiduciary duties by interfering with existing contractual rights).

<sup>225</sup> See S. REP. NO. 95-770, at 5–6 (noting the exclusion of substantive athlete rights in the Ted Stevens Act itself, but acknowledging their presence in the USOPC’s Constitution or Bylaws).

<sup>226</sup> *Id.* The Senate Report does note, however that “[f]or the first time, [athletes’] rights to compete in amateur athletic competition are legislatively being recognized.” *Id.* at 6.

<sup>227</sup> See 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22 (leaving open the possibility that the USOPC may select the AAA as the arbitral forum).

Finally, Section 22.3 of the USOPC Bylaws state that no Bylaw will force the USOPC to act contrary to the Ted Stevens Act.<sup>228</sup> Savings clauses, like USOPC Bylaw Section 22.3, do not automatically save otherwise invalid or illegal provisions.<sup>229</sup> Where a court cannot read a challenged Bylaw provision harmoniously with positive law in *any* circumstance, the savings clause is unavailing.<sup>230</sup> For example, the Delaware Court of Chancery stated in 2016, in *Solak v. Sarowitz*, that where a bylaw advanced a fee-shifting scheme directly contrary to Delaware law, a savings clause did not save the bylaw's validity.<sup>231</sup>

Here, the debate is whether one can read the USOPC Bylaw giving the USOPC Board the right to select the arbitral association in any way to match the Ted Stevens Act granting an aggrieved party the "right to review" the USOPC's determinations with the AAA.<sup>232</sup> On the one hand, the USOPC taking complete control over which arbitral association an aggrieved party must file with directly contradicts the Ted Stevens Act's granting of that right to the aggrieved party.<sup>233</sup> Under that interpretation, the savings clause is unavailing.<sup>234</sup> On the other hand, the USOPC could choose the AAA as the arbitral

<sup>228</sup> 2020 BYLAWS, *supra* note 19, § 22.3.

<sup>229</sup> *Solak*, 153 A.3d at 742–43.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* The plaintiff stockholder in *Solak v. Sarowitz* facially challenged the validity of a fee-shifting bylaw. *Id.* at 733. The bylaw purported "to the fullest extent permitted by law" to shift attorney's fees onto a plaintiff stockholder, directly contradicting DGCL section 109(b), which prohibits shifting attorney's fees onto the plaintiff stockholder. *Id.* at 740–41; *see* DEL. CODE ANN. tit. 8, § 109(b) (2019). In 2016, the Delaware Court of Chancery held the fee-shifting bylaw facially invalid and explicitly noted that the savings language, "to the fullest extent permitted by law," did not save the bylaw. *Solak*, 153 A.3d at 742–43. DGCL section 109(b) prohibited "any" fee-shifting scheme, thereby leaving the entirety of the bylaw invalid. *Id.* at 743; *see* DEL. CODE ANN. tit. 8, § 109(b). Accordingly, there was nothing "left in the challenged provision for the savings clause to save." *Solak*, 153 A.3d at 743.

<sup>232</sup> *See* *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 236 (Del. Ch. 2014) (finding that savings clause saved bylaw provision). In 2014, in *First Citizens BancShares*, the Delaware Court of Chancery concluded that a forum selection clause did not facially violate Delaware law. *Id.* at 233. There, Delaware law did not encompass the entirety of possible claims the forum selection clause covered. *Id.* at 236. The forum selection clause had a savings clause that limited its reach "to the fullest extent permitted by law." *Id.* This allowed claims that must be brought in Delaware to be brought there. *Id.* Accordingly, Delaware law did not completely subsume the bylaw, and the savings clause had something to save. *Id.*; *see Solak*, 153 A.3d at 743 (implying that a savings clause would save a bylaw if there was something left of it to save).

<sup>233</sup> *Compare* 36 U.S.C. § 220529(a) (granting the "right to review" by the AAA for an aggrieved party), *with* 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22 (allowing the USOPC Board to pick the arbitral organization for review of an aggrieved party's claim).

<sup>234</sup> *See Solak*, 153 A.3d at 743 (finding the savings clause irrelevant when the entirety of the bylaw contradicts the relevant state law). Even assuming the savings clause saves the 2020 Bylaw provisions purportedly granting the USOPC the right to choose the arbitral organization, the USOPC Board may have breached its fiduciary duties by adopting a Bylaw that "can never operate consistently with law." *See* *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 948–49 (Del. Ch. 2013) (indicating that plaintiffs could prevail in a facial challenge of a bylaw if they prove that no circumstance exists where the challenged bylaw comports with the law); 2020 BYLAWS, *supra* note 19,

association, thereby leaving the end result identical.<sup>235</sup> The savings clause may save the provision under that interpretation.<sup>236</sup>

### C. Purpose and Mission Statement

In the typical state-incorporated nonprofit corporation, such corporation's mission statement must track its purpose as defined in its governance documents, including the articles of incorporation.<sup>237</sup> If a nonprofit board of directors causes the corporation to deviate from its incorporating purpose, those directors may violate either their duty of loyalty, or, if recognized, their separate duty of obedience.<sup>238</sup>

The Ted Stevens Act identifies fifteen purposes for which Congress incorporated the USOPC as a nonprofit corporation.<sup>239</sup> Relevant to this Note, Congress identified "amateur athlete[s]," "amateur athletic competition," and "amateur sports organization[s]" as the targets of the USOPC's actions.<sup>240</sup> The Ted Stevens Act defines an "amateur athlete" as "an athlete who meets the eligibility standards established by the [NGB] or paralympic sports organization for the sport in which the athlete competes."<sup>241</sup>

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§§ 9.7, 10.21, 11.22 (purporting to establish that the USOPC has the authority to select the arbitral association). Section 220529 of the Ted Stevens Act states that an "aggrieved" party "may obtain review by any regional office of the [AAA]." 36 U.S.C. § 220529(a). The Ted Stevens Act, for complaints arising under §§ 220527 or 220528, does not offer any other arbitral association as a potential arbitral forum. *See id.* Section 220529 lays out the procedure by which "the Association" provides notice and selects an arbitration venue. *Id.* § 220529(b). The Ted Stevens Act refers to the Association, not an association. *See id.* The argument goes, then, that the adopted Bylaws "can never operate consistently with law" and the USOPC Board breached its fiduciary duties. *See Boilermakers*, 73 A.3d at 948–49.

<sup>235</sup> *See* 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22 (allowing the AAA to still be designated as the arbitral association by not explicitly stating that a different arbitral association will be used).

<sup>236</sup> *See First Citizens BancShares*, 99 A.3d at 236 (finding that a savings clause saved the bylaw).

<sup>237</sup> *See Palmiter*, *supra* note 145, at 467 (noting that the duty of obedience requires a nonprofit board of directors' actions to "track[] and reinforce[]" the nonprofit's purposes and mission as designated in its incorporating documents). Assuming the mission statement properly tracks the nonprofit's purpose, directors must then act within the confines of the nonprofit's mission statement. Joseph M. Long, *A Contextual Study of the Non-Profit Duty of Obedience: The National Collegiate Athletic Association*, 23 SETON HALL J. SPORTS & ENT. L. 125, 133–34 (2013) (stating that mission statements constrain nonprofit director action).

<sup>238</sup> *See Palmiter*, *supra* note 145, at 467 (identifying the duty to act within constraints of incorporating purpose).

<sup>239</sup> 36 U.S.C. § 220503.

<sup>240</sup> *See id.* (stating, for example, that the USOPC must "assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes" and "promote a safe environment in sports that is free from abuse, including emotional, physical, and sexual abuse, of any amateur athlete"). The Senate Committee Report also identified "amateur sports organizations and . . . the people of the United States" as those to whom the USOPC must respond. S. REP. NO. 95-770, at 5.

<sup>241</sup> 36 U.S.C. § 220501(b)(1). An "amateur athletic competition" means a contest, game, meet, match, tournament, regatta, or other event in which amateur athletes compete." *Id.* § 220501(b)(2). An

The USOPC's mission statement provides that "the mission of the corporation is to empower Team USA athletes to achieve sustained competitive excellence and well-being."<sup>242</sup> The USOPC Bylaws do not define "Team USA athletes."<sup>243</sup> The USOPC website does, however, provide a searchable biography bank of 7,134 Team USA athletes.<sup>244</sup> The website does not provide the characteristics that qualify an athlete as a "Team USA athlete."<sup>245</sup>

Although defined criteria for being considered a Team USA athlete is not apparent, the categorization necessarily constitutes only a portion of U.S. amateur athletes, as defined by the Ted Stevens Act.<sup>246</sup> The United States Ski and Snowboard Association (USSA), the USOPC-recognized NGB for the sports of skiing and snowboarding, *alone* reported 34,568 members in 2018.<sup>247</sup> USA Track and Field (USATF) identifies more than 130,000 members, and USA

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"'amateur sports organization' means a not-for-profit corporation, association, or other group organized in the United States that sponsors or arranges an amateur athletic competition." *Id.* § 220501(b)(3).

<sup>242</sup> 2020 BYLAWS, *supra* note 19, § 2.1. The Bylaws also lay out subsidiary "Core Principles:"

- We promote and protect athletes' rights, safety, and wellness
- We champion the integrity of sport
- We respect the important role of our member organizations and support their need for success
- We set clear standards of organizational excellence and hold ourselves and all member organizations accountable
- We engage as a trusted and influential leader to advance the global Olympic and Paralympic Movements
- We honor and celebrate the legacy of Olympic & Paralympic athletes

*Id.*

<sup>243</sup> *See id.* § 1.3 (providing no definition of "Team USA Athletes" in definition section).

<sup>244</sup> *Athletes*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/athletes> [<https://perma.cc/JLH8-G2WR>].

<sup>245</sup> *Id.* The list of athletes includes individuals who have represented the United States at an Olympic Game. *See, e.g., Shaun White*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/us-ski-and-snowboard/athletes/Shawn-White> [<https://perma.cc/K8J5-GPMW>] (listing Shaun White as competing in four separate Olympic Games). The list of athletes also includes, however, individuals who have not represented the United States at an Olympic Game. *See, e.g., Gia Dalesandro*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/usa-swimming/athletes/Gia-Dalesandro> [<https://perma.cc/38Q6-L3PS>] (listing Gia Dalesandro as a Team USA athlete, although she did not represent the United States at an Olympic Game). Dalesandro did compete in the 2016 Olympic Trials in the 200-meter Butterfly. *Gia Dalesandro*, IND. U. (2016–2017), <https://iuhoosiers.com/sports/womens-swimming-and-diving/roster/gia-dalesandro/8298> [<https://perma.cc/PND4-XRE7>].

<sup>246</sup> *See* 36 U.S.C. § 220501(b)(1) (defining amateur athlete); *infra* notes 247–248 and accompanying text (providing membership data for various USOPC recognized NGBs).

<sup>247</sup> U.S. SKI & SNOWBOARD ASS'N, 2018 ANNUAL REPORT 28 (2018), [https://usskiandsnowboard.org/sites/default/files/files-resources/files/2019/USS\\_18AnnualReport\\_FA.pdf](https://usskiandsnowboard.org/sites/default/files/files-resources/files/2019/USS_18AnnualReport_FA.pdf) [<https://perma.cc/3T3K-DN2W>] [hereinafter SKI & SNOWBOARD REPORT].

Gymnastics states that it has over “200,000 athletes, professionals and club members.”<sup>248</sup>

Congress charged the USOPC with protecting and providing services for *all* amateur athletes.<sup>249</sup> Therefore, the USOPC Board may have breached its fiduciary duty of obedience by narrowing the scope of athletes it identifies in its mission statement.<sup>250</sup> Alternatively, the USOPC Board may have breached its duty of loyalty by altering its mission statement without a corresponding change to its federally chartered purpose.<sup>251</sup> The USOPC Board would likely argue that courts do not recognize a separate duty of obedience, and in the alternative the sub-principle identifying the USOPC aim of protecting “athletes’ rights, safety, and wellness” satisfies their congressionally mandated purpose by encompassing “amateur athletes.”<sup>252</sup>

#### *D. Resource Allocation Decisions Concerning NGB Funding*

In addition to updating its mission statement, the USOPC Board engages in and approves activities that may violate the USOPC Board’s duty of obedience, or in the alternative duty of loyalty, by deviating from its congressionally incorporated purpose.<sup>253</sup> The Ted Stevens Act tasks the USOPC with fielding “the most competent amateur representation possible in each event” of the Olympic and Paralympic Games.<sup>254</sup> Yet in determining which NGBs receive USOPC grants, and how much money each grant provides, the USOPC “stra-

<sup>248</sup> *About USA Gymnastics*, USA GYMNASTICS, [https://usagym.org/pages/aboutus/pages/about\\_usag.html](https://usagym.org/pages/aboutus/pages/about_usag.html) [<https://perma.cc/4WMB-ASY3>]; *About USATF*, USA TRACK & FIELD, <https://www.usatf.org/about> [<https://perma.cc/9XDB-A74U>].

<sup>249</sup> 36 U.S.C. § 220503. The Ted Stevens Act does not reference Team USA athletes anywhere within its text. *See id.*

<sup>250</sup> *See Long, supra* note 237, at 133 (stating that the duty of obedience requires directors to act in furtherance and within the constraints of its purposes); Brakman Reiser, *Nonprofit Accountability, supra* note 152, at 213 (stating that directors may act only “[w]ithin the range of the mission articulated in its statement of purpose”).

<sup>251</sup> *See* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 2.02(c) (AM. LAW. INST., Tentative Draft No. 1, 2016) (identifying, as part of the duty of loyalty, the requirement under the “doctrine of *cy pres* or deviation” that a board of directors seek judicial permission before altering its charitable purpose (emphasis added)).

<sup>252</sup> *About the U.S. Olympic & Paralympic Committee*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/about-the-usopc> [<https://perma.cc/8CX8-WXZN>]; *see* 36 U.S.C. § 220503 (identifying congressionally mandated purposes of the USOPC); Sugin, *Resisting the Corporatization, supra* note 146, at 902 (“[T]he duty of obedience is carried out broadly with respect to consideration of the activities of the organization, rather than solely with reference to the purposes written in the documents.” (footnote omitted)).

<sup>253</sup> *See Long, supra* note 237, at 148 (noting that nonprofit director actions must reflect the nonprofit’s mission statement).

<sup>254</sup> 36 U.S.C. § 220503(4).

tegitally allocates” the grants “using a results-driven resource-allocation process.”<sup>255</sup>

For example, in 2011 the USOPC established a hierarchy of NGB funding.<sup>256</sup> The USOPC made funding decisions based on a tripartite breakdown of NGBs: (1) NGBs with the highest chance of medal success, “foundation” NGBs, receive the most money; (2) NGBs with a “chance” to win a medal stand second in line; and finally (3) NGBs characterized as “development’ organizations,” which stood little chance of receiving direct USOPC funding.<sup>257</sup> The USOPC’s Form 990 provides grant amounts for any grant-recipient receiving \$5,000 or more.<sup>258</sup> The highest NGB grant amounts went to the USSA (\$6,089,500), USATF (\$3,991,080), and USA Swimming (\$3,412,807).<sup>259</sup>

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<sup>255</sup> *Financial Resources*, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/Team-USA-Athlete-Services/Financial-Resources> [<https://perma.cc/BN3W-GC6G>]. The Financial Resources page also identifies “Operation Gold” awards given to athletes who win medals at the Olympics or Paralympics, or in non-Olympic or non-Paralympic years, the highest international competition. *Id.* For both Olympic and Paralympic athletes, a gold medal delivers \$37,500, a silver \$22,500, and a bronze \$15,000. *Id.*

<sup>256</sup> Tripp Mickle, *USOC Funding Strategy Worries Small NGBs*, SPORTS BUS. J. (Oct. 3, 2011), <https://www.sportsbusinessdaily.com/Journal/Issues/2011/10/03/Olympics/NGB-funding.aspx> [<https://perma.cc/K8NV-25TN>]; see DOWDEN & MCPHEE, *supra* note 6, at 144 (explaining that the most important factor in USOPC funding decisions is the medal potential of an NGB, followed by the “marketability of successful athletes,” in distributing funds).

<sup>257</sup> Mickle, *supra* note 256. At the time of the announced funding strategy, Steve Pastorino, then-general manager for USA Handball, remarked that he “would just like to have a substantial conversation about what the Olympic movement is all about. Is it really just medal count?” *Id.*

<sup>258</sup> U.S. OLYMPIC & PARALYMPIC COMM., 2018 FORM 990, at 41–46 (2019) [hereinafter 2018 FORM 990]. Additionally, the USOPC’s Form 990 states that the USOPC determined it is “sometimes beneficial” for the spouses of the “CEO and Board Members” to attend the Olympics. *Id.* at 53. The USOPC’s Form 990 also reveals that Scott Blackmun, the former CEO, received a \$2.4 million severance package. *Id.* at 51. *Each and every* one of these financial expenditures must be in furtherance of the USOPC’s purpose and mission statement for the USOPC Board to have acted obediently and loyally. See Brakman Reiser, *Nonprofit Accountability*, *supra* note 152, at 213.

<sup>259</sup> 2018 FORM 990, *supra* note 258, at 41–46. The largest reported grant, \$12,598,847, went to the U.S. Olympic and Paralympic Foundation. *Id.* at 46. The USOPC also gave lower grant amounts, for example a grant of \$7,500 to Central Cross Country Skiing (CXC). *Id.* at 42. CXC has 2,000 members and is the Midwest’s regional governing body for cross country skiing, as well as a “Gold Level Paralympic Sport Club.” *About Central Cross Country Skiing (CXC)*, CENT. CROSS COUNTRY SKIING, <http://www.cxcskiing.org/pages/about/mission-and-vision.html> [<https://perma.cc/8Q2H-YYK8>]. The U.S. Ski and Snowboard Association’s (USSA) grant represented almost 17% of its 2018 revenue. SKI & SNOWBOARD REPORT, *supra* note 247, at 55. The most recent Olympic participation numbers for the highest grant-receiving NGBs are 111 athletes from USSA, 129 athletes from USATF, and 47 athletes from USA Swimming. See 2018 U.S. Olympic Team by Sport, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/pyeongchang-2018-olympic-winter-games/team-usa/athletes> [<https://perma.cc/9JCW-XR9E>]; 2016 U.S. Olympic Team by Sport, U.S. OLYMPIC & PARALYMPIC COMMITTEE, <https://www.teamusa.org/road-to-rio-2016/team-usa/athletes> [<https://perma.cc/2CMX-49M3>]. Based on the number of Olympians present at their respective games, USSA receives approximately \$54,860 per Olympic athlete, and USATF received approximately \$30,938 per Olympic athlete. See 2018 FORM 990, *supra* note 258, at 41–46 (providing grant amounts); 2018 U.S. Olympic Team by Sport, *supra* note 259; 2016 U.S. Olympic Team by Sport, *supra* note 259. If based purely on membership numbers, USSA receives \$179 per member, and USATF receives \$30 per member. See 2018

This process of grant-giving may violate the USOPC Board's duty of obedience.<sup>260</sup> A "results-driven resource-allocation process" determining disparate grant awards does not further the USOPC's chartered purpose of providing "the most competent amateur representation possible in each" Olympic or Paralympic event, which constitutes a potential violation of the duty of obedience.<sup>261</sup> Here, disproportionate support of events, based on past or future NGB performance, does not track the requirement that the USOPC provide competent amateur athlete representation in *each* event.<sup>262</sup> If the grants are based on criteria other than fielding the most competent team of amateur athletes, then the USOPC Board is not acting within the constraints of the Ted Stevens Act, or its mission statement.<sup>263</sup>

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FORM 990, *supra* note 258, at 41–46 (providing grant amounts); SKI & SNOWBOARD REPORT, *supra* note 247, at 28 (providing membership numbers); *About USATF*, *supra* note 248 (providing membership numbers). USA Gymnastics received \$2,222,601 in USOPC grants in 2018, which breaks down to \$123,477 per athlete at the 2016 Olympic Games, but only \$11 per member. *See* 2018 FORM 990; 2016 U.S. Olympic Team by Sport, *supra* note 259 (detailing the number of gymnast Olympians at the 2016 games); *About USA Gymnastics*, *supra* note 248 (providing membership numbers). Additionally, the USOPC notes that the grant giving process aims to provide the "greatest number of American athletes the opportunity to reach the podium." *Financial Resources*, *supra* note 255.

<sup>260</sup> *See* Brakman Reiser, *Nonprofit Accountability*, *supra* note 152, at 213 (allowing a nonprofit to permissibly act only "within the range of the mission articulated in its statement of purpose").

<sup>261</sup> 36 U.S.C. § 220503(4); *Financial Resources*, *supra* note 255; *cf.* Long, *supra* note 237, at 143–50 (applying a similar mode of analysis in determining whether National Collegiate Athletic Association (NCAA) acts were within the scope of its mission statement). Long's article examines the duty of obedience as it relates to actions taken by the board of directors of the NCAA (NCAA Board). *Id.* at 143. In concluding that the NCAA Board breached its duty of obedience, Long first determines that all NCAA Board actions must further its stated mission of supporting student-athletes, with the first priority being a student-athlete's education. *Id.* at 141. Long then looks at three NCAA Board decisions. *Id.* at 143–50. For example, he argues that the NCAA Board decision to donate to UNICEF's Haitian Relief fund following a series of earthquakes violated the NCAA Board's duty of obedience because such donation did not further the NCAA's mission statement. *Id.* at 146. Long recognizes the NCAA Board's positive intentions, but nevertheless concludes that the donation violated the NCAA Board's duty of obedience because it acted "outside the scope of its mission statement." *Id.*

<sup>262</sup> *See* Long, *supra* note 237, at 148 (arguing that nonprofit leaders may not make decisions in a vacuum, but rather the "decisions must fulfill the specific mission of the non-profit organization").

<sup>263</sup> 36 U.S.C. § 220503(4) (requiring the USOPC to act in furtherance of obtaining "the most competent representation in *each* event" (emphasis added)). Some note the correlation between grant amounts and TV viewership. *See, e.g.*, Howard Gleckman, *Why Is the US Olympic Committee Tax-Exempt?*, URBAN-BROOKINGS TAX POL'Y CTR. (Mar. 29, 2018), <https://www.taxpolicycenter.org/taxvox/why-us-olympic-committee-tax-exempt-1> [https://perma.cc/2H8N-EKRL]. The USOPC's 2016 Tax Return shows a disparity in grant amounts and also reveals that the USOPC's direct athlete funding in 2016 accounted for 8% of its 2016 revenues. *Id.* (observing, too, that in 2016 the USOPC had a \$78 million positive margin and questioning whether the USOPC operates more like a for-profit corporation than a nonprofit one). *Id.* It is important here to distinguish the duty of loyalty from the duty of care in regards to funding decisions. *See* Mayer, *supra* note 110, at 109–10, 113–15 (describing duties of loyalty and care as distinct duties). If challenging the funding system under a duty of care claim, the USOPC Board, under the "best judgment" presumption, would likely argue that different sports require different levels of funding to achieve competence and thereby justify the disparate funding levels. *See id.* at 115 (comparing the for-profit corporation "business judgment rule" to the nonprofit "best judgment rule," which releases nonprofit directors from alleged breaches of their duties of



### III. THE U.S. ATTORNEY GENERAL SHOULD PURSUE CLAIMS AGAINST THE USOPC BOARD FOR BREACHES OF ITS FIDUCIARY DUTIES

The chances of making an Olympic Team are low.<sup>264</sup> Olympic hopefuls must initially clear two large hurdles: the money and time required to train and travel, and the competition to qualify.<sup>265</sup> Athletes must also clear a third hurdle: the USOPC itself.<sup>266</sup> With the Ted Stevens Act, Congress incorporated the USOPC as a federally chartered nonprofit corporation holding an intended benevolent monopoly over organized Olympic sports in the United States.<sup>267</sup> The Ted Stevens Act requires the USOPC to obtain for the United States “the most competent amateur representation possible in each event of the Olympic Games [and] the Paralympic Games,” all the while protecting “the opportunity of any amateur athlete” to compete in protected competitions.<sup>268</sup>

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care if the director acts “on an informed basis, in good faith, and in the reasonable belief they were doing so in the best interests of the nonprofit”). The loyalty claim, however, focuses on the *motivation* for the funding. See *Hazen & Hazen*, *supra* note 17, at 356 (distinguishing the duty of care as focusing on the decision-making process, and the duty of loyalty on the motivations for a decision). If, as Ropes’s Report suggested, a consideration in grant dispersal is the “marketability of successful athletes,” then the USOPC Board breached its duty of loyalty because its motivation was not providing the “most competent amateur representation possible in each event.” See 36 U.S.C. § 220503(4) (stating that one purpose of the USOPC is to “to obtain . . . the most competent amateur representation possible”); DOWDEN & MCPHEE, *supra* note 6, at 144 (identifying principles for USOPC funding decisions as first medal-winning capability and second “marketability”). Similarly, the USOPC Board breached its fiduciary duty of loyalty if funding decisions are driven by sport popularity or TV viewership. See Gleckman, *supra* note 263 (observing the correlation between grant amounts and TV popularity). The USOPC Board abides by its fiduciary duties only if *each and every* funding decision is driven by the desire to field a competent team in *each* event. See 36 U.S.C. § 220503(4) (stating one USOPC purpose); *Hazen & Hazen*, *supra* note 17, at 349 (observing that nonprofit law recognizes a director duty of loyalty to “act solely in the beneficiary’s best interests”); see also Palmiter at 467 (explaining that the duty of obedience requires nonprofit directors to act in furtherance of the nonprofit’s mission and in compliance with “external legal regimes”).

<sup>264</sup> See Scooby Axon, *How Many Americans Are Competing at the Olympics?*, SPORTS ILLUSTRATED (Feb. 9, 2018), <https://www.si.com/olympics/2018/02/09/team-usa-competing-pyeongchang-olympics> [<https://perma.cc/5FKU-YHXA>] (reporting that 244 Americans were named to the 2018 U.S. Winter Olympic Team, the largest team to date). For comparison, the United States’ population is (as of September 25, 2020) approximately 330,220,600 people. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [<https://perma.cc/9PK6-ZBDE>].

<sup>265</sup> See, e.g., Malcolm Gladwell, *Complexity and the Ten-Thousand-Hour Rule*, NEW YORKER (Aug. 21, 2013), <https://www.newyorker.com/sports/sporting-scene/complexity-and-the-ten-thousand-hour-rule> [<https://perma.cc/N2ZW-REBY>] (explaining the 10,000 hour “rule,” which theorizes that it takes 10,000 hours to master a skill).

<sup>266</sup> 36 U.S.C. § 220505(c)(3) (2018) (including in the USOPC’s powers the capacity to “organize, finance, and control the representation of the United States in” the Olympics, Paralympics, and Pan-American Sports Organization).

<sup>267</sup> See *id.* § 220503(3)(A) (granting the USOPC control over “all matters pertaining to United States participation in the” Olympic and Paralympic Games, among other competitions).

<sup>268</sup> *Id.* § 220503(4), (8); see, e.g., *Reininger v. U.S. Rowing Ass’n*, Case No. 72-199-0908-88, at 16 (Am. Arbitration Ass’n Aug. 30, 1988) (Hart, Arb.) (“The magnitude of the honor of representing the United States on an Olympic Team is such that the Congress has required that every effort be made at selecting athletes to represent the United States in a fair and equitable manner.”).

The USOPC makes the third hurdle increasingly difficult for athletes to clear—the USOPC’s 2020 Bylaws purport to restrict athletes protected by the USOPC to “Team USA athletes” while they simultaneously increase the USOPC’s power over the dispute resolution process.<sup>269</sup> Additionally, the USOPC’s resource-allocation regime gives it control over how much money to grant NGBs and the metrics used to make this decision.<sup>270</sup> Curiously absent is consideration of the congressionally-given rights imputed to all amateur athletes.<sup>271</sup>

Research has not uncovered an action against the USOPC Board for a breach of its fiduciary duties, perhaps because athletes do not know they have any rights at all.<sup>272</sup> Section A proposes that enforcement by the U.S. Attorney General is one of the only ways to hold the USOPC Board accountable and protect amateur athletes.<sup>273</sup> Section B proposes the Attorney General should require the USOPC to abide by its fiduciary duties and comply with the Ted Stevens Act, thereby securing the rights of amateur athletes who Congress incorporated the USOPC to protect.<sup>274</sup>

#### *A. The U.S. Attorney General Is the Proper Enforcer*

Typically, state statutes empower their respective state attorneys general to hold nonprofit boards of directors accountable for breaches of their fiduciary duty.<sup>275</sup> This stems from an attorney general’s perceived role as protector of the public interest.<sup>276</sup>

Courts consider the USOPC as possessing “nationalized citizenship,” which, in addition to defeating diversity jurisdiction, leaves the USOPC with-

<sup>269</sup> See *supra* notes 179–252 and accompanying text (explaining each of these two Bylaw changes in more detail).

<sup>270</sup> See *supra* notes 253–263 and accompanying text (describing in more detail the USOPC’s resource-allocation process).

<sup>271</sup> See 2020 BYLAWS, *supra* note 19, § 2.1 (neglecting to mention amateur athletes in the mission statement).

<sup>272</sup> See Sally Jenkins, Opinion, *Michael Phelps Says Olympians Face Greater Mental Health Risks. Does the USOPC Care?*, WASH. POST (Feb. 11, 2020), [https://www.washingtonpost.com/sports/olympics/michael-phelps-says-olympians-face-greater-mental-health-risks-does-the-usopc-care/2020/02/11/72afec9c-4ce9-11ea-b721-9f4cdc90bc1c\\_story.html](https://www.washingtonpost.com/sports/olympics/michael-phelps-says-olympians-face-greater-mental-health-risks-does-the-usopc-care/2020/02/11/72afec9c-4ce9-11ea-b721-9f4cdc90bc1c_story.html) [https://perma.cc/6XVG-8M4R] (quoting two-time gold medal winner at the 2012 Skeleton World Championships Katie Uhlaender as saying that athletes “have no rights. To be clear, the only right [athletes] have is the right to compete”).

<sup>273</sup> See *infra* notes 275–303 and accompanying text (explaining why the U.S. Attorney General is the proper party).

<sup>274</sup> See *infra* notes 304–349 and accompanying text (arguing that the Attorney General should pursue the three USOPC actions laid out in Part II of this Note because the USOPC Board breached its fiduciary duties in so acting).

<sup>275</sup> Mayer, *supra* note 110, at 121; Mead & Pollack, *supra* note 144, at 297–98.

<sup>276</sup> RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 5.01 cmt. a (AM. LAW. INST., Tentative Draft No. 2, 2017).

out a state attorney general to oversee it.<sup>277</sup> Because of the USOPC's nationalized citizenship designation and its status as a federally incorporated nonprofit corporation, the U.S. Attorney General is the proper party to bring a suit enforcing the USOPC Board's fiduciary obligations.<sup>278</sup>

The other attorneys general whom potentially have standing are the Colorado Attorney General and the Attorney General for the District of Columbia.<sup>279</sup> The Colorado Attorney General may have standing because the USOPC is headquartered in Colorado.<sup>280</sup> The Attorney General for the District of Columbia could also potentially have standing because the USOPC indicates on its 2018 Tax Return that it is legally domiciled in the District of Columbia.<sup>281</sup>

Two points refute possible contentions that any state attorney general has standing to bring a suit enforcing the USOPC Board's fiduciary duties.<sup>282</sup> First, the Ted Stevens Act itself references "*the* Attorney General" in its subsection relating to grants for protecting young athletes from abuse.<sup>283</sup> This indicates that Congress already views the U.S. Attorney General as having some oversight authority.<sup>284</sup>

Second, the Ted Stevens Act states under the subsection on organization that the USOPC is "a federally chartered corporation."<sup>285</sup> By contrast, when Congress incorporated the American National Red Cross (Red Cross), it explicitly noted that the Red Cross is a "[f]ederally chartered instrumentality of the United States and a body corporate and politic in the District of Colum-

<sup>277</sup> See *Burton v. U.S. Olympic Comm.*, 574 F. Supp. 517, 522 (C.D. Cal. 1983) (finding that the USOPC has nationalized citizenship).

<sup>278</sup> See *id.* (stating that USOPC has nationalized citizenship, and thereby does not have "localized" citizenship in any one state).

<sup>279</sup> See Hansmann, *supra* note 164, at 600 (observing that state attorneys general typically have power to challenge the acts of nonprofit boards of directors).

<sup>280</sup> See 2020 BYLAWS, *supra* note 19, § 1.2 (providing that the USOPC's principal office is in Colorado Springs, Colorado).

<sup>281</sup> See 36 U.S.C. § 220502(a) (stating that the USOPC is a federally chartered corporation); 2018 FORM 990, *supra* note 258, at 1 (indicating the legal domicile). In 1954, the District Court for the District of Columbia also recognized in *United States v. Mount Vernon Mortgage Corp.* that the United States, presumably via the U.S. Attorney General, may be the responsible party for pursuing breaches of nonprofit directors' fiduciary duties. 128 F. Supp. 629, 636 (D.D.C. 1954).

<sup>282</sup> See *infra* notes 283–287 and accompanying text (refuting the contention that state attorneys general are the proper parties to challenge the acts of the USOPC Board).

<sup>283</sup> 36 U.S.C. § 220531(a) (providing the Attorney General authority to make "grant[s] to an eligible nonprofit nongovernmental entity in order to support oversight of the [USOPC], each [NGB], and each paralympic sports organization" to protect "amateur athletes against abuse"); OFFICE OF MGMT. & BUDGET, U.S. DEP'T OF JUSTICE, SMART FY 2018: KEEP YOUNG ATHLETES SAFE (2018), <https://smart.gov/pdfs/SMARTFY18KeepSafe.pdf> [<https://perma.cc/NP96-N5T2>] (listing the Department of Justice as one of the entities seeking grant applications for approval).

<sup>284</sup> See 36 U.S.C. § 220531(a).

<sup>285</sup> *Id.* § 220502(a).

bia.”<sup>286</sup> Congress knew how to tie a federally incorporated nonprofit corporation to a specific state or district, but did not do so with the USOPC.<sup>287</sup>

The USOPC is unique in its broad scope, which renders the U.S. Attorney General the preferable enforcer and addresses a number of the issues facing state attorneys general in pursuing nonprofit breaches.<sup>288</sup> As an initial matter, the Attorney General advocates on behalf of the United States, and Congress explicitly stated that the USOPC is accountable to the United States.<sup>289</sup> The USOPC’s purposes are equally broad and touch nearly everyone in the United States.<sup>290</sup> The USOPC must not only “obtain . . . the most competent” athletes for the U.S. Olympic Team, but also encourage “public participation in amateur athletic activities.”<sup>291</sup> By giving the USOPC a monopoly over Olympic sports, Congress required the USOPC to act at *all levels* of sport.<sup>292</sup> The USOPC’s mission must track these federally mandated purposes of incorporation, lest it violate federal law.<sup>293</sup> The ideal enforcer to mobilize and enforce the fiduciary duties of such a sweeping nonprofit is the U.S. Attorney General.<sup>294</sup> Additionally, the dual-hat of the USOPC purposes as both positive law

<sup>286</sup> *Id.* § 300101(a).

<sup>287</sup> Compare *id.* § 220502(a) (providing no state in the USOPC organizing statute), with *id.* § 300101(a) (listing the District of Columbia in the Red Cross’s organizing statute).

<sup>288</sup> See *id.* § 220503 (prescribing fifteen purposes for the USOPC’s incorporation); *Phila. Indem. Ins. Co. v. U.S. Olympic Comm.*, No. 19-cv-01231-CMA-KMT, 2020 WL 610798, at \*3 (D. Colo. Jan. 28, 2020) (noting, in rejecting a diversity jurisdiction claim, that although the USOPC is headquartered in Colorado, “its mission and purpose are not only nationwide, but worldwide”); *Burton*, 574 F. Supp. at 521 (“Both under the terms of its charter and as a result of its multi-state, if not nationwide activities, the [USOPC] cannot be considered to be ‘localized’ in Colorado.”).

<sup>289</sup> See S. REP. NO. 95-770, at 5 (1978); *About the Office*, U.S. DEP’T OF JUST., <https://www.justice.gov/ag/about-office> [<https://perma.cc/74Y8-UAMS>] (last updated July 17, 2018).

<sup>290</sup> See 36 U.S.C. § 220503.

<sup>291</sup> *Id.*

<sup>292</sup> See *id.* § 220503(6) (incorporating the USOPC, in part, to “promote and encourage physical fitness and public participation in amateur athletic activities”); Koller, *supra* note 56, at 1044–45 (noting that “comprehensive amateur sport policy and grassroots sport development has fallen by the wayside in favor of elite, high-performance sport” and that the USOPC has narrowed its focus with Congress “tacitly” approving). Congress has not, however, changed the purposes laid out in the Ted Stevens Act to remove the promotion of amateur athletics and public participation. See 36 U.S.C. § 220503.

<sup>293</sup> See *Solo v. U.S. Soccer Fed’n*, Case No. 01-18-003-1976, ¶ 11 (Am. Arbitration Ass’n May 28, 2019) (Peterson, Albrecht, Witherspoon, Arbs.) (identifying the Ted Stevens Act as a U.S. law).

<sup>294</sup> See *infra* notes 304–349 and accompanying text (explaining why the Attorney General should investigate potential breaches of fiduciary duty by the USOPC Board). Arguably, another effective enforcement mechanism is activating the IRS’s capacity to threaten the USOPC’s § 501(c)(3) status. See 26 I.R.C. § 501(c)(3) (West 2019); Mayer, *supra* note 110, at 121. The IRS can challenge the acts of nonprofit directors if such acts run afoul of federal tax law. 26 I.R.C. § 501(c)(3). When a nonprofit spends resources outside of its incorporated purposes, the IRS could determine that the nonprofit acted outside of its exempt purposes. See Fishman, *supra* note 143, at 239 n.148 (“Since the duty of obedience requires the directors to uphold the organization’s founding documents, which require the organization to operate for a charitable purpose, operating for non-exempt purposes would be an ultra vires activity.”). The problem with this enforcement mechanism is the ultimate harm will fall on amateur

and its incorporated mission statement make cases of “mission creep” less subjective and easier to identify.<sup>295</sup>

Even if some of the qualms about attorneys general enforcing nonprofit fiduciary law have merit, there is no better alternative in the context of the USOPC.<sup>296</sup> In some states, members of a nonprofit corporation may bring a derivative suit against the board of directors of such nonprofit for breaches of fiduciary duties.<sup>297</sup> Here, the members are the NGBs.<sup>298</sup> The NGBs not only rely on the USOPC for their very existence, but also rely on grants from the USOPC for revenue.<sup>299</sup> For example, the USSA received a \$6,089,500 grant from the USOPC, pursuant to a “results-driven resource-allocation process.”<sup>300</sup> This represents almost seventeen percent of the USSA’s total revenue for 2018.<sup>301</sup> This is likely a material amount to the USSA, rendering it largely incapable of policing USOPC actions.<sup>302</sup> Furthermore, athletes cannot directly challenge the USOPC Board’s fiduciary duties because they are not members of the USOPC.<sup>303</sup>

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athletes, the very individuals Congress created the USOPC to protect. See 36 U.S.C. § 220503 (identifying amateur athletes as primary beneficiaries of the USOPC’s actions). Most amateur athletes already struggle to fund their Olympic pursuits. Eddie Pells, *Survey Finds Olympic, Elite Athletes Struggling Financially*, ASSOCIATED PRESS (Feb. 24, 2020), <https://apnews.com/1918e5dff91a479d9ab025cc644c29a7> [<https://web.archive.org/web/20200817085927/https://apnews.com/1918e5dff91a479d9ab025cc644c29a7>] (finding in a survey that 58% of 500 elite athletes “did not consider themselves financially stable”). The USOPC already does not adequately fund most athletes; subjecting it to for-profit taxation would only further diminish financial support of athletes. *Automatic Revocation of Exemption*, INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, <https://www.irs.gov/charities-non-profits/automatic-revocation-of-exemption> [<https://perma.cc/VT7Q-3QPU>] (providing that if a nonprofit loses its tax-exempt status, it is subject to federal income tax and cannot receive tax-exempt donations).

<sup>295</sup> See Brakman Reiser, *Nonprofit Accountability*, *supra* note 152, at 226 (noting that attorneys general may be unwilling to challenge “mission creep” if it is against their political interest, implying a subjective analysis).

<sup>296</sup> See *infra* notes 297–303 and accompanying text (arguing against other enforcement mechanisms).

<sup>297</sup> MODEL NONPROFIT CORP. ACT § 13.02(a)(2) (AM. BAR ASS’N 2008) (allowing “any director or member of a designated body” to bring derivative suits against nonprofit corporation); Mead & Pollack, *supra* note 144, at 297. *But see* Tran v. Hoang, 481 S.W.3d 313, 316–17 (Tex. Ct. App. 2015) (citing a Texas statute as support for the conclusion that members lacked standing to derivatively sue a nonprofit’s board of directors).

<sup>298</sup> 2020 BYLAWS, *supra* note 19, § 8.3.

<sup>299</sup> See 36 U.S.C. § 220521(a) (granting USOPC sole power to recognize NGBs); *Financial Resources*, *supra* note 255.

<sup>300</sup> SKI & SNOWBOARD REPORT, *supra* note 247, at 55; *Financial Resources*, *supra* note 255.

<sup>301</sup> SKI & SNOWBOARD REPORT, *supra* note 247, at 55.

<sup>302</sup> See *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (noting, in a different context, that courts will consider directors interested in a transaction when such transaction materially impacts such directors’ interests); *Material*, BLACK’S LAW DICTIONARY, *supra* note 36 (“Of such a nature that knowledge of the item would affect a person’s decision-making . . .”).

<sup>303</sup> Mitten & Davis, *supra* note 77, at 92.

*B. The U.S. Attorney General Should Pursue Breaches of  
the USOPC Board's Fiduciary Duties*

As there is no federal law of nonprofit corporations, and state nonprofit laws vary considerably, the first question facing the U.S. Attorney General is which body of law to apply.<sup>304</sup> This should not mean that the USOPC Board is not bound by fiduciary law.<sup>305</sup> Instead, the best solution is to follow the Model Act or the Restatement.<sup>306</sup>

Both the Model Act and the Restatement, as well as state nonprofit statutes, recognize that members of nonprofit boards of directors have a duty of loyalty.<sup>307</sup> This duty requires board members to act in the best interests of the nonprofit corporation.<sup>308</sup> Directors who knowingly violate the law do not act loyally towards their nonprofit corporation.<sup>309</sup> The Ted Stevens Act serves not only as federal law, but also as the equivalent of a typical nonprofit's articles of incorporation for the USOPC.<sup>310</sup> Accordingly, any USOPC Board action that violates the Ted Stevens Act contravenes U.S. law and the USOPC's own incorporating document.<sup>311</sup> Even though the Model Act and the Restatement do not acknowledge the duty of obedience by name, the Attorney General should also enforce this duty against the USOPC Board.<sup>312</sup>

This Note provided three instances in which the USOPC Board breached its fiduciary duties of loyalty and obedience by acting in violation of federal law and its incorporating statute: (1) removing any reference to the AAA; (2) narrowing the class of athletes for which the USOPC holds itself responsible; and (3) impermissibly allocating funds amongst NGBs.<sup>313</sup> The Attorney Gen-

<sup>304</sup> Berman, *supra* note 115, at 1581–82 (identifying varied state approaches to organizing nonprofit law).

<sup>305</sup> See Hansmann, *supra* note 164, at 601 (emphasizing the importance of fiduciary duties and standards in nonprofit law).

<sup>306</sup> See generally MODEL NONPROFIT CORP. ACT; RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS.

<sup>307</sup> MODEL NONPROFIT CORP. ACT § 8.30(a); RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 2.02(c) (AM. LAW INST., Tentative Draft No. 1, 2016).

<sup>308</sup> Mayer, *supra* note 110, at 109.

<sup>309</sup> Guttman v. Huang, 823 A.2d 491, 506 n.34 (Del. Ch. 2003).

<sup>310</sup> See 36 U.S.C. § 220502(a) (incorporating the USOPC under an act of Congress, listed within the federal statute).

<sup>311</sup> *Id.*

<sup>312</sup> See Fishman, *supra* note 143, at 229–30 (recognizing the duty of obedience); Palmiter, *supra* note 145, at 458 (providing that nonprofit fiduciaries “must abide by the legal restrictions that apply to their organizations, such as those imposed by the non-profits constitutive documents”).

<sup>313</sup> See *supra* notes 197–263 and accompanying text (describing three acts by the USOPC Board implicating their fiduciary duties of loyalty and obedience).

eral should challenge these acts because each represents an important congressionally-granted right and violates the duties of loyalty and obedience.<sup>314</sup>

First, the USOPC Board-approved 2020 Bylaws remove any reference to the AAA.<sup>315</sup> The Ted Stevens Act expressly grants parties unsatisfied with a USOPC determination regarding athlete rights recourse to the AAA.<sup>316</sup> The USOPC, by granting *itself* the right to pick the arbitral association which will hear the appeal, violated this law and breached its duty of loyalty.<sup>317</sup> Allowing the USOPC to pick the arbitral association, and the accompanying rules, puts athletes in an untenable position of uncertainty and only increases the asymmetry of power between athletes and the USOPC.<sup>318</sup>

The USOPC Board discussed the “hearing panel and arbitration provisions,” but did not provide any public reasoning for the impermissible substitution in its Bylaws of the AAA for an arbitral association chosen by the USOPC itself.<sup>319</sup> It is hard to come up with any justification at all.<sup>320</sup> The AAA maintains strict qualifications for arbitrators hearing sport related disputes.<sup>321</sup> It requires arbitrators to possess extensive sports law knowledge, maintain the utmost standards of neutrality and respect for the arbitration process, and sustain a good reputation among peers.<sup>322</sup> It is a known entity that provides “impartial” resolution of athlete disputes, with the capacity to do so on an “expedited” basis.<sup>323</sup> The USOPC Board’s removal of *any* reference to the AAA was not only contrary to law and a violation of its fiduciary duty of loyalty, but also a mys-

<sup>314</sup> See RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 5.01 cmt. a (noting that an attorney general’s standing stems from the office’s role as an agent of the state acting under the *parens patriae* doctrine and in furtherance of the public interest).

<sup>315</sup> Compare 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22 (providing that the USOPC may designate the arbitral organization for appeals), with 2019 BYLAWS, *supra* note 85, §§ 9.7, 10.21, 11.22 (stating that the aggrieved party may appeal to the AAA).

<sup>316</sup> 36 U.S.C. §§ 220522, 220527, 220529.

<sup>317</sup> See *Guttman*, 823 A.2d at 506 n.34 (noting that directors’ breaking the law is always a disloyal action).

<sup>318</sup> See *West v. U.S. Bobsled & Skeleton Fed’n, Inc.*, Case No. 01-19-0000-4345, ¶ 10.5 (Am. Arbitration Ass’n Mar. 19, 2019) (Myler, Arb.) (noting in a different context the importance of clarity in providing guidance to athletes). The AAA is a known entity, and as stated by a USOPC hearing board itself, has the capacity to ensure a “fair and impartial process.” Solo Dismissal, *supra* note 205, ¶ 43.

<sup>319</sup> U.S. OLYMPIC & PARALYMPIC COMM., MINUTES: USOPC BOARD OF DIRECTORS TELEPHONIC MEETING (Nov. 7 2019), <https://www.teamusa.org/About-the-USOPC/Meetings/Board-of-Directors/2019> [<https://perma.cc/XC7N-J59M>].

<sup>320</sup> See *infra* notes 321–324 and accompanying text (describing benefits of the AAA as the designated arbitral organization).

<sup>321</sup> AM. ARBITRATION ASS’N, QUALIFICATION CRITERIA FOR MEMBERS OF THE AAA NATIONAL SPORTS PANEL 1, [http://go.adr.org/rs/294-SFS-516/images/Neutrals\\_Sports\\_Panel\\_Qualifications.pdf](http://go.adr.org/rs/294-SFS-516/images/Neutrals_Sports_Panel_Qualifications.pdf) [<https://perma.cc/54PJ-Q5WS>].

<sup>322</sup> *Id.* at 1–2.

<sup>323</sup> Mitten & Davis, *supra* note 77, at 97.

terious rejection of a well-regarded and efficient dispute resolution organization.<sup>324</sup>

The USOPC's gift of the power to select an arbitral association *to itself* compounds the folly of such removal.<sup>325</sup> The Ted Stevens Act tasks the USOPC with providing swift resolutions of disputes.<sup>326</sup> With the AAA as the default, aggrieved parties could begin preparations for potential disputes in advance.<sup>327</sup> Now, an aggrieved party is faced with impermissible ambiguity and apparently must wait for the USOPC to decide which arbitral association it desires.<sup>328</sup> Again, this is not just a violation of the Ted Stevens Act, but also an ipso facto breach of the USOPC Board's fiduciary duties and bad policy.<sup>329</sup>

Second, the USOPC Board impermissibly restricted the scope of its mission statement by referencing "Team USA athletes," and not the broader category of amateur athletes as mandated by the Ted Stevens Act.<sup>330</sup> The USOPC has a total monopoly over organizing and overseeing Olympic sports in the

<sup>324</sup> 36 U.S.C. § 220503(8) (requiring the USOPC to "provide swift resolution of conflicts" concerning an amateur athlete's "opportunity . . . to participate"). Compare 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22 (granting the USOPC authority to designate the arbitral association), with 2019 BYLAWS, *supra* note 85, §§ 9.7, 10.21, 11.22 (providing the AAA as the venue for dispute resolution). Adding to the confusion, USOPC Bylaws Section 9.7 allows for athletes to simultaneously file their complaints with the arbitral organization and the USOPC in time sensitive situations. 2020 BYLAWS, *supra* note 19, § 9.7. Under the current regime, however, it is impossible for an athlete to *simultaneously* file with an arbitral association and the USOPC because the USOPC must first designate the arbitral association. See *id.* This obfuscation neglects athlete's rights in contravention of the Ted Stevens Act. See 36 U.S.C. § 220503(8) (tasking the USOPC with protecting an athlete's opportunity to compete).

<sup>325</sup> See 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22.

<sup>326</sup> 36 U.S.C. § 220503(8); see *Hyatt v. U.S. Judo, Inc.*, Case No. 01-14-0000-7635, at 2 (Am. Arbitration Ass'n June 27, 2014) (Mitten, Arb.) (stating that disputes involving the opportunity to compete in protected competitions are "required to be resolved by final and binding arbitration in accordance with the Commercial Rules of the AAA" (citing 36 U.S.C. §§ 220509(a), 220522(a)(4)(B))).

<sup>327</sup> *The AAA Sports Arbitration Practice*, AM. ARB. ASS'N, <https://go.adr.org/sports-dispute-resolution.html> [<https://perma.cc/9FVW-UMPG>] (providing information on the AAA's resolution of disputes concerning provisions of the Ted Stevens Act, as well as contact information and a form for submitting questions).

<sup>328</sup> See *Tubbs v. USA Taekwondo*, Case No. 01-15-0004-7133, ¶ 27 (Am. Arbitration Ass'n Sept. 10, 2015) (Campbell, Arb.) (quoting *USA Shooting v. Quigley*, CAS 94/129, ¶ 2) (Ct. Arbitration Sport May 23, 1995) ("Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the defacto practice over the course of many years of small group of insiders."); 2020 BYLAWS, *supra* note 19, §§ 9.7, 10.21, 11.22.

<sup>329</sup> See *Guttman*, 823 A.2d at 506 n.34 (stating that "one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey").

<sup>330</sup> 2020 BYLAWS, *supra* note 19, § 2.1 (referencing "Team USA athletes" in an updated mission statement); Fishman, *supra* note 143, at 230 (defining the duty of obedience as "requiring compliance with the expressed purposes of the organization"); Sugin, *Resisting the Corporatization*, *supra* note 146, at 900 (identifying a "narrow approach to the duty of obedience" and tying the duty of obedience "to the purposes in the corporation's internal documents, and that actions beyond those purposes are not within the corporate powers").



United States, which includes qualifying events for the Olympics.<sup>331</sup> By targeting “Team USA athletes,” a subgroup that does not have written qualifying criteria, the USOPC Board ignores the majority of the amateur athletes Congress tasked it with protecting.<sup>332</sup> The net-effect of this decision is a violation of the USOPC Board’s fiduciary duties of loyalty and obedience.<sup>333</sup>

The U.S. Attorney General should swiftly address and correct any attempted narrowing of the athletes that Congress tasked the USOPC with protecting.<sup>334</sup> The USOPC distances itself from any systemic abuse and violations of the Ted Stevens Act at the NGB level by narrowing the scope of athletes it prioritizes and protects.<sup>335</sup>

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<sup>331</sup> 36 U.S.C. § 220503(3)–(4) (granting the USOPC “exclusive jurisdiction” over all matters relating to United States participation in the Olympics and requiring the USOPC to provide the “most competent representation” at such events).

<sup>332</sup> Compare 36 U.S.C. § 220503 (listing fifteen different purposes, none of them referencing “Team USA athletes”), with 2020 BYLAWS, *supra* note 19, § 2.1 (stating the USOPC’s mission is to “empower Team USA athletes to achieve sustained competitive excellence and well-being”). Notably, many of the gymnasts sexually abused by Larry Nassar in his role as the USA Gymnastics’ team doctor likely would not have been “Team USA” athletes at the time of the abuse, and the first woman to come forward is not listed as a “Team USA” athlete on the USOPC website. *Athletes, supra* note 244 (cataloguing “Team USA” athletes, but not including Rachael Joy Denhollander, the first woman to publicly come forward about Larry Nassar’s abuse); Louise Radnofsky, *Nassar Victims Move to Throw Out USA Gymnastics’ Bankruptcy Bid*, WALL STREET J., (Jan. 22, 2020), <https://www.wsj.com/articles/nassar-victims-move-to-throw-out-usa-gymnastics-bankruptcy-bid-11579698001> [<https://perma.cc/W66N-GRKZ>] (stating that many victims were abused as teenagers at meets and training camps).

<sup>333</sup> See *Guttman*, 823 A.2d at 506 n.34 (noting that boards cannot act loyally while violating the law); RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 2.02(c) (identifying, as part of the duty of loyalty, the requirement under the “doctrine of *cy pres*” that a board seek judicial permission before altering its charitable purpose (emphasis added)); 2020 BYLAWS, *supra* note 19, § 2.1 (referencing “Team USA athletes” in an updated mission statement).

<sup>334</sup> See 36 U.S.C. § 220503 (addressing, repeatedly, amateur athletes as a target of the USOPC’s actions); 2020 BYLAWS, *supra* note 19, § 2.1 (targeting “Team USA athletes” in an updated mission statement).

<sup>335</sup> See 36 U.S.C. § 220503 (directing the USOPC to protect amateur athletes throughout the section delineating USOPC purposes); see also *id.* § 220542 (identifying duty of U.S. Center for Safe Sport to implement measures to protect amateur athletes from abuse). Some members of Congress proposed legislation that would enforce a duty of care on behalf of the USOPC Board to ensure compliance with safe sport policies. S. 2330, 116th Cong. § 5 (2019) (creating a duty of care to, among other related acts, “ensure that each national governing body and paralympic sports organization complies with the oversight practices, policies, and procedures” of the U.S. Center for Safe Sport). The legislation would additionally allow a complete dissolution of the USOPC Board in the event Congress determines that the USOPC violated this proposed duty of care. S. 2330 § 4. Completely dissolving the USOPC Board, much less placing this power in the hands of Congress, does not cut to the heart of the issue and could result in chaos. See *id.* (allowing joint resolution of Congress and Senate to dissolve the USOPC Board if it fails to abide by the Ted Stevens Act). This dissolution would put the U.S. Olympic Movement in the very disjointed position that Congress passed the Ted Stevens Act to remedy. See S. REP. NO. 95-770, at 3 (describing the impetus of 1978 amendments remedying the “disorganization” of Olympic sports in the United States and “resolv[ing] the serious factional disputes that were its result”).

Finally, the USOPC Board continues to violate its duties of loyalty and obedience by providing grants to NGBs based on a vaguely-worded “results-driven resource-allocation process.”<sup>336</sup> Nowhere does the Ted Stevens Act reference results; it requires only that the USOPC obtain the “most competent representation in each event.”<sup>337</sup> Despite this absence of results language in the Ted Stevens Act, and as Part Two Section D discusses, in 2011 the USOPC promulgated a hierarchy of funding and divided NGBs into three groups based on probability of medal success.<sup>338</sup> This allocation bears little, if any, resemblance to equally supporting NGBs and ensuring “competent amateur representation possible in each event.”<sup>339</sup> The discrepancy in grant amounts contravenes the Ted Stevens Act’s requirement that the USOPC enable competent representation in every Olympic and Paralympic event.<sup>340</sup> Therefore, the funding strategy violates the USOPC Board’s duties of loyalty and obedience.<sup>341</sup>

Additional breaches of duty likely exist.<sup>342</sup> For example, the USOPC Form 990 indicates that the CEO and members of the USOPC Board may bring their spouses with them to Olympic events.<sup>343</sup> How, and whether, this expenditure furthers the USOPC’s incorporated purpose is debatable.<sup>344</sup> There also may be breaches of duty where the USOPC fails to properly oversee NGB

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<sup>336</sup> See *Financial Resources*, *supra* note 255 (providing the standard for resource distribution). A board violates its duty of obedience if it fails to act in furtherance of the purpose of the corporation, which may also implicate a board of directors’ duty of loyalty not to act *ultra vires*. Sugin, *Resisting the Corporatization*, *supra* note 146, at 899 (“A director is charged with carrying out the purposes of the organization, as expressed in the legal documents creating and defining its mission. . . . [D]iversion[] of corporate resources to other goals, no matter how laudable, [is] not legally justifiable.” (quoting DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 85 (1998))).

<sup>337</sup> 36 U.S.C. § 220503(4). Despite the absence of money or medals mentioned anywhere in the Ted Stevens Act, an unnamed USOPC executive remarked that “‘money and medals’ were probably uttered at every staff meeting . . . with the effect of marginalizing other topics such as athlete programming.” See DOWDEN & MCPHEE, *supra* note 6, at 144.

<sup>338</sup> See *supra* notes 256–257 and accompanying text (providing more detail on the USOPC’s grant allocation to NGBs).

<sup>339</sup> See 36 U.S.C. § 220503(4) (requiring the USOPC to support and ensure proficient representation in each Olympic and Paralympic event); Mickle, *supra* note 256 (explaining disparate funding for NGBs).

<sup>340</sup> 36 U.S.C. § 220503(4).

<sup>341</sup> See Sugin, *Resisting the Corporatization*, *supra* note 146, at 899 (noting that spending assets not in furtherance of nonprofit purposes is indefensible).

<sup>342</sup> See *infra* notes 343–349 and accompanying text (discussing further acts by the USOPC Board which may constitute breaches of fiduciary duties).

<sup>343</sup> 2018 FORM 990, *supra* note 258, at 53 (noting “[t]he [USOPC] determined that it is sometimes beneficial for the CEO and Board Members to have their spouses accompany them to particular events, such as the Olympic Games. In such cases those expenses can be paid by the [USOPC]”). The USOPC’s Form 990 also reveals that the USOPC CEO may fly first class domestically or business class internationally, at his or her discretion. *Id.*

<sup>344</sup> See 36 U.S.C. § 220503 (listing the USOPC’s purposes).

compliance with the Ted Stevens Act.<sup>345</sup> For example, arbitrators make clear that the Ted Stevens Act requires the USOPC to protect not only the opportunity to participate in the actual Olympic Games themselves, but also qualifying competitions for the Olympics and naming to national teams.<sup>346</sup> Accordingly, when an NGB promulgates national team criteria that violates provisions of the Ted Stevens Act, the USOPC, by approving such criteria, breaches its duty of oversight.<sup>347</sup> For example, the USSA's criteria for selection to its national team admittedly applies different criteria for different ages, requiring older athletes to have a better world ranking than younger athletes.<sup>348</sup> This is a clear violation

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<sup>345</sup> See, e.g., *Solo*, Case No. 01-18-003-1976, ¶¶ 17–18 (noting USSF dispute resolution stood “alone next to most, if not all, other NGBs that currently comply with the [USOPC] bylaws”); see also *2021 U.S. Cross Country Team Nomination Criteria*, U.S. SKI & SNOWBOARD ASS'N (Sept. 2019), <https://usskiandsnowboard.org/sport-programs/criteria/us-cross-country-team-criteria> [<https://perma.cc/2UD8-VZWX>] [hereinafter *Cross Country Criteria*] (providing that when filling discretionary spots the USSA staff “may consider” the “[c]ompletion of individual markers” and that “[a]thletes who have been given individual performance criteria to meet will be subject to those specific criteria and not to general criteria as outlined below”). USSA’s criteria excludes from the general qualification requirements individual athletes for whom an unidentified authority establishes “individual performance criteria.” *Id.* This runs directly contrary to arbitrators’ assertions that discretionary selection be primarily “objectively based,” the USOPC Bylaw’s requirement of a “clear” selection procedure as approved by itself, and the Ted Stevens Act, which demands that selection procedures provide “an equal opportunity . . . to participate.” See 36 U.S.C. § 220522(8) (providing equal opportunity); *McConneloug v. USA Cycling*, Case No. 30-190-00750-04, ¶ 25 (Am. Arbitration Ass’n July 20, 2004) (Rivkin, Arb.) (stating that NGBs “have the responsibility to athletes and others to make the rules clear, transparent, and easy to apply without confusion”); 2020 BYLAWS, *supra* note 19, § 8.7.1(d) (requiring NGBs to establish “clear” selection procedures). The USOPC approved these qualification criteria, despite their blatant violation of three independent sources of law. See 2020 BYLAWS, *supra* note 19, § 8.7.1(d) (providing that the USOPC must approve any promulgated selection criteria).

<sup>346</sup> *Vinogradova v. U.S. Biathlon Ass’n*, Case No. 77-0190-00511-09, ¶ 2.1 (Am. Arbitration Ass’n Feb. 16, 2010) (Benz, Arb.) (standing for the proposition that selection to a national team is an opportunity to compete protected by the Ted Stevens Act, and that a dispute regarding national team selection is a controversy involving the opportunity of an athlete to participate within the meaning of § 220522(a)(4) of the Ted Stevens Act over which an AAA arbitrator has jurisdiction).

<sup>347</sup> See *Guttman*, 823 A.2d at 506 n.34 (providing that a director that causes the corporation to violate the law is a disloyal director); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971–72 (Del. Ch. 1996) (noting the potential for a breach of fiduciary duty when directors fail to oversee an implemented reporting system).

<sup>348</sup> See *Cross Country Criteria*, *supra* note 345 (providing different world rank levels for meeting objective criteria based on the age of an amateur athlete). The introduction to the criteria states: “Another change you’ll see is the inclusion of age-weighted criteria. This takes some of the guesswork out of deciding who is in a position to succeed at the World Cup level right now vs. younger athletes with strong potential.” *Id.* A cross-country skiing news outlet, *Fasterskiier*, recently interviewed U.S. Cross Country Ski Team head coach Matt Witcomb about 2020–2021 team selection. *Nordic Nation: U.S. Ski Team Head Coach Matt Witcomb Fields Questions from Left and Right Field*, *FASTERSKIER* (May 1, 2020), <https://fasterskiier.com/2020/05/nordic-nation-u-s-ski-team-head-coach-matt-witcomb-fields-questions-from-right-and-left-field/> [<https://perma.cc/4ZSN-GDAG>] [hereinafter *Witcomb Fields Questions*]. The interview discussed an athlete not named to the national team despite consistently beating all other male cross-country skiers in the United States in distance races. *Id.* The athlete missed the objective criteria. *Id.* He was ranked forty-third in the world but the objective criteria re-

of the prohibition on age discrimination in 36 U.S.C. § 220522(8), and approved by the USOPC in violation of its fiduciary duties.<sup>349</sup>

## CONCLUSION

Congress gave the USOPC a complete monopoly over Olympic and amateur sports in the United States, without providing equally robust accountability and enforcement mechanisms. As such, the USOPC Board has had a virtually unfettered ability to make changes to its Bylaws, structure, and activities without consequence. The USOPC Board, the entity tasked with managing and directing the acts of a federally incorporated nonprofit corporation, must recognize its fiduciary duties and face consequences when it breaches them. This Note highlights three acts of the USOPC Board implicating, and likely violating, their fiduciary duties of loyalty and obedience. The U.S. Attorney General is the proper party to enforce these duties and should promptly do so. The law only works when the decision-makers follow the law. The USOPC Board's decisions and accompanying fiduciary breaches harm athletes, the very group of individuals Congress incorporated the USOPC to protect.

ANNE HART

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quired a ranking of fortieth in the world. *Id.* The team did not use its discretionary power to name him, but did use its discretionary power to name a different male distance athlete. *Id.* The following exchange occurred during a discussion of age-based criteria:

**FasterSkier:** The messaging, it sounds like the point is medal potential rather than having your best distance skier represented on the team.

**Witcomb:** That's right, I think that's right . . . [he] is two years behind the curve. If he was twenty-seven and having the same results [the criteria] would capture him. And, so, the message is simply get on it.

*Id.* Section 220522(a)(8) of the Ted Stevens Act explicitly requires an NGB to grant amateur athletes "an equal opportunity to participate . . . without discrimination on the basis of . . . age." 36 U.S.C. § 220522(a)(8). It is nearly impossible to come up with a more flagrant statement and manifest acceptance of age discrimination than "[i]f [he] was twenty-seven and having the *same* results [the criteria] would capture him." See *Witcomb Fields Questions*, *supra* note 348 (emphasis added). The head coach affirmed, and the USOPC approved, a set of criteria denying a thirty-year-old athlete team nomination because of his age. *Id.* By approving this criteria the USOPC breached its fiduciary duties. See 36 U.S.C. § 220522(a)(8) (prohibiting discrimination on the basis of age). In addition, Witcomb's confirmation that "the point is medal *potential* rather than having your best distance skier represented on the team" is patently contrary to the Ted Stevens Act's mandate that the USOPC assure that the United States is represented by "the most competent amateur representation possible." See *id.* § 220503(4); *Witcomb Fields Questions*, *supra* note 348. The medal potential in a *future* protected competition has no place in criteria for selection to the *instant* protected competition. See 36 U.S.C. § 220503(4).

<sup>349</sup> See 36 U.S.C. § 220522(8); *Yun v. USA Taekwondo, Inc.*, Case No. 01-15-0005-7406, ¶ 87 (Am. Arbitration Ass'n Jan. 7, 2016) (Oliveau, Arb.) (suggesting that where qualification criteria restricts athletes of a certain age "per se" and "exclusively impact[s]" those athletes, such criteria may contravene the requirements of the Ted Stevens Act).