IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

Thomas Navarro, James Giorgio, and Nina Shaffer,	)	
Plaintiffs,	)	**Civil Action No.: 3:24-cv-00030**
v.	)	
United States Center for SafeSport, United States Olympic & Paralympic Committee, and United States Equestrian Federation, Inc.,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Thomas Navarro, James Giorgio, and Nina Shaffer, by counsel, hereby submit Plaintiffs' Opposition to Defendants' Motions to Dismiss.

INTRODUCTION

This is an action to challenge portions of the Ted Stevens Olympic and Amateur Sports Act (the "Ted Stevens Act" or "ASA"), 36 U.S.C. §220501, which unconstitutionally delegates federal legislative, executive, and judicial authority to a private entity. Plaintiffs further challenge certain policies and procedures developed and implemented by the Defendants that have deprived participants under the ASA from receiving a hearing prior to a determination of ineligibility, a statutory right that has been in effect since the original passage of the ASA.

STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff's allegations must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). In the context of a declaratory judgment action, this standard requires that the allegations of the

Complaint are sufficient to show that the controversies raised in the Complaint are plausible. See *Met. Life Ins. Co. v. Leich-Brannan*, Civ. Act. No. 3:09-CV-572, *8 (E.D.Va. Dec. 14, 2009) (citing *Iqbal*, 129 S.Ct. at 1949) ("Since this court considers Metlife's Complaint on a motion to dismiss for failure to state a claim, the question is not whether Metlife has paid benefits improperly, but whether, in light of the well pleaded factual allegations, Metlife's concerns are 'plausible.'").

"When one party to a litigation challenges the basis of a court's jurisdiction, the party asserting jurisdiction carries the burden of proving it." *Met. Life. Ins. Co. v. Leich Brannan*, Civ. Action No. 3:09-cv-572, *4 (E.D. Va. Dec. 14, 2009) (citing Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). "Where a party has challenged the sufficiency of the allegations on which jurisdiction is based, a court must take all facts stated in the complaint as true and draw all reasonable inferences in favor of the non-moving party." *Id*. (internal citations omitted). "Where a party has challenged the veracity of the allegations on which jurisdiction is based, a court may reach beyond the allegations in the complaint to determine whether jurisdiction exists." *Id*.

ARGUMENT

I. Plaintiffs' Complaint Is Not Barred By *Res Judicata*, Claim Preclusion, or Failure to Exhaust.

In order to prevail on a res judicata, or claim preclusion, defense, a party must show that there was a final judgment on the merits in a prior case. See e.g., *Andrews v. Daw*, 201 F.3d 521 (4th Cir. 2000). To date, no tribunal or court has decided the issues raised in this Complaint, and Defendants have failed to cite to any such judgment or ruling.

Plaintiffs are not asking this court to review whether they violated the SafeSport Code. Rather, the issues raised in the Complaint relate to the process employed by the Defendants. These issues were never heard during the Center's cases against Plaintiffs or in any other proceeding thereafter because, in the cases of Navarro and Giorgio, the SafeSport Code expressly prohibited

challenges to its process at the relevant time. The 2018 SafeSport Code, Rule 2 of the Supplementary Rules for Arbitration stated:

> Arbitration shall resolve only whether a Responding Party violated the SafeSport Code for the U.S. Olympic and Paralympic Movement (Code) and/or the appropriate sanction (if any). Challenges to, or complaints about, any organizational practices or procedures shall not be addressed and the arbitrator shall be limited to evaluating whether a Covered Individual violated the Codeand, if so, the appropriate sanction.

Thus, the scope of merits arbitration expressly prohibited individuals from raising procedural challenges and arbitrators from deciding those issues, even if raised.

Next, all versions of the SafeSport Code have expressly prohibited an individual from appealing the outcome of a merits arbitration to any court. Rule 34 of the Supplementary Rules for Arbitration in the 2018 SafeSport Code, and current Section XIV, Rule 34 of the SafeSport Code, states as follows:

> The arbitration decision shall be considered final and binding. The parties to arbitration waive, to the fullest extent permissible by law, any right to challenge in court the arbitrator's decision.

Despite this waiver, Defendants disingenuously argue that Plaintiffs Navarro and Giorgio have failed to exhaust their administrative remedies because they failed to file Motions to Vacate under the Federal Arbitration Act. Such an action would not only face Defendants' argument that Rule 34 of the SafeSport Code bars a Motion to Vacate, it would very likely be confronted with a Rule 11 motion because the grounds for an "appeal" under the Federal Arbitration Act are narrow and limited only to the following situations:

> **(1)** where the award was procured by corruption, fraud, or undue means;
> **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;

> **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 USC §10(a).

Due process or other procedural challenges to the Center's Code do not fall within any of the bases articulated under the Federal Arbitration Act. Plaintiffs were not required to file a futile, and potentially sanctionable lawsuit, to "exhaust" their administrative remedies. See, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 89 S.Ct. 548 (1969)(futility is an exception to an exhaustion of contractual or administrative remedies requirement). The strained logic of Defendants' insistence that Plaintiffs should have done so highlights the procedural quagmire Defendants have intentionally created to prevent the issues from being decided.

Prior to filing this case, Plaintiffs Navarro and Giorgio attempted to have the statutory interpretation issue heard within the Olympic Movement framework. Pursuant to 36 USC §220527 they filed Non-Compliance Complaints with USEF to have the issue heard. That process, which lasted over four years, resulted in a determination by a AAA Panel that it did not have jurisdiction to decide the issue. Comp. ¶79. As a result, no tribunal has ever decided whether a pre-deprivation hearing is required before an NGB declares an individual ineligible following an investigation and resolution by the Center.

Thus, the Complaint is not barred by *res judicata*. Furthermore, the argument that Plaintiffs have failed to exhaust their administrative remedies is belied by the decisions by USEF, USOPC, and AAA that they did not have jurisdiction to decide the issue. Plaintiffs have gone above and

beyond in trying to have this issue heard through the internal processes of the Olympic framework. All efforts reached a dead end with no decision.

II. The Court Has Jurisdiction to Hear This Declaratory Judgment Action.

Plaintiffs filed this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, which reads, in pertinent part:

> In a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201. Thus, a case seeking a declaratory judgment is properly before a court if the court has both subject matter jurisdiction and there exists an actual controversy between the parties.

A. This Court Has Subject Matter Jurisdiction Over The Complaint

The court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, which provides "federal question" jurisdiction and reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This action presents several federal questions, including the interpretation of federal statutes and the federal constitution. Counts II, II, V and VI all present issues under the Constitution. Counts III and IV present issues regarding the parties' rights and duties under 36 U.S.C. § 220522(8) and other sections of the ASA. Count VII presents state law issues under contract law, and this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Accordingly, this Court has subject matter jurisdiction.

B. This Case Presents an Actual Controversy.

This case also presents an "actual controversy" between the parties. To satisfy the requirement of an actual controversy, the dispute must "be definite and concrete, touching the

relations of the parties having adverse legal interests." *Aetna Life In. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The dispute must also be "a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id*. at 241. In other words, in the context of a declaratory judgment action, "the question in each case is whether the facts alleged, under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007) (citation and footnote omitted).

Each of the Counts in the Complaint involves an actual case or controversy for purposes of a declaratory judgment, and the Complaint includes factual allegations supporting not only that the controversy is immediate and real, but also that the parties' interests are adverse. The Complaint is structured to include each controversy as a separate Count, and to identify the parties who have an interest in the adjudication of that issue. For example, Count I seeks a declaration regarding the parties' rights and duties pursuant to the Constitution. Complaint ¶¶ 82-101. Count I asks for a declaration by this Court that the Congressional grant of authority to Defendant SafeSport to promulgate a Code that is specifically incorporated into federal law violates separation of powers and other Constitutional principles under precedent of the Supreme Court of the United States. Count I not only identifies each of the Defendants as having an interest in this adjudication, but specifically sets forth the reason for that interest. For instance, it specifically alleges that the Congressional grant of legislative and/or regulatory authority to Defendant SafeSport resulted in a SafeSport Code that is incorporated into federal law, Comp. ¶¶ 90-92. Congress also mandated that Defendant SafeSport exercise jurisdiction over Defendants' USOPC

and USEF through the SafeSport Code, Comp. ¶ 93. Under those circumstances, Defendants USOPC and USEF have an interest in the determination of the issues of whether they are bound by the SafeSport Code as a matter of federal law.

C. This Court Should Exercise its Discretion to Hear This Action.

"[A] declaratory judgment is a discretionary remedy, which federal courts may decline to provide where appropriate." *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 494 (E.D.Va. 2002) (citing *Public Affairs Assoc. v. Rickover*, 369 U.S. 111, 112 (1962)). "Of course a district court cannot decline to entertain such an action as a matter of whim or personal disinclination." *Public Affairs Press v. Rickover*, 369 U.S. 111, 112 (1962). The Fourth Circuit has set forth factors to consider when determining whether to exercise jurisdiction over a declaratory judgment action, and described the rationale for these factors follows:

> The factors which we have articulated to guide a district court in determining whether to exercise jurisdiction over a declaratory judgment action have their origin in *Quarles*. In that case we noted that such an action should not be used to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted." Based on this reasoning, we thus held that a district court should normally entertain a declaratory judgment action when it finds that the declaratory relief sought: (1) will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding.

Aetna Cas. Surety Co. v. Ind.Com Elec., 139 F.3d 419, 422 (4th Cir. 1998) (internal quotations omitted) (citing *Aetna Cas. Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937)); see also *Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004); *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 494 (E.D.Va. 2002). In addition, the Court identified another "related factor" that should "figure into the discretionary balance: "whether the declaratory judgment action is being used merely as a device for 'procedural fencing'—that is 'to provide another forum in a race for res judicata' or 'to achieve a federal hearing in a case otherwise not

removable." *Id*., (citing *Nautilus Ins. Co. v. Winchester Homes, Inc*., 15 F.3d 371, 377 (4th Cir. 1994)).

Applying the factors favors this court accepting this case for resolution. There is no danger of piecemeal litigation because there is no other forum to hear these issues, no other action has been instituted, and all of the issues are included in the Complaint. Accepting jurisdiction will serve the useful purpose of clarifying and settling the legal relations of the parties, and their rights and obligations toward among each other on the issues raised in this action, which have been ongoing without resolution for years. A declaratory judgment will also terminate and afford relief from uncertainty, insecurity, and the controversy giving rise to the proceeding. Finally, this action is not being used as a device for "procedural fencing." Rather than seeking another forum in a race for res judicata, this action is the Plaintiffs' final resort to have the issues raised herein heard and decided on their merits.

D. Additional Relief Doesn't Change the Standard Under the Declaratory Judgment Act.

The Plaintiffs' prayer for additional relief does not deprive this court of jurisdiction or change the pleading requirements for declaratory judgment action. Not only does the Declaratory Judgment Act provide that a court can award "further necessary or proper relief based on a declaratory judgment or decree," 28 U.S.C. § 2202, but also the Declaratory Judgment Act applies "whether or not further relief is or could be sought. 28 U.S.C. § 2201.

III. This Court Has Not Lost "Jurisdiction" Due to Preemption.

Each of the Defendants has moved for dismissal of this action under Rule 12(b)(1) of the Federal Rules of Civil Procedure asserting that this Court lacks subject matter jurisdiction. Relying on a series of district court decisions, Defendants argue that this case is "preempted" by the ASA,

and this "preemption" deprives this court of subject matter jurisdiction. These arguments, however, run afoul of the jurisdictional jurisprudence of the Supreme Court of the United States.

"'Jurisdiction' refers to 'a court's adjudicatory authority.'" *Reed Elsevier v. Muchnik*, 559 U.S. 154, 160 (2010) (citing *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)). "Accordingly, the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." *Id*., at 160-61 (citing *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("subject matter jurisdiction" refers to "the court's statutory or constitutional *power* to adjudicate a case") (emphasis in original); *Landgraf v. USI Film Products*, 511 U.S. 244, 274, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'") (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992)).

The Court has described the need for specificity in ruling on jurisdictional grounds as follows:

> While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case and did not require close analysis.

Reed Elsevier v. Muchnik, 559 U.S. 154, 161 (2010) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511-12, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). "Our recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings,' which too easily can miss the 'critical differences' between true jurisdictional conditions and nonjurisdictional limitations on

causes of action." *Id*. "In light of the important distinctions between jurisdictional prescriptions and claim-processing rules, we have encouraged federal courts and litigants to 'facilitate' clarity by using the term 'jurisdictional' only when it is apposite." *Id*. (internal citation omitted).

In *Arbaugh*, the Court described the general approach to distinguish 'jurisdictional' conditions from claim-processing requirements or elements of a claim:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). The Court used several factors to determine whether a limitation on a statute's scope is jurisdictional. First, the Court held that the limitation must "clearly state" it is jurisdictional. *Arbaugh* 163. In the present case, none of the Defendants cite any statutory language that purports to limit subject matter jurisdiction. Second, whether the limiting provision appears in the statute conferring subject matter jurisdiction also indicates it is jurisdictional. Id. The statute conferring subject matter jurisdiction on this Court, 28 U.S.C. § 1331, contains no limitation on jurisdiction for the matters raised herein. Although these factors alone should be dispositive, other provisions within the ASA indicate that Congress intended federal courts to have subject matter jurisdiction over the ASA, including eligibility decisions. For example, 36 U.S.C. § 220509 reads, in pertinent part:

> § 220509 Resolution of Disputes
>
> (a) General.—
>
> > The corporation shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to complaints of retaliation or the opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to participate in the Olympic Games, the Paralympic Games, the Pan-American Games, Parapan American Games, world championship competition, or pother protected competition as defined in the

> constitution and bylaws of the corporation. ***In any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate*** in the Olympic Games, the Paralympic Games, the Pan-American Games, or the Parapan American Games, ***a court shall not grant injunctive relief*** against the corporation within 21 days before the beginning of such games if the corporation, after consultation with the chair of the Athletes' Advisory Council, has provided a sworn statement in writing executed by an officer of the corporation to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games.

36 U.S.C. § 220509(a) (emphasis added). The ASA also specifically provides:

> § 220541 Designation of the United States Center for SafeSport
> (d) Limitation on Liability
> (3) Removal from Federal Court
> (A) In General.—Any civil action brought in a State court against the Center relating to the responsibilities of the Center under this section, section 220542, or section 220543, shall be removed, on request by the Center, to the district court of the United States district in which the action was brought, and such district court shall have original jurisdiction over the action without regard to the amount in controversy or the citizenship of the parties involved.

36 U.S.C. § 220541(d)(3)(A) (emphasis added). Not only do these provisions not "clearly show" that Congress intended to deprive federal court of subject matter jurisdiction over disputes related to the eligibility to participate in the Olympic Movement, they are just two examples of provisions "clearly showing" that Congress intended for federal courts to have subject matter jurisdiction over those disputes. In fact, Congress actually provided broader jurisdiction to federal courts in civil actions brought against Defendant SafeSport in state court, including civil actions relating to their responsibilities under § 220541, among which include Defendant SafeSport's duty to "provide fair notice and an opportunity to be heard," 36 U.S.C. § 220541(a)(1)(E), and the duty to "ensure that any action taken by [Defendant SafeSport] against any individual under the jurisdiction of the [Defendant SafeSport], including an investigation, the imposition of sanction, and any other disciplinary action, is carried out in a manner that provides procedural due process to the individual

…." 36 U.S.C. § 220541(a)(1)(H). Accordingly, the Defendant's arguments that this action should be dismissed for lack of subject matter jurisdiction should be denied.

IV. The ASA Delegates Federal Legislative and/or Rulemaking Power to Defendant SafeSport in Violation of the Nondelegation Doctrine.

In support of its arguments seeking to dismiss Count 1, Defendant SafeSport argues that Congress did not delegate any federal power to Defendant SafeSport in the ASA. Section 220541(b) of the ASA reads: "The policies and procedures developed under subsection (a)(1)(C) shall apply as though they were incorporated in and made a part of section 220524 of this title." 36 U.S.C. § 220541(b). Defendant SafeSport contends that this language does not give Defendant SafeSport federal legislative or other rulemaking authority, and that if Congress had intended that its policies and procedures be law, it would have said so. In support of this argument, Defendant SafeSport parses the language used by Congress, highlighting "as though they were incorporated," and ignoring "and made a part of." It is hard to fathom what else Congress could have meant with this language other than the SafeSport Code has the effect of federal law in violation of the nondelegation doctrine.

V. The ASA Requires a Predetermination Hearing.

There is no dispute that each of the Plaintiffs were sanctioned without being given a pre-determination hearing. Thus, USEF violated one of its requirements for NGB eligibility.

Defendants argue that participants are not entitled to a pre-determination hearing under the ASA. Plaintiffs do not dispute that Congress created a system where NGBs are presumptively statutorily bound to afford reciprocity to, and enforce the rulings of, the Center. However, Congress also imposed on NGBs a requirement that participants be afforded notice and a hearing

before a determination of ineligibility.[1] These two requirements should not conflict, but because of the process created by the Center, they do. It is Plaintiffs' position that when Congress gave the the Center the authority to create a system of due process, it did not anticipate that the the Center would deviate so significantly from the generally recognized system of "administrative due process."

The legislative history demonstrates that Congress expected the Center to adopt a hearing process substantially identical to that currently afforded by USEF, all other NGBs, and the US Anti-Doping Agency. USOPC Comp., ¶19, 26, Senate Report 115-443. That Senate Report states, in pertinent part:

> Section 220541(a)(6) would further require that these mechanisms provide fair notice and an opportunity to be heard and protect the privacy and safety of complainants. In an administrative proceeding to determine the opportunity of an individual to participate in amateur athletic competition, the requirement to provide ''fair notice and an opportunity to be heard'' is a lower standard than would be required as a matter of constitutional due process in a criminal proceeding.
> **Section 3 would add a new section 220541(b) to allow the Center to utilize a neutral arbitration body and develop policies and procedures to resolve allegations of sexual abuse** within its jurisdiction in order to determine the opportunity of any amateur participant, coach, trainer, manager, administrator, or official, who is the subject of an allegation of sexual abuse, to participate in amateur ath- letic competition.
>
> **********
>
> The Committee contemplates that the policies and procedures developed under this section may include procedures **to appeal the decision of the neutral arbitration body.**
>
> Senate Report 115-443, p. 4.

Thus, it is clear that Congress anticipated that a neutral body would make the determination of eligibility, and that an appeal of that neutral body's decision would be available. Instead, the

[1] Navarro and Giorgio were not given notice before being permanently banned. Thus, both the Center and USEF violated the ASA as to Navarro and Giorgio on the notice prong of due process. Comp. ¶ 14,18.

Center performs the investigation and makes the determination of ineligibility itself without giving a hearing to a participant. Then it issues sanctions, and only after the sanctions have been imposed and publicized can a participant **appeal** to a neutral arbitrator after paying the initial filing fee of $5,200.00. In the meantime, the Center directs the NGB to enforce the sanction immediately.

Senate Report 115-443 also states:

> This language is modeled off of the law authorizing the United States Anti-Doping Agency (USADA) (21 U.S.C. 2001, et seq.). It is the Committee's intention for the Center to exist on a similar footing with, and with the same independence as, USADA.

It is by design, and not by coincidence, that the USADA and NGB's (have a substantially identical process. The reason for the near-uniformity of hearing processes is based on the development of administrative law, which has recognized and adopted a standard hearing system that, while falling short of the constitutional requirements afforded by the court system, affords "due process" that is deemed "good enough" (at the very least "fundamentally fair") when lesser-than-constitutional rights are implicated. Plaintiffs assert that the problem with the Center is that its process not only falls well short of the lower bar reserved for administrative matters, including amateur sports disputes, but fails to meet the requirements set forth in the Act for both NGB's and the USCSS.

The argument that the recent modifications to the Act show that Congress approves of the current process is unavailing for two reasons. First, the law now explicitly requires that the Center:

> (H) ensure that any action taken by the Center against an individual under the jurisdiction of the Center, including an investigation, the imposition of sanctions, and any other disciplinary action, is carried out in a manner that provides **procedural due process** to the individual, including, **at a minimum**—
> (i) the provision of written notice of the allegations against the individual;
> (ii) a right to be represented by counsel or other advisor;
> (iii) an opportunity to be heard during the investigation;
> (iv) in a case in which a violation is found, a reasoned written decision by the Center; and

> (v) the ability to challenge, in a hearing or through arbitration, interim measures or sanctions imposed by the Center.

36 U.S.C. §220541(H)(emphasis added).

Second, Congress did not modify the requirement of a pre-determination hearing that is set forth in 36 U.S.C. §220522(a)(8). Thus, it is even more clear that Congress intended, and still intends, that a participant be provided a hearing before a determination of ineligibility. Thus, the only reasonable interpretation of the statutory scheme is the one set forth in the Complaint: participants are entitled to a hearing before a determination of ineligibility.

Finally, the conflict in the Ted Stevens Act is easily resolved if the Center simply affords a hearing, whether with an arbitrator or other tribunal, to an individual *before requesting that an NGB enforce its decision*. Given that the Center has the authority to issue temporary suspensions, there is no need for the Center's decisions to be enforced prior to a merits hearing because the individual can be, if they have already not been, removed from the "field of play" pending the outcome of the hearing. The ability to impose interim suspensions completely undermines Defendants' rationale that the nature of SafeSport cases necessitates depriving participants of a PDH. Why this simple remedy has not been undertaken is puzzling. It would have no effect on the safety of sports participants, but it would prevent an individual from experiencing the life-altering consequences of a final decision posted on the public database ("Wall of Shame") before being given the opportunity for a hearing.

VI. The ASA Provided a Private Right of Action.

Defendants USEF and USOPC assert that Count III of the Complaint, seeking to enforce the statutory right to a predetermination hearing found in 36 U.S.C. § 220522(8), is barred because the statute does not contain a private right of action. Defendants USEF and USOPC both cite to §220541(a)(2)(C), § 220505(b)(9), and § 220541(d)(3)(B) of the ASA for support that the ASA

does not provide a private right of action. Likewise, Defendant SafeSport asserts this same defense as to Count 4, relying on §§ 220541(a)(2)(C) and 220541(d)(3)(B). None of these provisions, however, were in the ASA when that Plaintiffs Giorgio and Navarro were ruled ineligible without a predetermination hearing.[2] Defendants USEF and USOPC also cite to opinions for the proposition that the ASA doesn't provide a private right of action. None of these opinions interpret the version of the ASA that applies to this case.

Plaintiffs do not dispute that the 2018 ASA did not include an express private right of action. A review of the ASA in 2018, however, shows that Congress intended to provide for a private right of action. In determining whether a statute provides for an implied private right of action, courts are guided by four factors: (1) whether the plaintiff is a member of a class that the statute intends to benefit; (2) whether there is an indication of Congress's intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the statute's underlying purposes; and (4) whether the cause of action traditionally is relegated to state law. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The 2018 version of the ASA provided specific rights to Participants, including the right to a predetermination hearing contained in § 220522(8).[3] Plaintiffs are members of the class the statute intends to benefit by providing this predetermination hearing. In light of the procedural history of the Plaintiffs' attempts to reach a resolution through the Defendants' processes provided in the ASA, a private remedy is consistent with the statute's underlying purposes. Plaintiffs Navarro and Giorgio sought to have these issues heard by each of the Defendants, including Defendant USEF. Defendant SafeSport did not provide any opportunity

[2] Defendant USEF relies on *Sanderson v. U.S. Center for SafeSport, Inc*., Civ. Act. No.: 21-cv-01771-CMA (D. Col. July 29, 2021) for support of its position. However, these provisions cited by Defendants were included in the version of the ASA interpreted by that court, so that court did not reach the issue of whether an implied private right of action existed. Instead, the court based its ruling on preemption, which is argued elsewhere herein.

[3] Defendant USEF relies on *Oldfield v. Athletic Congress*, 779 F.2d 505 (9th Cir. 1985) to support its argument. Unlike the Plaintiffs herein, Oldfield did not assert a right contained in the statute itself, but rather in the USOPC Constitution. Id.

for these issues to be heard per its rules. Defendants USEF and USOPC ruled that the issues raised herein were outside of their jurisdiction and didn't rule on the merits. Under those circumstances, the only forum to enforce the right afforded by § 220522(8) is in this Court.

In addition, the circumstances of this case provide additional reason to believe Congress would have intended for judicial review. In Free Enterprise Fund v. Public Company, 561 U.S. 477 (2010), the Court held that "we presume that Congress does not intend to limit [federal court] jurisdiction if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise. Id. at 489 (internal citations and quotations omitted). In the present case, the issues raised herein have received no review on their merits, and a dismissal by this Court would foreclose any review for the issues raised herein. In addition, this action seeks review of issues that are wholly collateral to the review process set forth in the ASA. Defendant SafeSport's rules denied the opportunity for Plaintiffs Giorgio and Navarro to raise these issues in its arbitration "hearing," and both Defendants USEF and USOPC ruled that they lacked jurisdiction to hear these issues in their statutory review processes. Accordingly, given that Plaintiffs Giorgio and Navarro could not raise these issues in these processes, it must be collateral to them. Finally, the statutory and Constitutional claims are beyond the expertise of Defendants USEF, USOPC and SafeSport. Thus, under the circumstances of this case, where the Defendants denied any opportunity for the issues raised herein to be heard, Congress intended that this case is properly before this Court.

Defendant USEF also seeks dismissal of Count V on the grounds that the ASA does not provide a private right of action. Unlike Counts III and IV, which seek a declaration interpreting statutory rights under the ASA, Count V seeks a declaration interpreting a Constitutional right, and whether the ASA provides a private right of action is irrelevant. As one court has stated:

> [W]here the Constitution is the source of the right allegedly violated, no other source of a right—or independent cause of action—need be identified. The parties point to no case—and the Court is aware of none—in which a court declined to hear a case requesting declaratory relief where subject matter jurisdiction was present and a plaintiff's constitutional rights were arguably implicated simply because the plaintiff did not have an independent cause of action apart from the DJA.

Comm. on Judiciary v. Miere, 558 F. Supp. 2d 53, 81-82 (D.D.C. 2008); see also Free Enterprise Fund v. Public Company, 561 U.S. 477, 491 n.2 (2010) (recognizing the jurisdiction of federal courts to enforce Constitutional rights). Accordingly, Count V is properly before this Court.

VII. Defendants' Other Arguments Fail.

The Defendants assert a variety of factual defenses to the claims asserting that the claim should be dismissed based on the Plaintiff's failure to allege a fact or the lack of what the Defendant asserts is a necessary element to the claim. None of these facts or elements, however, relate or are required in order for the court to award the relief sought by Plaintiffs. For example, each of the Defendants seeks dismissal of the Counts seeking a determination of the parties' rights and obligations under the Constitution on the grounds that they are not a "state actor," or that "participation in the Olympic Movement" is not a constitutionally protected right. A declaratory judgment, however, is not an adjudication of liability against an adverse party, but rather a declaration of the rights and obligations of parties with adverse legal interests. The state action at issue is contained in each Count seeking a declaration of the parties' Constitutional rights and obligations and sets forth the actual controversy among the parties and their respective interests therein. Other than Counts 2 and 6, the right to relief does not depend on a party being a state actor. Likewise, the Constitutional rights and obligations for which the Plaintiffs seek a declaration is specifically included in each Count, and no Count is based on a Constitutional right to participate in the Olympic Movement.

The Defendants also seek dismissal of certain Counts on the grounds that Count "fails to state a claim" for liability against that Defendant or fails to allege any wrongful act committed by the Defendant. While these allegations would be elements of a claim for liability and damages, the Plaintiffs are not seeking that relief.

Defendant SafeSport seeks dismissal because it was not using a government power when determining eligibility, and that it does not "enforce" violations. Like the other factual defenses identified above, they are immaterial to these Counts. The factual allegations on which the declaratory judgment is sought is contained in the Counts themselves.

Respectfully Submitted,

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