

NOTE

WADA: WASTING EFFORTS ON THE WRONG DOPE

I. INTRODUCTION

On June 19, 2021, Sha'Carri Richardson finished in first place in the women's 100-meter dash at the U.S. Olympic Track and Field Trials, guaranteeing her spot in the 2020 Tokyo Olympics.¹ Just days later, Richardson tested positive for THC and was suspended for one month by the U.S. Anti-Doping Agency ("USADA"), pursuant to international rules set by the World Anti-Doping Agency ("WADA"), disqualifying her from the Olympics.² According to Richardson, she smoked marijuana to cope with the unexpected death of her mother, which occurred just days before the race.³ Richardson's decision and subsequent suspension were widely publicized and debated throughout the United States and the world.⁴ While some were angered that a potential Olympic athlete would jeopardize her athletic future by using a substance that she knew was prohibited, others came to her defense and questioned why marijuana is even prohibited in the first place.⁵

WADA is an international independent agency that was established to lead the fight against the use of performance-enhancing drugs ("PEDs") in sports.⁶ It does so by conducting scientific research to identify substances and methods that enhance athletic performance,

1. Elisha Fieldstadt, *U.S. Sprinter Sha'Carri Richardson Suspended for One Month After Failed Drug Test*, NBC NEWS (July 2, 2021, 5:31 PM), <https://www.nbcnews.com/news/sports/shacarri-richardson-could-miss-olympics-after-failed-drug-test-n1272960> [https://perma.cc/BW6P-LXL6]; see Adam Kilgore & Rick Maese, *The Doping Rules That Cost Sha'Carri Richardson Have a Debated, Political History*, WASH. POST (July 3, 2021, 4:45 PM), <https://www.washingtonpost.com/sports/olympics/2021/07/03/shacarri-richardson-marijuana-olympics-doping-ban> [https://perma.cc/68X5-BXX9].

2. See Kilgore & Maese, *supra* note 1.

3. *Id.*

4. See *id.*

5. *Id.*

6. *Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> [https://perma.cc/TUE9-MA8E] (last visited Nov. 18, 2022).

educating athletes on the dangers of using such substances and methods, assisting governments and sports organizations in developing their own anti-doping programs, and implementing the World Anti-Doping Code⁷ (the “Code”)—“the document harmonizing anti-doping policies in all sports and all countries.”⁸ Pursuant to the Code, WADA publishes its Prohibited List, which lists prohibited substances and methods for all athletes involved in international competition.⁹

For a substance or method to be added to the WADA Prohibited List, it must meet two of the three inclusion criteria: (1) it “has the potential to enhance or enhances sport performance;” (2) its use “represents an actual or potential health risk” and (3) it “violates the spirit of sport.”¹⁰ WADA’s vague criteria allow for recreational drugs, such as marijuana, to be included on the List.¹¹ While WADA does not disclose which of the two criteria are met when it adds a substance or method to its Prohibited List, two WADA directors co-authored a paper in 2011 discussing the reasons why marijuana meets the criteria, emphasizing how marijuana has the potential to enhance performance.¹² To summarize, the authors argue that marijuana use diminishes the anxiety and stress that comes with competing in international competition, allowing athletes to perform better under pressure, and that it alleviates pain, empowering athletes to persevere through the wear and tear that comes from their rigorous training.¹³ What makes this explanation troublesome, however, is that “[a]ntidepressants, anxiolytics, antipsychotics, and anticonvulsants”—all of which “can improve mood and decrease anxiety”—as well as certain pain killers such as Vicodin and Ketorolac, are not prohibited.¹⁴

7. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2021), https://www.wada-ama.org/sites/default/files/resources/files/2021_code.pdf [<https://perma.cc/353Q-2TCL>] [hereinafter CODE].

8. See *Who We Are*, *supra* note 6.

9. CODE, *supra* note 7 art. 4, at 19.

10. *Id.* art. 4.3, at 20; *Marijuana FAQ*, U.S. ANTI-DOPING AGENCY, <https://www.usada.org/athletes/substances/marijuana-faq> [<https://perma.cc/45RB-NTYP>] (last visited Nov. 18, 2022).

11. *Prohibited In-Competition*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20210614035919/https://www.wada-ama.org/en/content/what-is-prohibited/prohibited-in-competition/cannabinoids> [<https://perma.cc/XS2Z-F9JB>] (last visited Nov. 18, 2022); see *infra* Part III.A.

12. Chloe Jones, *Why Can't Olympians Smoke Weed?*, PBS (July 9, 2021), <https://www.pbs.org/newshour/nation/why-cant-olympians-smoke-weed> [<https://perma.cc/FL6X-QHRN>]; see Marilyn A. Huestis et al., *Cannabis in Sport: Anti-Doping Perspective*, 41 *SPORTS MED.* 949, 954-56, 961-62 (2011).

13. Huestis et al., *supra* note 12, at 955.

14. Diana Robinson, *Prescription and Non-Prescription Medications Permitted for Performance Enhancement*, UPTODATE (May 3, 2022),

What is even more infuriating is that while Richardson was sidelined from the recent 2020 Olympic Games in Tokyo, Russian athletes were allowed to compete after it was discovered that a significant number of them were involved in the country's state-sponsored doping system in 2015, just six years earlier.¹⁵ Additionally, in the three months preceding the 2016 Olympic Games in Rio de Janeiro, over 1,900 athletes, many of whom competed in track and field events, were not tested at all.¹⁶ Although "WADA is the governing body for the implementation of the Code, it is the Code Signatories," such as the USADA, "who are responsible for the implementation of applicable Code provisions through policies, statutes, rules, regulations and programs according to their authority and jurisdiction."¹⁷ As a result, testing and the release of data regarding tests are extremely inconsistent from country to country, allowing for certain athletes to be tested multiple times a month, where others are not tested at all.¹⁸

This Note discusses the issues with WADA and its Prohibited List, to show why an amendment to its vague inclusion criteria is necessary.¹⁹ An amendment will allow WADA to focus on combating the use of legitimate performance-enhancing substances and methods that allow athletes and countries to fraudulently influence the outcomes of

<https://www.uptodate.com/contents/prescription-and-non-prescription-medications-permitted-for-performance-enhancement> [<https://perma.cc/SDC9-UZLV>]; *Examples of Prohibited and Permitted Substances and Methods*, U.S. ANTI-DOPING AGENCY, <https://www.usada.org/wp-content/uploads/2020-USADA-Wallet-Card.pdf> [<https://perma.cc/QG23-U54L>] (last visited Nov. 18, 2022).

15. See Kilgore & Maese, *supra* note 1; see Sean Ingle, *Decision to Halve Russia's WADA Doping Ban Met with Disbelief and Anger*, GUARDIAN (Dec. 17, 2020), <https://www.theguardian.com/sport/2020/dec/17/russia-doping-ban-halved-but-name-and-flag-barred-from-next-two-olympics-court-of-arbitration-for-sport-world-anti-doping-agency> [<https://perma.cc/TM3E-5V73>].

16. Matthew Futterman, *Ahead of Tokyo Olympics, Better Drug Testing Is a Hard Promise to Keep*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/05/06/sports/olympics/olympic-drug-testing.html> [<https://perma.cc/4K26-U53B>].

17. *Code Compliance*, WORLD ANTI-DOPING AGENCY, <http://web.archive.org/web/20210925052641/https://www.wada-ama.org/en/code-compliance> [<https://perma.cc/H99A-T4Q5>] (last visited Nov. 18, 2022).

18. See Sandra Harwitt, *Roger Federer Explains How He's Experienced the Inconsistency of Drug Testing*, USA TODAY (July 1, 2018), <https://www.usatoday.com/story/sports/tennis/wimb/2018/07/01/roger-federer-explains-inconsistency-drug-testing/749924002>

[<https://perma.cc/7ZRZ-9VKL>]; see Futterman, *supra* note 16; see also Michael Long, *Putting Anti-Doping Centre Stage: The Drama of Rebuilding Trust in the Wake of the Russian Scandal*, SPORTSPRO (May 12, 2020), <https://www.sportspromedia.com/from-the-magazine/anti-doping-russia-wada-olympics-rodchenkov-tygart-reedie> [<https://perma.cc/7BGK-CKHY>] (explaining how drug testing differs from country to country).

19. See *infra* Parts II–IV.

international athletic events.²⁰ Testing for marijuana and other recreational drugs that have no impact on the outcomes of events is an enormous waste of time and resources, and limits WADA's ability to prevent large-scale doping scandals, which persist throughout the world today.²¹

Part II will provide an overview of WADA and its governance structure, explain the history of marijuana's inclusion on the Prohibited List, and discuss the Russian doping scandal and other doping scandals that have occurred in recent years under WADA's watch.²² Part III will discuss the issues with the WADA Code and how the vague Prohibited List allows for doping scandals and other problems to persist throughout the realm of international athletics.²³ Part IV proposes that WADA amend the inclusion criteria for the Prohibited List, so that it can shift its efforts toward combating the use of legitimate performance-enhancing drugs that exploit international athletic competitions.²⁴

II. BACKGROUND

This Part will provide an overview of WADA, the Code, and the Prohibited List.²⁵ Subpart A will discuss the creation of WADA and the Code, as well as WADA's overall mission and governance structure.²⁶ Subpart B will discuss the Prohibited List, the reasons why marijuana was added to the Prohibited List, and why it remains prohibited today.²⁷ Subpart C will examine the Russian doping scandal and other doping scandals that have occurred in recent years.²⁸

A. *The World-Anti Doping Agency*

The 1998 Tour de France, better known as the "Tour of Shame," was a pivotal moment in the world of doping in sports.²⁹ Shortly before the start of the race, French authorities discovered a stash of PEDs belonging to the Festina cycling team.³⁰ The results of that discovery

20. *See infra* Part IV.

21. *See infra* Part III.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part II.

26. *See infra* Part II.A.

27. *See infra* Part II.B.

28. *See infra* Part II.C.

29. William Fotheringham, *Ten Years on from the Tour of Shame That Blew the Lid Off Organised Doping*, THE GUARDIAN (June 9, 2008), <https://www.theguardian.com/sport/2008/jul/10/tourdefrance.cycling> [<https://perma.cc/7Q5M-6ZQR>].

30. *Id.*

were rippling: the Festina team admitted to organizing a doping scheme, and many teams and riders withdrew from the race, as the sport was forced to come to terms with the fact that its athletes were using PEDs en masse.³¹ Even worse, because the event marked the first time that “systematic doping at the highest level had been exposed,” the entire world was left wondering what other major sports were tainted by widespread PED use.³² Realizing that serious changes were needed immediately, just one year later, the International Olympic Committee (“IOC”) held “the First World Conference on Doping in Sport,” resulting in the Lausanne Declaration on Doping in Sport.³³ Pursuant to the terms of the Declaration, “WADA was established on [November 10,] 1999 to protect athletes, promote the values of clean sport, and preserve the spirit of sport internationally.”³⁴

1. Goals, Mission, and Governance Structure

WADA is an international independent agency governed and funded equally by the Sports Movement³⁵ and world governments.³⁶ Its mission is “[t]o lead a collaborative worldwide movement for doping-free sport” with a vision of creating “[a] world where all athletes can participate in a doping-free sporting environment.”³⁷ WADA strives to carry out its mission by promoting, developing, and enforcing mandatory rules and regulations for athletes to follow worldwide, for example, while at the same time delegating authority to the various national anti-doping organizations to tailor their own programs and policies to be consistent with the Code.³⁸ WADA’s three guiding values are “integrity,”³⁹ “openness,”⁴⁰ and “excellence.”⁴¹ According to

31. *Id.*

32. *Id.*

33. *See Who We Are*, *supra* note 6.

34. *Id.*

35. *Youth Zone*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/youth-zone> [<https://perma.cc/DV86-5ULX>] (last visited Nov. 18, 2022). The Sports Movement, also known as The Olympic Movement, is composed of the International Olympic Committee, National Olympic Committees, International Sports Federations, and athletes. *World Anti-Doping Agency*, OLYMPICS, <https://olympics.com/ioc/wada> [<https://perma.cc/33Q2-B7KQ>] (last visited Nov. 18, 2022).

36. *Who We Are*, *supra* note 6.

37. WORLD ANTI-DOPING AGENCY, STRATEGIC PLAN 2020-2024, at 9 (2020) https://www.wada-ama.org/sites/default/files/resources/files/wada_strategyplan_20202024.pdf [<https://perma.cc/R9QH-PG8F>] [hereinafter WADA STRATEGIC PLAN].

38. *Id.* at 5.

39. *Id.* at 9 (“We protect the rights of all athletes in relation to anti-doping, contributing to the integrity in sport[;] [w]e observe the highest ethical standards and avoid improper influences or conflicts of interest that would undermine our independent and unbiased judgment[;] [w]e develop policies, procedures and practices that reflect justice, equity and integrity.”).

WADA, the central focus of the Agency, Code, and its related programs is to benefit and empower athletes, by keeping them informed and educated of the rules that they are required to follow.⁴²

WADA's complex governance structure is composed of a thirty-eight-member Foundation Board ("Board"), a fourteen-member Executive Committee ("ExCo"), five Standing Committees, ten Expert Advisory Groups ("EAGs"), and a Nominations Committee.⁴³ The Board is WADA's "highest policy-making body," which is responsible for supervising the Agency's operations as a whole, and ensuring that it remains independent and that its activities are transparent.⁴⁴ The Board is composed of WADA's President, Vice President, and eighteen representatives from the Sports Movement and world governments, respectively.⁴⁵ Presently, one-third of the Board consists of current or former international-level athletes.⁴⁶ The ExCo is responsible for the management and running responsibilities of WADA, "including the performance of activities and the administration of assets."⁴⁷ WADA's President and Vice President head the ExCo, and a majority of the remaining positions are held by Board members as well, with the exception that two positions that must be held by non-Board members.⁴⁸ Like the Board, one-third of the ExCo consists of athletes.⁴⁹

Pursuant to WADA's Statutes, the ExCo has the authority to create Standing Committees, whose roles are to advise WADA on policy decisions.⁵⁰ Each Standing Committee serves "as a forum for detailed and expert deliberation on specific families of issues, to develop

40. *Id.* at 10 ("We are impartial, objective, balanced and transparent[;] [w]e collaborate with stakeholders and the industry to find common ways to fight doping[;] [w]e listen to athletes' voices, as the stakeholders that are most impacted by anti-doping policies and activities[;] [w]e strive to be diverse and inclusive to ensure that everyone has equal opportunities to be represented[;] [w]e are self-reflective and ask for feedback[;] [w]e are trustworthy and respectful of all our stakeholders.").

41. *Id.* ("We conduct our activities with the highest standards of professionalism[;] [w]e develop innovative and practical solutions to enable stakeholders to implement anti-doping programs[;] [w]e apply and share best practice standards to all our activities[;] [w]e look for the most efficient methods to do our work.").

42. *Id.* at 7.

43. *Governance*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/governance> [<https://perma.cc/PT6V-DB6D>] (last visited Nov. 18, 2022).

44. *Id.*; WORLD ANTI-DOPING AGENCY, CONSTITUTIVE INSTRUMENT OF FOUNDATION OF THE AGENCE MONDIALE ANTIDOPAGE/WORLD ANTI-DOPING AGENCY, at 7 (2021), https://www.wada-ama.org/sites/default/files/resources/files/english_translation_wada_statutes_12_april_2021.pdf [<https://perma.cc/HM44-USFW>] [hereinafter WADA STATUTES].

45. *Governance*, *supra* note 43; WADA STATUTES, *supra* note 44, at 3, 5.

46. *Governance*, *supra* note 43.

47. *Governance*, *supra* note 43; WADA STATUTES, *supra* note 44, at 7.

48. *Governance*, *supra* note 43; WADA STATUTES, *supra* note 44, at 7.

49. *Governance*, *supra* note 43; WADA STATUTES, *supra* note 44, at 7.

50. *Governance*, *supra* note 43; WADA STATUTES, *supra* note 44, at 8.

recommendations for decisions by the ExCo or Board, as appropriate.”⁵¹ As of 2021, the five Standing Committees are the Athlete Committee, Compliance Review Committee, Education Committee, Finance and Administration Committee, and the Health, Medical and Research Committee.⁵²

EAGs work collaboratively with Standing Committees and other managing bodies by providing professional advice, guidance, and recommendations on how to operate as effectively as possible.⁵³ The current EAGs as of January 2022 are as follows: Ethics; Gene and Cell Doping; Laboratory; Legal; National Anti-Doping Organizations; Prohibited List; Social Science Research; Strategic Testing; Therapeutic Use Exemption; and Signatory Expert Group.⁵⁴ EAGs consist of experts who “are called upon to assist WADA on subject-specific matters, which change and evolve” over time.⁵⁵ For example, various medical doctors and scientists sit on the Prohibited List EAG, while the Legal EAG is made up of lawyers from around the world.⁵⁶ Finally, the Nominations Committee has the role of ensuring “that the right people, in terms of skills and independence, serve in senior governance roles within WADA.”⁵⁷

2. World Anti-Doping Code

The Code “is the core document that harmonizes anti-doping policies, rules, and regulations within sports organizations and among public authorities around the world.”⁵⁸ The first Code was approved in 2003 and became operative in 2004.⁵⁹ At that time, the Code was truly a

51. *Standing Committees*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20210629110719/https://www.wada-ama.org/en/who-we-are/governance/standing-committees> [https://perma.cc/AVJ9-Y82G] (last visited Nov. 18, 2022).

52. *Id.*

53. *Expert Advisory Groups*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are/governance/expert-advisory-groups> [https://perma.cc/6DXH-S2RN] (last visited Nov. 18, 2022).

54. *Id.*

55. *Id.*

56. *See Prohibited List Expert Advisory Group*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/prohibited-list-expert-advisory-group> [https://perma.cc/38JY-PR2F] (last visited Nov. 18, 2022); *Legal Expert Advisory Group*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/legal-expert-advisory-group> [https://perma.cc/F9CU-UV5T] (last visited Nov. 18, 2022).

57. *Governance*, *supra* note 43.

58. *The World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/world-anti-doping-code> [https://perma.cc/NF2M-EUDT] (last visited Nov. 18, 2022).

59. Saroja Cuffey, *Passing the Baton: The Effect of the International Olympic Committee’s Weak Anti-Doping Laws in Dealing with the 2016 Russian Olympic Team*, 43 BROOKLYN J. INT’L

revolutionary document as it was “the first global policy against banned [PEDs].”⁶⁰ According to WADA:

The purpose of the *Code* is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The *Code* has been drafted giving considerations to the principles of proportionality and human rights.⁶¹

When the first Code was approved in January 2003, WADA proclaimed that the document would not remain stagnant, promising that it would evolve over time to conform with developments in the anti-doping community.⁶² After two years of experiencing the Code in action, WADA, sticking to its word, commenced a series of consultation processes in 2006, 2011, and most recently in 2017.⁶³ According to WADA, the consultation processes “were fully collaborative” and “involved the whole anti-doping community, all of whom sought an enhanced Code [to] benefit athletes around the world.”⁶⁴ Following the 2017 Code review process, which produced the 2021 Code, the Code currently works cooperatively with eight International Standards that attempt to promote uniformity among Signatories in different technical and operational areas.⁶⁵ WADA, its Signatories, and national governments combine their expertise to develop effective International Standards which, like the Code, are modified over time based on

L. 665, 675 (2018); see *Code Review*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/world-anti-doping-code/code-review> [<https://perma.cc/FGY9-4VUD>] (last visited Nov. 18, 2022).

60. Cuffey, *supra* note 59, at 675. “Prior to [the Code’s] implementation, ‘every sport federation and country had its own rules and it was a chaotic situation. An athlete could be banned from participating in sports in one country but not in another.’” *Id.* (citing Susanna Loof, *IOC Adopts Global Anti-Doping Code*, USA TODAY (July 4, 2003, 9:13 AM), http://usatoday30.usatoday.com/sports/olympics/2003-07-04-doping-code_x.htm [<https://perma.cc/A2L8-FLV4>]).

61. CODE, *supra* note 7, at 8.

62. *Code Review*, *supra* note 59.

63. *The World Anti-Doping Code*, *supra* note 58.

64. *Id.*

65. *Id.* (The eight International Standards are: The International Standard for Testing and Investigations; The International Standard for Laboratories; The International Standard for Therapeutic Use Exemptions; The International Standard for the Prohibited List; The International Standard for the Protection of Privacy and Personal Information; The International Standard for Code Compliance by Signatories; The International Standard for Education; and the International Standard for Results Management.); *Code Review*, *supra* note 59; *International Standards*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/international-standards> [<https://perma.cc/LT4Y-5H9B>] (last visited Nov. 18, 2022).

developments in the anti-doping community.⁶⁶ The Prohibited List is one of these International Standards.⁶⁷ It lists the substances and methods generally prohibited both in-competition and at all times, and those prohibited for particular, identified sports.⁶⁸

The Code, along with the International Standards, defines “doping,” sets forth specific anti-doping rule violations, provides procedures for testing and doping investigations, and specifies consequences for athletes or teams who violate the Code.⁶⁹ Although there is no common definition of the term “doping” governing all sports organizations, the term generally “refers to the use of prohibited medications, drugs, or treatments by athletes with the intention of improving athletic performance.”⁷⁰ However, the Code redefines doping as “the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.11 of the *Code*,” which includes using a substance or method that is on the Prohibited List.⁷¹ Therefore, as long as an athlete tests positive for any substance or method found on the Prohibited List, those test results will be considered an anti-doping rule violation, regardless of whether that substance or method enhances performance or not.⁷²

Consequences for individual athletes testing positive are draconian and include disqualification of all results achieved in a particular event “including forfeiture of all medals, points, and prizes.”⁷³ Even worse, an athlete may be suspended from competition for up to two years for unintentional violations or four years for intentional violations.⁷⁴ Moreover, if a team is competing in a specific event, and one of its athletes tests positive during the event, not only will the individual

66. *International Standards*, *supra* note 65.

67. *The World Anti-Doping Code*, *supra* note 58.

68. CODE, *supra* note 7 art. 4.2.1, at 19.

69. Cuffey, *supra* note 59, at 676.

70. Klaus Vieweg, *The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position*, 15 MARQ. SPORTS L. REV. 37, 37 (2004); *The History of Doping*, AM. COLL. MED. TOXICOLOGY, https://www.acmt.net/cgi/page.cgi/_zine.html/Ask_A_Toxicologist/What_is_doping_and_why_do_athletes_do_this_ [<https://perma.cc/KUZ9-W2KT>] (last visited Nov. 18, 2022); *see also* Robert Alexandru Vlad et al., *Doping in Sports, a Never-Ending Story?*, 8 ADV. PHARM. BULL. 529, 530 (2018) (“The first official definition of doping dates from 1963 and it was issued by the European Committee Council: Doping represents the use of substances or physiological mediators, which are not normally present in the human body, introduced as an external aid to increase the athletes’ performances during a competition.”).

71. CODE, *supra* note 7, art. 1–2, at 13-16.

72. *See id.*

73. CODE, *supra* note 7, art. 10.1, at 34; Cuffey, *supra* note 59, at 676.

74. CODE, *supra* note 7, art. 10.2, at 34-35; Cuffey, *supra* note 59, at 676.

athlete be sanctioned, but the entire team may suffer similar consequences as well.⁷⁵

3. Code Compliance by Signatories: Who the Signatories Are and How They Enforce the Code

Although WADA is responsible for implementing the Code as a whole, it would be impossible for them to individually regulate the nearly 700 sports organizations throughout the world who are bound by the Code.⁷⁶ Consequently, “it is the Code Signatories who are responsible for the implementation of applicable Code provisions through policies, statutes, rules, regulations, and programs according to their authority and jurisdiction.”⁷⁷ WADA Signatories are composed of “the [IOC], International Federations, the International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations and other organizations having significant relevance in sport.”⁷⁸ The USADA, for example, “which is recognized as a world leader in protecting the rights of clean athletes and the fairness of sport competition,” is the national anti-doping organization that manages the anti-doping program in the United States.⁷⁹

Although WADA cannot force a sports organization to become a Code Signatory, agreeing to be bound by the Code is a prerequisite for an organization’s athletes to be able compete in the Olympics and similar events.⁸⁰ To be fully compliant with the Code, a Signatory must take the following three steps vis-à-vis the Code: accept, implement, and enforce it.⁸¹ Acceptance simply requires a Signatory to agree to be bound by the Code and comply with its requirements.⁸² After accepting the Code, a Signatory must implement it by enacting and amending its own measures according to its authority to be fully compliant with the Code.⁸³ While a Signatory is not required to mimic the entire Code, WADA requires that certain articles be implemented to be fully compliant, including: adhering to WADA’s definition of doping;

75. Cuffey, *supra* note 59, at 676.

76. *Code Compliance*, *supra* note 17; *The World Anti-Doping Code*, *supra* note 58.

77. *Id.*

78. CODE, *supra* note 7, art. 23.1.1, at 77.

79. OFF. OF NAT’L DRUG CONTROL POL’Y, EXEC. OFF. OF THE PRESIDENT, REPORT ON WORLD ANTI-DOPING AGENCY GOVERNANCE AS REQUIRED BY HOUSE REPORT 116-456, at 3 (May 17, 2021) [hereinafter ONDCP REPORT].

80. *See* CODE, *supra* note 7, art. 20.1.6 at 62.

81. *The World Anti-Doping Code*, *supra* note 58.

82. *Id.*; *see* CODE, *supra* note 7, art. 23.1 at 77.

83. *The World Anti-Doping Code*, *supra* note 58; CODE, *supra* note 7, art. 23.2.1, at 77.

adopting the circumstances that constitute anti-doping rule violations; providing for proof of doping; recognizing and enforcing the Prohibited List; acting within the statute of limitations for commencing anti-doping rule violation proceedings; and complying with WADA's interpretation of the Code.⁸⁴ Once the implementation process is completed, enforcement requires a Signatory to actually carry out its new measures.⁸⁵

B. The Prohibited List

WADA considers a substance or method for inclusion on the Prohibited List if, in WADA's sole discretion, it determines that the substance or method meets any two of the following three criteria⁸⁶: (1) "medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance";⁸⁷ (2) "medical or other scientific evidence, pharmacological effect or experience that the *Use* of the substance or method represents an actual or potential health risk to the *Athlete*";⁸⁸ or (3) "WADA's determination that the *Use* of the substance or method violates the spirit of sport described in the introduction to the *Code*."⁸⁹ The Code defines the "spirit of sport" as:

[T]he ethical pursuit of human excellence through the dedicated perfection of each *Athlete's* natural talents. Anti-doping programs seek to protect the health of *Athletes* and to provide the opportunity for *Athletes* to pursue human excellence without the *Use of Prohibited Substances and Methods*. Anti-doping programs seek to maintain the integrity of sport in terms of respect for rules, other competitors, fair competition, a level playing field, and the value of clean sport to the world. The spirit of sport is the celebration of the human spirit, body and mind. It is the essence of Olympism and is reflected in the values we find in and through sport, including: Health; Ethics, fair play and honesty; *Athletes'* rights as set forth in the *Code*; Excellence in

84. CODE, *supra* note 7, art. 23.2.2, at 77-78; Matthew Hard, *Caught in the Net: Athletes' Rights and the World Anti-Doping Agency*, 19 S. CAL. INTERDISC. L.J. 533, 543 (2010); see *Code Compliance*, *supra* note 17 ("After the initial step of accepting the Code, the Code signatory then determines how the Code is to be best implemented into its rules, regulations and/or policies in order to ensure compliance. These anti-doping rules must be submitted to WADA for review, in either English or French, in order for them to be pronounced in line with the Code.").

85. *The World Anti-Doping Code*, *supra* note 58.

86. CODE, *supra* note 7, art. 4.3, at 20.

87. *Id.*

88. *Id.*

89. *Id.*

performance; Character and *Education*; Fun and joy; Teamwork; Dedication and commitment; Respect for rules and laws; Respect for self and other *Participants*, Courage, Community and solidarity.⁹⁰

Substances or methods which mask the effect of, or the ability to detect prohibited substances, are also prohibited.⁹¹ Every year, following an extensive consultation process conducted by WADA's List Expert Group and its Health, Medical and Research Committee, WADA updates its Prohibited List.⁹² Despite the alleged time and expertise devoted to the annual update, as well as WADA's commitment to transparency, the Prohibited List itself is not transparent.⁹³ Instead of disclosing which two of its three inclusion criteria have caused the substance to be placed on the Prohibited List, WADA creates a blanket prohibition of the substance if it meets any two of the three criteria, and so does not discriminate based on the particular criteria violated.⁹⁴

Critically, not all WADA-sanctionable substances and methods are expressly named on the Prohibited List, raising obvious issues of notice.⁹⁵ If a substance has not yet been approved for "human therapeutic use," which "includes drugs under pre-clinical or clinical development, discontinued drugs, designer drugs or veterinary drugs," it can still be prohibited.⁹⁶ Even though WADA states that substances or methods not expressly named on the Prohibited List are deemed prohibited "only in rare occasions," athletes must be still be mindful of everything they put into their bodies, as the presence of a prohibited

90. *Id.* at 10.

91. *Id.* art. 4.3.2, at 20; *Prohibited List Q&A*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20210205120051/https://www.wada-ama.org/en/questions-answers/prohibited-list-qa> [https://perma.cc/AU7R-9PDP] (last visited Nov. 18, 2022).

92. *The Prohibited List*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20210128115623/https://www.wada-ama.org/en/what-we-do/the-prohibited-list> [https://perma.cc/LD3X-LHTE] (last visited Nov. 18, 2022); see *Prohibited List Q&A*, *supra* note 91 ("The Prohibited List is reviewed annually in consultation with scientific medical and anti-doping experts to ensure it reflects current medical and scientific evidence and doping practices. The Prohibited List comes into effect on January 1st of each year and is published by WADA three months prior to coming into force; however, in exceptional circumstances, a substance or method may be added to the Prohibited List at any time.").

93. See Jones, *supra* note 12.

94. See *id.*; CODE, *supra* note 7, art. 4.3, at 20.

95. *Prohibited List Q&A*, *supra* note 91. "The fact that a substance is not on the Prohibited List does not mean that it is not prohibited since most categories only include some common examples and are not exhaustive." *Id.*; *Understand The Prohibited List*, ATHLETICS INTEGRITY UNIT (Dec. 29, 2021), <https://www.athleticsintegrity.org/know-the-rules/understand-the-prohibited-list> [https://perma.cc/8WK2-WEYY].

96. *Prohibited List Q&A*, *supra* note 91. A designer drug is defined as "a synthetic analogue of a legally restricted or prohibited drug, devised to circumvent drug laws." *Id.*

substance in a drug sample is sufficient to trigger an anti-doping rule violation, even if the athlete took the substance unintentionally.⁹⁷

1. Prohibited at All Times versus Prohibited In-Competition

WADA utilizes the same inclusion criteria both for substances and methods that are prohibited at all times (both in-competition and out-of-competition), and for those that are prohibited only in-competition.⁹⁸ Substances prohibited at all times include anabolic agents, peptide hormones, growth factors, beta-2 agonists, hormone and metabolic modulators, and diuretics and masking agents.⁹⁹ Methods prohibited at all times include manipulation of blood and blood components, chemical and physical manipulation, and gene and cell doping.¹⁰⁰ The aforementioned substances and methods are prohibited at all times, according to WADA, “because of their potential to enhance performance in future Competitions or their masking potential.”¹⁰¹

In-competition, on the other hand, is the “period commencing just before midnight (at 11:59 P.M.) on the day before a *Competition* in which the *Athlete* is scheduled to participate until the end of the *Competition* and the *Sample* collection process.”¹⁰² Substances prohibited in-competition include stimulants, narcotics, cannabinoids, and glucocorticoids.¹⁰³ Unlike substances prohibited at all times, the Code does not provide an express explanation for why these substances are prohibited only in-competition.¹⁰⁴ However, most substances prohibited in-competition are labeled as “Substances of Abuse,” and are included on the Prohibited List “because they are frequently abused in society outside the context of sport.”¹⁰⁵ Not every sports competition is

97. *Id.*; see *Understand The Prohibited List*, *supra* note 95.

98. See CODE, *supra* note 7, art. 4.2.1, at 19.

99. *Prohibited at All Times*, WORLD ANTI-DOPING AGENCY, <http://web.archive.org/web/20210506074856/https://www.wada-ama.org/en/content/what-is-prohibited/prohibited-at-all-times> [<https://perma.cc/L4KC-PHKP>] (last visited Nov. 18, 2022).

100. *Id.*

101. CODE, *supra* note 7, art. 4.2.1, at 19.

102. *Prohibited In-Competition*, *supra* note 11.

103. *Id.* A cannabinoid is “a compound produced by the cannabis (marijuana) plant or synthesized as a chemical (synthetic cannabinoid). Of more than 100 cannabinoids in the plant, delta-9-tetrahydrocannabinol (THC) is the main psychoactive compound, which alters the mind or behavior.” *Cannabinoid*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20210916115406/https://www.wada-ama.org/en/questions-answers/cannabinoid> [<https://perma.cc/7ZFD-WQ8T>] (last visited Nov. 18, 2022).

104. See CODE, *supra* note 7, art. 4.2.1, at 19.

105. CODE, *supra* note 7, art. 4.2.3, at 19. “Substances of Abuse” include marijuana, cocaine, heroin, and MDMA. *Substances of Abuse 101*, U.S. ANTI-DOPING AGENCY (Jan. 13, 2021), <https://www.usada.org/spirit-of-sport/education/substances-of-abuse> [<https://perma.cc/N7UK-MR73>].

subject to each and every prohibited substance, however.¹⁰⁶ For example, substances known as “beta-blockers”¹⁰⁷ are prohibited in-competition only in particular sports.¹⁰⁸

2. Why Is Marijuana on the Prohibited List?

Marijuana was added to the Prohibited List as a substance prohibited in-competition in 2004, the same year that the Prohibited List was established.¹⁰⁹ Although WADA did not specify why marijuana was added to the Prohibited List at the time, it published a paper seven years later—in 2011—discussing why it meets the inclusion criteria.¹¹⁰ First, WADA found that marijuana has the potential to enhance performance “based on current animal and human studies as well as on interviews with athletes and information from the field.”¹¹¹ Second, according to WADA, marijuana poses a health risk to athletes because athletes who use marijuana in-competition pose a danger to “themselves and others because of increased risk taking, slower reaction times and poor executive function or decision-making.”¹¹² Lastly, WADA found that marijuana violates the “spirit of sport” because the use of any drug that is “harmful to health and that may have performance-enhancing properties, is not consistent with the athlete as a role model for young people around the world.”¹¹³

Although Richardson’s suspension certainly reignited the debate surrounding marijuana’s inclusion the Prohibited List, it has been prevalent ever since WADA’s formation.¹¹⁴ With over 100 countries representing their various attitudes towards marijuana, the discussion quickly became, and remains, a political hotbed.¹¹⁵ Still in 2022, while the United States and other countries around the world have become

106. *Prohibited in Particular Sports*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20210702144449/https://www.wada-ama.org/en/content/what-is-prohibited/prohibited-in-particular-sports> [https://perma.cc/95TU-96VY] (last visited Nov. 18, 2022).

107. *Beta Blockers*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/high-blood-pressure/in-depth/beta-blockers/art-20044522> [https://perma.cc/9XUX-CZZU] (last visited Nov. 18, 2022). Beta-blockers are defined as “medications that reduce blood pressure. Beta blockers work by blocking the effects of the hormone epinephrine, also known as adrenaline.” *Id.*

108. *See Prohibited in Particular Sports*, *supra* note 106 (These sports include archery, golf, shooting, skiing, snowboarding, and underwater sports, among others).

109. Huestis et al., *supra* note 12, at 949.

110. *Id.* at 953-56; *see Jones*, *supra* note 12.

111. Huestis et al., *supra* note 12, at 956.

112. *Id.* at 954.

113. *Id.* at 956.

114. Kilgore & Maese, *supra* note 1.

115. *Id.*

more marijuana-friendly, others continue to punish its use and/or possession, some with prison time.¹¹⁶ Including marijuana on the Prohibited List has been one of the most controversial and debated issues surrounding WADA, but it still remains on the Prohibited List today.¹¹⁷

3. War on Drugs and How the United States Was a Major Force for the Inclusion of Marijuana on the Prohibited List

Marijuana's inclusion on the Prohibited List can also be attributed to the United States' politics.¹¹⁸ In 1971, former President Richard Nixon declared a "war on drugs," exponentially increasing federal funding for drug control agencies and imposing harsh punishments on drug users.¹¹⁹ Many have viewed the so-called "war on drugs," however, as a war on the Black population.¹²⁰ The government first described marijuana as a drug used by inner city inhabitants and by Black people, they argue, and then posited that its use led to murder, rape and insanity.¹²¹ Although the war began with Nixon, it certainly did not end there.¹²² Rather, during Ronald Reagan's presidency in the 1980s, the war underwent a significant expansion, resulting in an unprecedented rise in drug incarceration rates.¹²³ From 1980 to 1997, incarceration rates for nonviolent drug offenses increased by more than 700 percent.¹²⁴

In 1998, during Bill Clinton's presidency, the United States "pledged \$1 million to assist the IOC in cleansing drugs from sports."¹²⁵ Barry McCaffery, head of the White House Office of National Drug Control Policy at the time, sent a ten-page memo to the IOC, demanding that they implement a comprehensive anti-drug program that included

116. *Id.*; see Terry Hacienda, *The 2021 Guide to Cannabis Laws Around the World*, CHI. TRIB. (July 15, 2021), <https://www.chicagotribune.com/marijuana/sns-tft-liststory-cannabis-laws-around-the-world-20210715-n6bdtyofrnaddj7x4ipiesmxdq-list.html> [<https://perma.cc/P9N2-RG6D>].

117. See WADA Executive Committee Endorses Recommendations of Non-Compliance of Eight Anti-Doping Organizations, WORLD ANTI-DOPING AGENCY (Sept. 14, 2021), <https://www.wada-ama.org/en/media/news/2021-09/wada-executive-committee-endorses-recommendations-of-non-compliance-of-eight-anti> [<https://perma.cc/9TMJ-D6PP>].

118. Kilgore & Maese, *supra* note 1.

119. *A History of the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/A6LF-W4XV>] (last visited Nov. 18, 2022).

120. *See id.*

121. John Hudak, *Marijuana's Racist History Shows the Need for Comprehensive Drug Reform*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/06/23/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform> [<https://perma.cc/U6YZ-DH3X>].

122. See *A History of the Drug War*, *supra* note 119.

123. *Id.*

124. *Id.*

125. Kilgore & Maese, *supra* note 1.

punishing athletes who test positive for recreational drugs like marijuana.¹²⁶ In justifying his radical position, McCaffery delineated that the United States raises “Olympic athletes up on international pedestals for all the world’s children to look up to as role models—it is vital that the message they send is drug-free.”¹²⁷

In response to a letter in which U.S. officials criticized WADA following Richardson’s suspension, Witold Banka, President of WADA, noted that the Agency had never before received a formal objection from the United States regarding the prohibition of marijuana.¹²⁸ Rather, Banka wrote that the United States, “has been one of the most vocal and strong advocates” for keeping marijuana on the Prohibited List over the last twenty years.¹²⁹ To further support his point, Banka stated that the “meeting minutes and written submissions received from the US over nearly two decades, in particular from the USADA, have consistently advocated” for the inclusion of marijuana on the Prohibited List.¹³⁰

4. Prohibited List Changes Regarding Cannabinoids

As mentioned, marijuana is only prohibited in-competition.¹³¹ Although WADA will continue to prohibit the use of marijuana in-competition in 2023, WADA has made certain changes to the cannabinoid portion of the Prohibited List over the years.¹³² For example, WADA started to recognize that even though many athletes were refraining from using marijuana during the in-competition period, they were still testing positive because of the long period of time that the substance remains in the body.¹³³ As a result, in 2013, “WADA raised the threshold level for a positive marijuana test (from 15 nanograms per milliliter to 150).”¹³⁴ Additionally, in 2019, cannabidiol (“CBD”), a chemical found in marijuana, was removed from the Prohibited List as WADA found that it is “not a cannabimimetic [agent] and does not have

126. Larry Siddons, *U.S. to Aid Olympic Doping Fight*, ASSOCIATED PRESS (Nov. 24, 1998), <https://apnews.com/article/36e9c87e8521c6553ef208d390b2885c> [<https://perma.cc/GP7E-M6HZ>].

127. *Id.*

128. Letter from Witold Banka, President, World Anti-Doping Agency, to Jamie Raskin, Chair, Subcomm. on C.R. & C.L., & Alexandria Ocasio-Cortez, Vice Chair, Subcomm. on C.R. & C.L. (July 10, 2021), https://www.wada-ama.org/sites/default/files/2021_07_letter_from_wada_president_to_jraskin_aocasio-cortez.pdf [<https://perma.cc/XK7L-ESNB>].

129. *Id.*

130. *Id.*

131. *E.g.*, *Marijuana FAQ*, *supra* note 10.

132. *See* Kilgore & Maese, *supra* note 1.

133. *See id.*; Mark A. Ware, *Cannabis and the Health and Performance of the Elite Athlete*, 28.5 CLINICAL J. SPORT MED. 480, 482 (2018).

134. Kilgore & Maese, *supra* note 1; Ware, *supra* note 133.

psychoactive properties.”¹³⁵ Most recently, in 2021, WADA announced that in response to requests from a number of stakeholders, for example, the backlash to Richardson’s suspension, it would conduct a scientific review of marijuana in 2022 to determine if the substance should remain on the Prohibited List.¹³⁶ Although the official results of the review have not been publicized yet, WADA decided that marijuana will remain prohibited in 2023 as its experts found that the substance is “against the spirit of sport.”¹³⁷

C. Recent Doping Scandals Under WADA’s Watch

Marijuana use is not the only source of controversy in international sports where doping scandals abound throughout the world.¹³⁸ For athletes competing at the highest levels, the physical abilities of competitors are generally the same;¹³⁹ thus, even the most minor advantage can turn the run-of-the-mill Olympian into a gold medalist.¹⁴⁰ Although athletes can improve their performance naturally, such as through superior training regimens, mental preparation, and dieting, nothing compares to the advantages gained by the use of PEDs.¹⁴¹

1. Russia’s State-Sponsored Doping System

Russia won only fifteen medals at the 2010 Vancouver Winter Olympics;¹⁴² however, only four years later, it won thirty three medals at

135. *Marijuana FAQ*, *supra* note 10; Ware, *supra* note 133. Cannabidiol (“CBD”) is “the second most prevalent active ingredient in cannabis (marijuana). While CBD is an essential component of medical marijuana, CBD does not cause a ‘high’ by itself . . . In humans, CBD exhibits no effects indicative of any abuse or dependence potential.” Peter Grinspoon, MD, *Cannabidiol (CBD) – What We Know and What We Don’t*, HARV. HEALTH PUBL’G (Sept. 24, 2021), <https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476> [<https://perma.cc/57TC-GCKE>]. Cannabimimetic agents are “compounds that mimic the effects of cannabinoids.” Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulations of Cannabis, Even After Descheduling*, 68 AM. U.L. REV. 823, 826 (2019).

136. *WADA Executive Committee Endorses Recommendations of Non-Compliance of Eight Anti-Doping Organizations*, *supra* note 117.

137. *Marijuana Stays on World Anti-Doping Agency Banned Substances List*, NBC SPORTS (Sept. 23, 2022), <https://olympics.nbcsports.com/2022/09/23/marijuana-doping-list-wada-banned> [<https://perma.cc/D8RH-6XQY>].

138. *See Sport Is Still Rife with Doping*, ECONOMIST (July 14, 2021), <https://www.economist.com/science-and-technology/2021/07/14/sport-is-still-rife-with-doping> [<https://perma.cc/UB2G-9LZ5>].

139. Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 834 (2006).

140. *Id.*

141. *Id.*

142. ONDCP REPORT, *supra* note 79, at 5.

the 2014 Sochi Winter Olympics.¹⁴³ While Russia's success brought momentary glory to the country and its leadership, it later emerged that the astronomical increase in the Russian medal count was the direct result of state-organized cheating.¹⁴⁴ In 2015, Dr. Grigory Rodchenkov, former head of Russia's national anti-doping laboratory, helped to expose Russia's state-sponsored doping system.¹⁴⁵ Dr. Rodchenkov absolutely knew what he was talking about, because he himself was the driving force that enabled the Russian athletes who were doping, to test negative ahead of their competitions.¹⁴⁶ Before the Sochi Olympics, Dr. Rodchenkov concocted a "three-drug cocktail of banned substances that he mixed with liquor" for the Russian sports ministry, to distribute to Russian athletes who were preparing to compete in the Games.¹⁴⁷ During the Sochi Olympics, the Russian Anti-Doping Agency ("RUSADA") and members of the Russian intelligence service continually and systematically replaced the actual PED-contaminated urine samples of Russian athletes, with clean urine samples, obtained elsewhere.¹⁴⁸

After a 2015 WADA investigation revealed that Dr. Rodchenkov and other Russian authorities had destroyed almost 1,500 dirty urine samples belonging to Russian athletes, WADA suspended RUSADA for its non-compliance with the Code.¹⁴⁹ Almost immediately, Dr. Rodchenkov fled to the United States and exposed the intricate details of Russia's state-sponsored doping system.¹⁵⁰ In response, WADA commissioned The McLaren Report¹⁵¹ in 2016, which confirmed Dr. Rodchenkov's claims that Russia was indeed sponsoring a statewide doping system.¹⁵² Following these findings, WADA and RUSADA

143. *Id.*

144. *Id.*

145. *Id.* at 7; see ICARUS (Netflix 2017).

146. Christopher Kelsall, *Book Review: The Rodchenkov Affair: How I Brought Down Putin's Secret Doping Empire*, ATHLETICS ILLUSTRATED (Sept. 29, 2020), <https://athleticsillustrated.com/book-review-the-rodchenkov-affair-how-i-brought-down-putins-secret-doping-empire> [<https://perma.cc/SHH5-MSNT>].

147. Rebecca R. Ruiz & Michael Schwartz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html> [<https://perma.cc/A7S7-5AXD>].

148. *Id.*

149. *The 'Real' Threat to Russia's Former Doping Mastermind*, BBC (July 31, 2020), <https://www.bbc.com/news/stories-53596997> [<https://perma.cc/RL7U-Y626>]; Nicholas Fitzpatrick, *WADA Bans Russia from Competing in Major Events for the Next 4 Years*, DLA PIPER (Dec. 11, 2019), <https://mse.dlapiper.com/post/102fvsz/wada-bans-russia-from-competing-in-major-events-for-the-next-4-years> [<https://perma.cc/KLL2-GYDR>].

150. *The 'Real' Threat to Russia's Former Doping Mastermind*, *supra* note 149.

151. RICHARD H. MCLAREN, THE INDEPENDENT PERSON REPORT 10, 29-30, 86 (2016) [hereinafter MCLAREN REPORT].

152. Fitzpatrick, *supra* note 149; see MCLAREN REPORT, *supra* note 151 (finding "beyond a reasonable doubt" that Russia's Ministry of Sport, the Centre of Sports Preparation of National

agreed to a comprehensive compliance plan outlining the procedures RUSADA was required to follow in order to become reinstated in the future.¹⁵³

Just two years later in 2018, WADA decided to reinstate RUSADA, but only after it agreed to accept two final conditions.¹⁵⁴ First, that the authorities responsible for anti-doping in Russia publicly accept the findings of The McLaren Report.¹⁵⁵ Second, that the Russian government provide WADA with access to stored samples and electronic data in RUSADA's former Moscow Laboratory.¹⁵⁶ Unsurprisingly, when WADA was granted access to the Moscow Laboratory in 2019, it found that the data "was intentionally altered prior to and during it being forensically copied by WADA."¹⁵⁷ Following this incident, WADA officially declared RUSADA in breach of the Code, suspended the agency for four years, and proposed that Russian athletes only be allowed to participate in future international events if they could prove that they were not associated with RUSADA's non-compliance.¹⁵⁸

Naturally, RUSADA disagreed with the punishment, and appealed WADA's decision to The Court of Arbitration for Sport ("CAS"), "the ultimate arbiter on global sports disputes,"¹⁵⁹ for a final determination.¹⁶⁰

Teams of Russia, the Federal Security Service, and the WADA-accredited laboratory in Moscow had "operated, for the protection of doped Russian competitors" within a "state-directed failsafe system" using "the disappearing positive [test] methodology" following Russia's poor medal count during the 2010 Winter Olympic Games in Vancouver).

153. Fitzpatrick, *supra* note 149.

154. *Id.*; WADA Executive Committee Decides to Reinstate RUSADA Subject to Strict Conditions, WORLD ANTI-DOPING AGENCY (Sept. 20, 2018), <https://www.wada-ama.org/en/media/news/2018-09/wada-executive-committee-decides-to-reinstate-rusada-subject-to-strict-conditions> [<https://perma.cc/4WER-BFTG>].

155. Fitzpatrick, *supra* note 149; WADA Executive Committee Decides to Reinstate RUSADA Subject to Strict Conditions, *supra* note 154.

156. Fitzpatrick, *supra* note 149; WADA Executive Committee Decides to Reinstate RUSADA Subject to Strict Conditions, *supra* note 154.

157. INTEL. & INVESTIGATIONS DEP'T, WORLD ANTI-DOPING AGENCY, FINAL REPORT TO THE CRC REGARDING THE MOSCOW DATA 11 (Nov. 20, 2019) [hereinafter MOSCOW LAB REPORT].

158. WADA Compliance Review Committee Recommends Series of Strong Consequences for RUSADA Non-Compliance, WORLD ANTI-DOPING AGENCY (Nov. 25, 2019), <https://www.wada-ama.org/en/media/news/2019-11/wada-compliance-review-committee-recommends-series-of-strong-consequences-for> [<https://perma.cc/YE8L-Y5ET>]; Alasdair Muller, *CAS Upholds Ban on Russia Competing in Major Events*, DLA PIPER (Dec. 18, 2020), <https://mse.dlapiper.com/post/102gm87/cas-upholds-ban-on-russia-competing-in-major-events> [<https://perma.cc/MHS9-DQ4C>].

159. Andrew Keh & Tariq Panja, *'It Doesn't Work': Critics of Russia's Doping Ban Blame the System*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/sports/olympics/russia-doping-wada-cas.html> [<https://perma.cc/5Z4X-H7LT>]. CAS "is an independent institution, created by the International Olympic Committee, that provides for services to facilitate the settlement of sport-related disputes, through arbitration or mediation, by means of procedural rules adapted to the specific needs of the sport world. WADA has a right of appeal to CAS for doping cases under the

Although CAS decided to uphold WADA's decision to declare RUSADA non-compliant, it reduced the suspension to two years, and abolished the requirement that Russian athletes prove that they were not associated with RUSADA's non-compliance.¹⁶¹ Surprisingly, CAS's decision meant that Russian athletes who were identified in The McLaren Report, but who did not receive individual suspensions from WADA, were still allowed to participate in the Olympics and similar events moving forward—so long as the athletes and their teams refrained from using “the name ‘Russia’, its anthem, and the flag” at the events.¹⁶²

Although WADA expressed its disappointment with CAS's decision, it ultimately decided not to appeal.¹⁶³ WADA, however, only has itself to blame because the Code is the substantive law that governs CAS anti-doping disputes.¹⁶⁴ Thus, CAS's adjudication in the case was

jurisdiction of World Anti-Doping Code signatories.” *Court of Arbitration for Sport*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/court-of-arbitration-for-sport> [https://perma.cc/4YKV-YDUZ] (last visited Nov. 18, 2022).

160. Muller, *supra* note 158.

161. *Id.*; World Anti-Doping Agency v. Russian Anti-Doping Agency, CAS 2020/O/6689, Arbitral Award at 154, 162 (2020) (Switz.), https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_6689.pdf [https://perma.cc/2EP5-9GFQ]; see also *WADA Statement on Court of Arbitration Decision to Declare Russian Anti-Doping Agency as Non-Compliant*, WORLD ANTI-DOPING AGENCY (Dec. 17, 2020), <https://www.wada-ama.org/en/media/news/2020-12/wada-statement-on-court-of-arbitration-decision-to-declare-russian-anti-doping> [https://perma.cc/2T3B-W93H] (explaining how “Russia will not be permitted to participate in, bid for or host any covered event, including two editions of the Olympic and Paralympic Games and many other major events, for the next two years”); see generally Keh & Panja, *supra* note 159 (explaining how Russia's reduced suspension is not much of a ban at all because a large number of Russian athletes still have an unobstructed path to competing in Olympic Games in the near future.).

162. Muller, *supra* note 158; Yaraschandra Devarakonda, *Anti-Doping Lessons from Tokyo 2020: Liability of Athletes for Signatory Actions*, WOLTERS KLUWER (Nov. 4, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/11/04/anti-doping-lessons-from-tokyo-2020-liability-of-athletes-for-signatory-actions> [https://perma.cc/Z2AJ-U54T].

163. *WADA Does Not Appeal CAS Decision Regarding Russian Anti-Doping Agency to Swiss Federal Tribunal*, WORLD ANTI-DOPING AGENCY (Feb. 2, 2021), <https://www.wada-ama.org/en/media/news/2021-02/wada-does-not-appeal-cas-decision-regarding-russian-anti-doping-agency-to-swiss> [https://perma.cc/D9H9-JTUF] (explaining how “WADA was disappointed that the CAS Panel, based on its own assessment of proportionality, decided not to impose all the consequences that WADA sought (and not for the full four-year period). However, the grounds of appeal to the Swiss Federal Tribunal are limited to procedural matters such as jurisdiction, the composition of the Panel and the right to be heard. The Swiss Federal Tribunal does not conduct a review of the merits and would therefore not interfere with the Panel's assessment of the proportionality of the consequences. As a result, and following unanimous advice from in-house and external legal counsels, WADA strongly believes an appeal would have served no useful purpose and decided to refrain from doing so”).

164. See Devarakonda, *supra* note 162. In 2019, “deriving power from the signatories of the WADC such as the International Olympic Committee and International Sports Federations (Ifs) with Olympic Recognition, CAS set up the Anti-Doping Division of the Court of Arbitration for Sports (CAS ADD) to hear and decide anti-doping cases as a first-instance authority. While the

limited to the issue of whether RUSADA complied with WADA's requirement, under the International Standard for Code Compliance by Signatories ("ISCSS"), to provide WADA with authentic data from the Moscow Laboratory.¹⁶⁵ Unfortunately, CAS's limited inquiry meant that Russia's continued refusal to play fair and reveal data from the Moscow Laboratory, actually served to protect and benefit many Russian athletes, who had violated the Code by using prohibited substances.¹⁶⁶

2. Other Recent Scandals

While Russia's state-sponsored doping system was one of the most well-known scandals in recent history, it is not the only instance of wide-spread doping cheating in recent years.¹⁶⁷ In 2019, for instance, WADA launched an investigation called "Operation Hercules," following allegations that Ukraine's National Anti-Doping Organization ("NADC") had been violating the International Standard for Testing and Investigations ("ISTI") for several years.¹⁶⁸ WADA's investigation revealed that since 2012, NADC administered advanced-notice drug tests for athletes at NADC offices, prior to important international sporting events.¹⁶⁹ Such a practice specifically violates one of the most important ISTI rules, which clearly states that drug testing "must take place with no advance warning to the athlete."¹⁷⁰

In addition, Operation Hercules found that in 2021, NADC knowingly and falsely reported various in-competition samples as out-of-competition samples, "for the purposes of meeting the minimum number of out-of-competition tests required from an athlete prior to

CAS ADD Arbitration Rules apply to the procedural aspect of the arbitration, the WADC Anti-Doping Rules continue to be the substantive law governing the dispute." *Id.*; see generally Keh & Panja, *supra* note 159 (quoting Max Cobb, a United States sports official, who stated "it's clear that the antidoping system as managed by WADA and CAS is catastrophically broken. It doesn't work").

165. *World Anti-Doping Agency*, CAS 2020/O/6689 at 4; Devarakonda, *supra* note 162.

166. See Devarakonda, *supra* note 162 ("[A]n alternative affirmation of actual doping of Russian athletes via an elaborate state-sponsored scheme backed by data as per the ISCSS norms would have, with certainty, meant that Russian athletes have used prohibited substances.").

167. See, e.g., *Sport Is Still Rife with Doping*, *supra* note 138; see *infra* Part II.C.2.

168. *WADA Issues Report from Investigation into Allegations Regarding the National Anti-Doping Organization of Ukraine*, WORLD ANTI-DOPING AGENCY (Oct. 26, 2021), <https://www.wada-ama.org/en/media/news/2021-10/wada-issues-report-from-investigation-into-allegations-regarding-the-national> [<https://perma.cc/8TVP-4Y9K>].

169. See *id.* (quoting Gunter Young, Director of WADA's Intelligence and Investigations Department, who stated, "[t]he evidence suggests that NADC would adopt this practice often before important international events and there were times when an entire discipline of the national team was present at the NADC awaiting testing").

170. *Id.*

attending the 2020 Tokyo Olympic Games.”¹⁷¹ Although there have been no developments since the investigation concluded, NADC’s Director, Ivan Kurlishchuk, and his deputy, Yaroslav Kruchek, resigned shortly after the findings were made public;¹⁷² the investigation was then assigned to WADA’s Compliance Review Committee, who will later decide on possible sanctions.¹⁷³

Most recently in 2020, another major scandal involving the sport of weightlifting—one of just nine sports that was played at the first Olympics in 1896—was brought to light, threatening the sport’s Olympic future for the first time, ever.¹⁷⁴ According to WADA and several whistleblower reports circulating in the media, a culture of doping in the sport of weightlifting was “tolerated, facilitated, and hidden,” for nearly a decade.¹⁷⁵ Spearheading the movement was none other than the International Weightlifting Federation (“IWF”), the lone WADA Signatory responsible for governing international weightlifting.¹⁷⁶

The whistleblower reports specifically revealed that more than 600 lifters from various countries had tested positive for banned substances in the ten-year period studied, and that some athletes had “substituted urine samples or used doppelgängers to evade testers.”¹⁷⁷ Additionally, there were 146 pending anti-doping violations that were never decided by the IWF due to “‘chaotic organizational processes’ and errors to ‘outright negligence, complicity, or—at worst—even blatant and

171. *Id.*; see generally *id.* (quoting Gunter Young, Director of WADA’s Intelligence and Investigations Department, who stated, “[t]he failure to correctly record a sample as either in or out-of-competition has ramifications that affect the analysis conducted by the laboratory as some substances and methods are prohibited in competition only. In this way, a positive test could be incorrectly categorized as negative and an athlete could evade an anti-doping rule violation as a result”).

172. *Heads of Ukraine Anti-Doping Body Resign After WADA Probe*, RADIO FREE EUROPE/RADIO LIBERTY (Oct. 27, 2021), <https://www.rferl.org/a/ukraine-anti-doping-resignations-wada/31532597.html> [<https://perma.cc/7JRR-8BVC>].

173. *Id.*

174. *E.g.*, Ognian Georgiev & Ken Belson, *Weight Lifting, an Original Olympic Sport, May Be Dropped*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/07/28/sports/olympics/weight-lifting-olympics.html> [<https://perma.cc/7AVH-QSS4>].

175. *WADA Statement on Latest Media Report About the IWF*, WORLD ANTI-DOPING AGENCY (Nov. 12, 2020), <https://www.wada-ama.org/en/media/news/2020-11/wada-statement-on-latest-media-report-about-the-iwf> [<https://perma.cc/HTL5-5A8S>]; Graham Dunbar, *Investigation Alleges Doping Corruption in Weightlifting*, ASSOCIATED PRESS (June 24, 2021), <https://apnews.com/article/2020-tokyo-olympics-doping-weightlifting-olympic-games-sports-7413c1ee8e71eb6f5e5dba87ff9d8020> [<https://perma.cc/34A2-9XDG>].

176. *WADA Statement on Latest Media Report About The IWF*, *supra* note 175; *Weightlifting About Us*, INT’L WEIGHTLIFTING FED’N, https://iwf.sport/weightlifting_/aboutus [<https://perma.cc/YUF8-2XAL>] (last visited Nov. 18, 2022); see Dunbar, *supra* note 175.

177. Georgiev & Belson, *supra* note 174.

intentional coverups,”” which included twenty-nine cases that could not be processed at all either because testing samples had been destroyed by the IWF or the statute of limitations had run.¹⁷⁸ The reports specifically faulted Tamas Ajan, former IWF president and a founding member of WADA, who was accused of multiple allegations, including ignoring WADA’s requests to provide information regarding anti-doping rule violations, accepting bribes to conceal positive drug tests, and using IWF’s bank accounts for his own personal use.¹⁷⁹ As of 2022, WADA’s investigation is still ongoing, as there remains many questions still to be answered by the IWF.¹⁸⁰

III. LEGAL ISSUE

This Part will discuss the problems inherent to WADA, the Code and the Prohibited List.¹⁸¹ Section A will discuss marijuana in relation to other prohibited and non-prohibited substances, and will explain how the prohibition of marijuana not only makes little sense from a performance-enhancing standpoint, but also detracts WADA from combatting the use of substances that actually enhance performance and corrupt international athletic competition.¹⁸² Section B will discuss the various ways in which legitimate PEDs harm the international athletic community.¹⁸³ Section C will then discuss the inconsistencies within WADA and its Signatories, and illuminate how WADA has done little to resolve its own major issues.¹⁸⁴

Simply put, WADA has failed to make any real progress in the anti-doping fight since its formation over twenty years ago.¹⁸⁵ A major reason for this is that the inclusion criteria for the Prohibited List are too vague, resulting in the prohibition of recreational drugs (such as marijuana) which have little to no impact on the outcomes of international athletic competitions.¹⁸⁶ As a result, WADA and its Signatories spend a significant amount of time and money combatting

178. Dunbar, *supra* note 175.

179. *Id.*; Georgiev & Belson, *supra* note 174.

180. WADA *Statement on Latest Media Report About the IWF*, *supra* note 176.

181. *See infra* Part III.

182. *See infra* Part III.A.

183. *See infra* Part III.B.

184. *See infra* Part III.C.

185. *See* Michael Weinreb, *Has WADA Helped or Hurt the Anti-Doping Movement?*, GLOB. SPORT MATTERS (Aug. 14, 2018), <https://globalsportmatters.com/science/2018/08/14/has-wada-helped-or-hurt-the-anti-doping-movement> [<https://perma.cc/TYR8-ZH3N>] (quoting Charles Yesalis, professor at Penn State University and longtime steroid researcher, who stated “[y]ou look at the history of this, and they’ve never been able to make real inroads”).

186. *See infra* Part III.A.

their use.¹⁸⁷ In turn, WADA ends up ignoring more harmful substances, allowing for large-scale doping scandals to persist throughout the world.¹⁸⁸

A. Issues with the Prohibition of Marijuana and Other Recreational Drugs

The biggest problem is that much or most of the efforts that should be directed toward preventing the use of legitimate PEDs are instead squandered on policing so-called “morality drugs” like marijuana.¹⁸⁹ Marijuana and other similar substances have no impact on the outcomes of athletic events, as numerous studies have shown.¹⁹⁰ Thus, the fact that WADA continues to spend a significant amount of its scarce resources to combat their use, causes much bigger problems for WADA, in and of itself.¹⁹¹

1. Marijuana Does Not Enhance Performance

Although the official results of WADA’s 2022 scientific review have not been made public, the study that WADA presently relies on to justify prohibiting marijuana is over a decade old.¹⁹² Further, experts are not persuaded with the study whatsoever, arguing that the science used by the authors essentially contradicts WADA’s own claims.¹⁹³ Now, the global consensus is that marijuana use tends to diminish athletic performance, rather than enhance it.¹⁹⁴ Common sense aside, there is

187. See Karolos Grohmann, *WADA to Ask Commercial Sponsors for Money in Anti-Doping Fight*, REUTERS (Nov. 5, 2019), <https://www.reuters.com/article/us-sport-doping-wada-sponsors/wada-to-ask-commercial-sponsors-for-money-in-anti-doping-fight-idUSKBN1XF1IZ> [<https://perma.cc/6FSW-35GJJ>].

188. See *supra* Part II.C.

189. Tom Schad, *Three Months After Sha’Carri Richardson’s DQ, WADA Announces It Will Re-examine Marijuana as Banned Substance*, USA TODAY (Sept. 14, 2021), <https://www.usatoday.com/story/sports/olympics/2021/09/14/wada-review-marijuana-banned-substances-sha-carri-richardson/8339486002> [<https://perma.cc/7U58-4CN2>].

190. See *infra* Part III.A.

191. See *infra* Part III.

192. *WADA Executive Committee Endorses Recommendations of Non-Compliance of Eight Anti-Doping Organizations*, *supra* note 117; see Huestis et al., *supra* note 12, at 949.

193. Diana Kwon, *Weed Shouldn’t Be Banned for Elite Athletes, Some Experts Say*, SCI. AM. (July 22, 2021), <https://www.scientificamerican.com/article/weed-shouldnt-be-banned-for-elite-athletes-some-experts-say> [<https://perma.cc/4HBJ-J383>] (discussing how Margaret Haney, a professor of neurobiology at the Columbia University Irving Medical Center, notes that WADA’s 2011 “article cites a study of cyclists that reported that endurance was slightly reduced after consuming weed”).

194. See *id.* According to David McDuff, sports psychiatrist and professor at the University of Maryland, “the consensus, in the absence of clear-cut information, is that cannabis is more likely to be viewed as performance-detracting rather than performance-enhancing.” *Id.*

simply no scientific evidence in 2022 to support the idea that marijuana use increases muscle mass, strength, or speed, unlike legitimate PEDs.¹⁹⁵ Even the most preliminary scientific studies regarding the effects of marijuana use on competitive athletes found that marijuana had “spiked their heart rates, increased their blood pressure levels, and hampered their ability to exercise.”¹⁹⁶ Although later studies have been less thorough and smaller in scale, they still ubiquitously suggest that marijuana use “does not improve strength or exercise endurance.”¹⁹⁷

Even WADA’s own Medical Director, Dr. Alan Vernec, acknowledges that marijuana does not enhance athletic performance.¹⁹⁸ Further, Vernec and other medical professionals admit that marijuana “use among athletes may be more related to social norms of behavior rather than to enhance performance.”¹⁹⁹ Therefore, it is clear that marijuana has no place on the Prohibited List alongside drugs that have obvious performance-enhancing effects.²⁰⁰ However, due to the Prohibited List’s current inclusion criteria, there is no need for WADA to prove that marijuana enhances performance, as it can fall back on the vague basis that its use represents a health risk to athletes and violates the “spirit of sport.”²⁰¹

2. Similar Substances That Are Not Prohibited

There is rather clear evidence that there are health risks associated with marijuana use, “especially regular daily use.”²⁰² According to the American Lung Association (“ALA”), “smoking marijuana clearly damages the human lung,” as marijuana smoke contains “many of the same toxins, irritants and carcinogens as tobacco smoke.”²⁰³ The ALA’s

195. Anahad O’Connor, *Can Marijuana Make You a Better Athlete?*, N.Y. TIMES (July 31, 2021), <https://www.nytimes.com/2021/07/11/well/move/marijuana-olympics-ban.html> [https://perma.cc/82BR-5MMU].

196. *Id.*

197. *Id.*

198. Ware, *supra* note 133, at 483. An article co-authored by Vernec concluded that while marijuana use is more prevalent among athletes engaged in high-risk sports, “there is no evidence of performance-enhancing or causal effects.” *Id.* Vernec and his co-authors acknowledge that “[s]elf reported use of cannabis for pain and concussion management among elite athletes is increasingly being reported, and with emerging scientific appreciation of the potential physiological role of the endocannabinoid system deserves serious further inquiry.” *Id.*

199. *Id.* at 481.

200. Ivan Waddington et al., *Recreational Drug Use and Sport: Time for a WADA Rethink?*, 2 PERFORMANCE ENHANCEMENT & HEALTH 41, 46 (2013).

201. Kwon, *supra* note 193; CODE, *supra* note 7, art. 4.3, at 20.

202. *See, e.g.*, Kwon, *supra* note 193.

203. *Marijuana and Lung Health*, AM. LUNG ASS’N (Dec. 17, 2020), <https://www.lung.org/quit-smoking/smoking-facts/health-effects/marijuana-and-lung-health> [https://perma.cc/4RJU-W27H].

research also shows that smoking marijuana can damage “the cell linings of the large airways, which could explain why smoking marijuana leads to symptoms such as chronic cough, phlegm production, wheeze and acute bronchitis.”²⁰⁴ Other studies show that marijuana can also weaken reaction time and impair the ability to make sound decisions.²⁰⁵ Additionally, some scientists opine that marijuana can be detrimental to mental health.²⁰⁶ For example, studies show that marijuana use increases the risk of “developing schizophrenia and other psychoses,” and that early exposure to it can serve as a gateway to more harmful drugs such as opioids, leading to even greater risks of mental disease development.²⁰⁷ However, WADA’s obsessive fixation on marijuana is hard to square when it fails to prohibit substances such as alcohol and nicotine, which may pose far more significant health risks than marijuana.²⁰⁸

Other similar substances that are not prohibited by WADA include anti-anxiety medications such as Xanax and Valium, and painkillers such as Vicodin and Ketorolac.²⁰⁹ It is important to recall that critically included in WADA’s justifications for prohibiting marijuana, is that it reduces the anxiety and stress of competition, and permits athletes to perform through injuries and pain.²¹⁰ However, while Xanax and Valium are primarily used for reducing anxiety and stress, and Vicodin and Ketorolac are primarily used for pain concealment, none of them are prohibited by WADA.²¹¹ Furthermore, the use of these permitted substances for anxiety or pain can cause much more adverse health consequences for athletes than marijuana has ever been shown to cause, including, to just name a few, severe addiction, brain damage, and memory loss.²¹²

204. *Id.*

205. O’Connor, *supra* note 195.

206. *Id.*

207. *Id.*

208. Kwon, *supra* note 193.

209. *Examples of Prohibited and Permitted Substances and Methods*, *supra* note 14.

210. Huestis et al., *supra* note 12, at 954-55.

211. *Examples of Prohibited and Permitted Substances and Methods*, *supra* note 14.

212. See Meredith Watkins, *Xanax Side Effects, Dangers & Long-Term Impacts*, AM. ADDICTION CTRS. (Oct. 26, 2021), <https://americanaddictioncenters.org/xanax-treatment/long-term-severe> [<https://perma.cc/44N7-ZSLC>]; see also *Long-Term Effects of Vicodin Abuse*, SAN ANTONIO RECOVERY CTR., <https://www.sanantoniorecoverycenter.com/rehab-blog/long-term-effects-of-vicodin-abuse> [<https://perma.cc/2XYR-452P>] (last visited Nov. 18, 2022).

3. The Disproportionate Cost of Marijuana Testing

WADA's measly budget is yet another reason why its prohibition of marijuana makes little sense.²¹³ In 2019 alone, 130 athletes under WADA's watch tested positive for marijuana.²¹⁴ The cost of fully processing a single positive test result is approximately \$10,000, meaning that anti-doping agencies spent \$1.3 million in total just on athletes who tested positive for marijuana.²¹⁵ Those numbers are hard to square when they do not include the total cost of testing for marijuana in general, and when WADA's annual budget is less than \$40 million and "the overall spending on anti-doping around the world, including by national anti-doping agencies, does not exceed \$260 million."²¹⁶ What makes \$1.3 million even more difficult to comprehend, is the fact that it is roughly the same amount that RUSADA was required to pay WADA for costs sustained in investigating the Russian doping scandal.²¹⁷ To make matters worse, in the aftermath of the scandal, WADA, acknowledging that its budget was inadequate, asked commercial sponsors to contribute funds towards the anti-doping fight.²¹⁸ Not surprisingly, that request was met with much criticism, as commercial sponsors and broadcasters already historically contribute billions of dollars to be associated with the Olympics and similar broadcasted sports events.²¹⁹

213. See *infra* Part III.A.

214. See Kilgore & Maese, *supra* note 1.

215. See *id.*

216. See Grohmann, *supra* note 187; WORLD ANTI-DOPING AGENCY, 2019 ANNUAL REPORT, at 92 (2020), https://www.wada-ama.org/sites/default/files/resources/files/ar2019_single_08102020_digital.pdf [<https://perma.cc/3WU9-D48Q>] [hereinafter 2019 WADA ANNUAL REPORT] (WADA's actual budget in 2019 was \$38,050,000 USD); see also Tariq Panja, *New WADA President Wants Sponsors to Help Finance Antidoping Efforts*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/sports/olympics/wada-doping-russia.html> [<https://perma.cc/4HBD-7DST>] (quoting Witold Banka, President of WADA, who stated, "[t]his is ridiculous we have less than \$40 million and we are the global regulator of antidoping").

217. See Laurel Wamsley & Merrit Kennedy, *Russia Gets Its Doping Ban Reduced But Will Miss Next 2 Olympics*, NPR (Dec. 17, 2020), <https://www.npr.org/2020/12/17/947504052/russia-suspended-from-next-2-olympic-games-over-anti-doping-violations> [<https://perma.cc/92HN-GLXM>] (discussing how RUSADA must pay \$1.27 million to WADA for costs incurred in its investigation).

218. Grohmann, *supra* note 187.

219. See *id.*; see also Panja, *supra* note 216 (explaining that when Banka revealed his proposal to seek funding from commercial sponsors, Ricardo Fort, the head of global sponsorships at Coca-Cola—among the biggest investors in global sports—"took to social media to say any conversation seeking funds would likely be 'very brief.'").

B. Why Legitimate Performance-Enhancing Drugs Are Harmful to the International Athletic Community

There are many substances and methods prohibited by WADA that do indeed enhance athletic performance and therefore exploit international athletic events.²²⁰ Anabolic-androgenic steroids, human growth hormones and blood doping, for example, help athletes artificially enhance their strength and speed.²²¹ On the other hand, beta blockers and other masking agents, which are also prohibited, allow athletes to avoid testing positive for banned substances.²²²

1. Consequences for Those Who Invest Substantial Amounts of Time, Effort, and Money in the Olympics and Other International Athletic Events

Athletes competing in the Olympics and similar international athletic events often spend large portions of their lives training to be ready to compete at the highest level.²²³ No amount of training, however, can give clean athletes an advantage over cheaters who use PEDs.²²⁴ Clean athletes are not only deprived of the success and recognition that they deserve, but they also lose out on the chance to benefit substantially from a financial standpoint.²²⁵ In the United States, for example, most Olympic athletes don't sign lucrative contracts like their peers in the MLB, NBA, and NFL, but they can benefit greatly from the endorsement deals and fame that come with winning Olympic medals.²²⁶ Having to compete with doped-up athletes deprives them of any chance because actual competition has been eradicated by PEDs.²²⁷ Even when cheaters are caught and their medals are returned to the deserving

220. See Shayna M. Sigman, *Are We All Dopes? A Behavioral Law and Economics Approach to Legal Regulation of Doping in Sports*, 19 MARQ. SPORTS L. REV. 125, 126-27 (2008).

221. *Id.* at 127-28, 139; see *Blood Doping*, WORLD ANTI-DOPING AGENCY, <https://web.archive.org/web/20211022091212/https://www.wada-ama.org/en/questions-answers/blood-doping> [<https://perma.cc/DAR6-2RLN>] (last visited Nov. 18, 2022) (explaining that “blood doping is the misuse of certain techniques and/or substances to increase one’s red blood cell mass, which allows the body to transport more oxygen to muscles and therefore increase stamina and performance”).

222. Sigman, *supra* note 220, at 127.

223. See *How to Train Like an Olympian*, FORBES (July 8, 2008), https://www.forbes.com/2008/07/08/training-perfect-athlete-olympics08-forbeslife-cx_avd_0708health.html?sh=2c68283a79c [<https://perma.cc/GRF7-QPFX>].

224. See, e.g., Haagen, *supra* note 139, at 835 (explaining how performance-enhancing substances “may be able to improve performance so much that unless removed from the competitive environment, they will render those athletes who do not use them uncompetitive”).

225. ONDCP REPORT, *supra* note 79, at 6.

226. *Id.*

227. See, e.g., Haagen, *supra* note 139, at 835.

winners, clean athletes are not made whole because they are still deprived of the opportunity to celebrate one of the greatest achievements of their lives, in front of the entire world.²²⁸

PED use not only harms the individual athletes who are competing fairly and cleanly, but also injures the various nations who are represented in the competitions.²²⁹ According to the U.S. Office of National Drug Control Policy, “[r]esults in international competitions affect perceptions of government competence; influence investment, tourism, and travel; and provide a measure of society’s level of success.”²³⁰ Additionally, fans who spend countless amounts of time and energy cheering on their heroes, and “the companies and governments which invest hundreds of millions of dollars into the Olympic games” are deprived of a genuine experience when they later uncover the truth.²³¹

C. Inconsistencies with WADA and Its Signatories

While WADA mandates that all Signatories comply with mandatory code provisions, the implementation of these provisions is extremely inconsistent from country to country.²³² Signatories differ politically, financially and morally, and most do not exemplify transparency in decision-making, or have a track record of truly committing to the anti-doping fight.²³³ Therefore, inconsistencies including differences in the number of tests conducted and the transparency of testing data, among other things, continue to weaken WADA’s credibility and effectiveness.²³⁴

228. See generally Nancy Armour, *In Latest Farce, International Olympic Officials Again Favoring Russia Over Clean Athletes*, USA TODAY (Dec. 9, 2019, 2:48 PM), <https://www.usatoday.com/story/sports/columnist/nancy-armour/2019/12/09/international-olympic-officials-favor-russia-over-clean-athletes/2628490001> [<https://perma.cc/LDC2-NFXR>] (illustrating how clean athletes who eventually get their rightful medals “can never get back the moment of celebrating a lifetime’s worth of sweat and sacrifice when the whole world is watching”).

229. ONDCP REPORT, *supra* note 79, at 6.

230. *Id.*

231. *Id.*

232. See Long, *supra* note 18 (explaining that while all athletes are required to sign up to the WADA Code, Signatories are not held to the same level of scrutiny).

233. Barrie Houlihan et al., *The World Anti-Doping Agency at 20: Progress and Challenges*, 11 INT’L J. SPORT POL’Y & POL. 193, 200 (2019).

234. See Eddie Pells, *Dirty Games? Testing Slowdown During COVID Raises Questions*, ASSOCIATED PRESS (July 22, 2021), <https://apnews.com/article/2020-tokyo-olympics-technology-sports-health-coronavirus-pandemic-bb03ddf9a98c4c49835df50cb156c894> [<https://perma.cc/8Z7V-NAPK>].

1. Inconsistent Testing Protocols

While WADA purportedly has made efforts to harmonize Code compliance by its Signatories, “testing has yet to be properly codified worldwide.”²³⁵ Drug testing and the release of data regarding tests are extremely inconsistent from country to country, allowing for certain athletes to be tested multiple times a month, and others never to be tested at all.²³⁶ Inconsistencies in the frequency and quality of testing controls are due in large part to the fact that: each Signatory follows its own testing protocols;²³⁷ there continues to be significant differences in resources and domestic funding for various Signatories;²³⁸ and the number of WADA-accredited laboratories differs materially from country to country.²³⁹ For example, in 2018, tennis star Roger Federer explained that he is tested quite regularly when he is living in Switzerland, stating “[i]n the village I live in [in] Switzerland, the tester lives in the same village, so it’s very convenient.”²⁴⁰ On the contrary, Federer acknowledged that he has only been tested once in the fifteen years he has been living in Dubai.²⁴¹

Even countries that have the capacity to test at higher rates do not necessarily do so, as testing rates differ significantly among countries with vast financial resources and successful sporting histories.²⁴² According to one study, which analyzed the total number of out-of-competition tests conducted in various countries in 2018 per “elite athlete,”²⁴³ several “successful” countries record relatively low testing rates.²⁴⁴ For example, countries such as Germany and Finland, which were home to ninety-one and thirteen “elite athletes,” respectively, had total testing rates of 23.5% and 22.2% in 2018.²⁴⁵ The United States (home to 338 “elite athletes”) and the United Kingdom (home to seventy-two “elite athletes”), on the other hand, had total testing rates of only 6.2% and 9.5%, respectively, in 2018.²⁴⁶ Even

235. Long, *supra* note 18.

236. *See id.*; Harwitt, *supra* note 18; Futterman, *supra* note 16.

237. Long, *supra* note 18.

238. *Id.*

239. *Id.*

240. Harwitt, *supra* note 18.

241. *Id.*

242. Bill Cuddihy, *No Standardisation or Harmonisation in Anti-Doping Testing Frequency*, *BMJ OPEN SPORT & EXERCISE MED.*, 2020, at 1.

243. *Id.* at 2. According to the study, “elite athlete” means the “top 50 performers in 2018” in each track and field event “that is included in the Olympic programme.” *Id.*

244. *Id.* at 4.

245. *Id.* at 2-3.

246. *Id.* at 2.

WADA's own published data support these findings.²⁴⁷ According to WADA's 2020 Anti-Doping Testing Figures, which reports the total number of drug testing samples performed on all international athletes, WADA-accredited laboratories in the United States collected only 11,926 samples, while the accredited laboratories in Germany collected 35,609 samples.²⁴⁸

One source of the discrepancy can be attributed to the fact that virtually every Signatory refuses to disclose the names and exact dates connected to the out-of-competition testing data revealed,²⁴⁹ the USADA is a rare exception.²⁵⁰ As a result, testing requirements for all Russian athletes competing in the 2020 Tokyo Olympic Games were completely unknown.²⁵¹

The 2016 Olympic Games in Rio de Janeiro also shed light on the inconsistencies in testing.²⁵² As mentioned in the introduction of this Note,²⁵³ in the months preceding the 2016 Olympic Games, over 1,900 athletes were not drug tested at all.²⁵⁴ The failure to test was due in part to the fact that the WADA-accredited laboratory in Rio was shut down shortly before the start of the Games for failing to satisfy the Internal Standard for Laboratories.²⁵⁵ Additionally, during the Games, there were multiple days where up to fifty percent of all in-competition tests were cancelled simply because athletes could not be found.²⁵⁶ WADA blamed the failure on "a lack of coordination," as well as "budget and operational cutbacks."²⁵⁷ According to WADA, chaperones—who were responsible for notifying athletes of testing—failed to report to work because they were not provided with adequate food or transportation arrangements to travel to and from testing venues.²⁵⁸ This was all the more deceptive, or at the very least incompetent, on the part of WADA,

247. See WORLD ANTI-DOPING AGENCY, 2020 ANTI-DOPING TESTING FIGURES REPORT, at 13 (2021), https://www.wada-ama.org/sites/default/files/resources/files/2020_anti-doping_testing_figures_en.pdf [<https://perma.cc/28ZV-X34B>] [hereinafter 2020 ANTI-DOPING TESTING FIGURES].

248. *Id.*

249. Futterman, *supra* note 16.

250. *Id.*

251. USADA Calls Russia Doping Ruling a 'Tragedy,' RFI (Dec. 17, 2020), <https://www.rfi.fr/en/sports/20201217-usada-calls-russia-doping-ruling-a-tragedy> [<https://perma.cc/P4NP-SY34>].

252. See Futterman, *supra* note 16.

253. See *supra* Part I.

254. See Futterman, *supra* note 16.

255. See *id.*

256. WADA Reveals up to 50% of Drug Tests at 2016 Olympics Games Had to Be Aborted, GUARDIAN (Oct. 27, 2016), <https://www.theguardian.com/sport/2016/oct/27/wada-serious-failings-rio-2016-olympics-anti-doping> [<https://perma.cc/4YK8-THQG>].

257. *Id.*

258. *Id.*

when the 2016 Olympic Games took place shortly after the revelations of Russia's state-sponsored doping system.²⁵⁹

2. WADA Avoids Efforts to Resolve Major Issues

WADA does not seem to be concerned with solving the problem of doping in sports, despite its name and alleged goals.²⁶⁰ A key example is CAS's decision in *WADA v. RUSADA*, following the Russian doping scandal, discussed earlier in this Note.²⁶¹ The major issue concerned the fact that a Signatory country received a measly slap on the wrist after being "caught red-handed, engaging in state-sponsored doping, tampering, and cover-ups."²⁶² Many critics argue that CAS's decision "raised questions about the global sports infrastructure's ability to effectively regulate doping amid its ranks, set a dangerous precedent that essentially invited other countries to engage in similar schemes, and further eroded confidence among athletes worldwide that their sports would ever be clean."²⁶³ Additionally, because most Russian athletes were still free to compete in the Tokyo Olympics and other international events moving forward with no repercussions for their past cheating, clean athletes competing against them now are feeling "hopeless," arguing that they "haven't seen any change."²⁶⁴

Another prime example was WADA's opposition to the Rodchenkov Anti-Doping Act of 2019²⁶⁵ ("the Act"), which criminalizes doping conspiracies that target international athletic events.²⁶⁶ The Act, named after Dr. Grigory Rodchenkov, extends U.S. law enforcement jurisdiction to international athletic events governed by the Code, where at least one American athlete is competing and in which the event organizer receives funding from an organization doing business in the

259. *See id.*

260. *See* Rick Maese, *WADA Has Concerns with U.S. Anti-Doping Legislation That Seeks to Clean Up Sport*, WASH. POST (Nov. 16, 2019), <https://www.washingtonpost.com/sports/2019/11/16/anti-doping-legislation-further-exposes-tensions-between-usada-world> [<https://perma.cc/4VWN-EQ62>]. According to Travis Tygart, CEO of the USADA, WADA doesn't "have the will, the determination to effectively police themselves." *Id.*

261. *See supra* Part II.C.

262. Keh & Panja, *supra* note 159.

263. *Id.*

264. *See id.* (quoting Noah Hoffman, an American cross-country skier who competed at the 2014 and 2018 Olympic Games).

265. Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, § 1, 134 Stat. 998 (2020) (to be codified at 21 U.S.C. § 2401).

266. *See* Maese, *supra* note 260 (explaining how WADA budgeted at least \$250,000 for lobbying efforts related to the bill).

United States.²⁶⁷ The motivation behind the Act is to mitigate the harm caused by doping scandals, “not only to clean athletes, but also to commercial sponsors and broadcasters; the economic value of the sports sector to the US economy; and the importance of whistleblowers in exposing doping conspiracies.”²⁶⁸ The Act provides:

It shall be unlawful for any person, other than an athlete, to knowingly carry into effect, attempt to carry into effect, or conspire with any other person to carry into effect a scheme in commerce to influence by use of a prohibited substance or prohibited method any major international sports competition . . . There is extraterritorial Federal Jurisdiction over an offense under this section.²⁶⁹

The Act also provides for fines of \$250,000 in the case of an individual violator, and \$1 million if the defendant is an anti-doping organization or similar entity, as well as a maximum prison sentence of ten years.²⁷⁰ Travis Tygart, USADA’s CEO, calls the Act a “game-changer,” not only for athletes and fans, but also for sponsors.²⁷¹ The idea, according to Tygart, is that when justice is done, sponsors will finally get a return on their investments, the value of which, they already paid for when they agreed to broadcast the events.²⁷²

WADA’s hostility towards the Act derives from the United States’ ability to prosecute offenders outside its borders, the Act’s potential interference with the Code, and the exclusion of United States professional and college leagues from its reach since they are not WADA Signatories.²⁷³ As the Act was moving through Congress, Witold Banka, President of WADA, argued that “if the United States

267. Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, § 2, 134 Stat. 998 (2020) (to be codified at 21 U.S.C. § 2402); Steve Keating, *Rodchenkov Anti-Doping Act a Game-Changer, Says Tygart*, REUTERS (Feb. 12, 2021), <https://www.reuters.com/article/us-sport-doping-rodchenkov-idUSKBN2AD009> [<https://perma.cc/R5Z9-V8B6>].

268. Alexander Chaize & Victoria Artaza, *Rodchenkov Act: The Potential of Controversial New US Anti-Doping Legislation in the Fight Against International Doping Conspiracies*, DLA PIPER (Feb. 5, 2021), <https://mse.dlapiper.com/post/102gqb6/rodchenkov-act-the-potential-impact-of-controversial-new-us-anti-doping-legislat> [<https://perma.cc/47GZ-FM8D>].

269. Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, § 3, 134 Stat. 998 (2020) (to be codified at 21 U.S.C. § 2402).

270. Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, § 4, 134 Stat. 998 (2020) (to be codified at 21 U.S.C. § 2403).

271. Keating, *supra* note 267.

272. *See id.* (quoting Tygart, who stated that “NBC has paid several billion dollars to broadcast the Tokyo 2020 Games that will happen this summer into the United States and you go back to 2016, 2014, 2012, what they paid for they didn’t get”).

273. Chaize & Artaza, *supra* note 268; *see also* Maese, *supra* note 260 (quoting Sir Craig Reedie, former WADA President, who stated “the area which is troublesome is the suggestion that American jurisdiction would go beyond the United States and might create liability in other parts of the world”).

acted alone in criminalizing international doping, it would compromise WADA's efforts to maintain one set of rules for sports everywhere."²⁷⁴ Not only did WADA voice these concerns, but it budgeted at least \$250,000 to lobby for substantive changes to the Act, before it was signed into law.²⁷⁵ WADA's actions frustrated United States officials and supporters of the Act, who noted that since the United States is WADA's largest financial contributor, WADA was likely using the United States' money to lobby against the Act.²⁷⁶ Further, the same anti-doping officials are confused because on its face, the Act appears to be directly on course with WADA's alleged mission.²⁷⁷ They note that since WADA has encouraged each country to enact its own anti-doping legislation, WADA's backlash to the Act's extra-territorial reach implies that it might be concerned that other countries will actually do so.²⁷⁸

What makes WADA's opposition even more confusing, is the fact that the Act is a direct result of the Russian doping scandal.²⁷⁹ The main objective of the Act is to prosecute those who actually organize the doping scandals, rather than the individual athletes who test positive for the prohibited substances, because the doping conspirators are rarely held accountable, while athletes who test positive for the prohibited substance[s] that the organizers traffic, are suspended under the Code.²⁸⁰ This, of course, was exactly what happened following the Russian doping scandal, as individual athletes, albeit only a few, were the only ones who truly suffered from the sanctions.²⁸¹ Therefore, it seems likely that WADA's only concern is that the Act will play a major role in

274. Matthew Futterman, *A New U.S. Law Would Target Doping's Enablers. International Watchdogs Don't Like It*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/11/18/sports/olympics/rodchenkov-doping-russia-olympics.html> [<https://perma.cc/3D2Z-UBJC>].

275. Maese, *supra* note 260.

276. *Id.*

277. *See id.*

278. *Id.*

279. *Id.*

280. Chaize & Artaza, *supra* note 268.

281. *See USADA Calls Russia Doping Ruling a 'Tragedy,' supra* note 251 (explaining how Russian IOC members, athlete support personnel, and government officials are exempt from the ban "even if they were involved with directly perpetrating fraud in the past"); George Ramsay, *US Anti-Doping Bill Welcomed as 'Monumental Day' in the Fight for Clean Sport Amid WADA Criticism*, CNN (Nov. 18, 2020), <https://www.cnn.com/2020/11/18/sport/us-anti-doping-bill-wada-spt-intl/index.html> [<https://perma.cc/89GU-DVCD>] (quoting Jim Walden, Dr. Rodchenkov's attorney, who stated that the "athletes themselves already face sanctions, with long-term suspensions under the terms of the World Anti-Doping Code. We need to apply the same strict sanctions to their entourage members, and in this respect this legislation will be helpful").

cleaning up doping in sports around the world.²⁸² It is difficult to understand WADA's underlying motives here.²⁸³

IV. PROPOSED SOLUTION

WADA allegedly strives for “a world where all athletes can participate in a doping-free sporting environment.”²⁸⁴ The undisputed facts throughout WADA's twenty-plus year existence, however, do not reflect that goal.²⁸⁵ Although WADA claims its central focus is to benefit athletes, most athletes are not experiencing any benefit at all.²⁸⁶ Athletes around the world, having little faith in the agency, cannot understand its complex governing processes, let alone navigate the Code's opaque and confusing nature.²⁸⁷ As the Prohibited List continues to grow in size each year, the problem worsens, and athletes increasingly question whether WADA has the resources to scientifically examine each prohibited substance, particularly when the List continues to contain many substances that have no evidence of performance-enhancing effects.²⁸⁸ For WADA to effectively combat the use of doping in sports, it must stop fighting the use of recreational drugs in the sporting environment, and instead focus on combatting the use and distribution of legitimate performance-enhancing substances and methods.²⁸⁹ Section A will propose an amendment to the Prohibited List's inclusion criteria, so that WADA's sole focus can be on stopping the spread of legitimate PEDs that cause the most damage to the integrity of the international sports community.²⁹⁰

A. Amended Prohibited List Inclusion Criteria

The current Prohibited List inclusion criteria allow WADA to police the private lives of athletes, detracting WADA from its efforts to combat the use of legitimate performance-enhancing substances and methods that exploit international athletic events.²⁹¹ The Code specifies that WADA considers marijuana and other recreational drugs to be prohibited “because they are frequently abused in society outside the

282. Maese, *supra* note 260.

283. *See id.*

284. WADA STRATEGIC PLAN, *supra* note 37, at 9; *see supra* Parts II–III.

285. *See supra* Parts II–III.

286. WADA STRATEGIC PLAN, *supra* note 37, at 7; *see* Weinreb, *supra* note 185.

287. Weinreb, *supra* note 185.

288. *See id.*

289. *See infra* Part IV.A.

290. *See infra* Part IV.A.

291. *See supra* Parts II–III.

context of sport.”²⁹² As WADA’s mission is to “lead a collaborative worldwide movement for doping-free sport,” this statement is counterintuitive, and quite bothersome at best.²⁹³ Prohibiting marijuana-like substances aligns more with a mission that strives for a drug-free lifestyle for athletes worldwide in general, than one for a worldwide doping-free sporting environment.²⁹⁴ In order for WADA to adhere to its stated goals and mission, it needs to amend its inclusion criteria so that recreational drugs like marijuana are not included on the Prohibited List.²⁹⁵

1. Remove the Spirit of Sport Criterion

Removing the criterion that a substance or method “violates the spirit of sport” is the most logical first step.²⁹⁶ Despite the fact that the Code provides a lengthy definition for the term “spirit of sport,” there is still controversy surrounding its true connotation and significance, as an initial matter.²⁹⁷ Critics argue that the clause is too vague to serve as a robust foundation for policy intended to prevent cheating in sports.²⁹⁸ Others critique WADA for intentionally using the phrase “to extend its power beyond the normal bounds of the sporting realm to serve interests such as public health concerns,” for the explicit purpose of prohibiting marijuana.²⁹⁹ Since recreational drugs like marijuana cannot be banned on the basis of performance-enhancement, WADA uses vague phraseology and the “spirit of sport” rationale to justify their prohibition.³⁰⁰ In effect, WADA is using the “spirit of sport” criterion to regulate individual lifestyle choices and social behaviors which are scientifically disproven to positively affect athletic performance.³⁰¹ A sports organization such as WADA should not have the right to discipline athletes in their private lives for using, in its own view, “immoral” substances “than it has to discipline athletes for any other

292. CODE, *supra* note 7, art. 4.2.3, at 19.

293. See WADA STRATEGIC PLAN, *supra* note 37, at 9.

294. See *supra* Part IV.A.

295. See *infra* Part IV.A.

296. See *infra* Part IV.A.

297. Mojisola Obasa & Pascal Borry, *The Landscape of the “Spirit of Sport,”* 16 BIOETHICAL INQUIRY 443, 444 (2019).

298. *Id.*

299. *Id.* at 447.

300. Waddington et al., *supra* note 200, at 45.

301. *Id.*

forms of what might be considered ‘moral turpitude.’”³⁰² It is clear that the “spirit of sport” criterion must be abolished.³⁰³

2. Remove the Health Risk Criterion

Though for less obvious reasons, the criterion that a substance or method “represents an actual or potential health risk to the Athlete” should also be removed.³⁰⁴ Although it is laudable that WADA wants to protect the health of its athletes, the use of substances and methods that negatively impact athletic performance should not be part of an anti-doping policy that is designed to prevent cheating and promote integrity in sport.³⁰⁵ It can also be argued that athlete health is not one of WADA’s legitimate concerns, as it seems that WADA is more concerned about the moral image that athletes present to the world, rather than the athletes’ physical wellbeing.³⁰⁶ For example, even though cocaine and heroin are among the most dangerous and deadliest drugs in the world, WADA only prohibits them in-competition, meaning that athletes can use them as frequently as they please, so long as they refrain from testing positive during the in-competition period.³⁰⁷ Additionally, even without using drugs, many international-level sports are harmful to an athlete’s health.³⁰⁸ Take boxing, for example, where the goal is to knock-out your opponent (that is, give them a concussion).³⁰⁹ While repeated concussions over time can lead to serious brain injuries and death, the sport has been played at every Summer Olympics since 1904.³¹⁰ Even non-contact sports can be quite injurious to an athlete’s health, especially when athletes must go through grueling training regimes just to be able to compete at the highest level of international

302. *Id.* at 46.

303. *See supra* Part IV.A.

304. *See infra* Part IV.A.

305. Waddington et al., *supra* note 200, at 44.

306. *See id.* at 42 (explaining how “critics have also pointed to several inconsistencies in the health based arguments: that there are many drugs on the banned list which appear to have few, if any, side effects; that many drugs which are legally used within sport have well documented and potentially serious side effects; and that there is a powerful argument which suggests that elite sport, because of the intensity of modern training and competition, is itself damaging to the health of athletes.”).

307. *See Substances of Abuse 101, supra* note 105.

308. Waddington et al., *supra* note 200, at 42.

309. *See* Stephanie Convery, *The Sports World Knows Concussion Can Kill. So Why Does No One Talk About It?*, *GUARDIAN* (Feb. 27, 2020), <https://www.theguardian.com/sport/2020/feb/28/the-sports-world-knows-concussion-can-kill-so-why-does-no-one-talk-about-it> [<https://perma.cc/8VR6-SUAY>].

310. *See id.*; Sean Crose, *Boxing May Be Removed From Olympics*, *BOXING INSIDER* (Dec. 14, 2021), <https://www.boxinginsider.com/headlines/boxing-may-be-removed-from-olympics> [<https://perma.cc/YAT2-536Z>].

competition.³¹¹ For instance, Tour de France “riders reckon that a good Tour takes one year off your life, and when you finish in a bad state, they reckon three years.”³¹²

With all that being said, most athletes competing at the international level are of the best in the world, and the reality is that they “must perfect their bodies to perform at the outer limits of human potential.”³¹³ The athletes that WADA should be most concerned with are not searching for substances that harm their bodies and have no performance-enhancing effects.³¹⁴ On the contrary, these cheating athletes are searching for those substances that significantly enhance athletic performance, and thus give them a distinct advantage over clean athletes who are relying solely on their natural athletic abilities and hard work.³¹⁵ WADA’s only focus should be on those substances that enhance performance and thus deprive clean athletes of any real chance of competing on a level playing field.³¹⁶ Thus, for WADA to be as effective as possible, the Prohibited List inclusion criteria must be amended so that it only prohibits those substances and methods “that actually enhance sporting performance.”³¹⁷

V. CONCLUSION

The World Anti-Doping Agency is a pivotal player in the world of international athletics.³¹⁸ It plays, or should play, a crucial role in preserving fair play in international athletic competition and ensuring that every athlete is on a level playing field.³¹⁹ All that said, since its formation, WADA has done a poor job adhering to its goals and mission.³²⁰ The purpose of this Note is not to argue that WADA’s job is an easy one or that the solution to solving the problem of doping in sports is simple.³²¹ Rather, being that WADA must regulate almost every athlete competing in international competition worldwide, this Note shows that WADA must scale-back the scope of the Prohibited List, so that it can re-allocate its resources more effectively, and focus more

311. See Hard, *supra* note 84, at 549.

312. See *id.*

313. See *id.* at 547.

314. See *supra* Part III.B.

315. See *supra* Part III.B.

316. See *supra* Part IV.A.

317. See *supra* Parts III–IV.

318. See *supra* Part II.

319. See *supra* Part II.

320. See *supra* Parts II–IV.

321. See *infra* Part V.

heavily on those substances and methods that fraudulently enhance athletic performance, and devalue the integrity of sport.³²²

Although amending the Prohibited List may not be a panacea for stopping the use of PEDs and preventing large-scale doping scandals from occurring worldwide, it is certainly a good starting point and one that will allow WADA and its Signatories to save a significant amount of time, money, and resources.³²³ Recreational drugs such as marijuana have no place on the Prohibited List because they have no performance-enhancing effects, and thus, play no part in distorting the outcomes of international athletic events and defrauding clean athletes who work their entire lives to perform at the highest level of athletic competition.³²⁴ Therefore, instead of concerning itself with morality drugs and the negative image that recreational drug users present to the public, in its subjective view, WADA must amend its Prohibited List so that only legitimate performance-enhancing substances and methods are prohibited.³²⁵ Once WADA makes this simple, yet crucial, change, WADA will certainly have a better chance at detecting and punishing the various athletes and countries who continue to exploit and undermine the international athletic community.³²⁶

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322. *See supra* Parts II–IV.

323. *See supra* Parts II–IV.

324. *See supra* Part III.

325. *See supra* Part IV.

326. *See supra* Part IV.

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