

The Swiss Federal Supreme Court Upholds the Socially Constructed Gender Binary on Female Athletes with Intersex Traits

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I. OVERVIEW

After winning the gold medal in the 800-meter race at the London 2012 and Rio 2016 Olympics and claiming title as a three-time world champion in the World Athletics Championships in Berlin (2009), Daegu (2011), and London (2017), Mrs. A’s gender was called into question.¹ Specifically, following Mrs. A’s win at the World Athletics Championship in Berlin, she was subjected to a gender verification test.² Following the gender verification test, the International Association of Athletics Federation, now known as World Athletics, informed Mrs. A that she would have to lower her testosterone levels to a certain threshold if she wanted to continue to compete at the international level.³ Mrs. A began taking contraceptive pills in order to lower her naturally higher testosterone levels; however, she stopped taking the contraceptive pills after the Court of Arbitration for Sport (CAS) put a two-year suspension on the existing regulations for female athletes with naturally higher testosterone levels than what is seen in most females.⁴ World Athletics then replaced the regulations with a new rule entitled “Regulations governing qualification in the female category (for athletes with differences in sexual development)” (“DSD Regulations”).⁵ Differences in sexual development is defined as a, “congenital anomaly causing atypical development of the chromosomal, gonadal, and/or anatomical

1. Tribunale fédérale [TF] [Federal Supreme Court] Aug. 25, 2020, 4A_398/2019 (Switz.).
2. *Id.* at A.b.
3. *Id.*
4. *Id.* at A.b-A.d.
5. *Id.* at A.f.

sex.”⁶ The DSD Regulations require female athletes who have a blood testosterone level greater than 5 nanomoles per liter (nmol/L) of blood and who are officially recognized as intersex or female to lower their blood testosterone level below 5 nmol/L by taking contraceptive pills for an uninterrupted period for at least six months and to maintain their blood testosterone level below 5 nmol/L at all times (whether or not they are in competition) to compete in certain female sporting events at the international level.⁷ This led to Mrs. A, a female athlete with a blood testosterone level higher than 5 nmol/L, to file an arbitration request with the CAS to challenge the validity of the World Athletics’ DSD Regulations.⁸

While Mrs. A was challenging the DSD Regulations to the CAS, World Athletics modified the list of female athletes covered by the DSD Regulations to only apply to female athletes with male typical XY chromosomes, not female athletes with XX chromosomes.⁹ Mrs. A claimed to the CAS that the hormone treatment to lower testosterone levels is not medically necessary and can have side effects.¹⁰ Mrs. A also argued that the exams performed by doctors to verify an athlete’s gender/hormonal make up are intrusive and undermine physical integrity.¹¹ The CAS ruled against Mrs. A, reasoning that it would be unfair for females with XY chromosomes (with their naturally high testosterone levels) to compete against women with XX chromosomes who have lower testosterone levels.¹² The CAS used expert testimony to reason that the primary driver of the sex difference in elite athletic difference is that biological males typically have much higher levels of testosterone during growth, development, and throughout their athletic career.¹³ The CAS said that people with XY chromosomes have testes, producing testosterone levels similar to those seen in men.¹⁴ Ultimately, the CAS panel noted that the DSD Regulations are discriminatory but upheld them because the DSD regulations constitute a necessary, reasonable means of achieving fairness in female sport competition.¹⁵ The Swiss Federal Supreme Court *held* that

6. *Id.* at A.f.a.

7. *Id.* at A.f.c.

8. *Id.* at B.a.

9. *Id.*

10. *Id.* B.c.f.a.

11. *Id.* at B.c.f.b.

12. *Id.* at B.c.e.

13. *Id.* at B.c.c.a.

14. *Id.* at B.c.c.b.

15. *Id.* at B.c.d.-B.c.e.

the CAS was correct in ruling that the DSD Regulations are reasonable and necessary to provide fair competition in female sports due to female athletes with XY chromosomes having significantly enhanced athletic performance from their naturally higher testosterone levels. *Tribunale fédérale [TF] [Federal Supreme Court]* Aug. 25, 2020, 4A_398/2019 (Switz.).

II. BACKGROUND

Certain athletic organizations believe that female athletes with differences in sexual development (DSD), due to their naturally high testosterone levels, have an unfair advantage over female athletes who do not have a DSD.¹⁶ For example, World Athletics believes that female DSD athletes' naturally high testosterone levels will significantly improve their athletic performance, finding that female athletes with a DSD usually win over female athletes who do not have a DSD.¹⁷ Therefore, World Athletics has been regulating or outright banning DSD female athletes from elite athletic competitions.¹⁸

In 2014, Dutee Chand, an Indian female sprinter, challenged World Athletics' regulations that governed the "Eligibility of Females with Hyperandrogenism to Compete in Women's Competition" (Hyperandrogenism Regulations) to the CAS.¹⁹ The Hyperandrogenism Regulations placed restrictions on the eligibility of female athletes with naturally high testosterone levels.²⁰ Chand argued that these regulations were unlawfully discriminatory against female athletes and athletes who possess a "particular natural physical characteristic."²¹ The CAS ruled that since the Hyperandrogenism Regulations only apply to female athletes and are facially discriminatory, the Hyperandrogenism Regulations should be necessary and reasonable to be valid under the World Athletics constitution and the Olympic Charter.²² To go about reaching that conclusion, the CAS first found that, due to expert testimony on the subject, there is a scientific basis for using testosterone as a marker for the

16. *Tribunale fédérale [TF]* Aug. 25, 2020, 4A_398/2019 at B.c.c.c.

17. *Id.*

18. *Id.*

19. *Chand v. Athletics Fed'n of India (AFI)*, CAS 2014/A/3759, Interim Arbitral Award, at 1,4 (2015).

20. *Id.* at 4.

21. *Id.*

22. *Id.* at 500.

Hyperandrogenism Regulations.²³ However, the CAS ruled that World Athletics had not established that the Hyperandrogenism Regulations met World Athletics' legitimate purpose of providing fair competition to female athletes.²⁴ The CAS said World Athletics had not proven, in this case, that hyperandrogenic female athletes have a substantially higher performance rate than non-hyperandrogenic female athletes.²⁵ Therefore, the CAS suspended the Hyperandrogenism Regulations for two years, allowing World Athletics to submit further evidence providing that hyperandrogenic female athletes have a substantial performance advantage over non-hyperandrogenic female athletes.²⁶ Ultimately, the CAS left open two major questions: First, do hyperandrogenic female athletes, who have naturally higher testosterone levels, have a substantial advantage in sport competition over non-hyperandrogenic females?²⁷ Second, is regulating hyperandrogenic female athlete's testosterone levels a reasonable, necessary, and proportionate way to ensure fair competition in female sports?²⁸

In 2018, the CAS answered these questions when Olympic athlete Caster Semenya challenged World Athletics' new regulations for DSD female athletes (or hyperandrogenic female athletes).²⁹ The CAS found, and the noted case upheld, that the primary driver of the sex difference in elite athletic performance is the presence of testosterone in males and people with XY chromosomes (which also encompasses some DSD female athletes) during growth, development, and throughout their athletic career.³⁰ The CAS then found that World Athletics' new DSD regulations were reasonable and met World Athletics' objective to ensure fair competition in women's sports.³¹

While the CAS and the Swiss Federal Supreme Court have upheld the DSD Regulations by concurring with World Athletics' view that testosterone is a significant indicator of athletic performance difference between males and females,³² these views are not universally held.

23. *Id.* at 494.

24. *Id.* at 529-30.

25. *Id.* at 522.

26. *Id.* at 548.

27. *Id.*

28. *Id.*

29. *Semenya v. Int'l Ass'n of Athletics Fed'ns*, CAS 2018/O/5794 & CAS 2018/O/5798, Arbitral Award, at 625-26 (2019).

30. *Id.* at 491-93.

31. *Id.* at 626.

32. *Id.* at 491-93; *Tribunale fédérale [TF]* Aug. 25, 2020, 4A_398/2019 at B.c.c.c.

For example, a recent case in the United States, found that the possible exclusion of intersex female athletes could be unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.³³ In *Hecox v. Little*, the plaintiffs challenged the constitutionality of a new Idaho law that excludes transgender women and girls from participating on sports teams in Idaho.³⁴ While there is a focus on the exclusion of transgender women and girls on sports teams in the Idaho law, the law has the potential to also exclude female athletes in Idaho with intersex traits.³⁵ The Act requires a sex verification process for any female athlete, transgender or not, whose biological sex is in dispute.³⁶ The sex verification process consists of a doctor verifying an athlete’s biological sex by their reproductive anatomy, genetic make-up, or normal testosterone levels.³⁷ While the court did not rule on the merits of this case, the court did find that both plaintiffs, a transgender female college athlete and a cisgender female athlete with “masculine” or nontraditional female traits, would be likely to prevail on their Equal Protection Clause violation claim.³⁸ The court found that the act would intentionally exclude transgender and intersex female athletes, saying that the Idaho legislature does not give a legitimate reason for this exclusion, and therefore, the Idaho law likely violates the United States Constitution.³⁹ The court ultimately issued a preliminary injunction of the Idaho law until a trial on the merits can be held.⁴⁰

III. COURT’S DECISION

In the noted case, the Swiss Federal Supreme Court held that, due to female athletes with differences in sex development (DSD) having significantly enhanced athletic performance due to their naturally higher level of testosterone, the CAS was correct in ruling that World Athletics’ DSD Regulations for female DSD athletes are reasonable and necessary to provide fair competition in female sports.⁴¹ The Swiss Federal Supreme

33. *Hecox v. Little*, No. 20-cv-00184, 2020 WL 4760138, at *39 (D. Idaho Aug. 17, 2020).

34. *Id.* at *1.

35. *Id.*

36. *Id.* at *5.

37. *Id.*

38. *Id.* at *35-38.

39. *Id.* at *34-35.

40. *Id.* at *39.

41. Tribunal fédérale [TF] Aug. 25, 2020, 4A_398/2019 at 10.5, 11.1.

Court had jurisdiction to hear this case due to CAS's headquarters being located in Lausanne, Switzerland.⁴² Since this was an appeal in international court, the only facts that were considered were the facts previously stated in the court above, and the court only examined whether the admissible complaints against the CAS ruling were "well founded" or not.⁴³

The majority of the complaints came from Mrs. A, who had been subjected to the DSD regulations.⁴⁴ The first complaint Mrs. A asserted was that the CAS ruling violates public order in that it is contrary to the principal of the prohibition of discrimination.⁴⁵ The court stated that a ruling is incompatible with public order if it disregards the widely recognized values that constitute the basis of any legal order.⁴⁶ The court further stated that discrimination is when a person is treated differently because of their belonging to a particular group that has in the past or presently suffers exclusion.⁴⁷ The court then pointed out that distinguish does not mean exclusion.⁴⁸ Separate treatment is possible if it is based on biological differences.⁴⁹ Ultimately, the court then found that the CAS ruling of upholding World Athletics' DSD regulations was not contrary to public order.⁵⁰ The court reasoned that all findings from the CAS were allowable because there is a biological difference between female athletes with XY chromosomes (some DSD female athletes) and female athletes with XX chromosomes.⁵¹ The Court also agreed and upheld CAS's ruling that XY females have an athletic advantage because of the natural increase of testosterone, finding that this natural advantage they have over non DSD females allows DSD females to "systematically" beat non DSD female athletes.⁵² Finally, the Court found that the CAS's ruling that World Athletics' concern to ensure fair sport competition for women as a reasonable interest to be correct.⁵³ Therefore, the Court found that the DSD violations do not violate public order because there is a biological difference between DSD female athletes and non DSD female athletes that

42. *Id.* at 3.

43. *Id.* at 5.2.2.

44. *Id.* at C.a.

45. *Id.* at 9.

46. *Id.* at 9.1.

47. *Id.* at 9.5.

48. *Id.*

49. *Id.*

50. *Id.* at 9.8.2.

51. *Id.*

52. *Id.*

53. *Id.* at 9.8.3.3.

puts DSD female athletes at an athletic advantage and, therefore, the DSD regulations are a reasonable way to attain fair competition in female sports.⁵⁴

The second complaint Mrs. A asserted was that the DSD regulations are an infringement of her personality rights.⁵⁵ The court first recognized that, when dealing with a high level sport, personality rights include the right to health, bodily integrity, honor, professional consideration, sporting activity, and in professional sports the right to develop and have economic fulfillment.⁵⁶ The court found that there was no violation on personality rights.⁵⁷ The court reasoned that the exams will be carried out by qualified doctors and, in excess to that, the athlete has a choice if the exams will be performed or not.⁵⁸ Furthermore, the contraceptive pills given to DSD female athletes to lower their natural testosterone levels is not forced upon the athlete.⁵⁹ Therefore, since the athlete will not be forced to undergo the treatments the DSD regulations require, there is no violation of personality rights according to the court.⁶⁰ As to Mrs. A's argument that the DSD regulations do not respect social and gender identity, the court also disagreed.⁶¹ The court stated that the DSD regulations do not intend to redefine or question the sexual or gender identity of DSD female athletes.⁶² The focus of the DSD regulations are only to establish eligibility rules, according to the court.⁶³ The court found that the DSD regulations do not infringe on a DSD female athlete's economic freedom.⁶⁴ The court's reason for this conclusion was that DSD female athletes can still compete in certain events that are not covered by the DSD regulations and, therefore, are not requirement to lower testosterone levels in such events.⁶⁵ Therefore, due to female DSD athletes having a choice in whether or not they undergo treatment required by the DSD regulations and the DSD regulations not infringing on social and gender identity or economic

54. *Id.* 9.8.2.-9.8.3.

55. *Id.* at 10.

56. *Id.* at 10.1.

57. *Id.* at 10.2.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 10.3.

62. *Id.*

63. *Id.*

64. *Id.* at 10.5.

65. *Id.*

freedom, the court found that the DSD regulations do not violate Mrs. A's personality rights.⁶⁶

Mrs. A's third and final complaint was that the DSD regulations are an attack on human dignity.⁶⁷ Mrs. A specifically argued that the DSD regulations will convey gender stereotypes.⁶⁸ The court disagreed with Mrs. A that the DSD regulations will convey gender stereotyping.⁶⁹ The court reasoned that the DSD regulations are not set in place to question what a woman or intersex person is but, as the court upheld in Mrs. A's previous claim, the DSD regulations are just to establish eligibility rules.⁷⁰ The court also found that Mrs. A's argument that female DSD athletes will be treated as "human guinea pigs" fails because female DSD athletes will not be forced to take the contraceptive pills to lower their testosterone levels.⁷¹ The court ultimately found that the DSD regulations do not violate human dignity.⁷²

The court ultimately upheld the CAS's determination that the DSD regulations serve a legitimate purpose to ensure the fair competition of female sports.⁷³ The court found that the CAS did not restrict its access in making this determination and, furthermore, that the DSD regulations do not violate public order, the DSD regulations are not an infringement on Mrs. A's personality rights, and the DSD regulations are not an attack on human dignity.⁷⁴ The court dismissed all appeals and upheld the CAS's finding that the DSD regulations are a reasonable way to meet World Athletics goal of ensuring fair female sport competition.⁷⁵

IV. ANALYSIS

The decision in the noted case is not consistent with current laws and international legal norms and will ultimately have adverse effects on any female athlete who does meet the traditional female binary standard that World Athletics has created for elite female athletes.⁷⁶ When upholding

66. *Id.* at 10.2-10.5.

67. *Id.* at 11.

68. *Id.* at 11.1.

69. *Id.*

70. *Id.*

71. *Id.* at 11.2-11.3.

72. *Id.* at 11.3.

73. *Id.* at 9.8.3.3.

74. *Id.* at 7, 9.8.2, 10.2, 11.3.

75. *Id.* at 9.8.3.3., 13.

76. *Hecox v. Little*, No. 20-cv-00184, 2020 WL 4760138, at *39 (D. Idaho Aug. 17, 2020); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding sex stereotyping a violation

World Athletics DSD regulations, the court created a digression in current law leading to adverse social and economic implications for female intersex athletes and/or female DSD athletes internationally.⁷⁷

For example, in March 2019, the United Nations Human Rights Council adopted a resolution entitled “Elimination of discrimination against women and girls in sport.”⁷⁸ Within this resolution, the United Nations addresses its concern that the eligibility regulations for the female classification by World Athletics may not be compatible with international human rights norms and standards.⁷⁹ The United Nations also notes they are concerned there is lack of legitimate and justifiable evidence for the regulations.⁸⁰ Specifically, the resolution states that requiring DSD female athletes to medically reduce their blood testosterone levels may “contravene” international human rights norms including the right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to sexual and reproductive health, the right to work with favorable conditions, the right to privacy, and the right to freedom from torture or other cruel and inhumane or degrading treatment or punishment.⁸¹ The United Nations goes on to say, in its resolution, that discrimination against women and girls on the basis of race, gender, and other grounds can lead to exclusion of women and girls in sports on the basis of their physical and biological traits, reinforcing harmful gender stereotypes.⁸²

Furthermore, it is unlikely that World Athletics’ DSD regulations would hold up in a United States court.⁸³ The DSD regulations, which only single out and have the potential to exclude female DSD athletes, would likely be a violation of the U.S. Constitution’s Fourteenth Amendment Equal Protection clause, which requires that all “similarly situated people be treated alike.”⁸⁴ For example, as previously mentioned, an Idaho Court recently held that an act that prohibited transgender and intersex girls and

of Title VII); Human Rights Council Res. 40/5, U.N. Doc. A/HRC/40/L.10/Rev.1 (Mar. 20, 2019).

77. See *Hecox*, 2020 WL 4760138, at *39; *Price Waterhouse*, 490 U.S. at 228; Human Rights Council Res. 40/5, U.N. Doc. A/HRC/40/L.10/Rev.1 (Mar. 20, 2019).

78. Human Rights Council Res. 40/5, U.N. Doc. A/HRC/40/L.10/Rev.1 (Mar. 20, 2019).

79. *Id.* at 1-2.

80. *Id.* at 2.

81. *Id.*

82. *Id.*

83. See *Hecox*, 2020 WL 4760138, at *39.

84. *Id.* at *25, *39.

women from playing on sports teams likely violates the United States Constitution in that the act discriminates between cisgender female athletes and non-cisgender female athletes.⁸⁵ Additionally, the DSD regulations are likely to violate United States law because it discriminates against female DSD athletes based on gender stereotypes.⁸⁶ In *Price Waterhouse v. Hopkins*, the United States Supreme Court found that “sex stereotyping” was a form of gender discrimination by employers and is not allowed under Title VII of the Civil Rights Act.⁸⁷

World Athletics’ DSD regulations creates gender stereotypes among female athletes.⁸⁸ The female athletes that are likely to be contested and, therefore, subjected to a gender verification test will likely be female athletes who do not have traditional feminine appearances.⁸⁹ If a female athlete with or without a DSD is more “masculine” looking than other female athletes, they could be subjected to a gender verification test to determine if they meet the criteria to be subjected to the DSD Regulations based solely on the fact that their body, genetics, and/or biology does not fit neatly into the gender binary society has created.⁹⁰ Another especially harmful aspect of the DSD Regulations stereotyping female athletes is that the DSD Regulations will uphold the stereotype that girls are not supposed to “systematically” win.⁹¹ Therefore, female DSD athletes are being punished (for their *natural* abilities) simply for being too good of an athlete than a female is thought to able to be.⁹²

Gender stereotyping is also prohibited by international norms.⁹³ For example, the Convention on the Elimination of All Forms of Discrimination Against Women (Convention) became an international

85. *Id.* at *39.

86. *See Price Waterhouse*, 490 U.S. at 255-58.

87. *Id.*

88. Human Rights Council Res. 40/5, U.N. Doc. A/HRC/40/L.10/Rev.1 (Mar. 20, 2019).

89. Tyler Wells, *Intersex, Hyperandrogenism, Female Athletes: A Legal Perspective on the IAAF Doping Regulations and Where Hyperandrogenic Female Athletes Fit in*, 17 SANTA CLARA J. INT’L L. 1, 12-13 (2019) (discussing Caster Semenya and Dutee Chand who were both subjected to gender verification tests due to their more “masculine” features such as Chand’s more pronounced muscles and “impressive stride”).

90. *Id.*

91. Tribunal fédérale [TF] Aug. 25, 2020, 4A_398/2019 at 9.8.2 (holding that the DSD rules are valid because the increase in testosterone seen in DSD female athletes allows them to systematically win over non-DSD female athletes creating an unfair athletic advantage in DSD female athletes because of their natural abilities).

92. *Id.*

93. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 34 U.N.T.S. 180 [hereinafter Convention].

treaty in 1981.⁹⁴ The Convention specifically states that discrimination and/or commonly held prejudices towards women must be eliminated.⁹⁵ Article Five (a) states that parties shall take all appropriate measures to “modify the social and cultural patterns of conduct by men and women, with a view to achieving the elimination of prejudices and customary which are based on the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”⁹⁶ As noted above, the DSD Regulations appear to place stereotypes on female athletes that they must look and perform a certain way to be truly female.⁹⁷ The DSD Regulations allow for women who do not look “feminine” enough or who are performing too well to be subjected to a gender verification test.⁹⁸ Therefore, the DSD Regulations are in violation of Article Five (a) of the Convention in that rather than “modifying the social and cultural patterns that cause prejudices based on . . . stereotyped roles for men and women,” the DSD Regulations are instead enforcing prejudices based on stereotyped roles for women such as women cannot be that fast to consistently beat other women by such a wide margin in certain events.⁹⁹

In Opposition to the argument that the Convention is only binding on states and not organizations such as World Athletics, 189 countries are parties to the Convention and nearly 100 countries are signatories of the Convention demonstrating that the Convention is likely an international norm that World Athletics should abide by.¹⁰⁰ Furthermore, many of the countries’ athletes, who compete in international competitions and may be subjected to the DSD Regulations, are signatories of the Convention (such as South Africa and India).¹⁰¹ Therefore, World Athletes should respect the rules and obligations of the various athletes’ countries who have signed the Convention and abide by the duties and obligations of the Convention not to exclude or enforce stereotypes on any of the sexes.¹⁰²

94. *Id.*

95. *Id.*

96. *Id.*

97. Wells, *supra* note 89, at 12-13.

98. *Id.*

99. *See* Convention, *supra* note 93.

100. *Convention On the Elimination of All Forms of Discrimination Against Women*, 1249 Treaty Series 13 (1980), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>.

101. *Id.*

102. *See* Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 117.

In addition to not being aligned with International Law and laws of other countries, World Athletics' DSD Regulations creates adverse social impacts for any athlete competing at the elite international level who does not fit within the traditional gender binary.¹⁰³ For starters, the DSD Regulations place too much emphasis on testosterone levels as the main indicator of enhanced athletic performance.¹⁰⁴ A 2014 study found that lean body mass could be the most likely explanation for the differences in sport performances between males and females, not testosterone.¹⁰⁵ Furthermore, the study looked at testosterone levels of male and female elite athletes finding the female elite athletes had high levels of testosterone and some of the male elite athletes had low serum testosterone values.¹⁰⁶ While having low testosterone levels at the time of performance, these male athletes still ran faster than the females showing that testosterone levels may play a small role in indicating athletic performance between males and females.¹⁰⁷ This shows the DSD Regulations' emphasis on "normal" testosterone levels of men and women is not an accurate reality for many athletes regardless if they have a DSD condition or not.¹⁰⁸ Therefore, the inaccuracy of this idea of normal hormone levels in men and women will harm any athlete who falls outside this category, making them vulnerable to strict regulations of their bodies.¹⁰⁹

In conclusion, the DSD Regulations are not in line with international or domestic law. Furthermore, the DSD Regulations, by upholding the traditional gender binary, has led to dangerous consequences creating physical and mental burdens on female DSD athletes by sending the message that a body that does not fit within the traditional gender binary of male or female is wrong and unnatural.¹¹⁰

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103. Wells, *supra* note 89, at 12-13.

104. *Id.* at 15.

105. *Id.* at 15-16.

106. *Id.* at 16.

107. *Id.*

108. *Id.*

109. *Id.* at 12-13, 16 (Discussing Dutee Chand and Semenya Caster being subjected to the DSD Regulations because their testosterone level was higher than what is believed to be "normal" for a female).

110. *Id.*

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