

21-55356

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALEX MORGAN; MEGAN RAPINOE; BECKY SAUERBRUNN; CARLI LLOYD;
MORGAN BRIAN; JANE CAMPBELL; DANIELLE COLAPRICO; ABBY
DAHLKEMPER; TIERNA DAVIDSON; CRYSTAL DUNN; JULIE ERTZ; ADRIANNA
FRANCH; ASHLYN HARRIS; TOBIN HEATH; LINDSEY HORAN; ROSE LAVELLE;
ALLIE LONG; MERRITT MATHIAS; JESSICA MCDONALD; SAMANTHA MEWIS;
ALYSSA NAEHER; KELLEY O'HARA; CHRISTEN PRESS; MALLORY PUGH; CASEY
SHORT; EMILY SONNETT; ANDI SULLIVAN; MCCALL ZERBONI, individually and
on behalf of all others similarly situated,

Plaintiffs-Appellants,

—v.—

UNITED STATES SOCCER FEDERATION, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**BRIEF FOR THE NATIONAL WOMEN'S LAW CENTER, WOMEN'S
SPORTS FOUNDATION, AND 63 ADDITIONAL ORGANIZATIONS AS
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS
[ADDITIONAL AMICI ON INSIDE COVER]**

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IN OUR OWN VOICE: NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE
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WOMEN'S LAW PROJECT

TABLE OF CONTENTS

	<u>Pages</u>
INTERESTS OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Gender Wage Gap Significantly Harms Women and Persists in All Areas of This Nation’s Labor Market, Including Sports	5
A. The Gender Wage Gap Is a Pervasive and Persistent Feature Across the Labor Market	6
B. Unequal Investment in Women’s Sports Perpetuates Gender Discrimination in Sports.....	12
II. The District Court’s Decision Is Contrary to the EPA.....	16
A. The EPA Requires an Equal Rate of Pay	17
B. Collective Bargaining Agreements Cannot Serve as a Defense to an EPA Claim.....	23
C. Defendant’s Remaining “Market-Based” Arguments for Unequal Pay Are Legally and Factually Flawed	29
III. The District Court’s Decision Is Contrary to Title VII.....	32
CONCLUSION	35

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985).....	26
<i>Beck-Wilson v. Principi</i> , 441 F.3d 353 (6th Cir. 2006).....	23
<i>Bence v. Detroit Health Corporation</i> , 712 F.2d 1024 (6th Cir. 1983).....	18, 22, 23
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<i>Brennan v. Bd. Of Ed., Jersey City, N.J.</i> , 374 F. Supp. 817 (D.N.J. 1974).....	25
<i>Brennan v. Victoria Bank & Trust Co.</i> , 493 F.2d 896 (5th Cir. 1974).....	25
<i>City of L.A., Dept. of Water and Power v. Manhart</i> , 435 U.S. 702 (1978).....	33
<i>Corning Glass Works v. Brennan</i> , 417 U.S. 188 (1974).....	16, 23, 24, 25
<i>Glenn v. General Motors Corp.</i> , 841 F.2d 1567 (11th Cir. 1988).....	25, 30
<i>Grant v. Bethlehem Steel Corp.</i> , 635 F.2d 1007 (2d Cir. 1980)	26
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<i>Johnson v. Canyon County, Idaho</i> , No. 19-cv-364, 2020 WL 7872511 (D. Idaho Dec. 31, 2020)	25

<i>Kaiser Steel v. Mullins</i> , 455 U.S. 72 (1982).....	26
<i>Lenzi v. Systemax, Inc.</i> , 944 F.3d 97 (2d Cir. 2019)	32
<i>Maxwell v. City of Tucson</i> , 803 F.2d 444 (9th Cir. 1986).....	17
<i>Rizo v. Yovino</i> , 950 F.3d 1217 (9th Cir. 2020).....	17, 25, 30
<i>Robinson v. Lorillard Corp.</i> , 444 F.2d 791 (4th Cir. 1971).....	26
<i>Sprogis v. United Air Lines, Inc.</i> , 444 F.2d 1194 (7th Cir. 1971).....	33, 34
<i>Taylor v. White</i> , 321 F.3d 710 (8th Cir. 2003).....	30
<i>Williams v. Owens-Illinois, Inc.</i> , 665 F.2d 918 (9th Cir. 1982).....	26
Statutes	
29 U.S.C. § 185	26
29 U.S.C. § 206(d)(1)	17
36 U.S.C. § 220522(8).....	30
36 U.S.C. § 220523	28
42 U.S.C. § 2000e-2(a)(1).....	32
42 U.S.C § 2000e-2(m).....	33, 35
Pub. L. No. 88-38, 77 Stat. 56 (1963)	16
Rules & Regulations	
29 C.F.R. § 1620.23	24

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AM. ASS’N OF UNIV. WOMEN, DEEPER IN DEBT, 2021 UPDATE
(2021), <https://bit.ly/2SyNXyZ> 12

ARIANE HEGEWISCH AND EVE MEFFERD, INSTITUTE FOR
WOMEN'S POLICY AND RESEARCH (“IWPR”), THE GENDER
WAGE GAP BY OCCUPATION, RACE, AND ETHNICITY 2020,
(2021), <https://bit.ly/3x221zL>..... 6, 7

BUREAU OF LABOR STATISTICS, TABLE 3: EMPLOYMENT STATUS
OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE,
SEX, AND RACE, CURRENT POPULATION SURVEY (2021),
<https://www.bls.gov/cps/cpsaat03.htm> 6

Cheryl Cooky et al., *One and Done: The Long Eclipse of
Women's Televised Sports, 1989-2019*, 9 COMM. & SPORT
(2021), <https://bit.ly/3jTSTcU> 15

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SEC., STILL SHORTCHANGED: AN UPDATE ON WOMEN’S
RETIREMENT PREPAREDNESS (2020),
<https://www.nirsonline.org/reports/stillshortchanged/> 12

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Gender Biases Favor Male Students*, 109 PNAS 16474
(2012), <https://bit.ly/3x3rb13> 8

*Do You Know the Factors Influencing Girls' Participation in
Sports?*, WOMEN'S SPORTS FOUND., <https://bit.ly/3ga7k9p> 13

Equal Pay Act of 1962: Hearing Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare, S. 2494 and H.R. 11677, 87th Cong. (1962) 27

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Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations* 8 (Nat’l Bureau of Econ. Rsch., Working Paper No. 21913, 2016), <https://bit.ly/3q5JUGV> 8

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HEIDI HARTMANN ET AL., IWPR, HOW EQUAL PAY FOR WORKING WOMEN WOULD REDUCE POVERTY AND GROW THE AMERICAN ECONOMY (2014), <https://bit.ly/3q9EL0d>..... 11

How can women best protect and grow their wealth?, UBS (Oct. 23, 2017), <https://bit.ly/3w2s8Wl> 11

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Janet S. Fink, *Sponsorship for Women's Sports Presents Untapped Opportunity*, SPORTS BUS. J. (2015), <https://bit.ly/3gEUJv1>..... 15

JASMINE TUCKER, NWLC, EQUAL PAY FOR ASIAN AMERICAN AND PACIFIC ISLANDER WOMEN (2020), <https://bit.ly/3dR3TEa> 7

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JESSICA ARONS, CTR. FOR AM. PROGRESS ACTION FUND, LIFETIME LOSSES: THE CAREER WAGE GAP (2008), <https://bit.ly/35Yo7Yn>; 10

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NAT'L WOMEN'S L. CTR. (“NWLC”), THE WAGE GAP HAS ROBBED WOMEN OF THEIR ABILITY TO WEATHER COVID-19, <https://bit.ly/3gA4rQC>..... 7

NATIONAL CTR. FOR EDU. STATISTICS, 2019 DIGEST OF
 EDUCATION STATISTICS, TABLE 318.30: BACHELOR'S,
 MASTER'S, AND DOCTOR'S DEGREES CONFERRED BY
 POSTSECONDARY INSTITUTIONS, BY SEX OF STUDENT AND
 DISCIPLINE DIVISION: 2017-18, (2019),
https://nces.ed.gov/programs/digest/2019menu_tables.asp 6

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 DISCRIMINATION FROM JOB TO JOB (2018),
<https://bit.ly/363pZik>;..... 8

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 ELEMENTARY AND SECONDARY SCHOOLS (2011),
<https://bit.ly/3fS22k8> 13

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 OTHER THAN SEX” LOOPHOLE TO STRENGTHEN PROTECTIONS
 AGAINST PAY DISCRIMINATION (2019),
<https://bit.ly/3x0IWxq> 28

NWLC, STATE PLAYBOOK FOR GENDER EQUITY: SET WORKING
 PARENTS AND THEIR CHILDREN UP FOR SUCCESS IN YOUR
 STATE (2019), <https://bit.ly/3rzd8P9> 9

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 GENDER WAGE GAP FOR WOMEN IN NON-STANDARD JOBS?
 (2020), <https://bit.ly/3wAFsCi>..... 27

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PRUDENTIAL, THE CUT: EXPLORING FINANCIAL WELLNESS
 WITHIN DIVERSE POPULATIONS (2018),
<https://bit.ly/2JJsLBp> 6

SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING
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<https://ampr.gs/3q5EgVf>..... 6

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GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION
OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS (Oct.
29, 1997), <https://bit.ly/3ijuw7Y> 14, 32

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CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS
AND WOMEN (2020), <https://bit.ly/3wEbCNs>..... 13, 14

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

Dated: New York, NY
July 30, 2021

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INTERESTS OF AMICI CURIAE

Amici are 65 organizations committed to advancing gender equality and to the enforcement of laws prohibiting discrimination in employment.¹

The **National Women’s Law Center** (“NWLC”) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women’s legal rights, and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and their families, including economic security, workplace justice, education, and reproductive rights and health. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity including numerous cases addressing sex discrimination in the workplace, such as pay discrimination. NWLC seeks to ensure that all individuals enjoy the full protection against sex discrimination promised by federal law and has a strong interest in the

¹ Counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to this brief’s preparation or submission. All parties have consented to the filing of this brief.

proper judicial interpretation of Title VII of the Civil Rights Act of 1964, Title IX, and the Equal Pay Act (“EPA”) as part of our broader work to close gender, race, and other discriminatory wage gaps and to promote gender justice for women and girls in all aspects of society.

The Women’s Sports Foundation (“WSF”) exists to enable girls and women to reach their potential in sport and life. WSF is an ally, an advocate, and a catalyst. Founded by Billie Jean King in 1974, WSF strengthens and expands participation and leadership opportunities through research, advocacy, community programming and a wide variety of collaborative partnerships. WSF has positively shaped the lives of millions of youth, high school and collegiate student-athletes, elite athletes, and coaches. WSF is building a future where every girl and woman can #KeepPlaying and unlock the lifelong benefits of sports participation.

All amici have a particular interest in this matter because ensuring correct legal interpretations of our nation’s civil rights laws is one critical component of achieving gender justice. Here, the district court’s decision does not follow the legal standards governing the EPA and Title VII, and is inconsistent with the central purpose of the EPA: to ensure that women

are paid equally for doing the same work as men and can work free of sex discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants are professional soccer players on the United States Women’s National Team (“USWNT”). They are among the greatest athletes and members of one of the greatest teams in the world—of any gender. The USWNT is by far the most decorated team in international women’s soccer and is among the most dominant national teams in any sport. Yet despite the USWNT’s unparalleled success, its team members are and have been paid at substantially lower rates than their male counterparts on the United States Men’s National Team (“USMNT”) for participating in international competitions such as the FIFA World Cup. Opening Br. for Plaintiffs-Appellants (“Plaintiffs’ Br.”) at 1.

In March 2019, Plaintiffs brought this class action lawsuit against the United States Soccer Federation (“USSF”), asserting unequal-pay claims under the Equal Pay Act (“EPA”) and Title VII, and unequal working conditions claims under Title VII. 6-ER-1192–1216. In November 2019, the district court granted Plaintiffs’ motion for class certification and the parties proceeded to summary judgment briefing. 6-ER-1119–

1133. In May 2020, the district court granted summary judgment to USSF on Plaintiffs' unequal-pay claims, disregarding Plaintiffs' argument that they were paid at a lower rate than players on the USMNT. 1-ER-5–36. The court held that the Plaintiffs had not established an EPA violation because the USWNT were paid more on a per-game basis than the USMNT and that the USWNT had agreed to a lower rate of pay in a collective bargaining agreement. 1-ER-25. The parties settled the remaining unequal-working conditions claims, 2-ER-39–43, and Plaintiffs appealed from the unequal-pay decision. 6-ER-1217–1218.

Amici submit this brief to provide additional context regarding the broader struggle for women's pay equity and to highlight significant errors in the district court's decision. The gender wage gap harms hundreds of millions of women in the United States and is persistent across every segment of the labor market, including professional sports, where women receive fewer resources, less support, and far less pay. The district court's erroneous interpretation of the EPA and Title VII—and its endorsement of the blatant pay disparities here—threatens to perpetuate unequal pay and thus, gender discrimination. The district court's ruling is irreconcilable with the text of the EPA, its implementing regulations, and

precedent, which require courts to evaluate the *rate of pay* when that is alleged to be the source of pay disparity, as here, and prohibit courts from treating collective bargaining agreements or market-based arguments as a defense. The district court's ruling likewise violates Title VII, which prohibits all forms of sex discrimination in the workplace, including discriminatory compensation practices. Amici urge this Court to reverse and allow Plaintiffs' equal pay claims to proceed.

ARGUMENT

I. The Gender Wage Gap Significantly Harms Women and Persists in All Areas of This Nation's Labor Market, Including Sports

Although the EPA and Title VII have explicitly prohibited sex discrimination in compensation for nearly sixty years, the gender wage gap remains a significant marker of gender inequality within the U.S. labor market, including in professional sports. Judicial interpretations of the EPA and Title VII that fail to interpret these statutes in a manner consistent with their promise—like the opinion on appeal—exacerbate the harms of the gender wage disparity.

A. The Gender Wage Gap Is a Pervasive and Persistent Feature Across the Labor Market

Women in the United States make up nearly half of the workforce,² are typically primary or co-breadwinners in their households,³ and receive more than half of bachelor's, master's, and doctorate degrees awarded each year.⁴ Yet, on average, women continue to earn less than men in virtually every occupation for which there is sufficient data to calculate an earnings ratio.⁵ In 2019, women working full-time typically made 82 cents for every dollar made by men, a wage gap of nearly 20

² BUREAU OF LABOR STATISTICS, TABLE 3: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE, CURRENT POPULATION SURVEY (2021), <https://www.bls.gov/cps/cpsaat03.htm>.

³ SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM 1 (2019), <https://ampr.gs/3q5EgVf>; PRUDENTIAL, THE CUT: EXPLORING FINANCIAL WELLNESS WITHIN DIVERSE POPULATIONS 1, 12–13 (2018), <https://bit.ly/2JJsLBp>.

⁴ NATIONAL CTR. FOR EDU. STATISTICS, 2019 DIGEST OF EDUCATION STATISTICS, TABLE 318.30: BACHELOR'S, MASTER'S, AND DOCTOR'S DEGREES CONFERRED BY POSTSECONDARY INSTITUTIONS, BY SEX OF STUDENT AND DISCIPLINE DIVISION: 2017–18, (2019), https://nces.ed.gov/programs/digest/2019menu_tables.asp.

⁵ See ARIANE HEGEWISCH AND EVE MEFFERD, INSTITUTE FOR WOMEN'S POLICY AND RESEARCH ("IWPR"), THE GENDER WAGE GAP BY OCCUPATION, RACE, AND ETHNICITY 2020 1, (2021), <https://bit.ly/3x221zL>.

percent.⁶ The wage gap is even starker for women of color. In 2020, Black women were paid just 63.6 percent for every dollar paid to white men, and Latina women were paid only 58.7 percent of the earnings of white men.⁷ In 2019, American Indian and Alaska Native women were paid just 59.7 percent of the earnings made by white men.⁸ The wage gap is also significant for some communities of Asian American and Pacific Islander women; for example, Nepalese, Burmese, Fijian, and Cambodian women are typically paid less than 60 percent of what white men are paid.⁹ The gender pay gap has not changed significantly in over a decade; at the current pace of change, men and women will not reach wage parity until 2059—and it will take until 2130 and 2224, respectively, for Black and

⁶ See NAT'L WOMEN'S L. CTR. ("NWLC"), THE WAGE GAP HAS ROBBED WOMEN OF THEIR ABILITY TO WEATHER COVID-19 1, <https://bit.ly/3gA4rQC>.

⁷ See HEGEWISCH & MEFFERD, *supra* note 5, at 6.

⁸ See IWPR, STATE-BY-STATE EARNINGS FOR AMERICAN INDIAN AND ALASKA NATIVE WOMEN: WAGE GAPS ACROSS THE STATES 1 (2020), <https://bit.ly/2UyKXDp>.

⁹ JASMINE TUCKER, NWLC, EQUAL PAY FOR ASIAN AMERICAN AND PACIFIC ISLANDER WOMEN 2 (2020), <https://bit.ly/3dR3TEa>.

Latina women's median annual earnings to reach parity with those of white men.¹⁰

The gender pay gap reflects the fact that women's work is systematically undervalued.¹¹ Women, and especially women of color, face both overt discrimination and unconscious biases in the workplace, including in hiring decisions and pay.¹² Even when controlling for factors like region, unionization status, education, occupation, industry, and work experience, 38% of the wage gap remains unexplained.¹³ Moreover, occupational differences between men and women often themselves reflect

¹⁰ See IWPR, *THE GENDER WAGE GAP: 2019, EARNINGS DIFFERENCES BY RACE AND ETHNICITY 2* (2020), <https://bit.ly/3vDTPVg>.

¹¹ Paula England, *The Gender Revolution: Uneven and Stalled*, 24 *GENDER & SOCIETY* 149 (2010).

¹² See, e.g., NWLC, *ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB 2* (2018), <https://bit.ly/363pZik>; Corrine A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 *PNAS* 16474 (2012), <https://bit.ly/3x3rb13>.

¹³ Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations* 8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21913, 2016), <https://bit.ly/3q5JUGV>.

gender biases.¹⁴ For example, occupational choices are driven by, among other things, gendered expectations that shape education, societal norms, and employer hiring practices.¹⁵ Another substantial long term adverse effect on pay is caused by the fact that women are also more likely to bear a disproportionate share of caregiving responsibilities and are more likely than men to reduce their hours or leave the workforce to care for children and other family members.¹⁶ Reliance on salary history in the hiring process perpetuates the wage gap; in a recent study, a significant percentage of employers who conduct pay equity audits found that relying on applicants' salary history is a key driver of gender wage gaps within their companies.¹⁷

¹⁴ JESSICA SCHIEDER AND ELISE GOULD, ECON. POLICY INST., "WOMEN'S WORK" AND THE GENDER PAY GAP 2 (2016), <https://bit.ly/3rD56F2>. Even within occupations, however, large gender wage gaps persist. *Id.*

¹⁵ *Id.* at 3.

¹⁶ NWLC, STATE PLAYBOOK FOR GENDER EQUITY: SET WORKING PARENTS AND THEIR CHILDREN UP FOR SUCCESS IN YOUR STATE (2019), <https://bit.ly/3rzd8P9>.

¹⁷ HARVARD BUS. REV. ANALYTIC SERVS., NAVIGATING THE GROWING PAY EQUITY MOVEMENT, WHAT EMPLOYERS NEED TO KNOW ABOUT WHAT TO DO (2019), <https://bit.ly/3hirXAD>.

The wage gap affects women as soon as they enter the workforce and increases over time.¹⁸ Over the course of a 40-year career, a woman in the United States today stands to lose over \$400,000 in income due to the wage gap.¹⁹ For Black and Native American women, that number jumps to over \$900,000, and for Latina women, over \$1.1 million, in comparison to white, non-Hispanic men.²⁰ The lifetime earnings gap is particularly high for women who have earned college or post-graduate degrees: such women stand to lose \$713,000 over a 40-year period compared to their male counterparts.²¹ A 2017 study found that, as a result of the pay gap, a woman would have nearly 40% less wealth by age 85 than a

¹⁸ See *Fighting for Fairness—Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomms. on C.R. & Hum. Serv. and Workforce Prot. of the H. Comm. on Educ. & Lab.*, 117th Cong. (Mar. 18, 2021) (statement of Fatima Goss Graves, President and CEO, NWLC).

¹⁹ JESSICA ARONS, CTR. FOR AM. PROGRESS ACTION FUND, LIFETIME LOSSES: THE CAREER WAGE GAP 1 (2008), <https://bit.ly/35Yo7Yn>; JASMINE TUCKER, NWLC, WOMEN AND THE LIFETIME WAGE GAP: HOW MANY WOMAN YEARS DOES IT TAKE TO EQUAL 40 MAN YEARS 1 (2019), <https://bit.ly/3w7LLMC>.

²⁰ TUCKER, *supra* note 19, at 1.

²¹ ARONS, *supra* note 19, at 4.

similarly-situated man.²² In order to close lifetime wage gaps, a white woman would have to work nearly 12 years longer than a white, non-Hispanic man retiring at age 60; Black women would have to work nearly 26 years longer; Native American women, nearly 30 years longer; and Latina women, more than 35 years longer.²³

The wage gap is one of the largest contributors to poverty rates in the United States. Studies estimate that achieving pay parity would cut the poverty rate for working women in half; for single mothers, the poverty rate would drop from 28.7% to 15.0%.²⁴ The gender wage gap also makes it much more difficult for women, and especially women of color,

²² *How can women best protect and grow their wealth?*, UBS (Oct. 23, 2017), <https://bit.ly/3w2s8Wl>.

²³ TUCKER, *supra* note 19, at 1.

²⁴ HEIDI HARTMANN ET AL., IWPR, HOW EQUAL PAY FOR WORKING WOMEN WOULD REDUCE POVERTY AND GROW THE AMERICAN ECONOMY 1 (2014), <https://bit.ly/3q9EL0d>.

to pay off student debt,²⁵ and to save for emergencies and retirement.²⁶ In addition to the many adverse economic effects described above, the gender pay gap also has negative mental health consequences.²⁷

B. Unequal Investment in Women's Sports Perpetuates Gender Discrimination in Sports

The gender pay gap is a persistent reality within sports, driven by and reflecting larger patterns of gender discrimination in athletics. From an early age, women and girls have fewer athletic opportunities and less

²⁵ AM. ASS'N OF UNIV. WOMEN, DEEPER IN DEBT, 2021 UPDATE (2021), <https://bit.ly/2SyNXyZ>. A recent study found that, on average, white men had paid off 44% of their student debt within 12 years of starting college, while white women paid off 28% and Hispanic women paid off 14% during the same time period, with black women's student loan debt *increasing* by 13% over these 12 years. MARK HUELSMAN, DEMOS, DEBT TO SOCIETY: THE CASE FOR BOLD, EQUITABLE STUDENT LOAN CANCELLATION AND REFORM (2019), <https://www.demos.org/research/debt-to-society>.

²⁶ CHRISTIAN E. WELLER ET AL., NAT'L INST. ON RETIREMENT SEC., STILL SHORTCHANGED: AN UPDATE ON WOMEN'S RETIREMENT PREPAREDNESS (2020), <https://www.nirsonline.org/reports/stillshortchanged/>.

²⁷ Jonathan Platt et al., *Unequal Depression for Equal Work? How the wage gap explains gendered disparities in mood disorders*, 149 SOC. SCI. MED. 1, 1–8 (Jan. 2016) (concluding that women earning less than equally qualified men were 2.4 times more likely to experience depression and four times more likely to have anxiety than women receiving equal pay).

access to funding than their male counterparts.²⁸ Boys have over 1.13 million more opportunities to play high school sports than girls do each year, and the gender gap in participation in high school sports has not narrowed much over the past 20 years.²⁹ High school girls today still have not achieved participation levels equal to those enjoyed by high school boys in 1971–72.³⁰ Access to athletic participation opportunities is significantly lower for girls of color, girls of lower socioeconomic status, and girls in rural and urban areas.³¹ These girls often enter sports later and withdraw earlier when compared to white girls, suburban girls and those of higher socioeconomic status.³²

²⁸ See, e.g., *Do You Know the Factors Influencing Girls' Participation in Sports?*, WOMEN'S SPORTS FOUND., <https://bit.ly/3ga7k9p>; NWLC, *THE BATTLE FOR GENDER EQUITY IN ATHLETICS IN ELEMENTARY AND SECONDARY SCHOOLS* (2011), <https://bit.ly/3fS22k8>.

²⁹ WOMEN'S SPORTS FOUND., *CHASING EQUITY: THE TRIUMPHS, CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS AND WOMEN* 14, 18 (2020), <https://bit.ly/3wEbCNs> (“CHASING EQUITY”).

³⁰ NAT'L FEDERATION OF STATE HIGH SCHOOL ASSN'S, *2018–19 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY*, <https://bit.ly/3dUs9oZ>.

³¹ See *CHASING EQUITY*, *supra* note 29, at 16.

³² See *id.*

At the college level, women athletes have substantially fewer participation opportunities than men in National Collegiate Athletic Association (“NCAA”) sports and receive at least \$240 million less in scholarship funding.³³ These inequities are reflected in the compensation for collegiate coaches as well: the median head coaches’ salaries for NCAA Division I men’s teams are over \$2 million more than for women’s teams.³⁴

At the professional level, so few viable opportunities exist in many sports that women are often compelled to pursue professional careers outside the United States.³⁵ Total prize money available to women’s teams, both domestically and abroad, is significantly less than that available to men’s teams—often by many tens of millions of dollars per sport.³⁶ Sponsorship opportunities are also heavily skewed towards male

³³ *See id.* at 14, 18.

³⁴ *See Pay Inequity in Athletics*, WOMEN’S SPORTS FOUND. (July 20, 2015), <https://bit.ly/3z4FIRh> (“*Pay Inequity in Athletics*”). *See also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS (Oct. 29, 1997), <https://bit.ly/3ijuw7Y> (“EEOC Enforcement Guidance”).

³⁵ CHASING EQUITY, *supra* note 29, at 14.

³⁶ *See Pay Inequity in Athletics*, *supra* note 34.

athletes. In 2015, Ernst & Young reported that “less than half of 1 percent of sports sponsorship is invested in women’s sport.”³⁷ Similarly, men’s sports receive overwhelmingly more media coverage than women’s sports do: in 2019, coverage of women’s sports on TV news and on ESPN’s flagship show *SportsCenter* received 5.1% and 5.7% of the airtime, respectively.³⁸

Despite the numerous obstacles that U.S. women athletes face, some of the most iconic and celebrated figures in the world are U.S. women at the top of their sports. This is especially true of women athletes who represent the United States in international competition, like the USWNT. Players on the USWNT have been frequently heralded as role models in this country.³⁹ Yet, just like women in nearly every industry

³⁷ See Janet S. Fink, *Sponsorship for Women’s Sports Presents Untapped Opportunity*, SPORTS BUS. J. (2015), <https://bit.ly/3gEUJv1>.

³⁸ Cheryl Cooky et al., *One and Done: The Long Eclipse of Women’s Televised Sports, 1989–2019*, 9 COMM. & SPORT 3 (2021), <https://bit.ly/3jTSTcU>.

³⁹ Louisa Thomas, *World Cup 2019: The U.S. Women’s Team Wins and Leaves the Stage as a New Kind of American Role Model*, THE NEW YORKER (July 7, 2019), <https://bit.ly/3w7P32q>.

and profession in the United States, players on the USWNT to continue receive lower pay than their male counterparts.

II. The District Court's Decision Is Contrary to the EPA

The district court's opinion contravenes the legal standards governing the EPA by ignoring the discriminatory rates of pay offered to the USWNT as compared to the USMNT, 1-ER-21, and treating the collective bargaining agreement as a defense to an EPA claim, 1-ER-22–24.

The EPA is “broadly remedial.” *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974). Congress enacted the EPA to combat pervasive “wage differentials based on sex,” Pub. L. No. 88-38, 77 Stat. 56 (1963), because “payment of wages on a basis other than that of the job performed ... is contrary to every concept of equality and justice in which we so strongly believe.” 109 Cong. Rec. 9195 (1963) (statement of Rep. Adam Powell). In passing the EPA, Congress sought to eliminate the “false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work.” 109 Cong. Rec. 9212 (1963) (statement of Rep. Harold Donohue).

Indeed, the cornerstone of the EPA is the concept of equal pay for equal work. See *Equal Pay Act of 1963: Report of the S. Comm. on Labor*,

88th Cong. (1963) (“The objective of [the EPA] is to insure that those who perform tasks which are determined to be equal shall be paid equal wages.”). The core protection of equal pay for equal work is so integral to the EPA that “no intent to discriminate need be shown” to establish a violation of the statute. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (internal quotation marks omitted); *see also Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir. 2020) (same).

The district court made two critical errors in its analysis: first, it overlooked the disparate rates of pay offered to the USWNT and the USMNT for participation in international competitions, 1-ER-21–25, and second, it impermissibly determined that Plaintiffs could not bring an EPA claim because they agreed to the terms of their employment contracts through collective bargaining. 1-ER-22–25. Each of these mistakes provides an independent ground for reversal—especially where, as here, the district court granted summary judgment in favor of Defendant notwithstanding competing expert reports. *See* 6-ER-1081; 3-ER-413.

A. The EPA Requires an Equal Rate of Pay

The EPA’s requirement of equal pay refers to the “rate” of pay and that is the focus of the claim in this case. 29 U.S.C. § 206(d)(1)

(prohibiting an employer from “pay[ing] wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work”); *see also Equal Pay Act of 1963: Hearing Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare*, S. 882 and S. 910, 88th Cong. (1962) (Statement of W. Willard Wirtz, Secretary of Labor) (referencing the “discriminatory wage rate” that the EPA was meant to combat); *see id.* at 18 (Statement of Esther Peterson, Assistant Secretary of Labor) (“[T]he wage rate discrimination [is what] this bill is designed to remedy.”)). “Comparison of pay rates entails measuring the amount of pay against a common denominator, typically a given time period or quantity or quality of output.” *Bence v. Detroit Health Corporation*, 712 F.2d 1024, 1027 (6th Cir. 1983).

To understand the errors in the district court’s reasoning, it is important to understand the underlying pay structures at issue in this case. Players on the USWNT and USMNT are paid for (1) playing games in international competition (appearance fees) and (2) winning those games (performance bonuses). *See* 4-ER-731; 4-ER-807–809. With respect to performance bonuses, each team is paid a specific amount for qualifying for, advancing in, and winning international competitions. *Id.* The bonus

amounts paid per game also vary based on the type of competition and increase by the stage of the competition: for both teams, the amounts offered for winning a tournament are much higher than the amounts offered for playing in a qualifying match, for example. *Id.*

Although players on the USWNT and USMNT are both paid appearance fees and bonuses, on the face of the underlying agreements, every appearance fee, and all but one performance bonus, is lower for the USWNT than for the USMNT.⁴⁰ *See* 3-ER-481–501, Plaintiffs’ Br. at 37. These disparities are borne out elsewhere in the record: for example, the USWNT was paid \$1.725 million for *winning* the 2015 World Cup, 6-ER-1203, while the USMNT would have received \$2.5 million for merely *qualifying* for the 2018 World Cup (which it failed to do), 4-ER-807. The differing rates of payment evident on the face of the underlying contracts and in other record evidence were, at a minimum, sufficient to create a question of fact that precluded summary judgment on the EPA claim.

⁴⁰ Some players on the USWNT receive an appearance fee for each game, while others receive a salary that constitutes payment for appearances in games. Players on the USWNT receive lower appearance fees on a per-game basis than women on the USMNT, whether those women receive appearance fees or a salary. *See* Plaintiffs’ Br. at 11–12.

Rather than focusing on the rates of payment, the district court mistakenly relied on two nondeterminative factors to resolve the EPA claim in Defendant's favor as a matter of law: the total compensation paid to the USWNT and USMNT on a per-game average basis, 1-ER-24–25, and a counterfactual analysis of whether the USMNT would have received more compensation under the USWNT's collective bargaining agreement. 1-ER-22–23. Neither point is relevant, much less dispositive, to Plaintiffs' EPA claims.

First, the district court erred in failing to account for the USWNT's superior performance in determining the rate of pay. Instead, the court focused simply on the total compensation paid to each team and averaged on a per-game-played basis. *See* 1-ER-20–22; Plaintiffs' Br. at 17. However, players on the USWNT received higher overall compensation because they *were more successful*. To compensate for the drastically lower rates of pay available for playing and winning games in international competition, the USWNT had to win substantially more games and in later stages of more important tournaments just to earn about the same as the far less successful USMNT. The USWNT's victories in later stages of tournaments drove up their per-game average but the district court's

focus on that number overlooked that members of the women's team had to perform substantially better to be paid about the same as their male counterparts.⁴¹

Considered in this crucial context, the district court's review of per-game average compensation in the abstract is wholly at odds with the text and purpose of the EPA. The district court disregarded the fact that Plaintiffs' total compensation was driven by their performance, and instead criticized Plaintiffs for failing to show that their higher total compensation "was due solely, or in material part, to the WNT working more than the MNT." 1-ER-22. A situation such as the one presented in this case where an employer pays its women employees a lower rate than male employees but relies on the fact that the women make up for the disparity by being more successful is exactly the result that the EPA does not countenance. An employer cannot sidestep an EPA violation by

⁴¹ The difference in per-game averages received by each respective team was negligible: even by the district court's calculations (based on Defendant's expert report), the USWNT played 111 games and were paid an average of \$220,747 per game, while the USMNT played 87 games and were paid an average of \$212,639 per game—a difference of \$8,108 across the entire roster. 1-ER-22.

paying “equal total remuneration” but a lower “commission differential” to women employees because an employer cannot require women to be more successful at their job to make up the difference in their rate of pay. *Bence*, 712 F.2d at 1031. The fact that the USWNT happens to be far more successful and thus may ultimately earn total compensation on par with the men’s team is not a defense to Plaintiffs’ EPA claim.

Second, in addition to citing to the collective bargaining agreement more broadly as a purported defense, as discussed below, the district court also erroneously accepted USSF’s argument that it should consider what players on the USMNT would have received if they were compensated according to the terms of the USWNT’s collective bargaining agreement. 1-ER-22–23. As an initial matter, the question of whether some male players might have made more under the terms of the USWNT’s agreement, and if so, how much, is a disputed issue of fact that cannot be resolved on summary judgment.⁴² In any event, the question in this case

⁴² As explained in Plaintiffs’ Br. at 51, n. 21, Defendant’s analysis had numerous flaws, including that its expert compared all male players only to salaried players under the USWNT contract and was limited to the last three years of the class period.

is whether Plaintiffs were paid less money than they would have been paid if they were members of the USMNT, and the answer is indisputably yes. Plaintiffs established in their expert report that if they had been compensated under the terms of the men's agreement, they would have made *tens of millions* of dollars more in compensation, 6-ER-1113.⁴³ This differential underscores the EPA violation here: the lower rate of pay “effectively lock[s] female employees, and only female employees, into an inferior position regardless of their effort or productivity.” *Bence*, 712 F.2d at 1031.

B. Collective Bargaining Agreements Cannot Serve as a Defense to an EPA Claim

Reversal is independently warranted because the district court erroneously treated the terms of the USWNT's collective bargaining

⁴³ It is likewise irrelevant that certain individual players on the USWNT are paid more than the highest-paid players on the USMNT. 4-ER-618 The fact that “a few women are among the higher paid groups d[oes] not negate an EPA claim,” and indeed, “[t]o permit [an employer] to escape that [equal pay] obligation by ... [paying some women] at a higher rate of pay ... would frustrate, not serve, Congress' ends.” *Beck-Wilson v. Principi*, 441 F.3d 353, 362 (6th Cir. 2006) (quoting *Corning Glass*, 417 U.S. at 2018)).

agreement as dispositive of Plaintiffs' EPA claims. The EPA's implementing regulations make clear that:

the inclusion in a collective bargaining agreement of unequal rates of pay does not constitute a defense available to ... an employer Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect.

29 C.F.R. § 1620.23. The Supreme Court, in the leading decision interpreting the EPA, has rejected the notion that a pay disparity built into a collective bargaining agreement has any bearing on an EPA claim. *See Corning Glass Works*, 417 U.S. at 205. In *Corning Glass*, the Court observed that a pay differential in a collective bargaining agreement “arose simply because men would not work at the low rates paid women ... and it reflected a job market in which Corning could pay women less than men.” *Id.* The Court firmly rejected the proposition that an employer could pay women less based on market forces or the employees' consent, including through collective bargaining agreements. *Id.* “That the company took advantage of such a situation may be understandable as a matter of economics,” the Court opined, “but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.” *Id.*

Subsequent case law has repeatedly reiterated this instruction. *See, e.g., Rizo*, 950 F.3d at 1222 (“*Corning Glass* rejected what was later called the ‘market force theory,’ holding that the EPA did not permit Corning Glass to pay women less simply because they were willing to work for less.”); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988) (same); *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974) (same); *Johnson v. Canyon County, Idaho*, No. 19-cv-364, 2020 WL 7872511, at *2 (D. Idaho Dec. 31, 2020) (same); *Brennan v. Bd. Of Ed., Jersey City, N.J.*, 374 F. Supp. 817, 832 (D.N.J. 1974) (“It is well established that: ‘no agreement between a company and a union, even if arrived at as a result of collective bargaining negotiations[,] can be used as a defense by ... (an employer) to the statutory requirements [of the EPA].’” (quoting *Hodgson v. Sagner*, 326 F. Supp. 371, 375 (D. Md. 1971), *aff’d sub nom. Hodgson v. Baltimore Regional Joint Bd., Amalgamated Clothing Workers of Am.*, 462 F.2d 180 (4th Cir. 1972))). The district court failed to acknowledge, much less grapple with, the governing regulation and case law on this point.

The basic premise that collective bargaining agreements cannot serve as a defense to violations of otherwise applicable law is also a

fundamental tenet of labor law. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) (“Clearly, § 301 [of the Labor Management Relations Act] does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.”); *Kaiser Steel v. Mullins*, 455 U.S. 72, 76–77 (1982) (refusing to enforce a collective bargaining agreement provision that was illegal under federal labor and antitrust laws). The same holds true in the context of, among other things, racial discrimination, *see Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 926 (9th Cir. 1982) (“An employer-union agreement permitting the employer to discriminate is not immune to race discrimination claims.”), and Title VII discrimination claims generally, *see Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971) (“The rights assured by Title VII are not rights which can be bargained away.”); *see also Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1016 (2d Cir. 1980) (“[U]nion pressure on an employer does not relieve the latter of its obligation to respect an applicant’s Title VII rights.”).

In the context of the EPA, the use of private contractual agreements is especially suspect because women and men negotiate (both individually and collectively) under conditions and circumstances that

themselves are shaped by gender inequity. In 1962, Secretary of Labor Arthur J. Goldberg, speaking in support of the Equal Pay Act, stated:

Certain unions have been very effective in bargaining the practice [of unequal pay] away. But practices deeply rooted in prejudice yield slowly to change through such a method The bargaining method, as labor itself has asserted in advocating a Federal law, is not adequate to eliminate unequal pay from the industrial scene.

Equal Pay Act of 1962: Hearing Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare, S. 2494 and H.R. 11677, 87th Cong. 2 (1962) (statement of Arthur J. Goldberg, Secretary of Labor). More than 50 years later, recent studies show that, although collective bargaining has the potential to increase wages for women, there is also an “imbalance in how much men and women in comparable jobs benefit from bargaining.”⁴⁴ Indeed, “[r]elying on negotiation to set salaries tends to work to the disadvantage of female employees” as “employers react more

⁴⁴ OECD, CAN COLLECTIVE BARGAINING HELP CLOSE THE GENDER WAGE GAP FOR WOMEN IN NON-STANDARD JOBS? 7 (2020), <https://bit.ly/3wAFsCi>.

favorably to men who negotiate salaries, while women who ask for higher pay” are often penalized.⁴⁵

The facts of this case demonstrate the continuing reality of bargaining inequities in the context of elite sports. An elite woman soccer player seeking to represent the U.S. in international play has no option but to work for USSF.⁴⁶ But USSF did not offer the USWNT the same deal as that offered to the USMNT, and thus players on the USWNT never had the opportunity to accept or reject that deal. *See* 4-ER-588–89; Plaintiffs’ Br. at 22. The court’s emphasis on the value of “insurance” provided by the USWNT’s collective bargaining agreement (1-ER-23) was also misplaced; the USWNT’s agreement sought to protect a baseline level of pay to compensate for the drastically unequal rates of pay for international competition. Had USSF offered the USWNT the same pay rates as it offered the USMNT—such as a \$9.375 million payout for winning the

⁴⁵ NWLC, *THE PAYCHECK FAIRNESS ACT: CLOSING THE “FACTOR OTHER THAN SEX” LOOPHOLE TO STRENGTHEN PROTECTIONS AGAINST PAY DISCRIMINATION* (2019), <https://bit.ly/3x0IWxq>.

⁴⁶ As a national governing body, USSF has sole control over the team representing the United States in international competition in soccer. *See* 36 U.S.C. § 220523.

World Cup—the USWNT may not have needed a provision to allow for salaries. 4-ER-808. But the USWNT was never offered the opportunity to make that choice.

For these reasons, the EPA and its implementing regulations preclude courts from interpreting collective bargaining agreements as consent to unequal pay for equal work and the district court erred in doing so here.

C. Defendant’s Remaining “Market-Based” Arguments for Unequal Pay Are Legally and Factually Flawed

In the proceedings below, USSF attempted to avoid accountability by blaming the wage disparity here on third parties such as FIFA. 4-ER-569–70. The fact that FIFA might discriminate on the basis of sex and gender plainly does not shield USSF from its obligation to comply with federal labor laws.⁴⁷ “[H]istorical wage discrimination based on sex” or wage discrimination by other market participants is no defense to an EPA claim. *Rizo*, 950 F.3d at 1229. Moreover, national governing bodies

⁴⁷ USSF’s focus on FIFA is a red herring for several other reasons as well: FIFA does not provide prize money for many of the games for which USSF refuses to provide equal pay, and USSF determined bonus rates before FIFA decided how much it would award in prize money for the World Cup. See Plaintiffs’ Br. at 43–44, n.15.

like USSF are precluded by federal law from discriminating on the basis of sex, *see* 36 U.S.C. § 220522(8), in addition to being required to comply with laws like the EPA and Title VII.

Nor can USSF rely on other “market forces” to “justify unequal pay for comparable work.” *Rizo*, 950 F.3d at 1226–27. “[T]he argument that supply and demand dictates that women qua women may be paid less is exactly the kind of evil that the [EPA] was designed to eliminate.” *Glenn*, 841 F.2d at 1570; *see also Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) (“[I]t is important to ensure that employers do not rely on the prohibited ‘market force theory’ to justify lower wages for female employees simply because the market might bear such wages.”); EEOC Enforcement Guidance at II.A.3.b (“Sex discrimination in the marketplace which results in lower pay for jobs done by women will not support the marketplace value defense.”); 109 Cong. Rec. 8683 (1963) (statement of Rep. Adam Powell) (rejecting “[t]he payment of wages on a basis other than that of the job performed”); and 109 Cong. Rec. 8694 (1963) (statement of Rep. Edith Green) (“This [Act] is based on merit, on work that is performed, rather than on other factors.”)).

For similar reasons, USSF cannot point to revenue considerations in justifying unequal rates of pay. 4-ER-569. As an initial matter, it should be noted that, notwithstanding USSF's underinvestment in the USWNT, the women's team has generated more revenue in ticket sales than the USMNT since 2015, disproving the factual basis for USSF's revenue-based arguments. 2-ER-76. Moreover, as with most employers, USSF controls many of the factors that determine revenue, including marketing and pricing. USSF has unilateral control regarding the venues where events are held, ticket prices for those events, and merchandising contracts for both national teams, and has consistently chosen to underinvest in the women's team, hamstringing the team's ability to generate revenue. *See* 6-ER-1206. USSF also bundles sponsorship and marketing deals, such that the revenue generated by the USWNT within those categories is not precisely measurable. *See* 4-ER-526–27. USSF cannot limit the ways in which the women's team brings in revenue, and then point to lower revenues to justify unequal pay. In such contexts, courts may not rely on revenue considerations as a defense to equal pay claims.⁴⁸

⁴⁸ See EEOC Enforcement Guidance, *supra* note 34, at II.A.3.a.

III. The District Court's Decision Is Contrary to Title VII

The district court independently erred in dismissing Plaintiffs' wage discrimination claim under Title VII. 1-ER-25. The district court did not analyze the claim under Title VII's legal standards: rather, the court summarily dismissed Plaintiffs' claims in a single paragraph because it found no "triable issue that WNT players are paid less than MNT players." *Id.* But "Title VII does not require a plaintiff alleging pay discrimination to first establish an EPA violation—that is, that she received less pay for equal work. Rather, all Title VII requires a plaintiff to prove is that her employer 'discriminate[d] against [her] with respect to [her] compensation ... because of [her] ... sex.'" *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 110 (2d Cir. 2019) (quoting 42 U.S.C. § 2000e-2(a)(1)). For example, an employer could violate Title VII but not the EPA by hiring a woman for a unique position in a company but paying her less than it would if she were a man. *See id.* In such a circumstance, there may be no EPA claim because there is no man being paid more for equal work, but there could be a Title VII claim because the employer's discriminatory wage practice is sex-based.

As detailed above, *supra* at 16–23, Plaintiffs *have* made out a claim that they received unequal pay for equal work. But even had they not, the undisputed differential pay structure in and of itself—coupled with a showing that sex “was a motivating factor” for that practice, 42 U.S.C § 2000e-2(m), should have been sufficient to defeat Defendant’s motion for summary judgment. In passing Title VII, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” and to “eliminate[] such irrational impediments to job opportunities and enjoyment which have plagued women in the past.” *City of L.A., Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

Because the district court treated the Title VII wage discrimination claim so summarily, it failed to analyze the copious evidence of discriminatory intent and sex stereotyping—evidence that, coupled with the differences in the teams’ contracts, is direct evidence of discrimination and establishes Plaintiffs’ *prima facie* case of discrimination under Title VII. See Plaintiffs’ Br. at 15, 56–58. Uncontroverted facts in the present case, for example, establish that USSF President Cordeiro has admitted on

multiple occasions that USSF has had a longstanding practice of gender discrimination. 5-ER-896; 5-ER-903. And USSF President Sunil Gulati has pointed to harmful and damaging stereotypes about women as purported justification for the pay structure provided to the USWNT, testifying that USWNT players received lower compensation due to their physical capabilities. 4-ER-534–35. This is exactly the type of discrimination that Title VII was enacted to combat. *See Sprogis*, 444 F.2d at 1198 (“Discrimination is not to be tolerated under the guise of physical properties possessed by one sex.”).

Nor is it relevant, as USSF contends, that FIFA treats men’s international soccer tournaments and women’s international soccer tournaments differently. 4-ER-569–70. “[A] defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger” Title VII. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020). Put another way, a Title VII plaintiff must show that sex “was *a* motivating factor for any employment practice,” but need not show that it was the *only* motivating factor. 42 U.S.C. § 2000e-2(m) (emphasis added). Plaintiffs have introduced numerous facts showing

discrimination on the basis of sex, including the use of sex-based stereotypes that are impermissible under Title VII. *See, e.g.*, 4-ER-534–35; 4-ER-588; 5-ER-896; 5-ER-903; 5-ER-1036. The district court was wrong to disregard these facts and to treat the outcome of the EPA claim as dispositive of the Title VII claim. 1-ER-25.

CONCLUSION

For these reasons and those argued by Plaintiffs, this Court should reverse the district court's decision, and allow Plaintiffs' claims for equal pay to proceed.

Dated: New York, NY
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned counsel certifies that this Brief: (i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger; and (ii) complies with the length requirement of Federal Rule of Appellate Procedure Rules 5(c)(1) and 29(a)(5) because it is 6,996 words (excluding cover page, corporate disclosure statement, table of contents, table of authorities, appendix, exhibit, certificates of counsel, signature block, and proof of service), equivalent to one-half the maximum length authorized for the Plaintiffs-Appellants' brief.

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CERTIFICATE OF SERVICE

I certify that on July 30, 2021, I electronically filed this Brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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