No. 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
No. 19-cv-1717 (Hon. R. Gary Klausner)

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INTRODUCTION

The U.S. Women's National Team is the best women's soccer team in the world and one of the best sports teams in history. The team has established the United States as a soccer powerhouse and has won the hearts of millions of fans around the world. The team also has brought international acclaim and millions and millions of dollars to the U.S. Soccer Federation, the organization that employs the men's and women's national teams.

In the Federation's words, the members of the women's team are the "best athletes in the world." 5-ER-1055. Yet the Federation consistently has paid them much less than the members of the men's team, even though they are doing the same job – representing the United States in international soccer games. The pay difference is huge: If the Federation had paid the women at the same rate as the men, the women would have made an additional $64 million over the five-year period at issue in this case.

The Federation's pay discrimination has been widely recognized. Sponsors of the national team and Members of Congress have expressed concern about the significant pay gap between the women's and men's teams. The men's team, for its part, has called out the Federation's discrimination and has urged the Federation to pay the women equally. The Federation itself has acknowledged the inequality; it just told the women they do not deserve equal pay.

After years of unequal pay, the members of the women's team sued the Federation. They brought claims under the Equal Pay Act and Title VII. They explained that the players on the women's and men's teams receive essentially two types of pay – appearance fees for playing in games, and performance bonuses for winning – and the numbers for both consistently are lower for the women. The women pointed out that, in order to make the same amount as the men over a five-year period, they had to be the best in the world and obtain the highest performance bonuses available, while the men never ranked above 22nd in the world. And the women showed that there is no good explanation for the pay disparity. The women are more successful than the men, they are more popular than the men, and they bring in more revenues than the men.

The district court granted summary judgment to the Federation, holding that the women's and men's pay was equal. The court reached that surprising result by looking at total pay, without accounting for the women's superior performance. In effect, the court held that pay is equal if a woman can obtain the same amount of money as a man by working more and performing better. That is not the law. The court also treated the women's collective-bargaining agreements as somehow waiving their equal-pay rights (which is flatly wrong), and discounted the women's direct evidence of discrimination (which the court is not allowed to do on summary judgment).

The district court concluded that no reasonable jury could find that the women were paid unequally. That is legally wrong, and it defies reality. This Court should reverse and remand the case for trial.

JURISDICTIONAL STATEMENT

The USWNT players brought claims under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on April 13, 2021. 1-ER-4.

This Court has jurisdiction under 28 U.S.C. § 1291. The players filed their notice of appeal on April 14, 2021. 6-ER-1217. The notice is timely because it was filed within thirty days of the judgment. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

ISSUE PRESENTED

Whether the district court erred in granting summary judgment to the Federation on the USWNT players' equal-pay claims under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., on the ground that the USWNT players received equal pay as a matter of law.

STATUTORY AND REGULATORY AUTHORITIES

The relevant statutory and regulatory authorities are set out in the addendum to this brief. *See* Add., *infra*, at 1a-4a.

STATEMENT OF THE CASE

A. Factual Background

1. The USWNT is the most dominant team in international soccer history

Plaintiffs are current and former members of the U.S. Women's National Team (USWNT). 6-ER-1194–97. The players on the team are professional athletes who represent the United States in international women's soccer games. 6-ER-1193.

The USWNT is the most successful team in international soccer history, and "one of the most dominant squads in the history of sport, men or women." 5-ER-1057. Since the team's inception in 1985, it has never been ranked lower than 2nd in the world by FIFA, the international governing body for soccer. 6-ER-1199; FIFA, *USA Ranking*, https://fifa.fans/3eIONRu (last accessed July 22, 2021). The USWNT has won the World Cup (the global competition held every four years) a record four times and has won four Olympic gold medals. 1-ER-7. In recognition of the team's success, the U.S. Olympic Committee named the USWNT its "team of the year" four times (another record). 6-ER-1199; U.S. Olympic Committee, *Team USA Awards – Past Winners*, https://go.teamusa.org/3xlFDkU (last accessed July 22, 2021).

From 2015 to 2019, the time period at issue in this case, the USWNT attained unprecedented success. The team was ranked 1st in the world that

entire time, 6-ER-1199, and it won both the 2015 and 2019 World Cups, 5-ER-906–08. During this period, the team played 111 games; it won 92 of them (83%), drew (tied) 12 (11%), and lost only 7 (6%). 2-ER-98.

The U.S. Men's National Team (USMNT) was much less successful during the same period. It was ranked between 22nd and 32nd in the world and did not qualify for the 2018 World Cup. 5-ER-978; FIFA, *USA Ranking*, *supra*. The men's team played fewer games (87); it won 46 of them (53%), drew 16 (18%), and lost 25 (29%). 2-ER-97. Thus, the women's team played more games, and had much greater success, than the men's team.

Driven by the immense popularity of the women's team, interest in soccer in the United States has reached a historic high. *See, e.g.*, 7-ER-1277; Caitlin Murray, *The Inside Story of How the USWNT Became the Most Dominant Force in Women's Football*, Goal (Apr. 5, 2019), https://bit.ly/35qkb28. As the Federation recognizes, the USWNT's success has "inspired an entire country." 5-ER-1055. The 2015 World Cup final, in which the USWNT beat Japan, was the most watched soccer game in U.S. television history; the 2019 final, in which the USWNT beat the Netherlands, was second. 6-ER-1199; Abigail Johnson Hess, *US Viewership of the 2019 Women's World Cup Final Was 22% Higher Than the 2018 Men's Final*, CNBC (Jul. 10, 2019), https://cnb.cx/3gCO8Bk.

2. The Federation is the common employer of the players on the USWNT and USMNT

The Federation is the "national governing body" for soccer in the United States. 3-ER-382; *see* 36 U.S.C. § 220523(a). It is tasked with developing the sport of soccer in the United States. 36 U.S.C. § 220523(a)(2). In doing that, it is required to provide "equal opportunity" and to not "discriminate on the basis of . . . sex." *Id.* § 220522(8); *see* 6-ER-1193 (Federation's mission statement). The Federation has the exclusive authority to field teams to represent the United States in international soccer competitions. 36 U.S.C. § 220523(a)(7); *see* 3-ER-383.

The Federation organizes both the USWNT and the USMNT. 3-ER-382. The Federation hires coaches and trainers; organizes training camps; and provides transportation, accommodations, and meals for games. 3-ER-396. It is undisputed that the Federation is the employer of the players on the USWNT and the USMNT. 6-ER-1159.[1] The Federation pays the members of each team according to the team's collective-bargaining agreement, which is negotiated by each team's union. 3-ER-399.

[1] In addition to playing for the national teams, USWNT and USMNT players play for club teams in the United States and abroad, such as Major League Soccer (the men's top-tier professional league in the United States) and the National Women's Soccer League (NWSL) (the women's top-tier professional league in the United States). 3-ER-396–97. Only the players' participation on the national teams is at issue in this case. *See* 6-ER-1193.

Players on the USWNT and USMNT are paid primarily for two things – playing and winning. That is, the Federation pays the players appearance fees (for playing in games) and performance bonuses (for winning or drawing games, and for qualifying for and advancing in tournaments). *See, e.g.*, 4-ER-763.[2] The players are not paid solely for coming to work; they are paid more for each success they achieve.

The USWNT and USMNT play in games known as "friendlies" and in tournaments. 1-ER-6–7. "Friendlies" are games played against other national teams that are not part of tournaments. 6-ER-1203. Tournaments include the men's and women's World Cups and various other tournaments for women (such as the SheBelieves Cup) and men (such as the Gold Cup). 1-ER-6–7.[3]

The Federation receives all revenues associated with the USWNT and USMNT, then it pays the players. The revenues come from a variety of sources, including ticket sales for games put on by the Federation (which can include both friendlies and tournament games); tournament prize money; sponsorships and merchandising; and broadcasting rights. 3-ER-

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[2] More precisely, players receive appearance fees for making the roster for a game or tournament, rather than actually playing in a game; not all players on the roster for a game play in that game. 4-ER-731.

[3] The USWNT also plays in the Olympics. The USMNT does not; Olympic men's soccer is (with limited exceptions) restricted to players under age 23. 3-ER-386.

387–88. For the first two categories – ticket sales and prize money – the USWNT brought in greater revenues than the USMNT during the time period at issue; the revenues were $94 million for the women and $72 million for the men. 2-ER-76; *see* 5-ER-997. For the third and fourth categories – sponsorships and broadcasting rights – the Federation earned about $50 million each year for both teams combined. 5-ER-1016. (The Federation jointly markets the rights for the women's and men's teams and does not break down its revenues from those sources between the teams. 4-ER-526–27.)

The Federation's revenues grew substantially in the last decade, netting the Federation significant cash reserves. In 2011, the Federation's revenues were $28 million per year. 5-ER-1069. By 2019, that number had grown to $135 million per year, 5-ER-1018, and the Federation had a cash reserve of $139 million, 5-ER-1009. Much of that growth was due to the USWNT's success – the Federation's sponsors wanted to invest in the women's team specifically because it is so popular with consumers. *See* 7-ER-1277.

3. The Federation always has treated the USWNT players worse than the USMNT players

Although the Federation's mission is to grow the sport of soccer in the United States, the Federation has underinvested in the USWNT from the

very beginning. The Federation first refused to buy the team uniforms, instead requiring the players to wear hand-me-downs from the men's team. *See* Michael Lewis, *Hand-Me-Downs, Snickers and Warm Pepsi: The Early Years of U.S. Women's Soccer*, Guardian (Jun. 6, 2015), https://bit.ly/3vzkUsB. Then the Federation provided the women's team with less training and fewer doctors and physical therapists when the team traveled to games. 2-ER-130–31; 6-ER-1204. The Federation also provided the women's team with worse travel arrangements, including lower quality accommodations and less comfortable flights. 2-ER-121–27. And the Federation scheduled a higher proportion of the women's games on artificial turf, which carries a higher risk of injury than grass. 2-ER-117–19.

The Federation was slow to promote the women's games and to seek merchandising opportunities for the team. For example, it would announce games just a few days before kickoff, too late to sell out the stadiums. 6-ER-1205–06; Julie Kliegman, *Nothing and Everything Has Changed for the USWNT*, Ringer (Jun. 10, 2019), https://bit.ly/3x3PRGN. The Federation also would schedule the women's games in smaller stadiums and set lower ticket prices than for the men's games. 6-ER-1206. And the Federation refused (and still refuses) to allow companies to enter sponsorship deals solely with the USWNT, even though some sponsors want to do that because they view the USWNT as the more marketable team. 7-ER-1268; 7-ER-1277. Despite

those obstacles, during the time period at issue, the USWNT more than made up the difference in revenues that used to separate the women's and men's teams. *See* 4-ER-614.

4. The Federation has not paid the USWNT players and USMNT players equally

This lawsuit concerns the time period 2015 to 2019. Under the collective-bargaining agreements in effect during that time, the bulk of the players' pay came from appearance fees and performance bonuses. *See* 6-ER-1099–103.[4] For every appearance fee and performance bonus available to both teams except one, the Federation paid the women a lower amount than it paid the men. 3-ER-481–501.[5]

For example, for winning a friendly against a team ranked 10th in the world by FIFA, the Federation paid each male player a bonus of $12,625, while it paid each female player a bonus of $1,350 (before 2017) or $5,250 (after 2017). 4-ER-667; 4-ER-763; 4-ER-807. When the women *won* the 2015 World Cup, the Federation paid the team $1.725 million in bonuses;

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[4] From 2015-2017, the USWNT players were compensated under a 2013 agreement. *See* 4-ER-659. From 2017-2019, the USWNT players were compensated under a 2017 agreement. *See* 4-ER-708. During the entire period, the USMNT players were compensated under a 2011 agreement. *See* 4-ER-765.

[5] The one exception is the bonus for winning a friendly against a Tier 3 (lowest-FIFA-tiered) opponent. *See* 4-ER-763; 4-ER-807.

when the men *lost* in the second round of the 2014 World Cup, the Federation paid that team $5.375 million in bonuses. 6-ER-1203. No matter what type of game, every appearance fee and every bonus but one was lower for the women. 3-ER-481–501.

The women's and men's collective-bargaining agreements have some differences. Most notably, the women's agreements divide the players into two groups – contracted and non-contracted. For playing in games, contracted players receive an annual salary, while non-contracted players receive an appearance fee per game. 4-ER-721; 4-ER-731. Contracted players also receive benefits like healthcare, severance and injury pay, and maternity leave. 4-ER-733–34. Both contracted and non-contracted players receive the same performance bonuses. 4-ER-731. Under the men's agreement, all men receive per-game appearance fees (like the non-contracted women) and performance bonuses (like all of the women). *See* 4-ER-783.[6]

Even accounting for the differences, the value of the women's agreements is much lower than the value of the men's agreement. The women's expert demonstrated that fact by calculating how much more the women would have made if they had been compensated under the men's agreement.

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[6] The women's agreements also contain terms relating to the NWSL. *See, e.g.*, 4-ER-732. Those terms are not at issue in this case; playing club soccer is a separate job from playing for the national team, and not all USWNT players play in the NWSL. *See* 4-ER-722; 5-ER-959.

6-ER-1084. The four class representatives would have earned, on average, an additional $2.5 million each. 2-ER-99. If all of the women in the classes had been paid under the men's agreement, they would have earned an additional $64 million. 6-ER-1113.

The women asked the Federation to pay them the same as the men, but the Federation refused. During collective bargaining for the USWNT's 2017 agreement, the Federation offered the women the same pay *structure* as the men – that is, it offered to eliminate contracted players and to pay all USWNT players per-game appearance fees and performance bonuses. 5-ER-834. But the Federation refused to offer the women the same *dollar amounts* as the men for appearance fees and performance bonuses. The Federation admitted that: The Federation agreed that it is an "undisputed fact" that the bonuses in its proposal "were lower than those found in the [men's] agreement," 3-ER-342, and its former president, Sunil Gulati, stated in an affidavit that he "never would have authorized offering or accepting" equal bonuses for the women, 4-ER-588. Given that equal pay was never on the table, the USWNT's union agreed to the best deal that could be negotiated. 5-ER-835.

5. The Federation's discrimination has been widely recognized, including by the Federation itself

Many of the Federation's sponsors, including Coca-Cola, Volkswagen, Anheuser-Busch, Visa, and Deloitte, have spoken out against the Federation's "unacceptable" treatment of the USWNT. 2-ER-62. One sponsor (Secret) took out a full-page advertisement in the New York Times "urg[ing] the [Federation]" to "end gender pay inequality once and for all, for all players." Kate Trafecante, *Secret Deodorant to Contribute $529,000 to US Women's Soccer to Address Pay Gap*, CNN (July 14, 2019), https://cnn.it/3A1hvpJ; *see* 2-ER-58; 2-ER-63.

Members of Congress also have recognized the Federation's discrimination. For example, in 2016, the Senate unanimously passed a resolution recognizing that the Federation "consistently paid" "the members of the United States Women's National Team" "less than similarly situated members of the United States Men's National Team" and urging the Federation to "immediately end gender pay inequity." 5-ER-1064–65.

The men's team also has called out the Federation's pay discrimination. The USMNT's union issued a public statement in which it criticized the Federation for "discriminat[ing] against the women in their wages." 5-ER-1070. It noted that, "[f]or more than 20 years, the Federation has resisted any concept of equal pay or basic economic fairness for the USWNT

players." 5-ER-1069. It then detailed how the women's collective-bargaining agreements are "worse financially" than the men's agreement. 5-ER-1070. According to the men, the women should have received "at least triple . . . in player compensation" compared to the men because of the women's immense success. 5-ER-1071. To the men, the solution "is simple": "Pay the women significantly more." 5-ER-1071.

Even the Federation has admitted that it does not pay the women equally. In 2017, the Federation's vice-president (and future president) Carlos Cordeiro confirmed that the "female players have not been treated equally." 5-ER-896. Cordeiro was campaigning for president at the time; part of his platform was a promise of equal pay. 5-ER-903. He said the Federation "clearly need[ed] to work toward equal pay for the national teams" and that "ensur[ing] equal pay" was "the right thing to do." 5-ER-903. But once elected, he reneged on that promise, committing only to seeking "more opportunit[ies]" for the women's team. 5-ER-866.

Further, during collective bargaining for the 2017 agreement, the USWNT asked that it be paid the same appearance fees and bonuses as the USMNT. 4-ER-524; 4-ER-639; 5-ER-847; 5-ER-857. The Federation expressly refused. 5-ER-857. The reason provided by its counsel was that "market realities are such that the women do not deserve equal pay." 5-ER-1036. At that point, the Federation was earning record revenues from the

women, and it was projecting that it would earn more from the women's games than the men's games within the year. *See* 4-ER-592.

The Federation has relied on sexist stereotypes to attempt to justify its discrimination. In his deposition as one of the Federation's corporate representatives, former president Gulati asserted that based on "genetics, biology, and so on," the "absolute quality" of the women's team was lower than the men's team. 4-ER-534–35. In its summary-judgment briefing, the Federation again relied on sexist stereotypes, asserting that it can pay the women less than the men because it is "indisputable science" that USWNT players are less skilled than the USMNT players, 2-ER-206; because the men face "tougher competition," 2-ER-208; and because the men carry greater "responsibility" than the women, 2-ER-208. (Other Federation witnesses expressly disagreed with those statements. 5-ER-887; 5-ER-931.) After significant blowback from sponsors and the public, then-president Cordeiro resigned. 2-ER-62. The Federation hired new lawyers, who disavowed those arguments, 2-ER-53, and expressly stipulated that "WNT players are equally as skilled as MNT players, including in key areas of soccer such as athleticism, 'tactical IQ,' tactical proficiency, and mental fortitude," 4-ER-647.

B. Procedural History

1. The USWNT players sued the Federation

In March 2016, the four class representatives (Alex Morgan, Megan Rapinoe, Becky Sauerbrunn, and Carli Lloyd) filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC). 4-ER-623–38. The EEOC investigated and issued each player a right-to-sue letter. 6-ER-1172–87.

In March 2019, all twenty-eight members of the USWNT filed this lawsuit. They alleged that the Federation violated the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by paying them less than the men because of their sex. 6-ER-1211–13. The players also alleged that the Federation violated Title VII by denying them equal working conditions, such as resources for training, support, and travel. 6-ER-1213. The parties settled the working-conditions claims, and they are not at issue in this appeal. 2-ER-40.

The district court conditionally certified the case as a collective action under the Equal Pay Act and certified the case as a class action under Title VII. 6-ER-1133.[7] Following discovery, the parties cross-moved for summary judgment. 6-ER-1239–40.

[7] The Title VII classes consist of (1) all current players, for injunctive relief; and (2) current and former players since June 11, 2015, for damages.

2. The district court granted summary judgment to the Federation

The district court granted summary judgment to the Federation on the USWNT players' equal-pay claims. 1-ER-19–25.

The district court acknowledged that the Equal Pay Act requires that women and men be paid an equal *rate* of pay, and that a woman cannot be required to work more than a man to achieve the same pay. 1-ER-20–21. But the court nonetheless used what it called a "total compensation approach," where it divided the total amount each team earned by the number of games played. 1-ER-20–22. The court calculated that, during the class period, the women's team was paid an average of $220,747 per game, and the men's team was paid an average of $212,639 per game. 1-ER-22. Because those numbers were approximately the same, the court determined that the women and the men received an equal rate of pay as a matter of law. 1-ER-22. The court did not account for performance – specifically, that the women had to be the best in the world to make about the same amount per game as the much less successful men. *See* 1-ER-20–22.

The district court did not independently analyze the women's Title VII pay-discrimination claim. Instead, it concluded that because it found no

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6-ER-1118. The Equal Pay Act collective action consists of all USWNT players since March 8, 2016. 6-ER-1133.

"triable issue that WNT players are paid less than MNT players" under the Equal Pay Act, the Title VII claim failed as well. 1-ER-25.

The district court then downplayed or dismissed all of the women's evidence of unequal pay. 1-ER-22–25. First, the court refused to consider the differences in pay in the teams' collective-bargaining agreements. 1-ER-22–24. It took the view that the agreements could not be compared, because some women received salaries and "other benefits" that the "MNT players do not receive." 1-ER-22.

Next, the court dismissed the women's expert evidence about the comparative value of the teams' agreements. 1-ER-22–24. The women's expert valued all of the compensation and benefits in the teams' agreements, and found that the women would have made $64 million more if they had been compensated under the men's agreement. 6-ER-1113. The Federation provided its own expert to analyze the comparative value of the teams' agreements. *See* 3-ER-438. Rather than recognizing that the dueling experts raised a fact issue, the court simply disregarded the women's expert evidence. 1-ER-22–23.

The district court also took the view that the women could not argue that their pay was unequal because their union agreed to it in collective bargaining. 1-ER-23–24. The court stated that "the MNT and WNT bargained for different agreements which reflect different preferences" and "the WNT explicitly rejected the terms they now seek to retroactively impose on

themselves." 1-ER-23. Notably, the district court did not state that the Federation ever offered the women the same terms as the men; it stated only that the Federation offered the women the same pay-to-play "structure" as the men. 1-ER-23.

Finally, the district court dismissed statements from Federation representatives admitting that the Federation has not paid the women equally. 1-ER-24. Those statements include Cordeiro's recognition that "our female players have not been treated equally" and the Federation's counsel's statement that "the women do not deserve equal pay." 1-ER-24. The court credited Cordeiro's after-the-fact explanation that his comment about "equal pay" was only about how the women should have "more opportunity." 1-ER-24. And the court dismissed the statement by the Federation's counsel on the ground that he "disputed" making the statement. 1-ER-25.

SUMMARY OF THE ARGUMENT

The USWNT players are some of the most successful athletes in the world. But their employer – the Federation – consistently has refused to pay them the same as the players on the USMNT. No matter what team the women beat, or what tournament they win, or what accolades they receive, the Federation treats them worse than the men. That unequal compensation is clear from the face of the teams' collective-bargaining agreements; it was documented by the women's expert economist; and Federation representatives directly acknowledged it. Based on all of that evidence, a

reasonable jury easily could find that the Federation has violated the Equal Pay Act and Title VII.

The district court granted summary judgment against the USWNT players, concluding that they were paid equally to the men. The court only reached that unexpected result by making two critical errors: First, the court used the wrong legal standards for assessing the women's claims, and second, the court weighed the evidence itself rather than letting the jury do its job.

The district court used the wrong legal standard under the Equal Pay Act. The Act requires an employer to pay women and men doing equal work an equal "rate" of pay. 29 U.S.C. § 206(d)(1). Equal rate means equal pay for equal work. Thus, an employer must pay a woman the same amount it pays a man for each measure of work. Here, the players' work is measured by both the number of games they play and the results they achieve. The Federation pays the players not just to play, but to win.

The district court did not account for performance in its Equal Pay Act analysis. It held that the compensation for the women and men was equal because the teams received about the same amount per game. That approach accounted for one measure of work (games played) but not the other (performance). That was a significant error, because the performance bonuses make up most of the players' pay, and the women were the best in the world, while the men were much less successful. The Equal Pay Act forbids

making a woman work more, or perform better, to achieve the same pay as a man doing the same job.

The district court also erred in treating its Equal Pay Act analysis as dispositive under Title VII. Title VII prohibits sex-based discrimination in employment, and it covers a broader range of discriminatory employment actions than the Equal Pay Act. The USWNT players provided direct evidence of discrimination – statements by Federation officials acknowledging that the women and the men were not paid equally and that the differential treatment was because of sex. Even if the district court were right about the Equal Pay Act, a jury could find a violation of Title VII based on the women's consistently lower appearance fees and bonuses, combined with the Federation's statements of discriminatory intent.

In addition to those legal errors, the district court incorrectly dismissed the USWNT players' evidence of unequal pay on summary judgment. First, the court should have considered the obvious disparities in the terms of the women's and men's collective-bargaining agreements. The court believed that the agreements could not be compared because some women earned fixed salaries and benefits. But those aspects of the agreements can be valued, as the parties' competing experts showed; the court itself valued them in its analysis. The court also believed that the women *chose* lower bonuses in exchange for guaranteed salaries. But the salaries were not guaranteed (a player could be cut from the team at any time), and

even with the salaries, the overall value of the women's agreements was much less than the men's agreement. Significantly, the Federation never offered the women the same deal as the men. That confirms that the agreements were nowhere near equal in value.

Second, the district court erred in dismissing the testimony of the women's expert economist. That expert calculated that the women's rate of pay was much less than the men's, taking all differences in the agreements into account. She showed that the women would have earned much more if they had been paid under the men's agreement. The court refused to consider this evidence because the agreements were the product of collective bargaining. But it is well-established that a union and an employer cannot bargain away employees' rights to equal pay under the Equal Pay Act and Title VII. The court also suggested that the women rejected the men's deal, but that was mistaken. The Federation offered the women the same pay-to-play *structure* as the men, but never the same amounts. The Federation admitted that, and former Federation president Sunil Gulati confirmed that he "never" would have authorized paying the women and the men the same bonuses. 4-ER-588.

Finally, the district court should not have discounted the USWNT players' direct evidence of discrimination. This is the rare case where the employer has admitted that it is paying women unequally and that the rea-

son is their sex. Former Federation president Carlos Cordeiro acknowledged that the "female players have not been treated equally" and that the Federation "clearly need[ed] to work toward equal pay for the national teams." 5-ER-896; 5-ER-903. Former president Gulati attempted to justify the unequal pay by saying that the "absolute quality" of the women's team was lower than the men's team because of "genetics, biology, and so on." 4-ER-534–35. The Federation's counsel stated during collective bargaining that "market realities are such that the women do not deserve equal pay." 5-ER-1036. The district court was supposed to view all of that evidence in the light most favorable to the USWNT players. Instead, the court allowed Cordeiro to walk back his statement after the fact; did not address Gulati's statement; and disregarded the Federation counsel's statement because it was "disputed." 1-ER-25. The court should have allowed the jury to consider the evidence and resolve any factual disputes.

The USWNT players provided more than enough evidence of unequal pay to go to the jury. The district court erred in rejecting their claims on summary judgment. This Court should reverse and remand the case for trial.

STANDARD OF REVIEW

This Court reviews a district court's order granting summary judgment de novo, with no deference to the district court. *Rizo v. Yovino*, 950 F.3d 1217, 1221 (9th Cir.) (en banc), *cert. denied*, 141 S. Ct. 189 (2020). The

Court "decide[s] whether the district court correctly applied the relevant substantive law"; "view[s] the evidence in the light most favorable to the nonmoving party" (here, the USWNT players); and "determine[s] whether there are any genuine issues of material fact" for trial. *Id.* (internal quotation marks omitted).

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE FEDERATION ON THE USWNT PLAYERS' EQUAL PAY ACT AND TITLE VII CLAIMS

A. Both The Equal Pay Act And Title VII Require Equal Pay For Equal Work

The USWNT players brought claims under the Equal Pay Act and Title VII. Both statutes prohibit sex-based pay discrimination.

The Equal Pay Act requires employers subject to its terms to provide an equal rate of pay to women and men who perform equal work under similar working conditions. It provides:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a *rate* less than the *rate* at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, which are performed under similar working conditions.

29 U.S.C. § 206(d)(1) (emphases added). The statute provides four affirmative defenses, permitting unequal pay that is due to "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or

quality of production; or (iv) a differential based on any other factor other than sex." *Id.*

Under the Equal Pay Act, the plaintiff must establish a prima facie case of unequal pay, and then the burden shifts to the employer to establish an affirmative defense. *Rizo*, 950 F.3d at 1222. To establish a prima facie case, the plaintiff must point to an opposite-sex employee who (1) is employed at the same "establishment" as the plaintiff; (2) performs a job that "requires equal skill, effort, and responsibility" as the plaintiff's; (3) performs the job under "similar working conditions" as the plaintiff; and (4) nevertheless receives a greater "rate" of pay than the plaintiff. *Id.* (internal quotation marks omitted); *see Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). No evidence of discriminatory intent is required. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986).

Title VII prohibits sex-based discrimination in employment, including with respect to compensation. It provides:

> It shall be an unlawful employment practice for an employer . . . to *discriminate* against any individual with respect to his *compensation*, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, *sex*, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphases added). To show sex-based discrimination under Title VII, a plaintiff need only show that sex "was a motivating factor" for the employment practice at issue, "even though other factors also

motivated the practice." *Id.* § 2000e-2(m). Unlike the Equal Pay Act, Title VII requires proof of discriminatory intent. *Rizo*, 950 F.3d at 1223.

A plaintiff can show a violation of Title VII using direct evidence (such as an employer's statement that sex was a reason for its compensation decision) or indirect evidence (such as statistical evidence indicating that sex was a reason for the decision). *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005). Title VII uses a burden-shifting framework when the plaintiff relies on indirect evidence of discrimination, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), but there is no burden shifting when the plaintiff provides direct evidence of discrimination, *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1148-49 (9th Cir. 1997). "Because direct evidence is so probative, [a Title VII plaintiff] need offer very little direct evidence to raise a genuine issue of material fact" at the summary-judgment stage. *Coghlan*, 413 F.3d at 1095 (internal quotation marks omitted).

As a general matter, "any violation of the Equal Pay Act is also a violation of title VII." 29 C.F.R. § 1620.27(a). But an "act or practice" that "is not a violation of the EPA [Equal Pay Act] may nevertheless be a violation of title VII." *Id.* Title VII is "broader" than the Equal Pay Act – it requires only proof that the plaintiff was treated worse because of her sex, and not that she was doing equal work to a male employee at the same establishment. *Maxwell*, 803 F.2d at 446 n.5; *see Wash. Cty. v. Gunther*, 452 U.S. 161, 179 (1981).

In this case, the district court addressed only one question – whether the USWNT and USMNT players received an equal rate of pay. Because the court concluded that players on both teams received an equal "rate" of pay under the Equal Pay Act, it did not independently analyze whether the Federation "discriminate[d]" against the women with respect to compensation under Title VII, and it granted the Federation summary judgment on both claims. 1-ER-25. The court did not address the other elements of the Equal Pay Act or Title VII claims or any affirmative defenses.[8] As explained below, the district court used the wrong legal standards and incorrectly dismissed the women's evidence of unequal pay at the summary-judgment stage, and so this Court should reverse and remand the case for trial.

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[8] On the remaining Equal Pay Act elements: The Federation stipulated that the USWNT and USMNT players perform equal work, meaning jobs requiring equal skill, effort, and responsibility. *See* p. 15, *supra*; *see also Marcoux v. Maine*, 797 F.2d 1100, 1106-07 (1st Cir. 1986). Further, the women work in "similar working conditions" for the "same establishment" as the men, because they play on the same-sized fields under the same rules and subject to the same potential hazards, for the same employer. *See* 29 C.F.R. § 1620.9(b); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591 (11th Cir. 1994); *Mehus v. Emporia State Univ.*, 222 F.R.D. 455, 475-76 (D. Kan. 2004); 5-ER-883.

The Federation raised various affirmative defenses, including the argument that it is not responsible for unequal World Cup bonuses. 4-ER-569–70; *see* n.15, *infra*. The district court did not address that argument.

B. The District Court Used The Wrong Legal Standards In Assessing The USWNT Players' Claims

The district court focused on the Equal Pay Act and the particular question whether the USWNT and USMNT players received an equal "rate" of pay. The court used what it called a "total compensation" approach, and concluded that the USWNT players received an equal rate of pay because they received about the same amount as the USMNT players per game during the class period. 1-ER-22.

The district court's reasoning suffers from a fatal flaw: It does not account for the effect of performance bonuses on the players' compensation. Under the court's approach, the women had to be the best in the world to achieve the same per-game pay as the much less successful men. That is not an equal rate of pay.

1. By requiring an equal "rate" of pay, the Equal Pay Act requires equal pay for the same measure of work

The Equal Pay Act's mandate is "simple": "[E]qual pay for equal work." *Rizo*, 950 F.3d at 1219. The Act requires employers to pay their female and male employees who do equal work an equal "rate" of pay. 29 U.S.C. § 206(d)(1). Women and men receive an equal "rate" of pay when they receive the same amount of compensation for the same measure of work. *See Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027-28 (6th Cir.

1983). If the compensation has multiple components, each reflecting a different measure of work (such as a salary and a performance bonus), the rate of pay for each component must be equal. *See, e.g.*, *EEOC v. Health Mgmt. Grp.*, No. 09-cv-1762, 2011 WL 4376155, at *3-4 (N.D. Ohio Sept. 20, 2011).

Take, for example, a shoe store that pays its salespeople an hourly wage and a commission for each pair of shoes sold. The Equal Pay Act requires the store to offer its male and female salespeople the same hourly wage and the same commission rate. The employer cannot offer its female employees a lower hourly wage, or a lower commission rate, and expect them to work more hours, sell more shoes, or both to earn the same total compensation as the male employees.

The plain text of the Equal Pay Act reflects that understanding. It prohibits an employer from "discriminat[ing]" "on the basis of sex" "by paying wages to employees" "at a *rate* less than the rate at which [the employer] pays wages to employees of the opposite sex." 29 U.S.C. § 206(d)(1) (emphasis added). By using the word "rate," Congress required equal pay for each measure of work. *See, e.g.*, *American Heritage Dictionary* 1460 (5th ed. 2018) ("A quantity measured with respect to another measured quantity."); *Webster's Third New International Dictionary* 1884 (1961) (defining "rate" as an "amount . . . of something measured per unit of something else"). The word "rate" reflects not the total amount, but an amount per unit – whether the unit is an amount of time, or an item sold, or a game won. *Bence*, 712

F.2d at 1027 ("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.").

If Congress intended to require only that female and male employees receive the same amount of pay overall – regardless of the quantity or quality of work the employees put in – it would have said so. For example, Congress could have referred to "total compensation," as it did elsewhere in the U.S. Code. *See, e.g.*, 10 U.S.C. § 1587a(b) (ordering the Secretary of Defense to obtain "pay parity" among certain senior executives with respect to the executives' "total compensation"); 22 U.S.C. § 3961(a) (setting limitations on the "total compensation" paid to certain members of the foreign service). Congress did not do that in the Equal Pay Act. The Act "speak[s] in terms of *rate of pay*, not total remuneration." *Ebbert v. Nassau Cty.*, No. 05-cv-5445, 2009 WL 935812, at *2 (E.D.N.Y. Mar. 31, 2009).

The EEOC has issued regulations and guidance that confirm this point. An EEOC regulation defines "rate" for purposes of the Equal Pay Act as "the standard or measure by which an employee's wage is determined." 29 C.F.R. § 1620.12(a). The EEOC's policy manual gives examples of possible "standard[s] or measure[s]" of work, such as "time, commission, piece, job incentive, profit sharing, [or] bonus." EEOC, *Compliance Manual Section 10: Compensation Discrimination* (Dec. 5, 2000), https://bit.ly/3gFk0VX (EEOC, *Manual*).

EEOC guidance also confirms that the rate of pay, not total compensation, is what matters under the Equal Pay Act. Its policy manual explains that if employees are paid by commission and "the commission rates [for a male and a female employee] are different, then a prima facie violation could be established even if the total compensation earned by both workers is the same." EEOC, *Manual*. These considered views of the expert agency responsible for enforcing the Equal Pay Act are entitled to deference. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

This understanding is consistent with the Equal Pay Act's purpose and with common sense. The Act was designed to correct "a serious and endemic problem of employment discrimination in private industry" – pay discrimination based on the "outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." *Corning Glass Works*, 417 U.S. at 195 (quoting S. Rep. No. 88-176, at 1 (1963)). In light of that purpose, Congress "could not have intended" the "absurd result" that an employer could "pay[] a woman $10 per hour and a man $20 per hour," "as long as the woman negated the obvious disparity by working twice as many hours." *Ebbert*, 2009 WL 935812, at *3. The district court itself recognized that point at the class-certification stage of this case. *See* 6-ER-1123–24.

Many courts have recognized that an employer violates the Equal Pay Act when its female and male employees receive different performance bonus rates, even if their total compensation is the same. In *Bence*, for example, the Sixth Circuit explained that a health spa could not pay its saleswomen a lower commission rate than its salesmen (5% versus 7.5%) and expect the women to make up the difference by making more sales. 712 F.2d at 1026-28. The court of appeals rejected the employer's "'equal total remuneration' argument," explaining that the Act requires an equal "rate" of pay. *Id.* Because employees were compensated on a "per sale" basis, the employer could not pay women less than men per sale – that is "precisely what the Equal Pay Act forbids." *Id.* at 1028.

The Fourth Circuit made the same point in *EEOC v. Kettler Brothers, Inc.*, 846 F.2d 70, 1988 WL 41053 (4th Cir. 1988) (unpublished). There, the employer (a real estate firm) "guaranteed a minimum salary to each sales manager plus a commission for each house that he or she sold," with lower commission rates for women than for men. *Id.* at *1. The district court compared the "gross earnings" of female and male sales managers, but the court of appeals rejected that approach. *Id.* at *2. Citing the EEOC's regulation defining "rate," the court of appeals concluded that the female sales manager made out a prima facie case of unequal pay because women received lower commission rates than men. *Id.* at *2-3.

As another example, in *Ebbert*, female police communication officers alleged that they were paid less than male fire communications officers. 2009 WL 935812, at *1. The employer argued that the pay was equal because the women had put in so much overtime that some of them "received *total remuneration* in excess of" some men. *Id.* at *2. The court rejected that view, explaining that the Equal Pay Act "speaks in terms of *rate of* pay, not total remuneration." *Id.* at *2-3. Other district court decisions are in accord.[9]

The law is clear: Under the Equal Pay Act, an employer must provide its male and female employees with the same *rate* of pay – meaning the same amount of compensation for the same measure of work. An employer violates the Equal Pay Act if it provides a female employee with lower base pay or lower performance bonuses than a comparable male employee for

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[9] *See, e.g.*, *Health Mgmt. Grp.*, 2011 WL 4376155, at *3-4 (female employee received a lower base salary and a lower commission rate than a male employee; court explained that "base salary and commission rate are the proper figures to compare, not the total amount of compensation"); *Kelly v. Media Gen., Inc.*, No. 03-cv-2557, 2005 WL 8158684, at *1-2 (N.D. Ala. July 20, 2005) (female employee had a lower "base compensation package" than her male colleagues but received higher "total compensation" because of a performance bonus; court determined that her "receipt of a performance bonus, available to her male comparators but not achieved by them" did not show equal pay); *see also Grover v. Smarte Carte, Inc.*, 836 F. Supp. 2d 860, 865 (D. Minn. 2011) (court declined to use total compensation because it would allow employers to "escape liability by underpaying a female employee, who nevertheless is paid the same in the aggregate because she makes up the difference in commissions through her own hard work").

equal work, even if the female employee works harder and/or performs better to make up the difference.

2. The district court's approach under the Equal Pay Act failed to account for performance, requiring the women to outperform the men for the same pay

The district court used the wrong legal standard in assessing the "rate" of pay in this case, because it did not account for a critical measure of work – performance. The court took a "total compensation" approach, dividing the total amount that the Federation paid the players on each team during the class period by the number of games each team played, resulting in a per-game average of $220,747 total for the entire women's team and $212,639 for the entire men's team. 1-ER-22. Based solely on that calculation, the district court held that the USWNT players could not establish a prima facie case of unequal pay. 1-ER-25.

The problem is that the Federation pays the teams not only to play, but to win. No one disputes that the pay for both teams has a performance component. That is plain from the teams' collective-bargaining agreements, which provide players with appearance fees for playing and performance bonuses for winning. *See* 4-ER-763; 4-ER-807–09. So the correct measures of work in this case are both the number of games played *and* the teams' performances in those games.

The district court failed to account for the performance component of the teams' compensation in its analysis. Its view of the Equal Pay Act required the women to significantly outperform the men just to receive approximately the same compensation on a per-game basis. The women's team had to win two World Cups and maintain an overall win rate of 83%, 2-ER-98, while the men's team did not qualify for the World Cup and won just 53% of its games overall, 2-ER-97.

The flaw in the district court's analysis becomes clear when considering how just one game would change the analysis. If the women had lost the 2019 World Cup final (instead of beating the Netherlands), they would have earned an average of $206,500 per game over the 111 games in the class period – $6,000 *less* than the men.[10] By the district court's logic, the women then *would* have a claim for unequal pay. That makes no sense. By comparing the teams' total compensation without regard to the role of performance, the district court penalized the USWNT players for their success. That is precisely the type of "absurd result" that the Equal Pay Act forbids. *Ebbert*, 2009 WL 935812, at *3.

[10] For winning the World Cup, the USWNT received a bonus of $2.53 million and a victory tour worth $1.4 million; if the team had come in second, it would have received a bonus of $1.15 million and a victory tour worth $1.2 million. *See* 4-ER-763; *see also* n.14, *infra*.

The district court's reasons for its approach do not withstand scrutiny. First, the court appeared to believe that the Equal Pay Act's text supported that approach. The court focused on the word "wages" in the Equal Pay Act, and relied on an EEOC regulation that defines "wages" to include "'all forms of compensation.'" 1-ER-20 (quoting 29 C.F.R. § 1620.10). But that ignores the word "rate." The Act prohibits paying women "at a *rate* less than the *rate* at which it pays *wages* to employees of the opposite sex." 29 U.S.C. § 206(d)(1) (emphases added). The reference to "wages" indicates only that the court should consider all of the types of compensation a female employee received in determining whether she received an equal "rate" of pay. *Kelly*, 2005 WL 8158684, at *2.

Second, the district court relied on two district court decisions for its "total compensation" approach. Neither provides support. The court quoted *Huebner v. ESEC, Inc.*, No. 01-cv-0157, 2003 WL 21039345, at *2 n.8 (D. Ariz. Mar. 26, 2003) (quoted in 1-ER-21), for the proposition that a court can compare women's and men's total compensation when "higher pay in one category can offset lower pay in another category." That proposition is wrong – the court in *Huebner* simply missed the fact that the Equal Pay Act refers to an equal "rate" of pay. *Id.* at *2. In any event, the quoted language is dicta; the court did not have before it a situation where an employee had higher pay in one category and lower pay in another. *Id.* at *2-3 (female

employee's compensation was "equal to or higher than the average compensation in each category paid" to comparable male employees). The facts in *Huebner* are nothing like the facts here, where the women were paid less than the men for every appearance fee and every performance bonus but one.

The district court's approach also is not supported by *Diamond v. T. Rowe Price Associates, Inc.*, 852 F. Supp. 372 (D. Md. 1994) (cited in 1-ER-22). The plaintiff in *Diamond* – a portfolio manager and financial analyst – was offered the same compensation deal as her male counterparts, but negotiated a unique compensation deal for herself. *Id.* at 376, 380-81. The court did not assess whether she "established a prima facie case of compensation discrimination" because it held that the employer made out two affirmative defenses. *Id.* at 391. So that decision likewise does not provide guidance on the meaning of "rate" of pay.[11]

The district court, in effect, used the women's successes against them. That was wrong as a matter of law. Under the Equal Pay Act, an employer cannot make a woman outperform a man to receive the same amount of pay.

[11] *Hein v. Oregon College of Education*, 718 F.2d 910 (9th Cir. 1983), likewise does not support a total compensation approach; that case did not address rate of pay, only whether women and men were doing equal work. *Id.* at 916.

3. The district court erred in treating its Equal Pay Act analysis as dispositive under Title VII

The district court treated its Equal Pay Act analysis as dispositive under Title VII. *See* 1-ER-25. That was wrong. Title VII is broader than the Equal Pay Act; it prohibits any pay discrimination based on sex, even if women and men are not doing equal work. *Maxwell*, 803 F.2d at 446 n.5; *see* 42 U.S.C § 2000e-2(a)(1). EEOC guidance confirms that an "act or practice" that "is not a violation of the EPA [Equal Pay Act] may nevertheless be a violation of title VII." 29 C.F.R. § 1620.27(a); *see, e.g.*, EEOC, *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions* (Oct. 29, 1997), https://bit.ly/3qKbOZm (discussing separate application of the Equal Pay Act and Title VII to sports coaches).

Here, the USWNT players provided sufficient evidence to permit the jury to find a Title VII violation. They showed that the women received lower appearance fees and bonuses than the men across the board, *see* 3-ER-481–501, and they provided direct evidence establishing that the Federation gave the women those lower amounts because they are women, 4-ER-534–35. Based on that evidence, a jury easily could find that the Federation "discriminate[d]" against the women "because of" their "sex." 42 U.S.C. § 2000e-2(a)(1); *see, e.g.*, *Wash. Cty.*, 452 U.S. at 179; *Cordova*, 124 F.3d at 1148-49. Thus, even if the district court's Equal Pay Act analysis

were correct, that would not preclude the USWNT players' separate Title VII claim.

C. The District Court Erred In Dismissing The USWNT Players' Evidence Of Pay Discrimination

The district court independently erred by dismissing the players' evidence of unequal pay. On the Federation's motion for summary judgment, the court was required to view all of the evidence in the light most favorable to the USWNT players and draw all inferences in their favor. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003); *see Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). The court was not supposed to "weigh disputed evidence" or "make credibility determinations." *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1036 (9th Cir. 2005) (internal quotation marks omitted); *see, e.g.*, *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1076 (9th Cir. 2001). Yet the court did just that, usurping the role of the jury.

The USWNT players provided three categories of evidence: the women's and men's collective-bargaining agreements, which expressly show unequal rates of pay for every appearance fee and every performance bonus but one; expert testimony from an economist who demonstrated that the value of the women's agreements was much less than the value of the men's agreement; and statements from the Federation acknowledging that the women do not receive equal pay because they are women. The district court

rejected all of that evidence out of hand. But that evidence was relevant and probative, and a reasonable jury could find that it establishes violations of the Equal Pay Act and Title VII.

1. The district court erred in disregarding the terms of the USWNT's and USMNT's collective-bargaining agreements

The express terms of the teams' collective-bargaining agreements show that the women's and men's rates of pay were unequal. The court dismissed that evidence on the mistaken belief that the agreements could not be compared. *See* 1-ER-22.

a. The agreements expressly show unequal rates of pay

The women's and men's agreements contain bonuses for winning and appearance fees for playing. The performance bonuses made up the vast majority of the players' compensation. *See* 4-ER-763; 4-ER-807–09.

i. Bonuses

For every bonus available to both the women and men but one, the amount was lower for the women. There is no dispute on that point: One of the Federation's corporate witnesses (Tom King) admitted at his deposition that every bonus in the women's agreements is lower than the corresponding bonus in the men's agreement, with only one exception. 3-ER-481–501.

The following chart compares the bonuses available to both the women and the men:

Table 1. *USWNT and USMNT Bonuses Per Player, 2015-2019*

Category	Women (2015-2016)	Women (2017-2019)	Men
Friendlies			
Draw (per game)	$0	$0 to $1,750	$1,250 to $3,125
Win (per game)	$1,350	$5,250 to $8,500	$4,375 to $12,625
Tournaments			
Draw (per game)	$0	$0 to $1,750	$1,563 to $1,875
Win (per game)	$1,350	$5,250 to $8,500	$4,375 to $10,375
Placement	$0	$0 to $5,000	$5,000 to $43,750
World Cup			
Qualifying rounds			
Draw (per game)	$0	$500	$2,500 to $5,000
Win (per game)	$0	$3,000	$10,625 to $13,125
Qualification	$15,000	$37,500	$108,696
Roster bonus	$15,000	$37,500	$68,750
Group stage			
Draw (per game)	$0	$0	$9,511
Win (per game)	$0	$0	$28,533
Overall placement			
Final 16	$0	$0	$192,652
Quarterfinal	$0	$0	$413,043
4th place	$10,000	$0	$657,609
3rd place	$20,000	$25,000	$711,957
2nd place	$32,500	$50,000	$929,348
1st place	$75,000	$110,000	$1,065,217

4-ER-667; 4-ER-763; 4-ER-807–09.[12]

[12] The USWNT players also could receive bonuses for qualifying for and winning medals at the Olympics. *See* 4-ER-763. The USMNT does not participate in the Olympics. *See* n.3, *supra*.

The first part of Table 1 addresses friendlies. It provides ranges for win and draw bonuses because the bonus amounts depended on the opponent's FIFA ranking. All bonuses (except one) for winning or drawing friendlies were lower for the women than the men.

The second part addresses tournaments other than the World Cup. It lists bonuses for winning or drawing individual tournament games, as well as placement bonuses (additional bonuses for coming in first, second, third, or fourth in the tournament). It provides ranges for win and draw bonuses because the bonus amounts depended on the opponent's FIFA ranking and on the tournament. It provides ranges for placement bonuses because those amounts differed by tournament. The bonuses always were lower for the women.

The third part addresses the World Cup. It lists bonuses for winning or drawing World Cup qualifying games (which vary based on the qualifying round); bonuses for qualifying for the World Cup and for making the roster for the World Cup; bonuses for winning or drawing games in the group stage (the first part of the World Cup tournament, before the knockout stages); and bonuses for reaching the top 16 and top 8 and for placing in the top 4.[13] These bonuses are cumulative, meaning that as a team advanced through

[13] The men's qualifying, group stage, and placement bonuses were paid to the entire team, 4-ER-807–08; per-player bonuses were calculated by dividing the team bonuses by the number of players on the team, *see* 3-ER-493.

the tournament, the players on the team received additional bonuses. The table shows that every bonus related to the World Cup was lower for the women. Further, some bonuses (for winning and drawing in the group stage, and for reaching the top 16 and top 8) were not available to the women at all – they only were available to the men.[14]

The significantly higher amounts for the men's performance bonuses are probative evidence of unequal pay. The Federation admits that these bonus amounts "are all undisputed and may be determined from the face of the respective agreements." 3-ER-236.[15] By offering the women lower performance bonuses than the men, the Federation required the women to be

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[14] The USWNT's agreements also provided that, for placing first, second, or third in the World Cup, the USWNT would play three or four games as part of a victory tour and receive additional bonuses. *See* 4-ER-667; 4-ER-763. Table 1 does not reflect those bonuses. But even with them, the women would receive much less than the men for placing first, second, or third in the World Cup. *See* 4-ER-763 (victory tour bonus at most was $60,870 per player).

[15] The Federation tries to justify unequal World Cup bonuses by blaming FIFA. *See* 4-ER-569–70. That argument, which the district court did not address, lacks merit. First, FIFA does not provide prize money for the vast majority of games for which the Federation refuses to provide equal pay – including World Cup qualifying games. *See* 4-ER-583. Second, FIFA does not pay the prize money to the players. The *Federation* receives all revenues from the World Cup (including prize money), and the *Federation* decides how to distribute it. In fact, the men's agreement makes clear that all prize money "belongs to the Federation" and the Federation has the "sole discretion" to decide whether to share that money with the players. 4-ER-799. Third, the Federation set the World Cup bonus amounts before FIFA even decided how much prize money to award. 4-ER-753. Finally, and most fundamentally, the Federation cannot blame FIFA for its own discrimination

more successful than the men – win a higher percentage of their games and perform better in tournaments and in the World Cup – to make up the difference. That evidence makes out a prima facie case under the Equal Pay Act; it is no different than the health spa in *Bence* requiring the women to sell more memberships than the men to make up for the women's lower commission rate. *See* 712 F.2d at 1027-28. The consistently lower bonuses for the women likewise are probative evidence of sex-based discrimination under Title VII. *See, e.g.*, *Wash. Cty.*, 452 U.S. at 178-79.

ii. Appearance fees

The agreements also are unequal when it comes to the teams' appearance fees. The appearance fees are the amounts the players receive for playing in games, regardless of outcome.

The women's and men's agreements differ in how they address appearance fees. The women are compensated in two ways: Some women (contracted players) receive annual salaries regardless of the number of

against its own employees. *See Rizo*, 950 F.3d at 1229; *see also Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1074, 1089 (1983).

games they play, and the others (non-contracted players) receive an appearance fee for each game they play. *See* 4-ER-763.[16] All of the men are compensated the same way – through appearance fees for each game played. *See* 4-ER-783.

The appearance fees for the women always are lower than for the men. The non-contracted women are directly comparable to the men, because both are paid each time they appear in a game. For all games other than World Cup games, each non-contracted USWNT player received appearance fees of between $1,080 and $4,000 per game, depending on the player's experience, 4-ER-660; 4-ER-700; 4-ER-763, whereas each USMNT player received $5,000 per game, 4-ER-807. For World Cup games, each non-contracted USWNT player received appearance fees of between $1,080 and $4,500 per game, depending on experience, 4-ER-660; 4-ER-700; 4-ER-763, whereas each USMNT player received $6,875 per game, 4-ER-807. So the non-contracted women always received lower appearance fees than the men.

The contracted women also can be compared to the men. That is done by taking the salary for a contracted player, adding the value of the addi-

[16] There were 24 contracted players on the USWNT in 2015 and 2016, 20 in 2017, 19 in 2018, and 18 in 2019. 4-ER-666; 4-ER-763. All of the other players were non-contracted.

tional benefits that player received, and dividing that amount by the number of games played. *See Health Mgmt. Grp.*, 2011 WL 4376155, at *3 (estimating an employee's commission rate when the employee received a flat commission fee by dividing the fee by the average sale, in order to compare that rate to another employee's commission rate). Here, a USWNT player who was contracted throughout the class period would have received an average of between $3,350 and $4,000 per game in salary (depending on her annual salary)[17] and health insurance and other benefits worth about $250 per game.[18] A contracted woman's per-game total was between $3,600 and $4,250 – well below a man's appearance fee of $5,000 to $6,875 per game. 4-ER-807. Thus, the contracted women always received less than the men for appearing in games.

The following table summarizes how all women received less in appearance fees per game than the men:

[17] The annual salaries for the contracted women were between $36,000 and $72,000 for 2015 and 2016, 4-ER-667, and $100,000 for 2017 to 2019, 4-ER-763. The USWNT played 111 games during those years. 4-ER-618.

[18] The USWNT players' expert explained that the total value of the benefits received by all contracted women during the class period was $570,000, because that was what it cost the Federation to provide those benefits. 2-ER-102–03.

Table 2. *USWNT and USMNT Appearance Fees Per Player, 2015-2019*

Category	Non-contracted Women	Contracted Women	Men
Non-World Cup games	$1,080 to $4,000	$3,600 to $4,250	$5,000
World Cup games	$1,080 to $4,500	$3,600 to $4,250	$6,875

4-ER-660; 4-ER-700; 4-ER-763; 4-ER-807.[19]

The lower appearance fees paid to the women are prima facie evidence of an unequal rate of pay under the Equal Pay Act and sex-based discrimination under Title VII. *Health Mgmt. Grp.*, 2011 WL 4376155, at *3-5. By comparing the express terms of the collective-bargaining agreements, a jury could readily conclude that the Federation did not pay the women equally and discriminated against them based on their sex.

b. The district court was wrong to say the agreements cannot be compared

The district court dismissed the collective-bargaining agreements because it believed they are not sufficiently comparable. 1-ER-22. In the court's view, it could not compare the agreements because of the unique as-

[19] The players also receive ancillary compensation, such as a share of ticket sales (for games put on by the Federation), media appearance fees, and fees for sponsorship and marketing. *See* 4-ER-748–53. Those items either are the same or nearly the same for both teams, *see* 4-ER-752, or were paid to the teams' unions rather than to individual players and so are not included in the players' claims, *see* 6-ER-1102–03.

pects in the women's agreements – the contracted players' salaries and extra benefits. *See* 1-ER-22. Rather than attempt to value those aspects, the court disregarded the agreements altogether. 1-ER-22. That was wrong.

As an initial matter, it is the jury's job, not the court's job on summary judgment, to evaluate the evidence and determine whether the women received unequal pay. The jury would have had ample basis to do that, using the agreements themselves and expert reports that valued the compensation provided under the agreements. A district court cannot reject evidence of pay discrimination out of hand just because of differences in compensation systems. If that were the law, then any employer could create slightly different compensation schemes for women and men and avoid all scrutiny under the Equal Pay Act and Title VII. The district court was wrong to simply refuse to consider the agreements' terms as part of the USWNT players' prima facie case. *See Freyd v. Univ. of Or.*, 990 F.3d 1211, 1220-22 (9th Cir. 2021) (reversing district court's summary-judgment decision on Equal Pay Act claim because the court evaluated the evidence itself instead of sending it to the jury).

Further, the district court was wrong to assume that a factfinder could not value the various components of the women's agreements. Both the women's expert (Dr. Finnie Cook) and the Federation's accounting expert (Carlyn Irwin) valued the contracted players' salaries and benefits based on how much it cost the Federation to provide them. *See* 2-ER-102–04; 4-ER-

609.[20] That is the accepted way to value benefits in employment cases. *See United States v. Am. Bar Endowment*, 477 U.S. 105, 118 (1986); *Hilyer v. Morrison-Knudsen Constr. Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981), *overruled on other grounds*, 461 U.S. 624 (1983).

In its analysis, the district court actually *did* value those benefits. The number the court used for "total compensation" for the women included the value of the contracted players' salaries, maternity leave, and severance pay. *See* 4-ER-609. The court got that amount from the Federation's accounting expert. *See* 1-ER-20 (citing 4-ER-618). So it certainly is possible to compare the value of the women's and men's agreements. The district court erred in not giving the jury the opportunity to do so.

The district court also suggested that the women chose their deal over the men's deal. It speculated that the women were "willing to forgo higher bonuses" in return for having "guaranteed" salaries, which the court viewed

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[20] The Federation's accounting expert (Ms. Irwin) reviewed the Federation's financial statements and reported its revenues and payments to the teams; its economist (Dr. Justin McCrary) attempted to value the men's and women's agreements.

For the contracted women, Ms. Irwin accounted for the salaries, maternity leave, and severance pay, *see* 4-ER-618; the USWNT players' expert (Dr. Cook) accounted for the salaries and all of the benefits, including some not considered by Ms. Irwin (health, dental, and vision insurance benefits and injury pay), *see* 2-ER-102–03.

Both parties moved to exclude or limit the other side's expert testimony. *See* 6-ER-1239; 6-ER-1248. The district court did not rule on those motions.

as a type of "insurance." 1-ER-23. But the women were never offered the same deal as the men, with the same levels of bonuses. 5-ER-834–35. Further, no USWNT player's salary was guaranteed; any player could be cut from the team at any time, for any reason (and would only receive a small amount of severance pay). *See* 4-ER-721. And even if the salaries had some additional intangible "insurance" value, a jury could determine that value. *Cox v. Remillard*, 237 F.2d 909, 912 (9th Cir. 1956) (determining the monetary value of an intangible benefit is within the "common sense of the ordinary juror" (internal quotation marks omitted)); *see Hernandez v. Comm'r*, 819 F.2d 1212, 1217 (1st Cir. 1987) (value of intangible benefit can be estimated by looking at "the costs of providing" the benefit), *aff'd*, 490 U.S. 680 (1989).

Finally, in comparing the value of the women's and men's agreements, the jury also could consider the fact that the Federation refused to offer the women and the men the same deal. During the 2017 negotiations, the Federation offered the women the same pay-to-play structure as the men (without salaries), but all of the women's bonus numbers were lower than the men's bonus numbers. 5-ER-834–35. That is undisputed. 3-ER-342. In other words, the Federation did not offer the women's team an agreement with the same economic value as the men's agreement, but presented a much worse deal. A jury could conclude that the women's final agreement

did not add so much value as to make up the significant disparities between the men's agreement and the Federation's pay-to-play offer to the women.

2. The district court erred in dismissing the USWNT players' expert testimony about the value of the USWNT's and USMNT's agreements

The USWNT players presented evidence from their expert economist, Dr. Cook. She demonstrated that the rate of pay in the women's agreements was much less than in the men's agreement. *See* 6-ER-1085. The Federation provided a competing economist, Dr. Justin McCrary, who attempted to show that the value of the agreements was equal. *See* 3-ER-416. Rather than recognizing that this competing expert evidence created a jury question, the court dismissed the women's evidence. 1-ER-22–23.[21]

a. The USWNT players' expert provided evidence that the pay in the agreements was unequal

Dr. Cook demonstrated that the women's and men's agreements did not provide for equal pay. She did that by calculating how much more the women would have earned during the class period if they had been paid under the men's agreement. *See* 6-ER-1091–99. Dr. Cook used the rates in

[21] Dr. McCrary's analysis was deeply flawed. To conclude that male players would have earned more under the women's agreements, Dr. McCrary considered only 2017 to 2019 (when the women's rates were higher, which artificially inflated the results) and assumed that the men would have received the same salaries as the contracted women (which also inflated the results because the men played far fewer games than the women). *See* 3-ER-439.

the men's agreement for the women's friendlies and World Cup games, and then used the average rates for the men's tournaments for other tournament games (because the women and men played in different tournaments). 6-ER-1092–96. She calculated the overall difference in the agreements by subtracting how much the women actually received from how much they would have received under the men's agreement. 6-ER-1105. Dr. Cook accounted for the value of the contracted women's benefits by subtracting the cost of those benefits from the overall difference between the women's and men's agreements. 6-ER-1099–100.

Dr. Cook determined that if the four class representatives had been paid under the men's agreement, they each would have received an average of $2.5 million more over the class period, and that the classes as a whole would have received $64 million more over that period. 2-ER-99; 6-ER-1113. From that analysis, a jury reasonably could conclude that the women's pay was worse than the men's.

b. The district court erred in rejecting the USWNT players' expert testimony on the ground that their union agreed to unequal pay in collective bargaining

The district court apparently believed that since the USWNT players' pay was the result of collective bargaining, the players could not argue that their pay was unequal under federal law. Specifically, the court called Dr. Cook's expert analysis "untenable" because "the MNT and WNT bargained

for different agreements which reflect different preferences." 1-ER-23. The court was wrong. Pay specified in a collective-bargaining agreement is not immune from challenge under the Equal Pay Act or Title VII.

The Equal Pay Act contains no exception for pay discrimination in collective-bargaining agreements. The Act prohibits unequal pay for equal work, subject only to four specified affirmative defenses. *See* 29 U.S.C. § 206(d)(1). It is not a defense to say that an employee's union agreed to the unequal pay in a collective-bargaining agreement. *See, e.g.*, *Corning Glass Works*, 417 U.S. at 192-94, 205-09 (holding that unequal pay rates in collective-bargaining agreements violated the Act); *Anderson v. Univ. of N. Iowa*, 779 F.2d 441, 444 (8th Cir. 1985) ("[T]he mere existence of a wage agreement cannot be considered a 'factor other than sex' if the contract perpetuates pay differentials which would themselves violate the Act."); *Dean v. United Food Stores, Inc.*, 767 F. Supp. 236, 239 n.1 (D.N.M. 1991) ("A person is not precluded from bringing a claim under the Equal Pay Act because he or she has agreed by contract to a certain level of pay.").

EEOC guidance confirms the point. "The establishment by collective bargaining or inclusion in a collective bargaining agreement of unequal rates of pay does not constitute a defense" under the Equal Pay Act; "[a]ny and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA [Equal Pay Act] are null and void and of no effect." 29 C.F.R. § 1620.23; *see* EEOC,

Manual ("An employer's assertion that a compensation differential is attributable to a collective bargaining agreement does not constitute a defense under the EPA."). The legislative history of the Equal Pay Act reflects that understanding; the Act was needed because collective bargaining had proven "not adequate to eliminate unequal pay." Bureau of Nat'l Affairs, *Equal Pay for Equal Work: Federal Equal Pay Law of 1963*, at 6 (1963) (internal quotation marks omitted); *see, e.g.*, 109 Cong. Rec. 9209 (1963) (statement of Rep. Charles Goodell) (noting that the Act places an "obligation" on employers to "change" existing bargaining agreements if such agreements are in "violat[ion] of this act").

Similarly, Title VII does not exempt pay discrimination in collective-bargaining agreements. The Supreme Court has held that collective-bargaining agreements "must comply with federal laws that prohibit discrimination," including "Title VII." *UMWA Health & Ret. Fund v. Robinson*, 455 U.S. 562, 575 & n.15 (1982); *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). Accordingly, this Court has recognized that "[r]ights established under Title VII" "are not rights which can be bargained away – either by a union, by an employer, or by both acting in concert." *Williams v. Owens-Ill., Inc.*, 665 F.2d 918, 926 (9th Cir. 1982) (internal quotation marks omitted). The other courts of appeals agree that "[a]n employer-union agreement permitting the employer to discriminate is no defense" under Title VII. *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2d Cir.

1980); *see, e.g.*, *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 472 n.10 (8th Cir. 1984); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1377 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971).

Employers therefore cannot shield their discriminatory compensation practices from legal scrutiny by getting their employees to agree to the unequal pay. That makes sense, because *every* employee who has been discriminated against has agreed to his or her salary, whether through collective bargaining or individual negotiation.

The district court also dismissed the USWNT's expert testimony because it believed that the USWNT players "expressly rejected the terms they now seek to retroactively impose on themselves." 1-ER-23. Nothing in the record supports that assertion. The women were never offered the same deal as the men. The Federation offered the women the same structure as the men, where all women would be paid appearance fees and performance bonuses, and no women would receive annual salaries or other benefits. 1-ER-11. But the women's numbers were nowhere near the same as the men's numbers; the performance bonuses for the women were far below those offered to the men. 5-ER-834–35.

The Federation acknowledged that all of the bonuses in its pay-to-play offer to the women were lower than in the men's agreement. 3-ER-342. The district court did not find to the contrary; it stated only that "the WNT rejected an offer to be paid under the same pay-to-play *structure* as the MNT."

1-ER-23 (emphasis added). At no point did the Federation offer the women an agreement with the same terms as the men's agreement. As a result, equal pay was never on the table, and the USWNT's union agreed to the best deal that could be negotiated.

3. The district court erred in disregarding admissions by Federation representatives that the Federation paid the women unequally

Finally, this is the rare case in which the employer itself has expressly admitted its discrimination. Not only did Federation representatives admit that the Federation has not paid the women and men equally, but they said that they would never give the teams the same bonuses, and that the women did not deserve equal pay. The district court dismissed those statements because it believed they were "rebutted" by other evidence. 1-ER-24. The court was not allowed to do that on summary judgment.

a. The Federation's statements are direct evidence of sex-based pay discrimination

Federation representatives repeatedly have acknowledged that the Federation pays the women unequally. For example, when he was the Federation's vice-president (and was campaigning to become president), Carlos Cordeiro admitted that the "female players have not been treated equally." 5-ER-896. He further stated that the Federation "clearly need[ed] to work toward equal pay for the national teams," and that "ensur[ing] equal pay" was "the right thing to do." 5-ER-903. The Federation's then-president

(Sunil Gulati) admonished Cordeiro for making those statements, claiming that it was "incredibly irresponsible" for a "US Soccer officer" to have made those statements while an equal-pay lawsuit was pending. 5-ER-895.

Gulati made the Federation's position clear, again and again. Not only did he admonish Cordeiro, but in an affidavit filed in the district court, Gulati stated that he would "never" have authorized paying the women the same bonuses as the men. 4-ER-588. Gulati explained why the Federation would not pay the women and men equally – the belief that the "absolute quality" of the women's team was lower than the men's team because of "genetics, biology, and so on." 4-ER-534–35. The Federation's corporate witness on this subject (Tom King) confirmed that the women and men do not receive equal bonuses. He went through the bonuses one by one, and confirmed that with a single exception, the bonuses always were lower for the women than for the men. 3-ER-481–501.

Further, during the negotiations for the women's 2017 agreement, the Federation's counsel (Russell Sauer) stated that "market realities are such that the women do not deserve equal pay." 5-ER-1036. That statement is evidence both that the Federation was not paying the women equally, and that the Federation was basing that decision on an impermissible sex-based justification (a claim that others in the market viewed women as less valuable). *See Corning Glass Works*, 417 U.S. at 205 (Equal Pay Act forbids an employer from relying on the belief that the "job market" would permit it to

"pay women less than men for the same work"); *Rizo*, 950 F.3d at 1227 ("[M]arket forces cannot justify unequal pay for comparable work.").

A reasonable jury could take the Federation at its word. The statement that the women were not paid equally supports the women's claim that they did not receive an equal rate of pay under the Equal Pay Act. And the statements that the women were not paid equally because they are women, which relied on sexist stereotypes, support the claim that the Federation intentionally discriminated on the basis of sex in violation of Title VII. *See, e.g.*, *Portis v. First Nat'l Bank of New Albany, Miss.*, 34 F.3d 325, 329 (1st Cir. 1994); *see also Coghlan*, 413 F.3d at 1095 ("very little" direct evidence is required to withstand summary judgment under Title VII (internal quotation marks omitted)). It is the jury's job – not the district court's – to decide what weight to give this evidence.

b. The district court erred in weighing the evidence on summary judgment

The district court erred in crediting the Federation's version of events, rather than viewing the evidence in the light most favorable to the USWNT players.

The court credited Cordeiro's after-the-fact explanation that he did not mean what he said when he admitted that the Federation did not pay the women equally. Specifically, during Cordeiro's deposition in this case, he claimed that his reference to "equal pay" meant only that he thought that

the Federation should provide the women with "equal opportunit[ies]" to play "competitive events that would drive more revenue and compensation." 3-ER-468. That, of course, is not what Cordeiro said, and Cordeiro's explanation is undercut by the fact that Gulati admonished him for his original statement. Rather than recognizing that there is (at least) a fact issue for the jury, the court just accepted Cordeiro's self-serving explanation, without addressing Gulati's statements. 1-ER-24.

The court also dismissed the statement of the Federation's counsel about how "market realities" mean that the women "do not deserve equal pay." The court noted that "it is disputed whether Sauer made the alleged 'market realities' comment." 1-ER-24–25 (citing 3-ER-462). But two USWNT witnesses said they heard that statement. 5-ER-1029; 5-ER-1036. That dispute, too, created a fact issue for the jury.

On summary judgment, the district court was not supposed to "assess the weight of the conflicting evidence" or "make credibility determinations." *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1328 (9th Cir. 2000). Instead, the court should have viewed all of the evidence in the light most favorable to the women's team. *See Raad*, 323 F.3d at 1194. If it had done so, it would have recognized that the Federation's own admissions are probative evidence of pay discrimination. A jury should be allowed to consider that important evidence.

CONCLUSION

The Court should reverse the decision of the district court and remand the case for trial.

Dated: July 23, 2021

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

STATUTORY AND REGULATORY AUTHORITIES

1. 29 U.S.C. § 206 provides, in relevant part:

Minimum wage

* * * * *

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

* * * * *

2. 42 U.S.C. § 2000e-2 provides, in relevant part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * * *

3. 29 C.F.R. § 1620.10 provides, in relevant part:

Meaning of "wages."

Under the EPA, the term "wages" generally includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment.

* * * * *

4. 29 C.F.R. § 1620.12 provides:

Wage "rate."

(a) The term wage "rate," as used in the EPA, refers to the standard or measure by which an employee's wage is determined and is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis. The term includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. It further includes the rate at which a draw, advance, or guarantee is paid against a commission settlement.

(b) Where a higher wage rate is paid to one gender than the other for the performance of equal work, the higher rate serves as a wage standard. When a violation of the Act is established, the higher rate paid for equal work is the standard to which the lower rate must be raised to remedy a violation of the Act.

5. 29 C.F.R. § 1620.23 provides:

Collective bargaining agreements not a defense.

The establishment by collective bargaining or inclusion in a collective bargaining agreement of unequal rates of pay does not constitute a defense available to either an employer or to a labor organization. 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.

6. 29 C.F.R. § 1620.27 provides, in relevant part:

Relationship to the Equal Pay Act of title VII of the Civil Rights Act.

(a) In situations where the jurisdictional prerequisites of both the EPA and title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 200e *et seq*., are satisfied, any violation of the Equal Pay Act is also a violation of title VII. However, title VII covers types of wage discrimination not actionable under the EPA. Therefore, an act or practice of an employer or labor organization that is not a violation of the EPA may nevertheless be a violation of title VII.

* * * * *

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 13,968 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) 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 Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 23, 2021

s/ *Nicole A. Saharsky*
Nicole A. Saharsky

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 23, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Nicole A. Saharsky*
Nicole A. Saharsky