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. 2:19-CV-01717-RGK-AGR

BRIEF OF FORMER FEDERAL OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
Tel.: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. The District Court Misapplied Key Principles Of The Equal Pay Act. 5
A. Statutory and Regulatory Framework 5
B. The District Court Wrongly Analyzed Total Per-Game Compensation Rather than Making the Required Wage Rate Comparison. 8
1. The district court's "average total compensation per game" metric ignored the performance component of the employer's wage rates. 9
2. Complexity does not permit a court to avoid comparing the employer's actual wage rates. 12
3. Collective bargaining agreements do not confer Equal Pay Act immunity. 16
4. The Title VII compensation claim must be analyzed independently. 19
II. FIFA Does Not Control Wage Rates And Its Prize Money Disparities Do Not Excuse The Federation's Obligation To Pay Equal Wage Rates. 20
CONCLUSION 23
CERTIFICATE OF COMPLIANCE 24
CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases

Anderson v. Univ. of N. Iowa,
779 F.2d 441 (8th Cir. 1985) 17

Bence v. Detroit Health Corp.,
712 F.2d 1024 (6th Cir. 1983) 11, 13

Boaz v. FedEx Customer Info. Servs.,
725 F.3d 603 (6th Cir. 2013) 17

Cnty. of Wash. v. Gunther,
452 U.S. 161 (1981) 20

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 17, 18

EEOC v. Health Mgmt. Grp.,
No. 09-cv-1762, 2011 U.S. Dist. LEXIS 106780
(N.D. Ohio Sept. 20, 2011) 16

EEOC v. Kettler Brothers, Inc.,
846 F.2d 70, 1988 U.S. App. LEXIS 20103 (4th Cir. 1988) 12

Freyd v. Univ. of Or.,
990 F.3d 1211 (9th Cir. 2021) 15

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 7

Rizo v. Yovino,
950 F.3d 1217 (9th Cir. 2020) 5, 6, 22

Schwartz v. Fla. Bd. of Regents,
807 F.2d 901 (11th Cir. 1987) 17

Statutes

29 U.S.C.

§ 206(d)(1) 5, 6, 21
§ 206(d)(1)(iv) 22

Regulations and Rules

29 C.F.R.

§ 1620.1(c) 18
§ 1620.10 ..... 6, 13, 19
§ 1620.12 ..... 6, 9
§ 1620.23 ..... 7, 17, 18
§ 1620.27(a) 20
§ 1620.8 21

41 C.F.R. § 60.20-4 12

Fed. R. Evid. 702 15

Other Authorities

EEOC, *Compliance Manual Section 10:*

Compensation Discrimination (Dec. 5, 2000) ..... *passim*

Webster's Third New International Dictionary (1961) 7

INTEREST OF *AMICI CURIAE*[1]

Amici served as officials in the Equal Employment Opportunity Commission (EEOC) and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) responsible for the interpretation, application, and enforcement of federal anti-discrimination law. As leaders in their respective agencies, each *amicus* participated in administrative processes to interpret the relevant statutes and precedent, develop regulatory guidance, and enforce the Equal Pay Act, Title VII's prohibition of discrimination on the basis of sex, and Executive Order 11246, which imposes analogous obligations on federal contractors. None of the *amici* are currently employed by their former agencies, and the views they express are their own, not those of the agencies. *Amici* write separately to explain, based on their extensive experience, how the district court's decision fundamentally misunderstands the Equal Pay Act, gives short shrift to Title VII, and disregards related regulatory guidance that *amici* were responsible for drafting and implementing. If not reversed, the decision would provide a (misguided) roadmap for other courts to bless unequal pay through an overly simplistic and cursory analysis in a wide range of common (but complicated) compensation arrangements.

[1] No counsel for any party authored this brief in whole or in part, no party or counsel for a party contributed money to fund preparing or submitting the brief, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4).

Congress demanded more.

Amici are listed below in alphabetical order:

- Leslie T. Annexstein, Senior Attorney Advisor to the EEOC General Counsel (2010-2016);
- Gilbert F. Casellas, Chairman, EEOC (1994-1998);
- Lorraine C. Davis, Assistant General Counsel, Appellate Litigation Services, EEOC (1986-2018);
- Eric Harrington, Appellate Attorney (2010-2014), Special Assistant to Commissioner Chai Feldblum (2011), EEOC;
- Stuart Ishimaru, Commissioner (2003-2012), Acting Chairman (2009-2010), EEOC;
- Dianna Johnston, Assistant Legal Counsel for Equal Pay Act & Title VII, EEOC (1979-2013);
- Jean P. Kamp, Trial Attorney, Supervisory Trial Attorney, Regional Attorney Milwaukee District, Associate Regional Attorney Chicago District, EEOC (1985-2019);
- David Lopez, General Counsel, EEOC (2010-2016);
- Peggy R. Mastroianni, EEOC Legal Counsel (2010-2017);
- Patrick O. Patterson, Senior Counsel to the EEOC Chair (2010-2014); Deputy Director, OFCCP (2014-2017);

- James Sacher, Regional Attorney Houston District, EEOC (1988-2016);
- Patricia A. Shiu, Director, OFCCP (2009-2016);
- C. Emanuel Smith, Supervisory Trial Attorney, Denver and Phoenix District, Regional Attorney Birmingham District, EEOC (1997-2016);
- Ellen Vargyas, EEOC Legal Counsel (1994-2001); and
- Carolyn L. Wheeler, Assistant General Counsel, Appellate Litigation Services, EEOC (1990-2015).

INTRODUCTION AND SUMMARY OF ARGUMENT

A compensation plan that offers less pay for better work is not equal. The Equal Pay Act and regulatory guidance developed and implemented by *amici* as leaders of their respective agencies prohibit employers from making women work twice as hard for the same (or less) pay. The statute requires courts to enforce this prohibition by comparing pay rates, not total pay. Whatever the metric (or metrics) by which employees are compensated, women and men must receive the same amount of pay for each measure of work. Here, the employer measures work in part by success on the field: wins and advancing in tournaments. And it is indisputable that U.S. Soccer paid women less per win than it paid men. It also paid women less for making the roster for each game. That is unequal pay.

The district court's conclusion that these undisputed disparities somehow still add up to equal pay misapplied three key principles of the Equal Pay Act. First,

employers must pay equal rates, regardless of total compensation. If women manage to achieve higher total pay by working more and doing better, it does not excuse unequal pay rates. Second, rates (including all compensation and benefits) must be valued and compared for each element of the pay structure (such as base pay and performance pay). Complex pay structures do not excuse a court from its statutory duty to compare apples to apples as best it can. If (as here) the parties dispute how to value some pay elements, those disputes must be resolved by a jury. Third, an employee's agreement to the pay rates in a collective bargaining agreement does not negate pay inequality.

These fundamental principles apply whenever an employer sets pay through a combination of base pay and performance measures. The district court's errors, if left standing, thus risk upending equal pay enforcement in common settings. Worse still, the district court treated the Equal Pay Act analysis as dispositive of the Title VII compensation claim, notwithstanding evidence that the employer adopted discriminatory elements of the compensation structure, including vastly smaller performance bonuses for the World Cup, precisely because the women's team was the women's team and not the men's. Nor can the employer avoid its equal pay obligation on the theory that it does not determine the prize money for the World Cup. All that matters is whether the employer set equal pay rates. The employer is U.S. Soccer, it set the pay rates years before the World Cup prize money was

determined (which applies to only a small subset of games, anyway), and it cannot escape responsibility for setting unequal rates by blaming the discriminatory decisions of others.

The context here may be unique—international sports competition at the highest level. But the problem of requiring women to work twice as hard for half as much is far too common. The district court's mistaken conclusions here undercut decades of regulatory guidance and enforcement designed to fulfill Congress's promise that all women and men, including those employed far from the spotlight, receive equal pay for equal work.

ARGUMENT

I. The District Court Misapplied Key Principles Of The Equal Pay Act.

A. Statutory and Regulatory Framework

The Equal Pay Act prohibits an employer from discriminating "on the basis of sex by paying wages to employees … at a rate less than the rate at which [it] pays wages to employees of the opposite sex" for substantially equal work. 29 U.S.C. § 206(d)(1). Under the Act, the "employee bears the burden of establishing a prima facie case of wage discrimination by showing that 'the employer pays different wages to employees of the opposite sex for substantially equal work.'" *Rizo v. Yovino*, 950 F.3d 1217, 1222 (9th Cir. 2020) (en banc) (quoting *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986)). If "the plaintiff is successful, the burden shifts to the employer to show an affirmative defense." *Id.* at 1223. No proof of

discriminatory intent is required. *Id.* The district court held that the Women's National Team failed to establish a prima facie case, 1-ER-25, so affirmative defenses are not at issue on appeal.

To make out a prima facie case, an employee must show (i) that the employer paid wages to one sex "at a rate less than … the opposite sex" in the same establishment (ii) for substantially equal work in terms of "skill, effort, and responsibility" and "similar working conditions." 29 U.S.C. § 206(d)(1); *see* EEOC, *Compliance Manual Section 10: Compensation Discrimination* § 10-IV-B (Dec. 5, 2000) (EEOC Compliance Manual). Only the first element—an unequal wage rate—is at issue here.[2] The term "'wages' generally includes all payments made to [or on behalf of] an employee as remuneration for employment," including "all forms of compensation" and "[f]ringe benefits." 29 C.F.R. § 1620.10 (first brackets in original). The wage "rate" 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." *Id.* § 1620.12.

The Act's equal wage "rate" mandate means employers must pay an equal dollar amount for each unit of measurement by which the employer measures

[2] The Federation stipulated that that the men's and women's jobs require equal "skill, effort, and responsibility." *See* Opening Br. 27 n.8.

work—regardless of total compensation. *See Webster's Third New International Dictionary* 1884 (1961) (defining "rate" as an "amount … of something measured per unit of something else"). If there were any doubt, the EEOC's Compliance Manual makes this clear, and warrants deference based on the agency's expertise. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (deferring to EEOC Guidelines as "a body of experience and informed judgment").

An employee can establish a prima facie case of unequal pay even if total compensation is approximately equal. EEOC Compliance Manual § 10-IV-C. For example, commission-based wages are unequal "if the commission rates are different" between a man and a woman, "even if the total compensation earned by both workers is the same." *Id.* Working twice as hard to earn the same total compensation is not equal pay. By the same token, if the rates are the same, then unequal total compensation does not establish a prima facie case. *Id.* The point of comparison is not total compensation, but instead the total remuneration per each measure by which an *employer* determines the employee's wage, whether that is time (hour, week), production (sale, widget), performance (quality targets, wins or losses), or something else.

If an employer pays unequal rates for equal work in the specified metrics, it violates the Act unless it can prove an affirmative defense—even if the unequal rates are the product of collective bargaining. *See* 29 C.F.R. § 1620.23.

B. The District Court Wrongly Analyzed Total Per-Game Compensation Rather than Making the Required Wage Rate Comparison.

The district court misapplied this rate-comparison framework in three ways. First, the district court compared average per-game total compensation, rather than comparing the wage rates based on the measures set by the employer—which measured pay not only per game, but per the type and outcome of games. Second, the court declined to compare (or to find that material disputes of fact required the jury to compare) the value of each pay element because the pay structure for some (but not all) of the women was different from the men's. The statute does not allow this kind of punt. Finally, the district court erred by holding that the women's acceptance of a different pay structure through collective bargaining effectively vitiated their right to an equal pay rate.

Although the pay structures here are more complex than many employment arrangements, the features that caused the district court to go awry are common, including the combination of base pay with performance bonuses, and existence of collective bargaining agreements. Guidance developed and implemented by *amici* on behalf of their respective agencies reveals how the district court's analysis contravenes the Equal Pay Act.

1. The district court's "average total compensation per game" metric ignored the performance component of the employer's wage rates.

To find that the women's team received equal pay, the district court engaged in back-of-the-envelope math, ignoring the actual terms of how players are compensated and instead adding up the total compensation that each team received and dividing it by the number of games, arriving at an average total compensation per game of about $220,000 for women and $212,000 for men. 1-ER-22 (accepting the Federation's expert's valuation). This comparison missed the mark by substituting a court-invented flat per-game total compensation metric for the statutory requirement of the actual "standard or measure by which [each player's] wage is determined." 29 C.F.R. § 1620.12 (defining wage "rate"). That real-world measure accounted for not only the number of games played, but also the type of game and results—in other words, how well the team played. Under both teams' agreements, the wage rate for more important games (e.g., games against higher-ranked opponents, World Cup games) was higher than the rate for other games, and the wage rate for wins was higher than for losses. 1-ER-6–7; 1-ER-17. The district court's total per-game compensation calculation impermissibly ignored these performance components of the players' wage rates. It was fatal legal error to ignore the actual compensation structure.

The upshot of the district court's sloppy math was to convert the Act's equal

pay mandate to a permission slip for unequal pay so long as women make up for it by being better at their jobs. This equal-pay-for-better-work standard flies in the face of Congress's promise of equal pay that *amici* have long worked to enforce.

As the district court recognized, the Equal Pay Act forbids an employer from requiring women to work more to make the same amount of pay. *See* 1-ER-21 (noting that merely comparing total compensation would be inappropriate, because it would permit an "obvious disparity" in wage rates to be "negated" by the women working more). What the court missed, however, is that the Equal Pay Act likewise forbids employers from requiring women to be more successful to make the same pay. The Act ensures that employers cannot require more or better work for equal pay by making clear that it is the wage "rate" and not the total wage amount, that must be the same between the sexes. An equal pay rate means paying the same wage for the same measure of work, whether that measure is time, success, profits, or something else.

Transplanting the district court's flawed analysis to a more familiar compensation context makes the error plain. It is common for salespeople to be paid based on a combination of time (e.g., a base hourly wage) and success (e.g., a commission). As the EEOC Compliance Manual explains, if commission rates are unequal, then pay is unequal, regardless of how total compensation shakes out. EEOC Compliance Manual § 10-IV-C. Imagine a jewelry store that pays its male

sales force a $10 base hourly wage, plus an additional $10 for each sale, and a $100 special bonus for selling an item made by a high-end designer. Now imagine that women are paid half that for each wage measure. If the women are better salespeople—make more sales, of more high-end items—the district court's method (taking total compensation and dividing it by the total number of hours) could easily arrive at higher per-hour compensation for the women than for the men. But this higher per-hour average is, like the district court's higher per-game average here, divorced from reality. *See* 1-ER-22. It has nothing to do with how the women are actually being paid, or how much their pay rates are, compared to the men. And under the district court's flawed methodology, the women's Equal Pay Act claim would fail, even though their wage rates were less than the men's on every single measure, simply because they worked better. But Congress did not include a superior performance exception to the Equal Pay Act.

Here, as in the example above, the women were paid less on every metric: less per game (including when both salary and fringe benefits are considered for the women who received them, Opening Br. 47), less per win, and less per high-end tournaments like the World Cup, *see* Opening Br. 41. As other courts of appeals have held, such disparate rates make out a prima facie case of unequal pay, even if total compensation (or, here, total compensation per one of several measures of work, *i.e.*, per game) is roughly equal. *See, e.g.*, *Bence v. Detroit Health Corp.*, 712

F.2d 1024, 1027 (6th Cir. 1983) (unequal pay element of prima facie case satisfied where employer paid higher commission rate to males than females, even though total remuneration was substantially equal); *EEOC v. Kettler Brothers, Inc.*, 846 F.2d 70, 1988 U.S. App. LEXIS 20103, at *2, *8 (4th Cir. 1988) (unpublished) (same where employer guaranteed same minimum salary to all employees but also paid men higher commission rates); *see also* Opening Br. 32-33 & n.9 (collecting cases). If male employees are offered a certain incentive, profit-sharing, or bonus opportunity, female employees doing equal work must be provided the same opportunities, at the same pay level. *See* EEOC Compliance Manual § 10-IV-C ("wage rate" "encompasses rates of pay calculated on a … commission, … job incentive, profit sharing, … or other basis"); *see also* 41 C.F.R. § 60.20-4 (OFCCP regulation implementing EO 11246, specifying that federal contractors may not "deny[] women equal opportunity to obtain regular and/or overtime hours, commissions, pay increases, incentive compensation, or any other additions to regular earnings").

2. Complexity does not permit a court to avoid comparing the employer's actual wage rates.

Of course, the wage-rate comparison mandated by the Act can get more complicated when an employer's wage rate is based on several different measures, and some measures are not applicable to both sexes. In this case, some members of the women's team received types of pay and benefits that the men did not, including

annual base salaries (as compared to being paid per game for each game where they made the roster) and fringe benefits. *See* 1-ER-22.[3]

The district court reasoned that the disparate pay structures required the court to default to a total compensation approach, rather than even attempt to engage with the expert evidence to compare the different wage rates specified by the teams' contracts for games, wins, and the like. 1-ER-22. Such a shortcut violated Congress's command to consider "all forms of compensation," 29 C.F.R. § 1620.10 (defining "wages"), only in the form of wage "rates"—how much each employee is paid per "measure by which an employee's compensation is determined," EEOC Compliance Manual § 10-IV-C. The statute requires "measuring the amount of pay"—including all of the base pay and fringe benefits—"against a common denominator," *Bence*, 712 F.2d at 1027, and specifically the common denominator that is chosen by the employer (not invented by the court).

To compare the measures of pay selected by the employer would mean, in this case, comparing the total amount of compensation provided men and women as base pay—i.e., for being put on a roster for a game—and the total amount of compensation provided for wins (in games of varying importance). The district court

[3] Some members of the women's team were not on salary and did not receive these fringe benefits. The wage rates for those team members can be straightforwardly compared to the men's, and establish a prima facie case, without the need to resolve any disputed expert valuations. *See* Opening Br. 45.

appeared stymied by the fact that some players (all of the men and some women) were paid base pay in per-game fees, and others (some of the women) were paid base pay in salary and benefits. But arriving at a per-game rate for the latter players is a simple matter of dividing salary and benefits by the number of games. When pay structures differ, the calculation of comparable pay rates may be more complex, but the parties' dueling expert opinions show that it is not impossible. *See* Opening Br. 18 (describing different expert approaches). The district court's refusal to compare the rates set forth in each team's contract suffers from three major flaws.

First, the Equal Pay Act would be toothless if employers could obfuscate unequal pay rates with complex, disparate pay structures. The contracts were not, in fact, so wildly different as the district court appeared to think, given that for many women the forms of pay were identical to the men's, just less. And the fact that pay structure differed for some women should spark more careful scrutiny of whether the rates were equal, not permit the court to gloss over differential pay rates with a total compensation per game number that does not reflect the actual measures of work for any team member, male or female.

Second, to the extent that different types of pay may lead the parties to disagree on how to value the fringe benefits or other aspects of the contracts, we trust juries to resolve such fact disputes. District judges may have a gatekeeper duty under the Federal Rules of Evidence in determining, for example, whether particular

expert testimony is reliable and "will help the trier of fact," Fed. R. Evid. 702, but ultimately it is the jury's province to decide disputed fact questions. *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1219-20 (9th Cir. 2021) (where evidence is "not so one-sided as to mandate [the] conclusion" that men and women were paid equally, district court erred by granting summary judgment). Here, the district court improperly circumvented that process by relying on its own overly simplistic analysis—which, in fact, effectively adopted the Federation's expert's total valuation, 1-ER-20–21—and did so while ignoring conflicting evidence. Ultimately, whatever the complexities in the teams' compensation structure, one thing is clear: the district court cannot make blatant pay disparities on key indicators magically disappear by relying on a flawed comparison that is worlds (or World Cups) apart from how the teams are actually paid.

Third, the type of differential pay forms that caused the district court to refuse to compare the men's and women's actual contracted pay rates are likely to reflect sex stereotyping, and therefore bear closer scrutiny. In fact, there was direct evidence of such stereotyping here that the district court entirely discounted. 1-ER-24–25. The women's team accepted a contract with a greater fixed pay component (for some women) only after the Federation refused to offer them the same "pay to play" structure as the men at the same pay level (dollar amounts) as the men, with its counsel commenting "market realities are such that the women do not deserve equal

pay" (viewing the evidence in the light most favorable to the non-moving party). *See* Opening Br. 14-15.

Such stories are all too common. There are many situations in which sex stereotypes may drive an employer to pay women less, while obfuscating unequal rates by paying women differently. For example, an employer might presuppose that women are more likely to be risk averse, and therefore structure its pay offers to women with more salary and less upside potential, while offering men riskier, but potentially far more lucrative, pay packages. Whether or not the resulting compensation is unequal, and thus establishes a prima facie case, is a contextual inquiry that is highly fact-dependent. The answer might be that the pay rates are equal, but that conclusion can be reached only after a considered assessment that ensures every element of pay is equal. *See, e.g.*, *EEOC v. Health Mgmt. Grp.*, No. 09-cv-1762, 2011 U.S. Dist. LEXIS 106780, at *8-9 (N.D. Ohio Sept. 20, 2011). But that answer must be reached, not avoided. The court cannot, as the district court did here, short circuit the inquiry by treating salaries and performance measures as non-comparable, or ignore disputed facts by making an overly simplistic comparison of pay that does not reflect reality.

3. Collective bargaining agreements do not confer Equal Pay Act immunity.

The district court buttressed its refusal to compare some women's salaried base pay with the men's substantially higher appearance fees and performance pay

by finding that the women agreed, through collective bargaining, to be paid less in exchange for more pay certainty and stability. 1-ER-23–24. Under the statute and EEOC guidance, a collective bargaining agreement cannot play the dispositive role that the district court assigned to it.

It is beyond dispute that an unequal pay rate that violates the Act is not made lawful because employees agreed to it through collective bargaining. *See* 29 C.F.R. § 1620.23 ("Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the [Equal Pay Act] are null and void and of no effect."); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 208-10 (1974) (holding that unequal pay rates contained within collective bargaining agreements violated the Equal Pay Act).

Nor can employees prospectively waive their Equal Pay Act claims in a collective bargaining agreement. *See, e.g.*, *Anderson v. Univ. of N. Iowa*, 779 F.2d 441, 444 (8th Cir. 1985). Courts presume that Congress was aware, when it enacted the Equal Pay Act as an amendment to the Fair Labor Standards Act (FLSA), that the Supreme Court had held FLSA claims non-waivable. *Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603, 607 (6th Cir. 2013) (citing *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114, (1946); *Brooklyn Savs. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)). Accordingly, Congress intended prospective Equal Pay Act claims to be non-waivable as well. *Id.*; *see also Schwartz v. Fla. Bd. of Regents*, 807 F.2d 901,

906 (11th Cir. 1987) ("There can be no prospective waiver of an employee's rights ... under the Fair Labor Standards Act, a portion of which is the Equal Pay Act[.]").

Although it did not go so far as to expressly hold that the collective bargaining agreement barred the team's claims, the district court nonetheless gave undue exculpatory weight to the fact that the Women's National Team had entered a collective bargaining agreement. Specifically, the Court denied the women their equal pay rights by holding that the team could not "retroactively deem their CBA worse than the [men's] CBA by reference to what they would have made" under the men's agreement when "they themselves rejected such a [performance-based] structure." 1-ER-23. The method of comparison, the district court held, must "account for the choices made during collective bargaining." 1-ER-23.

But under the Act, the question is whether the pay rates (fairly compared) received by men and women are equal, not whether the employees agreed to them. It is nonsensical to make bargaining an escape hatch from a law that was "motivated by concern for the weaker bargaining position of women." 29 C.F.R. § 1620.1(c); *see Corning Glass Works*, 417 U.S. at 206. The comparison of value is the same whether the pay rates are set by agreement or dictated by the employer. If the pay rates for substantially equal work are unequal, then a prima facie Equal Pay Act claim is proved, regardless of whether employees agreed to those pay rates. 29 C.F.R. § 1620.23; EEOC Compliance Manual § 10-IV-F(2)(j) ("An employer's

assertion that a compensation differential is attributable to a collective bargaining agreement does not constitute a defense under the EPA.").

The district court's contrary conclusion confuses preferences regarding pay structure with acquiescence to being paid less for better results. As described above, there is no dispute that the base salaries and benefits negotiated by the women's team have value that must be considered as part of the total compensation when comparing pay rates. *See* 29 C.F.R. § 1620.10. But the fact that the women's team negotiated a pay structure with fixed-pay components for some women does not cut off their right to object to both base-pay and performance-pay disparities that a reasonable jury could find dwarf the value of the fixed pay. This is particularly true here because the team was never offered a performance pay option at the same wage rates as the men, despite requesting it. *See* Opening Br. 12. The fact that the women's team rejected a "pay-to-play proposal *similar* to the [men's] CBA," 1-ER-23 (emphasis added)—but not equal—does not obviate the requirement, under the Act, to compare the value of the pay rates that the Federation ultimately decided to pay its male and female employees, and to determine if those rates are equal.

4. The Title VII compensation claim must be analyzed independently.

The district court compounded its Equal Pay Act errors by treating the women's Title VII compensation claim as if it inexorably rose or fell with the Equal Pay Act. 1-ER-25. EEOC regulations establish that an "act or practice" that "is not

a violation of the [Equal Pay Act] may nevertheless be a violation of title VII." 29 C.F.R. § 1620.27(a). Even if (counterfactually) total pay were equal, and that sufficed for Equal Pay Act purposes, the women's team brought forward evidence that the employer paid lower per-game and performance fees to the women's team because they were women—*i.e.*, direct evidence of discrimination. *See* 1-ER-24. That is sufficient to make out a prima facie case under Title VII, and at the very least must be evaluated separately as a claim based on "direct evidence, that [women's] wages were depressed because of intentional sex discrimination." *Cnty. of Wash. v. Gunther*, 452 U.S. 161, 166 (1981).

II. FIFA Does Not Control Wage Rates And Its Prize Money Disparities Do Not Excuse The Federation's Obligation To Pay Equal Wage Rates.

The greatest disparities in the performance components of the wage rates relate to the World Cup. *Compare* 1-ER-7, *with* 1-ER-17. *Amici* understand that the Federation argued below that FIFA, soccer's international governing body, sets different prize money for the men's and women's World Cup, and therefore the Federation is not responsible for any unequal pay rates related to the World Cup. The district court did not address this argument. But *amici* write to emphasize that any prize money disparity from FIFA cannot excuse the Equal Pay Act violations here.

First, the argument is irrelevant to most of the pay disparities. FIFA does not set prize money for any games outside the World Cup, yet the Federation set

disparate pay rates for non-World Cup games. *See* Opening Br. 41. In addition, FIFA does not pay any prize money for either men's or women's World Cup qualifying rounds, 4-ER-583, yet the Federation set unequal bonuses for those games, too. Opening Br. 41.

Second, the Federation cannot so easily avoid its responsibilities as the employer. The "employer" is the entity responsible for paying an equal wage. 29 U.S.C. § 206(d)(1). The "employer" is the entity that suffers or permits an employee to work. 29 C.F.R. § 1620.8. FIFA does not employ the Women's National Team. FIFA is not a party to the collective bargaining agreement; only the Federation is. FIFA does not set wage rates; only the Federation does that. In fact, the Federation sets wage rates for World Cup games *before* FIFA has even set the World Cup prize money. *See* Opening Br. 43 n.15. And FIFA does not pay the team; the Federation does, out of a wide variety of revenue streams it receives, including but not limited to the FIFA World Cup prize money. *See* Opening Br. 7-8.

In a sense, the Federation sells a service to FIFA of fielding a winning team in the World Cup. Whatever FIFA's preferences, the Federation must still comply with federal law. Imagine a homeowner who tells a landscaping company that he will pay $50 to have his lawn mowed if the landscaping company assigns a man to the job, and $25 if it sends a woman. It would upend equal pay law if the landscaping company could pass on this blatant discrimination and avoid responsibility for

paying its female employees half the wage rate that it pays the men by claiming "the customer made me do it."

Third, the FIFA-made-me-do-it argument will not fly as an affirmative defense because it is not job-related. The Equal Pay Act permits employers to justify a pay differential "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). The "scope of [this] exception is limited," and it encompasses only factors that are job-related. *Rizo*, 950 F.3d at 1223-24. The amount of prize money FIFA decides to pay for different tournaments—after the Federation has already set its pay rates—is not a factor that relates to the women's education, skills, or experience, *see id.* at 1228 (discussing these as job-related factors). The differential prize money is most likely a carry-forward of a history of discrimination in women's sports, and thus a wholly impermissible factor on which to defend unequal pay. *See id.*

CONCLUSION

The judgment of the district court should be reversed.

July 30, 2021

Respectfully submitted,

s/Hyland Hunt

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
Tel.: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 5,270 words, and thus complies with the type-volume limitation set forth in Rule 29(a)(5) and Circuit Rule 32-1.

s/Hyland Hunt
Hyland Hunt

July 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on July 30, 2021, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt
Hyland Hunt