

Case 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-1717 (Hon. R. Gary Klausner)

**BRIEF FOR THE UNITED STATES NATIONAL SOCCER TEAM
PLAYERS ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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TABLE OF CONTENTS

	Page
Interest of <i>Amicus Curiae</i>	1
Introduction	2
Argument.....	5
I. USWNT players are elite athletes at the pinnacle of their sport.....	5
II. The Federation has discriminated against the women for decades.	7
III. The Federation pays the women unequally.	12
A. The Federation pays both the men and the women for playing games and provides higher pay for securing positive results.	12
B. The Federation pays the women less than the men.	15
C. The district court’s comparison of the women’s pay agreed to in 2017 and the men’s pay agreed to in 2011 overlooked the growth of U.S. Soccer in the interim.....	17
IV. The district court’s decision improperly condones the Federation’s abuse of its monopsony power.	22
Conclusion.....	28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Beef Indus. Antitrust Litig.</i> , 600 F.2d 1148 (5th Cir. 1979)	26
<i>Brown v. Pro-Football, Inc.</i> , 50 F.3d 1041 (D.C. Cir. 1995)	24
<i>NCAA v. Alston</i> , 141 S. Ct. 2141 (2021)	24
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	27
Statutes	
36 U.S.C. § 220523	23
Other Authorities	
Am. Soccer History, <i>USMNT Results: 2010-2014</i> , https://bit.ly/3rTrFp7	11
Am. Soccer History, <i>USWNT Results: 2010-2014</i> , https://bit.ly/3laRzmS	11
Andrew Das, <i>U.S. Soccer and Women’s Stars Reach Deal on Working Conditions</i> , N.Y. Times (Dec. 1, 2020).....	21
Lawrence Dockery, <i>USWNT average attendance 8% greater than US men’s soccer team in 2019</i> , World Soccer Talk (Dec. 25, 2019), https://bit.ly/2THva57	11
FBref, <i>FIFA Women’s World Cup Tournaments</i> , https://bit.ly/3y9uFj6	5
FBref, <i>Olympics – Women’s Tournament</i> , https://bit.ly/3wX0Ocn	5

TABLE OF AUTHORITIES
(continued)

FIFA, <i>Commentary on the Rules Governing Eligibility to Play for Representative Teams</i> (Jan. 2021), available at https://fifa.fans/36TmT12	23
FIFA, <i>Women’s Ranking</i> , https://fifa.fans/3kHQjHr	5
Aram Gumusyan, <i>Comparing US Soccer ticket prices to other national teams and sports</i> , WorldSoccerTalk (Feb. 19, 2020), https://bit.ly/3wRIe5n	10
Rob Harris, <i>Investment pays off as Europe dominates FIFA Women’s World Cup</i> , Denver Post (June 26, 2019), https://dpo.st/3BCvFyL	6
Abigail Johnson Hess, <i>US viewership of the 2019 Women’s World Cup final was 22% higher than the 2018 men’s final</i> , CNBC (July 10, 2019), https://cnb.cx/3rnWj9K	6
Grahame L. Jones, <i>Women Soccer Players Boycott Olympic Camp: Atlanta Games: Dispute involving top U.S. players hinges on rejection of contract offers</i> , L.A. Times (Dec. 6, 1995), https://lat.ms/3rpBxXl	9
Daniel Libit, <i>Going for Gold: Team USA Eyes \$100M+ in Legal Fees Since Rio Games</i> , Sportico (May 10, 2021), https://bit.ly/36S9LJr	21
Jeré Longman, <i>How Megan Rapinoe and the U.S. Beat France at the World Cup</i> , N.Y. Times (June 28, 2019), https://nyti.ms/3hVAsmP	6
Jeré Longman, <i>SOCCEer: Women’s Team Ends Boycott, Agreeing to a Contract</i> , N.Y. Times (Jan. 30, 2000), https://nyti.ms/2W2BogJ	9
Juliet Macur, <i>On Artificial Turf Issue, U.S. Women Dig In at Last</i> , N.Y. Times (Dec. 8, 2015), https://nyti.ms/3hWZfGk	11

TABLE OF AUTHORITIES
(continued)

Allison McCann, *U.S. Men’s Soccer, But Not Women’s, Gets To Play All Its Games On Grass*, FiveThirtyEight (Dec. 7, 2015), <https://53eig.ht/3iCmOEb>.....10

Kathleen McNamee, *U.S. Soccer continues to clash with USWNT after new equal pay documentary airs*, ESPN (June 25, 2021), <https://es.pn/3y0DMTc>12

Caitlin Murray, *The National Team: The Inside Story of the Women Who Changed Soccer* (2019)7, 8, 9, 10

Julia Poe, *Lisa Baird addresses big NWSL changes ahead of draft*, Orlando Sentinel (Jan. 12, 2021), <https://bit.ly/3hY1oCG>.....25

Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* (2000).....23

Jonathan Tannenwald, *Details of U.S. Soccer’s budget for national teams*, NWSL, Phila. Inquirer (Mar. 7, 2016), <https://bit.ly/3BKDmCP>19

Tom VanHaaren, *Jersey sales soaring for USWNT, setting records*, ESPN (July 3, 2019), <https://es.pn/3hUnNk0>6

INTEREST OF *AMICUS CURIAE*¹

The United States National Soccer Team Players Association is the labor organization for the current members of the United States Men's National Team (USMNT) and a member organization for alumni members of the Men's National Team. The Association has unique insight into the history of collective bargaining negotiations between the United States Soccer Federation and the Men's and Women's National Teams. It also has a keen understanding of the Federation's long-standing discrimination against the Women's National Team and its players. The Association has a strong interest in ensuring equal and fair compensation for the elite athletes, male and female, who represent the United States in international soccer competition. The men stand with the women in their fight to secure the equal pay they deserve.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amicus curiae* or its counsel, contributed money intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

The United States Soccer Federation markets the United States Men's and Women's National Teams under the slogan, "One Nation. One Team." But for more than thirty years, the Federation has treated the Women's National Team players as second-class citizens, discriminating against the women in their wages and working conditions and paying them less than the Men's National Team players, even as U.S. Soccer has enjoyed a period of extraordinary financial growth. The Federation has never offered or provided equal pay to the women, and the district court's holding to the contrary cannot be squared with the facts.

The members of the Women's National Team are elite athletes who have dedicated their lives to establish the Team as a force of unparalleled dominance on the international soccer stage. But rather than rewarding the women's effort and success with equal compensation, the Federation has spent more than three decades treating the women as an afterthought, discriminating against them through inferior wages and working conditions, and forcing the women to struggle for the equal pay and fair treatment they deserve.

This latest chapter of discriminatory treatment is no different. The Federation has chosen to pay the women less than the men. The disparity is apparent on the face of the National Teams' collective bargaining

agreements: The Federation pays the women lower performance bonuses and lower per-game appearance fees than the men.

The district court disregarded these disparities by improperly adding up the *total* amount of compensation paid to the men and women, then dividing it by the total number of games, concluding that, on average, the women's pay per game was not lower than the men's. But the women only managed to get to the same total per game pay by having extraordinary success on the field, while the years relied on by the district court were the first time the men did not qualify for the World Cup in *more than thirty years*. The district court's oversimplified math made the women victims both of their own success and of the men's atypical struggles in 2017-2018. A woman's rate of pay is not equal to a man's if the woman must consistently achieve better outcomes merely to get to the same place. If the women had won fewer games, or if the district court had analyzed a more representative period of the men's performance as a point of comparison, the per-game disparity would have been obvious, glaring, and undeniable.

The district court's view of equality is further flawed because the court compared the women's pay under the 2017 agreement to the men's pay under their 2011-2018 agreement. The men's 2011 agreement was entered into in the shadow of the financial crisis. The financial terms in that agreement were based on the Federation's assertion that its position

was tenuous and the economics of the upcoming years were uncertain. But from 2011 to 2017, the United States economy righted itself, and soccer and sponsorship interest in the U.S. Men's and Women's National Teams had tremendous growth, leading to a threefold increase in the Federation's revenue. If anything, true equality should have led to the women in 2017 being paid *more* than the men were paid under their 2011 agreement.

The Federation has imposed economic hardship and stress on National Team athletes for too long. Indeed, rather than compensating the women equally and embracing *all* National Team players, the Federation has devoted substantial revenue to litigating and lobbying, in the misguided hope of preserving a system that treats the women as inferior. The female athletes who have represented the United States with distinction deserve better. Given the visibility and popularity of the Team and women players, the Federation's discrimination also sends a corrosive public message to women and girls that, even at the highest level, no matter how hard they work or how much they succeed, they can and will be diminished and undervalued by their employers. That is as dispiriting as it is unlawful. The Court should reverse the district court's grant of summary judgment and remand the case for trial.

ARGUMENT

I. USWNT players are elite athletes at the pinnacle of their sport.

The U.S. Women's National Team (USWNT) is a force of unparalleled dominance on the international stage in women's soccer. It has been the world's top-ranked women's team for the last six years, and over its three-plus decades of existence, it has never ranked lower than second. FIFA, *Women's Ranking*, <https://fifa.fans/3kHQjHr> (last accessed July 29, 2021). Among their many accomplishments, the women have won four Women's World Cups, including two during the period covered by this case; no other nation has won more than two in the entire history of the competition. FBref, *FIFA Women's World Cup Tournaments*, <https://bit.ly/3y9uFj6> (last accessed July 29, 2021). The USWNT has earned third-place or better in every edition of the Women's World Cup; only seven nations have even *appeared* in every edition. *Id.* The USWNT has won the gold medal in four Olympics; no other nation has managed more than one gold. FBref, *Olympics – Women's Tournament*, <https://bit.ly/3wX0Ocn> (last accessed July 29, 2021). During the period covered by this case, the USWNT won 82% of its 111 games and tied an additional 11%, scattering just eight defeats (7.2% of its games) over four years. 2-ER-98, 5-ER-904–08.

The USWNT's dominance during this period should not be taken to suggest that its remarkable success has come easily. As other countries increased their investment in women's soccer, the competition grew stiffer. Rob Harris, *Investment pays off as Europe dominates FIFA Women's World Cup*, Denver Post (June 26, 2019), <https://dpo.st/3BCvFyL>. The USWNT players nevertheless held off their toughest challengers in hostile stadiums, and succeeded even while carrying the burden and stress of sky-high expectations. *E.g.*, Jeré Longman, *How Megan Rapinoe and the U.S. Beat France at the World Cup*, N.Y. Times (June 28, 2019), <https://nyti.ms/3hVAsmP>. In doing so, they have contributed to the Federation's considerable growth in revenue and helped to solidify the popularity of soccer among men, women, boys, and girls of all ages in the United States. *See, e.g.*, Tom VanHaaren, *Jersey sales soaring for USWNT, setting records*, ESPN (July 3, 2019), <https://es.pn/3hUnNk0>; Abigail Johnson Hess, *US viewership of the 2019 Women's World Cup final was 22% higher than the 2018 men's final*, CNBC (July 10, 2019), <https://cnb.cx/3rnWj9K>.

This is a testament to the skill and commitment of the players on the USWNT. Like other elite athletes, the women have dedicated their minds and bodies to competing and succeeding at the highest level. They have spent long hours in practice and trained relentlessly to stay in peak physical condition. They have risked injury and played through pain for the

benefit of their team. They have sacrificed time with their family and friends to train and travel across the globe. Representing the United States on the international soccer stage is an honor and a privilege for every athlete, male or female—and it is also an incredibly demanding job, mentally and physically, that warrants fair and appropriate pay and working conditions.

II. The Federation has discriminated against the women for decades.

The women's success is all the more remarkable because it has come in the face of persistent discrimination and unfair treatment from the United States Soccer Federation. For decades, the Federation has staunchly resisted any concept of equal pay or basic economic fairness in compensating the women. It has forced the women to fight and protest, time and time again, for equal pay and acceptable working conditions.

The Federation's disparate treatment of the women is well-documented and predates even the period at issue in this case. For years following the formation of the Women's National Team, the Federation forced the women to wear hand-me-downs from the men instead of giving them their own uniforms. Caitlin Murray, *The National Team: The Inside Story of the Women Who Changed Soccer* 16 (2019) (“[Shannon] Higgins, all 5-foot something, 120 pounds of her, wore No. 3, which meant she had to

wear the uniform of whichever player was No. 3 on the men's team. That was John Doyle, a 6-foot-3, 200-plus pound giant.”). When the women competed abroad, the entire team could be forced to sleep in a single large room, while the youth men's team was lodged comfortably in a hotel a few miles away. *Id.* at 17. Even the per diems were unequal, with the Federation giving the men \$25, while the women received no more than \$15. *Id.* at 18. While the men received \$10,000 bonuses for qualifying for the 1990 World Cup, the women who qualified for the 1991 World Cup were given nothing more than t-shirts with a Budweiser logo. *Id.*

The women soon began calling attention to the inequality they face and began to demand equal treatment from the Federation. In 1995, for example, members of the 1991 World Cup winning team, including now-household names such as Mia Hamm, Briana Scurry, and Michelle Akers, raised concerns over disparities in the performance bonuses set by the Federation for the 1996 Olympics; the men would be awarded bonuses for obtaining any medal, while the women would receive bonuses only for winning gold. Murray, *The National Team* at 20. When the Federation refused to budge, nine players refused contract offers from the Federation and boycotted training camp just a few months before the Olympics. *Id.* at 21; Grahame L. Jones, *Women Soccer Players Boycott Olympic Camp: Atlanta Games: Dispute involving top U.S. players hinges on rejection of*

contract offers, L.A. Times (Dec. 6, 1995), <https://lat.ms/3rpBxXl>. The Federation responded by locking those players out of a pre-Olympics training camp, before ultimately agreeing to a compromise that would make bonuses available to the women for gold or silver medals—an agreement that still fell short of what the Federation provided to the men. Murray, *The National Team*, at 22–23.

A few years later, on the heels of the women’s historic win in the 1999 World Cup, the Federation offered the players only short-term contracts with such marginal compensation that all 20 members of the team boycotted a January 2000 tournament in Australia. Jeré Longman, *SOCCKER; Women’s Team Ends Boycott, Agreeing to a Contract*, N.Y. Times (Jan. 30, 2000), <https://nyti.ms/2W2BogJ>. The Federation attempted to break the players’ resistance by sending a young team of replacement players to the tournament, only to see those younger players later join the veterans in holding out for a new, fair contract offer. *Id.* Only then did the Federation relent and agree to a multiyear contract with modestly enhanced appearance fees and performance bonuses. *Id.*

As the 2000 agreement came to a close, the Federation continued to dismiss the women’s demands for equal treatment. In 2004, frustrated by the Federation’s intransigence in collective bargaining negotiations, the women raised concerns to the United States Olympic Committee about pay

equality and the Federation's lack of commitment to the women's team. The women's counsel specifically identified "USSF's unwillingness to pay the women anywhere near equal compensation for successes comparable to the men's" as an impediment to the negotiations. 4-ER-643; Murray, *The National Team* at 115.

The Federation's disparate treatment of the women continued through the negotiation of the women's most recent collective bargaining agreement in 2017. Record evidence shows that, during those negotiations, the Federation told the women in no uncertain terms that "the women do not deserve equal pay." 4-ER-653. The Federation also treated the women unequally in terms of travel and hotels, and provided the women with fewer doctors and physical therapists to travel with the team. 2-ER-121-28. It has forced the women to play in smaller stadiums and set lower prices for tickets for their games than for the men's games. Aram Gumusyan, *Comparing US Soccer ticket prices to other national teams and sports*, WorldSoccerTalk (Feb. 19, 2020), <https://bit.ly/3wRIe5n>. And it has forced the women to play on artificial turf surfaces that increase athletes' risk of injury, while providing permanent grass or temporary sod fields for the men's games. Allison McCann, *U.S. Men's Soccer, But Not Women's, Gets To Play All Its Games On Grass*, FiveThirtyEight (Dec. 7, 2015),

<https://53eig.ht/3iCmOEb>; Juliet Macur, *On Artificial Turf Issue, U.S. Women Dig In at Last*, N.Y. Times (Dec. 8, 2015), <https://nyti.ms/3hWZFgK>.

The Federation has also discriminated against the women using contractual provisions that appear neutral on their face, but that are expected to and in actual experience disadvantage the women economically. For example, after facing criticism for an earlier facially disparate bonus structure, the Federation revised the structure to award equal amounts to men and women for each ticket purchased to their respective games controlled by the Federation and played in the United States²—but it made this change at a time (the early 2010s) when annual attendance at domestic men’s games exceeded attendance at the women’s games.³ Compare Soc’y for Am. Soccer History, *USMNT Results: 2010-2014*, <https://bit.ly/3rTrFp7> (last accessed July 29, 2021) with Soc’y for Am. Soccer History, *USWNT Results: 2010-2014*, <https://bit.ly/3laRzmS> (last accessed July 29, 2021) (reporting attendance figures per game). The Federation could therefore

² See, e.g., 4-ER-661 (agreeing to “[p]ayment of \$1.20 per/ticket sold to US Soccer-promoted home friendlies—under the same terms as the agreement with the men”).

³ In more recent years, the attendance figures for USWNT games have generally equaled or exceeded attendance figures for USMNT games. Lawrence Dockery, *USWNT average attendance 8% greater than US men’s soccer team in 2019*, World Soccer Talk (Dec. 25, 2019), <https://bit.ly/2THva57>.

proclaim publicly to be treating the two National Teams “equally,” all the while expecting that it would never pay the women as much as it paid the men.

In short, the Federation has persistently treated the women as second class throughout the 35-year history of the Women’s National Team. The Federation has tried to portray the women as too demanding and claimed that players in other nations have it worse. *See, e.g.*, Kathleen McNamee, *U.S. Soccer continues to clash with USWNT after new equal pay documentary airs*, ESPN (June 25, 2021), <https://es.pn/3y0DMTc>. But the Federation’s long-standing—and ongoing—disparate treatment of the U.S. Women’s National Team players is not absolved merely because the Federation has put *some* money into women’s soccer or because other nations lag behind.

III. The Federation pays the women unequally.

A. The Federation pays both the men and the women for playing games and provides higher pay for securing positive results.

As the employer of both the Men’s and Women’s National Team players, the Federation has entered into collective bargaining agreements establishing the players’ compensation. The men’s agreement was

negotiated in 2011 to cover 2011 through 2018.⁴ 4-ER-764–814. The women’s agreement was negotiated in 2017 to cover 2017 through 2021. 4-ER-707–63.

The core principle of compensation is consistent across the two agreements: Players are compensated for two primary tasks—playing for the team, regardless of result (appearance fees) and securing positive results, including victories and draws (performance bonuses). The framework for performance bonuses is similar across the two agreements: players receive additional payments over and above their appearance fees for draws (ties) and victories. While the exact values shift somewhat depending on the type of match, payments for victories are greater than payments for draws, and payments for results against higher-ranked opposition are generally greater than those for results against lower-ranked opposition. *See* 4-ER-763, 807–09. With respect to appearance fees, the men receive a fixed per-game payment for each game in which they are on the roster, as do some women (“non-contract” players). *Id.* Other women are designated as “contract” players. Instead of receiving separate per-game payments, they receive a fixed annual salary and certain health and other

⁴ The Federation continues to compensate the men according to the terms of the now-expired 2011 collective bargaining agreement. 3-ER-398.

benefits. 4-ER-721–22, 731–34. The value of their salary and benefits can be divided by the number of games played and the number of “contract” players to calculate a per-game equivalent for their appearance fees.⁵ Whether paid to the players as a fixed per-game payment (as with the men and “non-contract” women) or as an annual salary (as with the “contract” women), the athletes receive this portion of their compensation regardless of the result of any of their games.

Both pillars of the compensation structure are essential. The appearance fees compensate the players for the time and energy that they devote to training and competing with the National Team. And the performance bonuses reward the players for their success—success that is crucial to the financial performance of the Federation. Positive results enable the Federation to collect more prize money in tournaments, to sell more jerseys and tickets, and to attract more interest from sponsors and television viewers. Because the Federation exclusively controls revenue from the National Teams’ games, broadcasting, sponsorship, licensing, and

⁵ Salaries ranged from \$36,000 to \$100,000 depending on the year. 4-ER-660, 763. The total value of the benefits provided across the entire time period at issue was approximately \$570,000. 2-ER-102–03. The women played 111 games during the time period. 5-ER-904–08. And the number of “contract” players ranged from 18 to 24. 4-ER-666–67, 763. Based on these figures, the per-game equivalent for “contract” players ranged from \$3,600 to \$4,250.

merchandising, the more successful the National Teams are, the more the Federation's revenues increase across multiple spheres. 3-ER-387–88.

B. The Federation pays the women less than the men.

Contrary to the district court's conclusion, the Federation pays the women at rates lower than the men on both pillars—appearance fees and performance bonuses—under their collective bargaining agreements. For example, under the men's agreement, if the men played a friendly (non-tournament) match in 2019 against the world's third-ranked men's team, each player on the roster for that game would be paid \$5,000 regardless of result (their appearance fee). 4-ER-807. If they won, they would earn an additional \$12,675; if they tied, they would earn an additional \$3,125. *Id.* Under the women's agreement, by contrast, if the women played a friendly match in 2019 against the world's third-ranked women's team, each player would be paid between \$3,500 and \$4,250 regardless of result.⁶ 4-ER-763. If they won, they would earn an additional \$8,500; if they drew, they would earn an additional \$1,750. *Id.* Both the men and the women receive

⁶ “Contract” players earned \$100,000 in salary in 2019, along with benefits, which can be divided across the 24 games played by the USWNT in 2019 to calculate a per-game value. 4-ER-763; 5-ER-906. “Non-contract” players, who did not receive a fixed annual salary, were paid an appearance fee of either \$3,500 or \$4,000 depending on the number of prior appearances they had made for the USWNT. 4-ER-763.

appearance fees and performance bonuses—but the women’s pay is lower (if the men and women both won in this example, the men would receive \$17,675 and the women no more than \$12,750).

Indeed, during the time period at issue, the performance bonuses available to the women for securing favorable results were (and continue to be) lower than the corresponding men’s performance bonuses for every type of match, with just one exception. *Compare 4-ER-763 with 4-ER-807–09.* The disparity also exists regardless of whether the match is one controlled entirely by the Federation or one played as part of a tournament under the auspices of a global (FIFA) or regional (CONCACAF) governing body. *Id.*

Likewise, the appearance fees for the women have been and continue to be lower than the corresponding appearance fees for the men. *Compare 4-ER-763 with 4-ER-807–09.* This is true even accounting for the category of “contract” players under the women’s agreement, who receive a fixed annual salary in lieu of individual game appearance fees, as well as maternity leave, health insurance, and other benefits not included in the men’s agreement. The women submitted an expert analysis calculating the value of the salary and benefits over the time period at issue. *2-ER-102–03.* That value divided by the number of games played by the USWNT during that period shows that the per-game value to the “contract players” was *still* substantially less than the men’s per-game appearance fees.

The district court overlooked this disparity in the rates of pay because it conflated the two pillars of compensation. It calculated the *total* amount paid by the Federation to the men and women between 2015 and 2019 and divided it by the number of games played, without distinguishing between appearance fees and performance bonuses, and concluded that because the women received more money in total, on an average per-game basis, they were not paid less than the men. 1-ER-22. But when pay is based at least in part on outcomes, the rate of pay of two workers is not the same if one of them must achieve consistently better outcomes in order to earn the same pay as the other: If performance is equal, pay will be unequal. That the women won enough games between 2015 and 2019 to make up the difference in pay rates is a remarkable accomplishment—aided by the fact that 2017 and 2018 were outlier years of the Men’s National Team performance, when the men struggled and did not qualify for the World Cup for the first time since 1986—but it does not immunize the Federation’s unequal and unlawful pay practices.

C. The district court’s comparison of the women’s pay agreed to in 2017 and the men’s pay agreed to in 2011 overlooked the growth of U.S. Soccer in the interim.

While the women are correct that the Federation has refused to provide them with equal pay, the reality is that equal should have been an absolute minimum under the facts of this case. Because of the Federation’s

dramatic increases in revenue associated with the USMNT and USWNT in the years preceding the 2017 collective bargaining agreement, the women's agreement should not have provided simply for appearance fees and performance bonuses *equal* to those in the men's 2011 agreement; it should have provided the women *higher* pay. The USMNT Players Association expected the Federation to agree in 2017 to pay the women far in excess of what the men were being paid under their agreement negotiated in 2011 and was stunned to see that the Federation did not even agree to pay the women at the same level it had negotiated with the men six years earlier. *See* 5-ER-1070. Given the Federation's dramatically improved financial circumstances, the women were due at least triple the compensation provided for in the men's agreement. Instead, the Federation has refused to negotiate an equal agreement commensurate with its own increases in cash revenue and net assets.

The men and women do not negotiate and settle on their collective bargaining agreements simultaneously. The most recent men's agreement was negotiated in 2011—six years before the most recent women's agreement. Although the Federation had experienced significant increases in revenue associated with the USMNT and Federation sponsorships between 2003 and 2010 (the term of the prior collective bargaining agreement between the Federation and the USMNT), during negotiation of

the 2011-2018 collective bargaining agreement, the Federation was unwilling to make an agreement that would assume those increases were likely to continue. It rejected a proposal from the men for an agreement that would tie the players' compensation to revenue. 3-ER-405. It pointed to the country's recent financial crisis as creating instability for the Federation and insisted upon only a single 25% increase in player compensation over the eight-year term of the agreement, an increase of only about 3% per year. *See* 4-ER-807–09, 5-ER-1069.

Notwithstanding the uncertainty at the time of the 2011 Agreement, U.S. Soccer experienced dramatic revenue growth in the following years. Compensation for the men increased 25% over the eight years covered by the 2011 agreement; the Federation's sponsorship and game revenues increased by close to 300%. In 2016, for example, the Federation budgeted for a \$420,000 annual loss—only to end up projecting an ultimate profit of nearly \$18 million. Jonathan Tannenwald, *Details of U.S. Soccer's budget for national teams*, *NWSL*, Phila. Inquirer (Mar. 7, 2016), <https://bit.ly/3BKDmCP>. When the Federation negotiated its agreement with the men, its records reflected \$28 million in annual combined cash revenue from games, sponsorship, television, and licensing revenue associated with the USMNT and USWNT, along with \$50 million in net assets. 5-ER-1069–70. By the time the Federation negotiated its agreement with the women, it

had over \$100 million in annual combined cash revenue, along with \$168 million in net assets. *Id.*; *see also* 5-ER-1009, 1018. A significant portion of that increase was generated because the increased interest in USWNT games in the United States had caused a dramatic increase in Federation ticket sales and other revenues associated with USWNT home games.

The USMNT Players Association was therefore shocked to learn that the women's 2017 collective bargaining agreement provided the women none of the benefits from the Federation's threefold increase in *both* annual cash revenue and net assets. *See* 5-ER-1070–71. The Federation flatly rejected a proposal from the women that would have tied their compensation to the Federation's revenue. 3-ER-404–05. Then, not only did the Federation fail to increase player compensation commensurate with its own explosive financial growth, it did not even grant the women financial terms equal to those it had pressured the men into accepting more than half a decade earlier. The women deserved better from the Federation—and a lot more money. Given the growth of revenue in the interim, an agreement in 2017 at the same terms as 2011 was a major step backwards from the Federation. Using the men's 2011 agreement as the baseline thus understates the extent to which the women's pay is unfairly low.

Now, with public pressure mounting on the Federation to pay the women as they deserve, the Federation has yet again returned to its old

standby of claiming financial instability, asserting that it would “likely bankrupt” the Federation to pay the women equally, Andrew Das, *U.S. Soccer and Women’s Stars Reach Deal on Working Conditions*, N.Y. Times (Dec. 1, 2020), <https://nyti.ms/3xZ1oYD>—but all the while spending tens of millions on legal fees to avoid their obligation to treat their athletes fairly. Daniel Libit, *Going for Gold: Team USA Eyes \$100M+ in Legal Fees Since Rio Games*, Sportico (May 10, 2021), <https://bit.ly/36S9LJr> (“U.S. Soccer reported nearly \$19 million on outside legal expenditures between April 1, 2019, and March 31, 2020. That amounted to almost half of what the organization paid in wages and benefits for all its 868 employees over that same period.”).

The district court was wrong to conclude that the women in 2017 were paid at the same rate as the men in 2011. They were actually paid a lower rate. But assuming that the women’s pay in 2017 should have merely matched the men’s pay as agreed in 2011 itself devalues the women’s work. The women, just like the men, deserve better treatment from the Federation, and that requires the Federation to compensate the athletes for the extraordinary financial growth their labor has produced.

IV. The district court’s decision improperly condones the Federation’s abuse of its monopsony power.

The Federation cannot simply hide behind differences in the National Teams’ collective bargaining agreements to sidestep responsibility for its discriminatory compensation practices. The Federation never offered the women equal pay in collective bargaining, and the bargaining process was tainted by the Federation’s use of its monopsony power to pressure the women into an unfair and unequal agreement. The district court’s analysis of the collective bargaining process was flawed through and through.

First, although the district court believed the women’s claims of unequal pay should fail because the women rejected a compensation offer that included “the same pay-to-play structure” as the men’s agreement, 1-ER-23, the Federation never offered the women appearance fees and performance bonuses equal to those in the men’s collective bargaining agreement. The Federation offered the women an agreement more similar in structure to the men’s collective bargaining agreement—*i.e.*, offering only appearance fees and bonuses with no designated “contract” players—but that offer still included lower performance bonuses. The Federation does not even attempt to assert otherwise. 3-ER-341–42 (“The bonus amounts, however, were lower than those found in the USNSTPA agreement for friendlies.”); *see also* 5-ER-834–35. The fact that the women

refused one form of unequal pay does not immunize the Federation from liability for another.

Moreover, by dismissing the women’s claims of discriminatory pay as nothing more than a bargained-for result, the district court endorsed the Federation’s long-running abuse of its total control over athletes’ ability to represent the United States to impose unfair compensation arrangements. But this is exactly why Title VII and the Equal Pay Act do *not* exempt compensation arrangements contained in collective bargaining agreements from scrutiny: Collective bargaining does not always give employees sufficient leverage to overcome an enormous power imbalance in negotiations over compensation. And here, the Federation holds monopsony control over the labor market to represent the United States on the international stage. Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 137–38 (2000) (“Monopsony is often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals.”).

As the governing body for soccer in the United States, the Federation has complete control over which athletes will be permitted to represent the United States at the international level—and over the terms of their compensation. 36 U.S.C. § 220523(a)(7). Players may only represent the country that corresponds to their nationality. *See* FIFA, *Commentary on the*

Rules Governing Eligibility to Play for Representative Teams 9-16 (Jan. 2021), <https://fifa.fans/36TmT12>. As a result, absent exceptional circumstances, American soccer players who wish to compete internationally must do so under the auspices of the Federation; they are not free to field offers from competing federations of other countries to maximize their compensation. *Id.*

This places enormous pressure on National Team players to accept the Federation's offers in collective bargaining, even if unfair or unequal. The Federation has consistently used that advantage to place National Team players—male and female—in an untenable bargaining position and depress their wages. *See Brown v. Pro-Football, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) (“Athletic prowess is, of course, a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation.”); *cf. NCAA v. Alston*, 141 S. Ct. 2141, 2154 (2021) (NCAA's monopsony control over labor market for college athletes rendered it “capable of depressing wages below competitive levels”). For example, the Federation routinely drags its feet in negotiating new collective bargaining agreements, forcing teams to play under expired agreements for years at a time. The most recent Men's National Team collective bargaining agreement, negotiated and agreed in 2011, expired in 2018. 4-ER-765. For more than two and a half years, 26 matches (and

counting), the men have been forced to play under the terms of the expired agreement—an agreement that is by now more than a decade old. 3-ER-398.

The Federation’s monopsony power with respect to the women is compounded by the Federation’s managerial control over the National Women’s Soccer League (NWSL) from 2013 through 2020.⁷ Julia Poe, *Lisa Baird addresses big NWSL changes ahead of draft*, Orlando Sentinel (Jan. 12, 2021), <https://bit.ly/3hY1oCG>. The NWSL is the professional domestic club soccer league operating in the United States. The Federation’s management role ensured that the Federation controlled not only the women’s ability to represent the United States in international competition, but also the women’s ability to play domestically in a professional league. It had the power to shut down the NWSL—which would have jeopardized playing opportunities not just for the USWNT players themselves, but also for the hundreds of *other* professional NWSL

⁷ While the women’s 2017 collective bargaining agreement includes terms relating to compensation for playing in the NWSL, those terms are not at issue in this case because they compensate a subset of players for their club soccer employment, not National Team employment. *See* 4-ER-722, 5-ER-959. But the Federation’s control over the NWSL provides important context for understanding the collective bargaining negotiations and the pressure on the Women’s National Team players to accept the Federation’s terms.

players and the thousands of younger players inspired by the NWSL every year. Any assessment of the women's acquiescence to the terms of the 2017 agreement must account for the fact that *both* of the women's primary sources of employment hung in the balance. The women were forced to choose between agreeing to the unequal and unfair wages the Federation offered or potentially be left without any wages at all. *Cf. In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158 (5th Cir. 1979) ("In the monopsony ... the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all."). The Federation knew its control over the NWSL gave it significant power in negotiations, and that dramatically added to the pressure on the USWNT players to accept whatever the Federation was offering.

By treating the women as if they freely accepted unequal pay, the district court gave a free pass to the Federation's abuse of its monopsony position to impose an unfair agreement with artificially depressed wages. If upheld, the court's ruling would leave the players with even less leverage to negotiate for the pay they deserve.

* * *

The players on the U.S. Women's National Team have represented this nation with distinction, and in the process have helped make soccer an essential piece of the fabric of the American sports landscape. Their

accomplishments are all the more remarkable in light of the discriminatory and unfair treatment they have had to endure from the Federation that employs them and benefits from the revenue they generate. The district court was wrong to paper over the disparities in the rate of pay the Federation provides to the women as opposed to the men, which are anathema to the deeply rooted American values that every National Team player is proud to represent. “Inherent differences’ between men and women ... remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *United States v. Virginia*, 518 U.S. 515, 532 (1996) (Ginsburg, J). It is high time for the Federation to live up to that basic precept and to pay the women the equal wages they deserve.

CONCLUSION

The Court should reverse the grant of summary judgment to the Federation and remand the case for trial.

Dated: July 30, 2021

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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 5,969 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 30, 2021

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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 30, 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.

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