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; MERITT 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)

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN FAVOR OF REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing the Equal Pay Act, 29 U.S.C. § 206(d)(1) ("EPA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). This case raises important questions under both statutes.

The district court held that the plaintiffs, current and former members of the senior U.S. women's soccer team (WNT) and reigning World Cup champions, could not establish a prima facie case of pay discrimination under the EPA or Title VII because they earned more overall than members of the senior U.S. men's soccer team (MNT) from 2015-19. Although the WNT's expert calculated that the women's team would have earned millions more during that period had they been paid under the terms of the MNT's collective bargaining agreement, and the undisputed record evidence shows the unequal availability of bonuses to the women in nearly all game categories, the district court threw out both claims on summary judgment. In so ruling, the court deemed the plaintiffs

to have rejected proposals never offered to them, relied on several legally irrelevant factors, conflated one element of an affirmative defense with the plaintiffs' prima facie case, and generally credited the defendant's evidence over the plaintiffs—all without resolving pending motions challenging various aspects of the expert reports. This Court should correct these errors.

Because the EEOC has a strong enforcement interest in the proper analysis of pay discrimination claims under the EPA and Title VII, it offers its views to the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Whether the district court erred in holding that the plaintiffs could not establish a prima facie case of discrimination under the EPA where they offered evidence that their rate of compensation was lower than the MNT's, but they earned more in total because they won significantly

[1] We take no position on any other issue in this appeal.

more—and more important—games than the MNT, including two World Cup tournaments.

2. Whether the district court erred in granting summary judgment to the defendants on the plaintiffs' Title VII disparate-pay claim where a reasonable jury could find that the women would have earned $64 million more had they been working under the MNT's collective bargaining agreement.

STATEMENT OF THE CASE

A. Statement of Facts

Defendant United States Soccer Federation, Inc. (USSF) is a not-for-profit, tax-exempt corporation whose purpose is, inter alia, to develop and promote soccer in the United States. 3-ER-381-82. USSF employs the WNT and the MNT to play in international games and tournaments. 6-ER-1193. Both teams play "friendlies," which are exhibition games played outside of any recognized soccer competition (6-ER-1203); Federation Internationale de Football Association (FIFA) World Cup-qualifying and tournament games; and various other tournaments. 3-ER-383-87. The WNT, but not the MNT, also competes in the Olympic Games and associated qualifying

matches. 3-ER-383. Men's Olympic soccer is an age-restricted, under-23 tournament, so the MNT, as a senior team, is not eligible to play. 3-ER-398.

The two teams have separate unions and are governed by separate collective bargaining agreements (CBAs). 3-ER-399; Opening Brief for Plaintiffs-Appellants (Opening-Br.) 10 n.4. While the terms of the respective agreements differ, both CBAs provide for two basic kinds of compensation for the players: (1) one or more forms of base pay for participating in games, not tied to outcome; and (2) variable pay in the form of performance bonuses. 4-ER-763; 4-ER-667; 4-ER-807-809. On the WNT, the form of base pay varies depending on whether a player is contracted or non-contracted. Contracted players receive annual base salaries plus benefits including health insurance, maternity leave, severance and injury protection, and childcare allowances, regardless of how many games they play. 4-ER-721, 733-34. Non-contracted WNT players and all MNT players receive game appearance fees pursuant to a "pay-to-play" arrangement, in which they are paid for games for which they are selected. 4-ER-783; 4-ER-731; 3-ER-401. In 2015 and 2016, the WNT

had twenty-four contracted players (4-ER-659), twenty in 2017, nineteen in 2018, and eighteen in 2019. 4-ER-721. There is no limit on the number of WNT non-contracted players eligible for a particular roster. 4-ER-722. (There are no contracted MNT players.)

For all games other than World Cup matches, the non-contracted women players received appearance fees of at most $3,240 per player before 2017, and up to $4,000 per game since 2017, while the MNT players received $5,000 per game. 4-ER-660 & 4-ER-700; 4-ER-763; 4-ER-807. For World Cup games, non-contracted women earned up to $3,240 before 2017 and $4,500 since 2017 per game. 4-ER-660 & 4-ER-700; 4-ER-763. The MNT players received $6,875 per game. 4-ER-807. Although the contracted women did not receive a per-game appearance fee on top of their salaries, the highest-paid salaried women earned a per-game average of $4,000 from 2015-19, with health insurance and other benefits worth under $250 per player per game.[2] The $4,250 the salaried players earned was lower than

[2] The highest salaries paid to the contracted women were $72,000 for 2015 and 2016 and $100,000 for 2017-19. 4-ER-667; 4-ER-763. The team played

the MNT per-game earnings of $5,000 to $6,875. 4-ER-807; *see also* Opening-Br. 47 (Table 2).

With respect to variable, performance-based pay, both the WNT's and the MNT's CBAs allow players to earn performance bonuses for individual games, with the amounts varying by the type of game, FIFA ranking of the opponent, and the game result (i.e., winning or tying). The record reflects that bonuses available to the WNT were lower in nearly every instance, whether for winning a friendly, placing well or winning tournaments, or qualifying and performing well in the World Cup. *See* Opening-Br. 41 (Table 1); 4-ER-667; 4-ER-763; 4-ER-807-09.

During the class period (2015-19), the WNT was more successful as a team than the MNT. The MNT played in eighty-seven games, winning forty-six (52.9%), tying sixteen (18.4%), and losing twenty-five (28.7%). 2-ER-97. They did not qualify for the 2018 World Cup. 5-ER-978. During the same time frame, the WNT played 111 games—winning ninety-two

111 games. 2-ER-98. The total value of the benefits was $579,000 for the class period. 2-ER-102-03.

(82.9%), tying twelve (10.8%), and losing only seven (6.3%). 2-ER-98; 5-ER-906-08. They won several major tournaments and qualified for and won two consecutive World Cups, in 2015 and 2019. 5-ER-906-08.

Table 1:
WNT/MNT Performance Records During Class Period

	Total Games	Won	Tied	Lost	World Cups/ Quals./Tournament Wins
WNT	111	92	12	7	2/2/2
MNT	87	46	16	25	1/0/0

The plaintiffs' expert, economist Finnie B. Cook, concluded that from 2015-19, WNT players earned a lower rate of pay than MNT players, considering all compensation and fringe benefits. 6-ER-1085; 2-ER-102-3. She calculated that the women would have earned $63,822,242 more working under the MNT CBA than under their own,[3] and that each named plaintiff made almost 70% less than she would have if USSF had paid her

[3] As Cook explained in her report, the $63,822,242 figure represented both the actual discrepancy in the women's pay during the relevant period and the back pay damages for the Title VII class—not the EPA damages. 2-ER-103-04. Because the EPA and Title VII have different limitations periods, the damages figures varied depending on the statutory claim.

according to the same CBA terms as the men. 6-ER-1086; 2-ER-99. Cook's analysis assumes equal pay for each type of game, so the hypothetical player could be male or female—the calculation is what that person would make under the men's contract if he/she won X games and Y tournaments. 2-ER-98-99. Cook valued the fringe benefits included for the contracted players and found it did not make up for the difference in the larger bonus rate paid to the men. 2-ER-102-03. After adjusting for the differences in the two contracts, Cook then calculated the gap between what the women would have made under a CBA equal to the men's and what they earned over the class period. 2-ER-103-04.

USSF's expert, accountant Carlyn Irwin, used a different approach. Based on USSF compensation spreadsheets, she computed the total earnings paid to each team from 2015-19, combining fixed pay such as salaries and appearance fees with variable bonus pay, then dividing by the number of games each team played in the class period. 4-ER-608-10. As a result, she concluded, "USSF paid more to members of the WNT and the WNT Players Association both in total and on a per game basis." 4-ER-617.

According to Irwin, USSF paid WNT players $24,502,863 to play 111 games from 2015-19, for an average of $220,747 per game, while it paid MNT players $18,499,615 to play 86 games, an average of $212,639 per game. 4-ER-618. Irwin also determined that, during the class period, USSF paid more than $1 million to the four highest-paid women but less than $650,000 to the four highest-paid MNT players. 4-ER-619-20.

USSF also submitted the reports of economist Justin McCrary, who compared the WNT's and MNT's CBAs. 3-ER-416. McCrary concluded that the CBAs were "qualitatively different from one another" and opined that neither contract is "systematically better," with each reflecting tradeoffs and different risk levels. 3-ER-416, 419-20, 438, 441, 443. McCrary asserted that the value of the fixed payments the WNT players receive offset the more variable performance pay that the MNT players may receive. 3-ER-423. McCrary emphasized that the men would have earned more under the WNT CBA from 2017-19 if they (the men) performed as they did. 3-ER-420, 439.

The plaintiffs submitted a rebuttal report from Cook to respond to Irwin's and McCrary's methodology and conclusions. Cook explained that, because Irwin failed to consider the significant difference in the teams' respective performances in her calculation of average pay per game, Irwin's comparison provides no basis for assessing whether the WNT players were paid at a lower rate than the MNT players. 2-ER-97. In response to McCrary's suggestion that the men's and women's pay structures and amounts were too difficult to compare, Cook countered that, because the CBAs detail the fixed and performance-based payments to each team, she was able to calculate backpay damages based on the WNT players' lower rate of pay "with reasonable economic certainty." 2-ER-101. As to her own methodology, Cook explained that her approach—calculating what the members of the WNT would have earned under the MNT CBA both collectively and individually and comparing it with their actual earnings—accounted for the number and type of games the WNT played and the level of success they achieved. 2-ER-101-04.

WNT players Alex Morgan, Megan Rapinoe, Carli Lloyd, and Becky Sauerbrunn filed charges with the EEOC in April 2016. 4-ER-623-38. During the contract negotiations leading to the 2017 WNT CBA, the WNT's union explicitly requested compensation from USSF equal to the MNT players. 5-ER-847. Union Executive Director Rich Nichols emailed USSF's General Counsel as follows: "[W]e want the SAME PAY PER GAME compensation as the MNT. This is a legal requirement and we should not even have to bargain for the USSF to comply with the law." 4-ER-639. Nichols added that the WNT's "demand for 'equal pay' is literal; we want at least the same per game WNT Player compensation enjoyed by the MNT." *Id.* USSF refused the WNT union's demands for the same pay structure with the same amounts for game bonuses; an attorney for USSF cited "market realities." 5-ER-1036; 5-ER-857. Instead, USSF offered the WNT the same pay-to-play structure as the MNT, with equivalent appearance fees but not the same dollar amounts for bonuses. 5-ER-834-35. Prior to these negotiations, the per-game bonuses available under the MOU

were even lower compared to the MNT for all categories of games. 4-ER-667; 4-ER-700.

The EEOC issued right-to-sue letters (6-ER-1172, 1177, 1182, 1187), and the WNT players filed their complaint in March 2019 alleging EPA and Title VII violations. 6-ER-1211-13. The district court certified two classes of plaintiffs under Title VII and conditionally certified the plaintiffs' collective action under the EPA in November 2019. 6-ER-1132-33; Opening-Br. 17 n.7.

Both parties moved for summary judgment. 6-ER-1239-40. Each party also moved to exclude some portion of the other side's expert testimony (6-ER-1239; 6-ER-1248), but the court did not address any of these motions before ruling on summary judgment.

B. District Court's Decision

The district court granted summary judgment to USSF. 1-ER-25. The court concluded that the WNT failed to establish a prima facie case under the EPA because it did not show that the reason that it was paid more than the MNT was "due solely, or in material part, to the WNT working more than the MNT." 1-ER-22. Citing the calculations in Irwin's expert report,

the court stated, "[i]t is undisputed that, during the class period, the WNT played 111 total games and made $24.5 million overall, averaging $220,747 per game. By contrast, the MNT played 87 total games and made $18.5 million overall, averaging $212,639 per game. Based on this evidence, it appears that … the WNT both played more games and made more money than the MNT per game. Under these circumstances, it is not 'absurd' to consider the total compensation received by the players." *Id.* (citing *Ebbert v. Nassau Cnty.*, No. 05-CV-5445, 2009 WL 935812, at *3 (E.D.N.Y. March 31, 2009)).

The court acknowledged that the plaintiffs were paid lower per-game bonuses for friendlies, World-Cup-related games, and other tournaments. In the court's view, however, a finding that the unequal bonuses violated the EPA "ignores other benefits received by the WNT players, such as guaranteed annual salaries and severance pay—benefits the MNT players do not receive." *Id.* The court explained, "[t]o consider these bonus provisions in isolation would run afoul of the EPA, which expressly defines 'wages' to include all forms of compensation, including fringe benefits." *Id.*

The court held that the plaintiffs could not establish they were paid less than the MNT players "solely by reference to these bonus provisions." *Id.*

Without ruling on either party's motion regarding the experts, the court rejected the plaintiffs' expert evidence that they would have made $64 million more under the MNT's CBA than they did under their CBA, noting the defendant's evidence that the MNT would have made more under the women's CBA than they did under *theirs*. 1-ER-22-23. The court stated, "merely comparing what each team would have made under the other team's CBA—is untenable in this case because it ignores the reality that the MNT and WNT bargained for different agreements which reflect different preferences, and that the women explicitly rejected the terms they now seek to retroactively impose on themselves." 1-ER-23.

The court pointed out that the WNT requested bonuses equivalent to those received by the MNT, but USSF refused because the WNT "was asking for all of the upsides of the MNT CBA (namely higher bonuses) without any of the drawbacks (e.g., no base salary)." *Id.* According to the court, the WNT rejected a pay-to-play proposal "similar" to the MNT CBA

in favor of "some element of" guaranteed compensation. *Id.* Under the circumstances, the court said, comparing the CBAs both "fails to account for the choices made during collective bargaining" and "ignores the economic value of the 'insurance' that WNT players receive under their CBA." *Id.* The court surmised that it was difficult to quantify the benefit the women gained from a guaranteed salary but emphasized there is "indisputably economic value" to such a contract. 1-ER-23-24. Thus, the court concluded, the evidence was insufficient to create a factual issue for trial on the EPA claim. 1-ER-25.

On the Title VII claim, the court stated only that its holding under the EPA that the plaintiffs failed to demonstrate a triable issue as to pay discrimination applies equally to the Title VII claim. 1-ER-25.

ARGUMENT

I. The plaintiffs adduced sufficient evidence to support a reasonable jury finding that USSF violated the EPA by compensating them at a lower rate of pay to perform the same job as the men's team.

"[W]hat is required to defeat summary judgment is simply evidence 'such that a reasonable juror drawing all inferences in favor of the

respondent could return a verdict in the respondent's favor.'" *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (quoting *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)). Put simply, the WNT offered sufficient evidence to support a finding that they received a lower rate of pay to perform the same job as the MNT.

A trier of fact could find that the respective CBAs, on their faces, show an overtly sex-based wage system with unequal appearance fees and bonuses for nearly every category of game. Plaintiffs' expert Cook calculated that the WNT would have made nearly $64 million more from 2015-19 had they been able to secure the same contract as the men. This evidence, if believed by a jury, establishes that USSF paid its men and women players unequal rates of pay that, absent a defense, would violate both the EPA and Title VII.

The EPA makes it unlawful for an employer to "pay[ ] 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, and which are

performed under similar working conditions." 29 U.S.C. § 206(d)(1). Once the plaintiff has made this showing, the employer can avoid liability only by proving that the different payment to employees of opposite sexes was made pursuant to one of four statutory "exceptions": "(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.* Establishing any of these defenses requires an employer to "prove 'not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.'" *Rizo v. Yovino*, 950 F.3d 1217, 1222 (9th Cir.) (en banc), *cert. denied*, 141 S. Ct. 189 (2020) (citation omitted). The creation of unequal rates of pay through the collective bargaining process does not qualify as an exception or constitute a defense available to an employer for violations of the Act. 29 C.F.R. § 1620.23.

To prove an EPA violation, the WNT players had the burden of establishing a prima facie case of discrimination by showing that employees of the opposite sex were paid different wages for equal work.

Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1073-74 (9th Cir. 1999). At this stage of the litigation, it is undisputed that the respective team members perform substantially equal work. Opening-Br. 15 & 27 n.8. Thus, the only issue before this Court is whether the WNT players met their prima facie burden of demonstrating that their rate of pay is less than that of the MNT players.

The EPA itself defines neither "wages" nor "wage rate." The EEOC's interpretive regulations define the term "wage 'rate,'" as used in the EPA, to be "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." 29 C.F.R. § 1620.12(a). "Wages," in turn, include "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." 29 C.F.R. § 1620.10; *see also* EEOC Compliance Manual, § 10-IV (Dec. 2000), *available at*

https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination#10-IV%20COMPENSATION%20DISCRIMINATION.

As the Sixth Circuit explained in *Bence v. Detroit Health Corp.*, "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*." 712 F.2d 1024, 1027 (6th Cir. 1983) (emphasis added); *see also EEOC v. Health Mgmt. Grp.*, No. 5:09-CV-1762, 2011 WL 4376155, at *3 (N.D. Ohio Sept. 20, 2011) (to properly compare pay rates court must measure the amount of pay against a common denominator) (citing *Bence*). Moreover, "it is necessary to identify the proper factor by which to measure rate of pay. This must be a practical inquiry which looks to the nature of the services for which an employer in fact compensates an employee." *Bence*, 712 F.2d at 1027. In *Bence*, the employer compensated the employees primarily for selling gym memberships. *Id.* at 1028. Women were paid a lower commission rate than men, but they earned as much in total salary because female sales managers were made to sell gym memberships to women, and more women bought memberships. *Id.* The Sixth Circuit held

that Bence established a prima facie case under the EPA because "[e]valuation of the employer's compensation on a 'per sale' basis makes it apparent that it paid female managerial personnel at a lower rate than their male counterparts. This is precisely what the Equal Pay Act forbids." *Id.* at 1028.

The district court concluded that the WNT players failed to establish a prima facie case under the EPA because, according to USSF expert Irwin, USSF paid the women more in total and per game when total compensation was divided by number of games each team played. This ruling was incorrect for two reasons. First, the district court made a legal error on summary judgment by choosing to credit the defendant's expert and reject the plaintiffs'—with barely any analysis, and without even ruling on the parties' pending motions challenging various aspects of the expert reports. As a matter of basic summary-judgment law, the court was required to view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party (here, the plaintiffs). *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Am.*

Bankers Ass'n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005). As this Court has observed, "'at this stage of the litigation, the judge does not weigh disputed evidence with respect to a disputed material fact…. These determinations are within the province of the factfinder at trial.'" *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1036 (9th Cir. 2005) (quoting *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987)); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) (it is axiomatic that disputes about material facts must be resolved at trial, not on summary judgment).

In evaluating proffered expert testimony, this Court has stated repeatedly, the trial court is "a gatekeeper, not a fact finder." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014) (quoting *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010)). "A district court may disregard an expert's opinion offered in opposition to summary judgment if the opinion is legally insufficient to create a material issue of fact for trial." *Kauffman v. Manchester Tank & Equipment Co.*, No. 98-35218, 1999 WL 1103357, at *2 (9th Cir. Dec. 3, 1999) (unpub.) (citing *Bulthuis v. Rexall Corp.*,

789 F.2d 1315, 1317-18 (9th Cir. 1985) (per curiam) (as amended)). This Court considers an expert's opinion legally insufficient "if it 'is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable….'" *Id.* (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995)). Here, the district court made no such finding with respect to Cook's expert analyses, nor did it have any basis to do so.

Second, in crediting the defendant's expert analyses, the district court simply chose to look past some obvious analytical errors that, a jury could find, rendered *them* unreasonable. Irwin added together total compensation from 2015-19, both fixed and variable, and then divided it by the number of games played. Thus, she concluded, the WNT played 111 total games and made $24.5 million overall, averaging $220,747 per game, while the MNT played 87 total games and made $18.5 million overall, averaging $212,639 per game. *See* 4-ER-618; 1-ER-22. But, as Cook explained, by assuming all games are equal, whether World Cup or friendly, Irwin ignored the WNT's greater success as a team and the fact that the WNT had to be significantly

more successful than the MNT for its players to earn the same pay. A jury could agree with Cook that this assumption rendered Irwin's calculations flawed.

Fundamentally, USSF compensates its teams primarily for playing soccer games. Both *quantity* of games—the total number—as well as *quality* of games—the importance, opponent ranking, and results of those games—account for what the teams earn. Thus the CBAs for both teams have two "measures of work": (1) base pay for making the roster and playing in games, whether described as appearance fees or annual salary, and (2) performance bonuses, which function like commissions, for performing well in those games. This compensation system is analogous to a salesperson who earns an hourly, biweekly, or yearly wage as well as variable commissions that depend on success, which can result from talent, industriousness, or a combination of factors. Although the bonus structures at issue here are more complicated than a fixed commission rate per sale, the same principle applies. Where one employer pays men and women different base compensation and different bonuses to perform the same job,

that compensation structure violates the EPA, regardless of the total compensation earned by each team. *See* 29 U.S.C. § 206(d)(1) (forbidding employer from paying employees "at a rate less than the rate at which [it] pays wages to employees of the opposite sex").

Somewhat incongruously, the district court then appears to have become confused about *Ebbert v. Nassau County*, a case it once understood. In its 2019 class-certification order, the court used *Ebbert* correctly to reject USSF's argument that a female employee's greater annual compensation vis-à-vis similarly-situated males will defeat her EPA claim, regardless of whether she receives a lower rate of pay. "[C]ourts interpreting the EPA and (to a lesser extent) Title VII have explicitly rejected this argument—for good reason. To hold otherwise would yield an 'absurd result,' as this would mean not only that 'an employer who pays a woman $10 per hour and a man $20 per hour would not violate the EPA… as long as the woman negated the obvious disparity by working twice as many hours[,]' but also that a woman in this scenario would not even have standing to challenge the complained-of practice in the first place. Congress simply could not

have intended such a result." *Morgan v. United States Soccer Fed'n, Inc.*, No. 2:19-cv-1717, 2019 WL 7166978, at *4 (C.D. Cal. Nov. 8, 2019) (quoting *Ebbert*, 2009 WL 935812, at *3).

It is unclear why the court later decided that the same passage in *Ebbert supports* the view that a total-compensation method of comparison is appropriate on summary judgment, where it was not at the class-certification stage. *Ebbert* itself was a decision denying summary judgment on an EPA claim. *See* 2009 WL 935812, at *7. Perhaps the confusion stemmed from the district court's myopic focus on the specific quantitative discrepancy discussed in *Ebbert*—one sex making more money than the other because it worked *more hours* at a lower rate. The court then rejected *Ebbert* as inapposite once the record did not bear out a similar difference in hours worked between WNT and MNT players. *See* 1-ER-22. The flaw in that reasoning is that, even assuming the district court were correct that the WNT players did not necessarily work more hours, its analysis ignored the *quality* of the women's output—i.e., their significantly larger number of

high-profile games played and won, including two World Cup championships.

In an earlier EPA and Title VII case consistent with *Ebbert*, *EEOC v. Kettler Brothers, Inc.*, Nos. 87-3069, 87-3083, 1988 WL 41053, at *2 (4th Cir. Apr. 27, 1988) (unpub.), the Fourth Circuit reversed the district court's grant of summary judgment to the defendant. The company conceded that the sales manager jobs were the same. Sales managers were paid a minimum base salary plus a commission for each house sold; male sales managers were paid a higher commission rate than women. Although some men with the company made more than some women, the highest-paid woman earned more than two male comparators. The district court ruled that a comparison of gross earnings showed no discriminatory difference in pay between female and male sales managers. *Id.* at *1. In reversing summary judgment, the court of appeals acknowledged that the higher-grossing woman claimant made more in total earnings, but pointed out, "to achieve her higher earnings," she "had to sell more houses at a lower commission rate than the men." *Id.* at *2. As in *Kettler Brothers*, if

game bonuses for winning are like commissions earned per sale, WNT players had to be the best in the world to earn a salary comparable to MNT players.

The base pay-to-play structure that applied to MNT players and non-contracted women players on the WNT as well as the bonuses USSF set for tying or winning games are directly comparable. The bonuses for both WNT and MNT players depended on the ranking of the opponent played, and salaried and non-salaried women players are treated the same for bonuses. Cook calculated that the WNT players would have made millions more under the MNT CBA. A jury could credit her relative valuation of the two contracts.

Instead of allowing a jury to make this factual determination, the district court minimized the unequal game bonuses on the face of the CBAs, opining that a finding that unequal bonuses violate the EPA "ignores other benefits received by the WNT players, such as guaranteed annual salaries and severance pay—benefits the MNT players do not receive." 1-ER-22. In so ruling, the court appears to have implicitly

embraced the assumptions detailed in USSF expert McCrary's report, summarized *supra* at 9. Somewhat contradictorily, the court declared that fixed pay has an "indisputable" economic value compared to performance pay, while using the purported difficulty of calculating that economic value to justify characterizing the respective CBAs as incomparable yet functionally equivalent. 1-ER-23-24. The court also appears to have endorsed McCrary's view that it was somehow relevant to the case that, had the MNT players been paid under the terms of the WNT's CBA, they would have made more than they did under their own CBA. 1-ER-22.

The court's uncritical acceptance of McCrary's expert analysis over Cook's repeated some of the same errors it made with respect to Irwin. Again, the court substituted its view of the evidence for that of a factfinder, without resolving the parties' pending motions regarding the experts' respective methodologies. While it may well be true that a guaranteed salary, versus pay-to-play, has some additional, intangible economic value, it would be the jury's job to assess that value and to decide whether it compensated for the overt inequities in the terms of the two CBAs, along

with the $64 million difference in potential compensation. Moreover, that determination would be based on evidence, not just a vague sense that the value existed. *Cf. Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 263-64 (3d Cir. 1970) (reversing district court judgment where court made no finding of economic value of male employees' flexibility in when they worked, the criterion district court had found justified a ten percent wage differential).

Juries are routinely asked to value intangible benefits across a wide spectrum of court cases, and there is no reason to think that exercise would have been any less feasible in this case. *Cf., e.g., United States v. CB & I Constructors, Inc.*, 685 F.3d 827, 836-37 (9th Cir. 2012) (affirming jury award of intangible environmental damages for negligently set fire; observing "[e]nvironmental harm shares characteristics with other noneconomic damages in that they are 'subjective, non-monetary losses.'… Under California law, the government may recover intangible environmental damages because anything less would not compensate the public for all of the harm caused by the fire") (internal citations omitted); *Miller v. Int'l Revenue Serv.*, 829 F.2d 500, 504 (4th Cir. 1987) (in tax context, noting that

"the IRS and the courts have recognized that 'economic' value can be assigned to intangible return benefits that are difficult to translate into monetary value"); Ninth Cir. Jury Instructions Comm., Manual of Model Civil Jury Instructions § 5.2 (2017 ed.; last updated Mar. 2021) (in measuring damages, jury should consider relevant factors including loss of enjoyment of life and mental, physical, and emotional pain and suffering); *id.* § 15.27 (in assessing damages for trademark claims, jury should consider loss of reputation and loss of goodwill).

A reasonable jury could reject as a red herring McCrary's observation that MNT players would have fared better under the WNT's CBA than they did under their own. First, the MNT is not claiming pay discrimination, so whether they would have fared better under a different arrangement is not before this Court. Second, the implication of McCrary's analysis is that the WNT CBA is more favorable for a team that plays fewer games and is less successful, which the MNT is relative to the WNT. This does not make the respective CBAs a wash—rather, it makes them a scheme that compensates MNT players at a higher rate of pay for a lesser

rate of success. Whether MNT players could make even more for their lesser rate of success under a different scheme is of no consequence.

A reasonable jury could also find the assessment in Cook's Rebuttal Report to be more useful: i.e., calculating what MNT players would have made under their CBA had they been as successful as the WNT from 2015-19. As Cook pointed out, "[h]ad the USMNT had success on the field comparable to the success of the USWNT, and had these USMNT players participated in as many games as the members of the USWNT during the same period, [the four highest-paid MNT players] would have been paid substantially more." 2-ER-99. As to the notion that the women "traded" higher bonuses for more salaries, the record reflects that the WNT was never offered the same bonus amounts as the MNT in the first place—one cannot trade away what one does not have to bargain with. Given the terms of the CBAs and Cook's contrary conclusions, a jury would not have to credit any of McCrary's findings. Thus the district court's acceptance of them was erroneous.

Finally, the district court improperly emphasized what it characterized as the WNT's decision to "bargain for" its pay arrangement in its CBA. *See* 1-ER-23. Although the court purported to grant summary judgment solely because the plaintiffs failed to establish a prima facie case of pay discrimination, the court's suggestion that the women's compensation is not different from the men's "because of sex" would have to be analyzed under the EPA's "any other factor other than sex" affirmative defense. *See supra* at 16-17. Because the EPA's affirmative defenses are not at issue in this appeal, this is not an appropriate ground for affirmance here.

Nonetheless, even if the "any other factor other than sex" defense were at issue, a reasonable jury could disagree with the district court's characterization that WNT players solicited or welcomed their current pay arrangement. Even the court acknowledged that the WNT was offered the MNT pay-to-play *structure*, but not equivalent dollar amounts in bonuses. 1-ER-11, 23. The WNT offered evidence that the women players demanded equal pay, including equal bonuses, but USSF rejected that early in the

negotiations. *See supra* at 10-11. *See also Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App'x 280, 284 (5th Cir. 2014) (a different approach to salary negotiation was not a factor other than sex where the female plaintiff was told she could not negotiate her salary while her male comparator was allowed to make a counteroffer; court held a reasonable jury could reject the employer's defense because it discriminatorily applied its negotiation policy).

In any event, the WNT's union could not bargain away its members' rights under the EPA, which specifically provides that no labor organization "shall cause or attempt to cause" a covered employer to violate the statute. 29 U.S.C. § 206(d)(2). Nor is it relevant that the terms of *two* CBAs—the men's and the women's—are at issue. The basic principle that the collective bargaining process cannot justify wage disparities remains the same. *See* 29 C.F.R. § 1620.23 ("The establishment by collective bargaining or inclusion in a collective bargaining agreement of unequal rates of pay does not constitute a defense available to … an employer ….").

Additionally, "[a]ny 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." *Id.*

USSF was fortunate that WNT players were willing to play, and succeed, under the terms of their CBA. But the EPA provides that an employer cannot pay its women employees less simply because they are willing to work for less. *Rizo*, 950 F.3d at 1222-23 (internal citations omitted) (recounting that in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), the Supreme Court rejected the "market force theory" in which an employer can pay willing women less to do the low-wage jobs men refuse even if "understandable as a matter of economics" because "its [wage] differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work").

II. The plaintiffs' evidence would support a reasonable jury finding of actionable pay discrimination under Title VII.

Section 703(a)(1) of Title VII provides that it shall be "an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation … because of such individual's … sex …." 42 U.S.C. § 2000e-2(a)(1). As this Court has

recognized, Title VII is much broader than the EPA, and Title VII's statutory scheme covers claims of sex-based wage discrimination whether or not they also fall under the EPA. *Bartelt v. Berlitz Sch. of Languages of Am.*, 698 F.2d 1003, 1005-06 (9th Cir. 1983). Whereas the EPA holds employers strictly liable for a limited subset of sex-based pay discrimination, Title VII reaches all compensation discrimination that occurs "because of … sex." 42 U.S.C. § 2000e-2(a)(1). "Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'" *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion)).

Just as in any Title VII disparate-treatment suit, "[t]he difference in treatment based on sex must be intentional." *Bostock*, 140 S. Ct. at 1740. Thus, a Title VII pay discrimination plaintiff is not required to establish a prima facie case under the EPA or demonstrate "equal pay for equal work." Rather, on summary judgment a plaintiff may either present direct evidence of pay discrimination or proceed under the *McDonnell Douglas*

burden-shifting framework (or "circumstantial evidence" approach) typically applied in such cases to permit a jury to find intentional discrimination. *See Freyd v. Univ. of Or.*, 990 F.3d 1211, 1228 (9th Cir. 2021).

The Supreme Court has held that Title VII "incorporate[s] the four affirmative defenses of the Equal Pay Act … for sex-based wage discrimination claims." *Cnty. of Washington v. Gunther*, 452 U.S. 161, 168 (1981) (construing 42 U.S.C. § 2000e-2(h)). In other words, if a pay differential is based on seniority, merit, quantity or quality of production, or any other factor other than sex, it is not sex discrimination under Title VII or the EPA. *Id.* at 169; 29 U.S.C. § 206(d)(1).

The same evidence that would support a jury finding in the plaintiffs' favor on their EPA claim would likewise support a finding that USSF violated Title VII. A reasonable jury could credit the plaintiffs' evidence and find that USSF pays its men's team differently—and better—than its women's team pursuant to both CBAs, as well as the MOU that predated the women's CBA. WNT players were systematically given lower bonuses

for winning and tying games and placing in tournaments, and even the set base pay for the two teams was unequal.

The explicit classification by sex of USSF's payment schemes to WNT and MNT players is facially discriminatory. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (where employer's policy distinguishes on its face based on membership in protected group, it constitutes direct evidence of discrimination); *City of L.A., Dep't of Power & Water v. Manhart*, 435 U.S. 702, 711 (1978) ("An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of [Title VII]. Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'") (internal citation omitted); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000) ("An employer's policy amounts to disparate treatment if it treats men and women differently on its face.").

The district court therefore erred as a matter of law in relying on the defendant's disputed calculations to hold that the plaintiffs did not "demonstrate[] a triable issue that WNT players are paid less than MNT players." 1-ER-25. Insofar as there was any question about which of the experts' methodologies or calculations had more merit, that question should have been resolved either via the parties' motions regarding the expert reports or by a trier of fact, not on summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

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I certify that this brief complies with the type-volume requirements set forth in Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1. This brief contains 6,977 words, from the Statement of Interest through the Conclusion, as determined by the Microsoft Word for Office 365 word processing program, with 14-point proportionally spaced type for text and footnotes.

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Dated: July 30, 2021

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I hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system on July 30, 2021. I further 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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