No. 21-55356

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

United States Soccer Federation, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 19-cv-1717 (Hon. R. Gary Klausner)

BRIEF FOR THE INDEPENDENT WOMEN'S LAW CENTER AS AMICUS CURIAE IN SUPPORT OF THE DEFENDANT/APPELLEE

Independent Women's Law Center
Jennifer C. Braceras
1802 Vernon St. NW #1027
Washington, DC 20009
jennifer.braceras@iwf.org

Marquis Aurbach Coffing
Brian R. Hardy, Esq. (SBN 10068)
Kathleen A. Wilde, Esq. (SBN 12522)
10001 Park Run Drive
Las Vegas, Nevada 89145
bhardy@maclaw.com
kwilde@maclaw.com
Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, the Independent Women's Law Center hereby states as follows: The Independent Women's Law Center is a project of the Independent Women's Forum (IWF), a 501(c)(3) nonprofit in the United States of America.

In accordance with Federal Rule of Appellate Procedure 29(c)(5), the Independent Women's Law Center states that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel contributed money to fund the preparation or submission of this brief.

Dated this 29th day of September, 2021

MARQUIS AURBACH COFFING

By */s/ Brian Hardy*

Brian R. Hardy, Esq.
Nevada Bar No. 10068
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
bhardy@maclaw.com
kwilde@maclaw.com
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF INTEREST[1]

Independent Women's Law Center is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes access to free markets and to the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. Independent Women's Law Center supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order.

Independent Women's Law Center is particularly concerned that a ruling for the U.S. Women's National Soccer Team will undermine collective

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). As noted above, no counsel for any party authored this brief in whole or in part, no party or party's counsel has contributed money intended to fund the preparation or submission of the brief, and no individual or organization contributed funding for the preparation and submission of the brief. *See id.* 29(a)(4)(E).

bargaining and limit the rights of female workers to negotiate contracts that provide financial stability and other high-value benefits. Independent Women's Law Center urges this court to uphold the ruling of the U.S. District Court for the Central District of California finding no pay discrimination in violation of either the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964.

SUMMARY OF THE ARGUMENT

The U.S. Women's National Soccer Team ("Women's Soccer") does not seek equal pay. If it did, the players would have to take a pay cut in order to bring their compensation down to the level of the U.S. Men's National Soccer Team ("Men's Soccer").

Nor does Women's Soccer seek the same contract as Men's Soccer. Women's Soccer has never requested a contract similar to that of Men's Soccer. In fact, in mid-September this year, the U.S. Soccer Federation offered Women's Soccer the *exact same contract* as the men's team, but the women's players association dismissed the offer out of hand, calling it a "publicity stunt."

This court is, indeed, witnessing a publicity stunt, but not from the Soccer Federation. On the contrary, it is the players on the women's team who have skillfully manipulated the media into painting them as victims of discrimination when, in fact, Women's Soccer was better compensated than Men's Soccer during the time period relevant to this lawsuit.

This compensation was earned pursuant to a collective bargaining agreement negotiated by the players' union and agreed to by Women's Soccer. In the course of their negotiations, Women's Soccer rejected the Federation's offer of a more incentive-based, pay-to-play arrangement (similar to that agreed to by Men's Soccer). Instead, Women's Soccer sought an agreement that provided higher base salaries paid irrespective of whether the players attended training camp, took the field, or won a game. This gamble paid off, as it allowed the players on the women's team to continue collecting their salaries during the height of the COVID-19 pandemic despite not playing in any games. By contrast, the players on the men's team went ten months without a paycheck.

In light of their winning record during the time period that is the subject of this lawsuit, Women's Soccer now argues that the Men's Soccer contract would have been even more lucrative than the contract they signed, at least for some of the players on the team. That may be true, but it is an elementary principle of law that a party to a contract may not avoid its obligations simply because she experiences regret. A ruling for appellants

here would undermine collective bargaining and the right to contract, especially for women. This court should affirm the judgment of the district court below.

ARGUMENT

Women's Soccer was not denied equal pay for the simple reason that it earned *more* than Men's Soccer. A ruling requiring the U.S. Soccer Federation to pay the female players even more than they earned under the terms of their collective bargaining agreement might benefit these celebrity appellants, but it will deny other female workers the ability to negotiate favorable workplace arrangements that differ from those of their male peers. And it will undermine our nation's longstanding policy in favor of collective bargaining.

I. BECAUSE WOMEN'S SOCCER EARNED MORE THAN MEN'S SOCCER, IT CANNOT PROVE A VIOLATION OF THE EQUAL PAY ACT.

In 1963, Congress passed, and President Kennedy signed into law, the Equal Pay Act, which prohibits employers from paying higher wages to employees in substantially equal jobs on the basis of sex.

The Equal Pay Act provides:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex.
> 29 U.S.C. § 206(d)(1).

In order to establish a *prima facie* case of discrimination under the Act, a plaintiff must show "that women were paid less than men in the same establishment for equal work requiring equal skill, effort, and responsibility and performed under similar working conditions." *Price v. Northern States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011); *see* 29 U.S.C. § 206(d)(1).

Most cases at the *prima facie* stage turn on whether the plaintiff is performing equal work under similar working conditions, at times an intricate inquiry. Here, the case is much simpler: Because of the undisputable fact that Women's Soccer earned *more* than Men's Soccer, the female players cannot establish even a threshold case of discrimination.[2]

[2] Women's Soccer states that Title VII is "broader" than the Equal Pay Act, and that the district court should have further considered whether the

The record reveals that, during the period in question (from 2015 to 2019), Women's Soccer earned approximately $24 million overall, while Men's Soccer earned only $18 million. 1-ER-20. The average take per game was $220,747 for the women's team, compared to $212,639 for the men's team. 1-ER-20-21. And while the individual female plaintiffs made an average of $11,356 to $17,416 per game, the four *highest-paid* male players made an average of $10,360 to $13,964 per game. 1-ER-21. These facts are not in dispute.

The female players' compensation is vastly higher than that of the male players several other significant ways. Women's Soccer players—unlike Men's Soccer players—receive bonuses for Olympic play, signing bonuses,

---

women were treated worse than the male players because of sex. Opening Brief of Plaintiff-Appellants at 26. But the only relevant inquiry here is whether Women's Soccer was treated worse by receiving unequal pay, and thus a separate discussion of Title VII is not useful. *See Foster v. Arcata Assocs.*, 772 F.2d 1453, 1465 (9th Cir. 1985), overruled on other grounds by *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir. 1991) ("when a Title VII claimant contends that she has been denied equal pay for substantially equal work . . . Equal Pay Act standards apply"); *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (Title VII claims of pay discrimination on the basis of sex are to be determined in the same way as Equal Pay Act Claims).

severance benefits, health insurance, guaranteed rest time, partnership bonuses, and a promise from the Soccer Federation to secure a minimum number of games (which worked, as the women secured more games than the men). 1-ER-17-18, 22.

Women's Soccer argues that, although it received more money overall than Men's Soccer, the female players' "rate" of pay was lower. Opening Brief of Plaintiff-Appellants at 34. Women's Soccer limits its computation of the "rate" of compensation to per-game appearance fees and bonuses. But this confined focus deliberately ignores valuable benefits for which the women collectively bargained. On its face, that approach is nonsensical. According to that reasoning, each player, hypothetically, could receive a free jet, a house, and a car, but would still see herself as a victim of pay discrimination so long as her per-game bonus was lower than that of the male players. But an assessment of wages under the Equal Pay Act must consider all sources of wages. 29 C.F.R. § 1620.12(a); 29 C.F.R. § 1620.11(a). And under that assessment, it is irrefutable that the women earned more than the men.

II. THE EQUAL PAY ACT WAS NOT PASSED TO LIMIT WOMEN'S CHOICES.

The fact that Women's Soccer earned more than Men's Soccer should be the end of the matter. But Women's Soccer tries to take this court's eye off the ball, claiming that the Soccer Federation should have paid the female players according to the terms of the Men's Soccer contract, which would have been even more lucrative for some of the female players than the contract to which they agreed. Opening Br. at 56.

The Equal Pay Act does not dictate a standard form of compensation, nor does it forbid wage differentials generally—only those that are "based on" sex. The Ninth Circuit has recognized that "[t]he Act's limited goal was to eliminate only the purest form of sex-based wage discrimination: paying women less *because* they are women." *Rizo v. Yovino*, 950 F.3d 1217, 1227 (9th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 189 (2020). All of which is to say that a woman's right to contract survived the passage of the 1963 law unscathed, and women today are empowered to participate in the workplace, negotiating the terms of employment that work best for them without being wedded to the choices that men make.

A. Women's Soccer Sought and Received a Low Risk Contract That De-emphasized Performance.

In this case, Women's Soccer sought a contract that guaranteed players a better base rate of pay, but with fewer performance incentives. In other words, the Women's Team chose a low-risk, lower-yield contract over a contract with higher risk and the potential for a higher yield. According to this agreement, and unlike Men's Soccer, Women's Soccer has players on contract who earn six-figure base salaries, *whether or not they ever touch the field*. 1-ER-17.

Nevertheless, Women's Soccer argues that because it won more games than Men's Soccer during the time period in question, its players are entitled to even more money than they received under their agreed upon contract. Opening Br. at 28 ("The district court's reasoning … does not account for the effect of *performance*.")

The fact that the Women's Team ultimately won more games than the Men's Team is irrelevant where the collective bargaining agreement intentionally minimized the influence of winning (or losing) on take-home pay. And nothing in the Equal Pay Act compels courts to hand out

performance bonuses to employees who are not contractually due those bonuses.

An analogy may be helpful. Imagine two undergraduate students take a course: Student 1 takes the course pass/fail, Student 2 does not. Student 1 ends up earning an A, but having taken the class pass/fail, that grade is not reflected on her transcript, nor does she receive a GPA boost. Student 2 earns a B in the course. Though Student 1 outperformed Student 2, in retrospect she would have been better off under Student 2's grade structure. From behind a Rawlsian veil of ignorance, Student 1 chose to forgo the high-risk, high-yield strategy in favor of a low-risk strategy that made high performance (and low performance) irrelevant. So too here. Women's Soccer cannot now argue that the players' successful performance entitles them to additional pay where the team chose to limit both the upside and the downside of performance.[3]

[3] Women's Soccer compares the situation of their players to that of female sales associates who receive lower commission percentages than their male colleagues but who make up the difference by selling a greater quantity of product. *See Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027 (6th Cir. 1983)

Women's Soccer had every right to place a higher value on income security than performance bonuses, and it is not for this court to second guess that choice simply because hindsight demonstrates that a different choice would have yielded some players even more income.

(holding that an employer may not lower female commissions to equalize male and female employees' total compensation).

That comparison is absurd. First, the many, valuable benefits Women's Soccer bargained for reveal how inapt it is to compare the team to under-commissioned female sales associates. In *Bence*, the employer agreed that it failed the *prima facie* test; the employer explicitly paid women a lower rate. 712 F.2d at 1027. Here, the Soccer Federation pays women a *higher* rate not only in per-game wages, but through the several high-value benefits that Women's Soccer fails to even mention.

Women's Soccer argues that instead of comparing wages on a per-game basis, the Court should consider wages on a "performance" basis. By looking at per-win wages, Women's Soccer argues the Court will be evaluating the "same measure of work." Opening Br. 33-35. As discussed above, the women chose to limit the upside and downside of winning, eliminating the relevance of such a comparison. But it is also worth noting that, for an employer, an employee's performance relates to profitability, not just to the number of sales. For sports employers, a team's "performance" incorporates many factors that relate to profitability: not just winning but also per-game attendance, tournament prize money, and television contracts. This court should not recalculate wages to adopt Women's Soccer's focus on wins, which the team itself chose to deemphasize during the bargaining process and which also ignores many of the key ingredients that together constitute "performance."

B. The Choice of a Low-Risk/Lower-Yield Contract Was a Reasonable One that Paid Off Here.

That Women's Soccer opted for a low-risk, lower yield contract should come as no surprise to even a casual observer of labor economics. Studies show that Americans place significant value on job stability. A 2017 study of young workers revealed that despite the workers' belief that self-employment and independent contract work produced greater job satisfaction and increased opportunities, they preferred to work for an employer regardless because they valued job security and a fixed income. Deloitte, *Millennials seek job stability, flexibility*, The Wall Street Journal (Mar. 28, 2017), http://bit.do/fRYAn. And women generally place greater value on hard-to-quantify benefits, such as flexibility and stability, than do men.

According to a recent Morning Consult survey, nearly 20 percent of women said they never want to return to work in person, compared to just 7 percent of men. Alyssa Meyers, *Back to the Office: What Businesses Should Know About Employees' Views on the Return to In-person Work*, Morning Consult (Jul. 7, 2021), http://bit.do/fRZSZ. This is not a new, pandemic-inspired reality. A 2017 study found that women valued paid time off and

working from home more highly than men did. *See* Cathleen Clerkin, *What Women Want—And Why You Want Women—in the Workplace*, Center for Creative Leadership (July 2017), http://bit.do/fRYyD; *see also* Courtney Connley, *Why Long-term Flexible Work Options could be a Game Changer for Women*, CNBC (Apr. 29, 2020), http://bit.do/fRYy7. On a scale with 4 being the "most important" workplace benefit, women on average rated working from home 3.08, while men rated this benefit only 2.74. *Id*. A 2021 study found that 80 percent of women ranked remote work as a top job benefit, compared with 69 percent of men. Rachel Pelta, *Survey: Men & women experience remote work differently*, FlexJobs (last visited Sept. 21, 2021), http://bit.do/fRY7s.

Recent studies also indicate that female workers tend to be more risk averse than their male colleagues. *See* Alexandra Van Geen, *Risk in the Background: How Men and Women Respond*, Harvard University (2013), http://bit.do/fRYy9 (men and women have different baseline levels of risk tolerance). For example, researchers found that only 36 percent of female MBA students at the University of Chicago and Northwestern University

chose risky careers in finance, compared to 57 percent of male students. Paola Sapienza et al., *Gender Differences in Financial Risk Aversion and Career Choices are Affected by Testosterone*, Proceedings of the National Academy of Sciences (Sept. 8, 2009), http://bit.do/fRYzb. A study of Uber drivers found that men drove 2.2 percent faster than women, driving up men's per-hour earnings. Cody Cook et al., *The Gender Earnings Gap in the Gig Economy: Evidence from Over a Million Rideshare Drivers*, National Bureau of Economic Research (June 2018), http://bit.do/fR2j4. Risk tolerance in career selection does not just relate to potential earnings; the most physically dangerous occupations are numerically dominated by men. Lawrence White, *Why do Men have the Most Dangerous Jobs?*, Psychology Today (Apr. 21, 2021), http://bit.do/fRY7J. Of the individuals who work in the four most dangerous jobs categories (fishing and hunting, logging, piloting a small plane or helicopter, and roofing), more than 90 percent are men. *Id*.

Sex-based differences in risk tolerance can also be seen outside of the workplace. Of college-aged people who gamble, for example, 14 percent of men, but only 3 percent of women, gambled at problematic levels. Gloria

Wong et al., *Examining Gender Differences for Gambling Engagement and Gambling Problems Among Emerging Adults*, 29 J. Gambl. Stud. 171 (2013). Men are twice as likely to drink and drive as women. 2019 Traffic Safety Culture Index, AAA 30 (June 2020), http://bit.do/fRY7A. On the "Jeopardy!" television program, men are more likely to take larger risks as their category knowledge increases, compared to women, who tend to keep their wagers level, and thus their risk, even. Vikas Mittal, Xin He, & J. Jeremy Inman, *Gender Jeopardy in Financial Risk Taking*, 45 Journal of Marketing Research 414 (2008).

As it turns out, the decision to limit risk paid off for Women's Soccer. In 2020, the COVID-19 pandemic brought a sudden halt to public events, and Women's Soccer paused all matches between from March 11 through November 27 —a more than nine-month gap. U.S. Women's Soccer Matches, https://USSoccer.com/all-matches (select "Results," then select "U.S. Women's National Team" and "2020"). During this gap, the women's team players were continually paid, pursuant to their contract. Meanwhile, all members of the men's team went without a paycheck.

Moreover, the financial stability provided by the fixed-wage contract allowed individual female players to *decline* to play in National Women's Soccer League events, such as the Champions Cup, during the pre-vaccine period where participation in sporting events brought substantial uncertainty. Steven Goff, *Megan Rapinoe, Two Other USWNT Players Opt Out of NWSL Tournament*, The Washington Post (June 23, 2020), http://bit.do/fRYzi. The freedom to stay home and stay safe while getting paid was a direct result of the beneficial contract Women's Soccer secured.

Although the COVID-19 pandemic post-dates the time period at issue in this lawsuit, it is nevertheless worth noting that the women were paid even when they did not work because this undisputed fact illustrates the significant economic advantage of the women's contract: job security in the face of factors that were impossible to predict *ex ante*. A ruling for appellants would ignore the very real economic value of this "insurance" that the players sought and received under their contract.

C. Limiting Risk is a Permissible "Factor Other Than Sex" Under the Equal Pay Act.

Pay differences based on job-related "factor[s] other than sex" do not violate the Equal Pay Act. *See* 29 U.S.C. § 206(d)(1) (prohibiting unequal wages "except where such payment is made pursuant to . . . any other factor other than sex"). In a Sixth Circuit case, two executives, one male and one female, chose different pay structures, and that court found the resulting pay difference was due to a "factor other than sex." *Schleicher v. Preferred Solutions, Inc.*, 831 F.3d 746, 753 (6th Cir. 2016). In *Schleicher*, the female chose to be compensated pursuant to a lower-risk, lower-upside option, and (unlike here) received $700,000 less than her male counterpart over the course of five years. *Id.* at 748. The Sixth Circuit, like the Ninth, does not broadly read "factor other than sex" to include any other factor, but only legitimate business-related factors. *Id*. at 754. It found that personal choice—linked there, as here, to income security—is a job-related factor. The Sixth Circuit recognized that the female "did not want to be paid on a profit-pool-only basis because she thought it was risky." *Id*. at 755. The court distinguished its case from one in which employees were "never in a

position to choose *how* they would be compensated." *Id*. In *Schleicher*, the male and female employee chose the compensation model that suited each best. The female's "personal choice was clearly a 'factor other than sex,' and it explains why [the male] outearned [the female]." *Id*.

The Sixth Circuit was right to emphasize respect for women's personal choices. To see why, imagine the alternative. Let's say a woman desperately wants to work from home, but her employer says it is time to show up in person. Instead of quitting, she contracts for a smaller bonus but gets to stay home. (And she pockets more money through savings on parking, gas, dry cleaning, lunch, and various household necessities.) None of the employer's male employees ask for this arrangement, and so no men receive it. The woman stays in the workforce, keeps the flexibility she cares about, and all parties are better off. This scenario is allowable under the Sixth Circuit's ruling and under the ruling of the district court below. But a ruling for Women's Soccer here would discourage employers from offering such an option because "flexibility" does not show up on a W-2 as wages, and personal choice is an afterthought.

Equal pay laws were not passed to equalize risk tolerance levels of male and female employees or to prevent employees from negotiating contracts that best meet their individual needs. Yet, if appellants succeed in convincing this court to second guess their choice, they will limit their own choices moving forward. Indeed, in the future, Women's Soccer will be forced to accept the identical contract as Men's Soccer, even if this does not benefit the players.

Such a precedent will not only limit the choices of professional soccer players. It will render invalid the contracts of countless women across the country who have chosen income security, flexibility, or other benefits in exchange for lower pay than their male colleagues. Women's Soccer will remain powerful and well-represented by its union, but for most women the dissolution of personal choice in employment contracts will mean reducing their options: Women will just have to take whatever deal men take, since that is all employers will offer.

III. OVERRULING THE DISTRICT COURT WOULD UNDERMINE COLLECTIVE BARGAINING.

A. National Labor Policy Favors Enforcement of Collective Bargaining Agreements.

The National Labor Relations Act ("NLRA") created a national policy in favor of collective bargaining. 29 U.S.C. § 151. In the context of sports, as elsewhere, collective bargaining aims to level the playing field between employer and employees. "[M]atters such as contract length, compensation, grievance procedures, and player safety become bargaining chips rather than unilaterally imposed conditions." Daniel Pannett, *Collective Bargaining in Sport: Challenges and Benefits*, 4 UCL J. L. & Jurisprudence 189, 190 (2015).

The first collective bargaining agreement in sports appeared in baseball, signed in 1968. The model has been successful. In 1972, for example, baseball players conducted the first strike in professional sports, and secured health insurance and retirement benefits in return. Genevieve F.E. Birren, *A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof)*, 10 DePaul J. Sports L. & Contemp. Probs. 1 (2014). Strikes have since become more common, and

even their threat gives more power to players over salary, revenue sharing models, pension and retirement, salary arbitration, free agency, and more. *Id*.

A key part of expanding and promoting labor unions is enforcing the contracts they negotiate, especially those that secure enormous benefits for employees. And it is inherent in the nature of bargaining that the parties must negotiate terms without knowing what the future holds. *See, e.g.*, *Ackermann v. United States*, 340 U.S. 193, 198 (1950) (litigants cannot be relieved of the consequences of their strategic decisions merely because hindsight indicates that a decision was wrong); *Omega Engineering, Inc. v. Omega, S.A.*, 432 F.3d 437, 445 (2d Cir. 2005) ("It is an elementary principle of contract law that a party's subsequent change of heart will not unmake a bargain already made.").

This is true for workers in almost any industry, but it is particularly true in the unpredictable world of competitive sports. A professional soccer player simply has no way of knowing, years in advance, whether he or she will be selected for a particular tournament, whether the team will be

successful in a particular game or tournament, whether he or she will be injured or otherwise sidelined, whether games will be broadcast internationally or widely attended by fans, or whether games will be cancelled due to a global pandemic or other act of God. Given the enormous range of unknowns, players and their unions are faced with a choice: seek a high-risk/high-yield contract or one that limits risk and provides stability at a lower wage. Like any other contract, once a choice is made, one party cannot unilaterally amend its terms. It cannot be the case that if a player overperforms his prediction, he gets to have the higher-risk contract. The parties must guess up front.

In professional sports, as elsewhere, labor unions have greatly enlarged the power of players to seek and secure favorable working conditions. The continued success of labor unions in professional sports requires that unions be given room to negotiate, to secure beneficial results like here where the U.S. Women's National Team Players Association secured more money on a per-game basis than the men *and* secured additional, valuable benefits like guaranteed contracts.

B. The CBA Negotiated by Women's Soccer Constitutes a "Factor Other Than Sex" Under the Equal Pay Act.

Women's Soccer notes that collective bargaining agreements are not a defense to unequal rates of pay. Opening Br. at 53; 29 C.F.R. § 1620.23. True, but irrelevant. While collectively bargained agreements do not eliminate or override equal pay laws, "[l]abor agreements . . . are 'factor[s] other than sex'" that can explain disparate wages. *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 925 (7th Cir. 2000). *See also Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App'x 452, 457 (6th Cir. 2017) ("a wage differential resulting from status as a union member constitutes an acceptable 'factor other than sex'"). In other words, differences in rates of pay are not unlawful where, as here, the rates were negotiated and agreed to by two different unions representing the interests of two separate groups of workers.

In this case, Women's Soccer and Men's Soccer have chosen to be represented by unions that best represent the unique needs of their players. The Women's Soccer Players Association (the "Players Association") is not a remote public body but an association of the players themselves. The

Players Association is deeply knowledgeable about the needs and concerns of Women's Soccer because its members *are* Women's Soccer.

The negotiating history between the Players Association and the Federation is helpful to show that the pay structure that Women's Soccer selected was a reasonable choice, one that was uniquely tailored to the needs of the players at that time. It also provides a reminder that player-negotiated contracts are vital tools in maximizing benefits for women. The women requested, and secured, a huge number of concessions from the Soccer Federation, including a roster of players under contract, who are paid two salaries for participating on the Women's Team and the National Women's Soccer League. 1-ER-17. The women secured signing bonuses, severance benefits, health, dental, and vision insurance, and much more. 1-ER-18.

The law requires employers to bargain in good faith. Employers cannot, for example, refuse to discuss union proposals. *NLRB v. Express Pub. Co.*, 312 U.S. 426 (1941). Here, the Soccer Federation was required to (and did) consider every proposal presented by the Players Association. Women's Soccer at no point sought the terms that it now seeks is retrospect.

If it had, the Soccer Federation would have been required to consider those terms. In fact, the Soccer Federation offered incentive based, pay-to-play terms, which Women's Soccer rejected. 1-ER-23; 3-ER-401.

Women's Soccer does not here argue that the Soccer Federation negotiated in bad faith and cannot do so based on the facts. Instead, it seeks to bypass labor law to claim the Soccer Federation should have unilaterally paid Women's Soccer according to the terms agreed to by Men's Soccer. That is not how bargaining works. And had the Federation done that, it would have not only taken power away from the female players and their chosen bargaining unit, it would have opened up the Federation to the possibility of an unfair labor practice charge under the NLRA.

C. A Ruling for the Appellants Would Undermine Current Collective Bargaining Efforts.

The Soccer Federation continues to negotiate in good faith, as it is required to do under the NLRA. In fact, recently as September 14, 2021, the Soccer Federation offered Women's Soccer the exact same contract as Men's

Soccer – an offer that Women's Soccer quickly rejected.[4] Jeff Carlisle, *U.S. Soccer Offers Men's, Women's Teams Identical Contract Proposals*, ESPN (Sept. 14, 2021), http://bit.do/fRZSN. Although the Federation's latest offer post-dates the relevant facts of this case, the response of Women's Soccer shows that their claim to want the same collective bargaining agreement as Men's Soccer is a red herring.

The reality is that Women's Soccer never sought, and still seems not to want, the freedom to choose between its own contract and the one signed by Men's Soccer. Women's Soccer wants the benefit of pay-to-play, the benefit of fixed compensation, the benefit of severance pay and other risk-padding measures, and a legal mandate requiring this all-upside contract.

---

[4] On Twitter, the Women's Players Association stated:

> [The Soccer Federation's] PR stunts and bargaining through the media will not bring us any closer to a fair agreement. In contrast, we are committed to bargaining in good faith to achieve equal pay *and* the safest *working conditions* possible. The proposal that [the Soccer Federation] made recently to us does neither.

USWNT Players (#USWTPlayers), Twitter (Sept. 15, 2021, 12:12 PM) http://bit.do/fR2hi (emphasis added).

If Women's Soccer truly seeks the exact same contract and pay structure as Men's Soccer, they have the option to be represented by the same union. But, at least for now, Women's Soccer has chosen to be represented by a separate union and to undertake a separate bargaining process. This court should not undo that choice or otherwise circumvent the NLRA. Doing so would not only undermine current negotiations between Women's Soccer and the Federation, it would throw into question the legitimacy of collective bargaining for unions across the country.

. . .

. . .

. . .

. . .

. . .

CONCLUSION

Having collectively bargained for their current contract, the U.S. Women's Soccer Team cannot now get out of it, claiming that it is discriminatory. Allowing them to do so denies women agency and free will and undermines the United States' system of collective bargaining. This court should affirm the district court's ruling granting summary judgment for the U.S. Soccer Federation.

Respectfully submitted this 29th day of September, 2021

MARQUIS AURBACH COFFING

By /s/ *Brian R. Hardy*
Brian R. Hardy, Esq. (SBN 10068)
Kathleen A. Wilde, Esq. (SBN 12522)
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Amicus Curiae

INDEPENDENT WOMEN'S LAW CENTER
Jennifer C. Braceras[5]
1802 Vernon St. NW #1027
Washington, DC 20009

[5] Jennifer Braceras is the Director of the Independent Law Center and is not counsel of record in the Ninth Circuit.

STATEMENT OF RELATED CASES

The Independent Women's Law Center is not aware of any related cases before this Court, and it is believed that there are no related cases under Ninth Circuit Rule 28-2.6.

DATED: September 29, 2021.

MARQUIS AURBACH COFFING

By /s/ *Brian R. Hardy*

Brian R. Hardy, Esq. (SBN 10068)
Kathleen A. Wilde, Esq. (SBN 12522)
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this amicus 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 5,815 words, from the Statement of Interest through the Conclusion, and is set in Palatino Linotype font in 14 points.

DATED: September 29, 2021.

MARQUIS AURBACH COFFING

By /s/ *Brian R. Hardy*

Brian R. Hardy, Esq. (SBN 10068)
Kathleen A. Wilde, Esq. (SBN 12522)
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system on September 29, 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.

DATED: September 29, 2021.

/s/ Leah Dell
An employee of Marquis Aurbach Coffing