

COMMENTS

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The Gender Pay Gap: Seeking Fairness for Women in Professional Sports

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INTRODUCTION

My soccer career, like many other girls’ soccer careers, started when our uniforms were so oversized that our shorts looked like pants, short sleeves looked like long sleeves, and our shin guards covered our knees. As a child, I never considered playing women’s soccer at a National Collegiate Athletic Association Division II college. But there I was, years later, co-captain of the women’s soccer team for my university. The head coach of the women’s soccer team was also the head coach of the men’s soccer team. This meant that the men’s and women’s teams traveled to games and ate dinner together.

On one trip to California, I caught a glimpse of inequality among female and male athletes. Both teams had just finished playing and headed back to the hotel for dinner. The head coach asked the women’s team to create groups of three women to share one pizza for dinner. My group finished our pizza, and then I scoured the hotel halls hungrily looking for leftovers. Later, I realized the men’s team had to create groups of only two men to share one pizza.

The men’s and women’s team each had the same per diem for dinner, but the women were given less pizza. This issue may seem insignificant. But this story is just one small example that illustrates gender discrimination in sports. If one person is willing to give me a smaller slice of pizza, what stops this person from paying me a lower wage, denying me opportunities for advancement, or plainly discriminating against me because of my gender? Looking back now, I

wish I had embodied the same courage while playing collegiate soccer that the U.S. Women's National Soccer Team (WNT) has shown in its continued fight against gender inequality in professional sports.¹

Professional female athletes are constantly being asked to do more with less. They are asked to perform better and attract more viewers, often with less pay, less media coverage, and fewer sponsorships. Professional female athletes should be able to use the Equal Pay Act (EPA) to close the gender pay gap. However, not all professional athletes can use the EPA as a legal tool. In order to close the gender pay gap, the U.S. must alter its sports ecosystem to give professional female sports an equal part in broadcasting and sponsorships. This Article aims to address these issues and present solutions to close the gender pay gap in professional sports. Part I of this Article introduces the WNT's continued fight for equal pay. Part II analyzes the pay, broadcasting, and sponsorship gaps between professional female and male sports. Part III explores the elements and defenses of the Equal Pay Act. Part IV applies the Equal Pay Act to the WNT's lawsuit had it gone to trial and briefly summarizes Judge Klausner's partial summary judgment in favor of the United States Soccer Federation (USSF). Part V explores Australia's approach to the gender pay, broadcasting, and sponsorship gaps in professional sports. Finally, Part VI presents solutions to close the gender pay gap in professional sports in the United States.

I

INTRODUCTION TO THE U.S. WOMEN'S NATIONAL TEAM'S CONTINUING FIGHT

A. 2016 Lawsuit

In 2016, five WNT players filed a wage discrimination complaint with the Equal Employment Opportunity Commission (EEOC) against their employer, the USSF.² The USSF employs professional soccer players on the United States Men's National Soccer Team (MNT) and

¹ Adriana Figueroa, *U.S. Women's Soccer Team Files Class/Collective Action Over Unequal Pay*, HR DAILY ADVISOR (May 15, 2019), <https://hrdailyadvisor.blr.com/2019/05/15/u-s-womens-soccer-team-files-class-collective-action-over-unequal-pay/> [<https://perma.cc/Y7UW-2PMG>].

² Amy Settee Fox, *U.S. Women's Soccer Team's EEOC Charge Spotlights Wage Discrimination Issues*, HR DAILY ADVISOR (June 19, 2016), <https://hrdailyadvisor.blr.com/2016/06/19/u-s-womens-soccer-teams-eeoc-charge-spotlights-wage-discrimination-issues/> [<https://perma.cc/K2EY-H678>].

the WNT.³ Five WNT players sought to be paid the same wages as their male counterparts on the MNT.⁴ The women also alleged that the USSF denied them “at least equal playing, training, and travel conditions; equal promotion of their games; equal support and development for their games; and other terms and conditions of employment equal to the MNT.”⁵ The women alleged that “the USSF pays male players nearly four times more despite the fact that the women’s team generated nearly \$20 million more in revenue than the men’s team in 2015.”⁶ The WNT and the USSF reached a settlement after the WNT filed its EEOC complaint.⁷ In 2017, the WNT entered into a new collective bargaining agreement (CBA) with the USSF. While specific details of the CBA were not disclosed, it has been made public that the WNT would receive “raises in base pay and bonuses as well as better provisions for travel and accommodations, including increased per diems [and] some control of certain licensing and marketing rights.”⁸

B. 2019 Lawsuit

On March 8, 2019, International Women’s Day, all twenty-eight WNT players filed a proposed class action lawsuit against the USSF.⁹ The WNT filed the lawsuit in a California federal court based on “institutionalized gender discrimination” under the EPA.¹⁰ The WNT sued the USSF for unequal pay and gender discrimination, claiming the USSF treats the MNT more favorably than the WNT.¹¹ In addition to pay discrimination, the WNT claimed discrimination in other aspects of its employment, including where the team played its games, how the

³ Figueroa, *supra* note 1.

⁴ Fox, *supra* note 2.

⁵ Complaint at 2, Morgan v. U.S. Soccer Fed’s, Inc., No. 2:19-CV-01717 (C.D. Cal. filed Mar. 8, 2019).

⁶ Fox, *supra* note 2.

⁷ The Business of Sports Podcast with Andrew Brandt, *Jeffrey Kessler & the US Women’s Soccer Lawsuit*, ROSS TUCKER MEDIA, at 11:01 (June 4, 2019), <https://www.podcastone.com/episode/Jeffrey-Kessler--the-US-Womens-Soccer-Lawsuit> [<https://perma.cc/YPH6-NRP8>].

⁸ Anne M. Peterson, *Goal Reached: US Women’s Soccer Team Gets New Contract*, U.S. NEWS & WORLD REP. (Apr. 5, 2017), <https://www.usnews.com/news/sports/articles/2017-04-05/us-soccer-and-womens-national-team-agree-on-new-contract> [<https://perma.cc/7WJV-L4L6>].

⁹ Figueroa, *supra* note 1.

¹⁰ *The Fight for Equal Pay in Women’s Sports*, WOMEN’S SPORTS FOUND. (Apr. 2, 2019), <https://www.womenssportsfoundation.org/education/fight-equal-pay-womens-sports/> [<https://perma.cc/7ZTB-VXXX>].

¹¹ Figueroa, *supra* note 1; see *The Fight for Equal Pay in Women’s Sports*, *supra* note 10.

team traveled, the team's medical treatment, and the coaching the team received.¹² The WNT's complaint alleged that the USSF paid the female players significantly less than the male players despite the female players having the same job responsibilities and maintaining superior job performance.¹³ The women argued they are entitled to equal pay and benefits¹⁴ because they "achieved 'unmatched success' that led to 'substantial profits,' which 'outstripped' the MNT's net profit."¹⁵

The WNT excels in its sport compared to the MNT.¹⁶ The WNT has placed in the top three teams in every Women's World Cup since 1991¹⁷ (the year the women's tournament began) and has four titles.¹⁸ The MNT has placed in the top three of the Men's World Cup once—in 1930—and has no titles.¹⁹ In the six Olympic Games that have included women's soccer, the United States has captured four gold medals and a silver medal.²⁰ The MNT has never won an Olympic gold medal and has not won any Olympic medals in more than a century.²¹ The WNT's performance in Lyon, France, at the 2019 World Cup final drew in 14.3 million television viewers in the United States.²² Fox Sports reported that the total viewership, including online streaming, reached 20 million viewers. This made the 2019 Women's World Cup

¹² Alexandra Svokos, *After World Cup Win, US Women Pivot to Gender Discrimination Lawsuit*, ABC NEWS (July 7, 2019, 10:01 AM), <https://abcnews.go.com/Sports/world-cup-us-women-gender-discrimination-fight/story?id=64109603> [<https://perma.cc/HRV3-7J6Y>]; Maya Salam, *The Long Fight for Pay Equality in Sports*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/sports/us-womens-soccer-pay.html> [<https://perma.cc/8Z7J-XQL3>].

¹³ Figueroa, *supra* note 1.

¹⁴ Complaint, *supra* note 5, at 2.

¹⁵ *Id.*

¹⁶ *The Fight for Equal Pay in Women's Sports*, *supra* note 10.

¹⁷ *Id.*

¹⁸ Daniel Moritz-Rabson, *Gender Pay Gap in Sports Is More of an Issue After Women's World Cup Win*, NEWSWEEK (July 26, 2019, 1:38 PM), <https://www.newsweek.com/gender-pay-gap-sports-more-issue-after-womens-world-cup-win-1451335> [<https://perma.cc/93QR-Y4CH>].

¹⁹ Leah Asmelash & Brian Ries, *These Stats Show How the USWNT Leads in Soccer – and How Far It Lags in Compensation*, CNN (July 8, 2019, 3:15 PM), <https://www.cnn.com/2019/07/08/sport/uswnt-btn-equal-pay-trnd/index.html> [<https://perma.cc/22GX-L9ZT>].

²⁰ *The Fight for Equal Pay in Women's Sports*, *supra* note 10.

²¹ Asmelash & Ries, *supra* note 19.

²² Abigail Hess, *US Viewership of the 2019 Women's World Cup Final Was 22% Higher than the 2018 Men's Final*, CNBC (July 10, 2019, 3:26 PM), <https://www.cnbc.com/2019/07/10/us-viewership-of-the-womens-world-cup-final-was-higher-than-the-mens.html> [<https://perma.cc/AZL2-KJFR>].

final the most-watched soccer match on English-language television since the 2015 Women’s World Cup final, which had 25.4 million viewers.²³ The WNT achieved this viewership despite broadcasters airing this match on the same day as two other men’s professional soccer matches, including the Men’s CONCACAF Gold Cup final and the Men’s Copa America final.²⁴

The WNT also argued that both the players on the WNT and the MNT have jobs requiring the same skills.²⁵ Those skills include “a high level of competitive soccer skills, physical conditioning, certain nutrition, physical therapy, national and international travel, and adherence to the same rules.”²⁶ The women claimed that since 2012, and even after entering a new CBA in 2017, the USSF has repeatedly rejected the WNT’s request to match the MNT’s pay.²⁷ The WNT also claimed that the USSF provides the WNT with less favorable resources such as inferior playing surfaces and less suitable travel options.²⁸ The WNT requested relief including “back pay, front pay, the financial value of lost job benefits, punitive damages reflecting just punishment, and attorneys’ fees.”²⁹ In addition, the players demanded a “permanent injunction to prevent the USSF from any further (alleged) discrimination.”³⁰ These twenty-eight female athletes continue to take a stand for gender equality in soccer, hoping to create an example for the rest of the world.

Fortunately, the WNT has received some support from corporate sponsors that show their commitment to equality by investing in the WNT. Soon after the WNT’s victory in the 2019 FIFA World Cup, Budweiser became the first official beer sponsor of the entire U.S. National Women’s Soccer League (which includes the WNT).³¹ Proctor & Gamble, an official sponsor of U.S. Soccer, published a full-

²³ *Id.*

²⁴ *Id.*

²⁵ Figueroa, *supra* note 1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Michael McCann, *Inside USWNT’s New Equal Pay Lawsuit v. U.S. Soccer – and How CBA, EEOC Relate*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/soccer/2019/03/08/uswnt-lawsuit-us-soccer-equal-pay-cba-eoc-gender-discrimination> [https://perma.cc/SJB6-35RX].

³⁰ *Id.*

³¹ Katie Lebel, *How Big Brands Could Solve the Gender Pay Gap in Sport*, THE CONVERSATION (Aug. 6, 2019, 12:08 PM), <https://theconversation.com/how-big-brands-could-solve-the-gender-pay-gap-in-sport-120463> [https://perma.cc/M5E4-E9VY].

page advertisement in the *New York Times* urging the USSF to be on the correct side of history by closing the gender pay gap between the WNT and the MNT.³² Proctor & Gamble also announced it would donate \$529,000 to the WNT in support of closing the gender pay gap.³³ In addition, Visa mandated that 50% of its official sponsorship will go toward the WNT in Visa's new deal with the USSF.³⁴ Lastly, Luna Bar announced that it would donate \$31,250 to each of the twenty-three players on the WNT to make up the difference between the women's and men's World Cup roster bonuses.³⁵ These brands realized the market potential of women's sports and took action to change the culture of gender inequality in professional sports by narrowing the pay gap.

The WNT's lawsuit against the USSF was set for trial on May 5, 2020, but Presiding Judge Klausner ordered partial summary judgment in favor of the USSF three days before trial.³⁶ Judge Klausner dismissed the WNT's claim that the WNT was paid less than the MNT for the same work paid under their respective CBAs.³⁷ Judge Klausner reasoned that the WNT forwent the same pay structure as the MNT for other benefits, such as a greater base compensation scheme and a higher guaranteed number of contracted players.³⁸ Consequently, Judge Klausner held that the WNT "cannot now retroactively deem their CBA worse than the MNT CBA by reference to what they *would have made* had they been paid under the MNT's pay-to-play structure when they

³² *Id.*

³³ *Id.*

³⁴ *Id.*; Jeff Beer, *Visa's New Deal with U.S. Soccer Could Be a Game Changer for Women's Sports*, FAST CO. (May 31, 2019), <https://www.fastcompany.com/90357577/visas-new-deal-with-u-s-soccer-could-be-a-game-changer-for-womens-sports> [https://perma.cc/ME38-657V] (Visa's Senior Vice-President of the Visa Brand and head of North American Marketing stated, "The U.S. federation is not unbundling [their sponsorship structure], so we are sponsoring both the men and the women's teams But over 50% of our investment will go to the U.S. women's team. And why would it not? They are the best team in the world. They really stand for the values that Visa embraces and supports, which is all about driving women's empowerment. So that's where we're controlling what we can control, which is our investment to support the women's team.").

³⁵ Lebel, *supra* note 31.

³⁶ Franklyn Cater, *Federal Judge Dismisses U.S. Women's Soccer Team's Equal Pay Claim*, NPR (May 2, 2020, 4:10 AM), <https://www.npr.org/2020/05/02/849492863/federal-judge-dismisses-u-s-womens-soccer-team-s-equal-pay-claim> [https://perma.cc/B3AX-5SVP].

³⁷ *Id.*

³⁸ *Id.*

themselves rejected such a structure.”³⁹ The WNT filed an immediate appeal, but the court denied the appeal.⁴⁰ Judge Klausner scheduled a trial for September 15, 2020, on the WNT’s remaining claim of discriminatory work conditions.⁴¹ As female athletes are continually asked to do more with less, this Article presents dynamic solutions to bridge the gender pay gap among professional athletes.

II PAY, MEDIA COVERAGE, AND SPONSORSHIP GAPS IN PROFESSIONAL SPORTS

While the WNT’s lawsuit draws important attention to the gender pay gap in professional sports, other gender gaps in professional sports also exist, including gender gaps in sponsorships and media coverage. This Part explores discrimination of professional female athletes in pay, media coverage, and sponsorships. Despite society’s desire to see professional female sports treated equally to professional male sports, gender-based discrimination persists.⁴²

³⁹ *Id.*

⁴⁰ Associated Press, *USWNT’s Request for Final Judgment Denied, Delaying Appeal of Equal Pay Ruling*, SPORTS ILLUSTRATED (June 24, 2020), <https://www.si.com/soccer/2020/06/24/uswnt-equal-pay-case-judgment-appeal-delay-us-soccer> [<https://perma.cc/2JTS-98KZ>].

⁴¹ *Id.* Due to the COVID-19 pandemic, a jury trial would not be available until January 29, 2021. Associated Press, *US Women’s Soccer Players Told to Wait Until 2021 for Jury Trial*, THE OREGONIAN (Jul. 29, 2020), <https://www.oregonlive.com/soccer/2020/07/us-womens-soccer-players-told-to-wait-until-2021-for-jury-trial.html> [<https://perma.cc/M9XW-T7G9>]. However, on December 1, 2020, the WNT and USSF agreed to a settlement on the WNT’s inequitable working conditions claim. Anne M. Peterson & Ronald Blum, *Women’s Team, US Soccer Settle Part of Their Lawsuit*, THE ASSOCIATE PRESS (Dec. 1, 2020), <https://apnews.com/article/international-soccer-soccer-womens-soccer-lawsuits-courts-19b5599494006be69d6162ecd35058a3> [<https://perma.cc/454D-MLHW>]. As a result of the settlement, the USSF has agreed to provide equal resources to the WNT and MNT for chartered flights; maintain comparable budgets for accommodations; ensure the WNT stays in top-quality hotels; ensure the playing surfaces and venues under the USSF’s control will be similar to the MNT; and provide equal support staffs to both the MNT and WNT. *Id.* With the inequitable working conditions claim settled, the WNT may appeal to the Ninth Circuit Court of Appeals to restore the wage claim. *Id.*

⁴² Moritz-Rabson, *supra* note 18 (discussing a study done by Morning Consult and ASCEND, a women’s empowerment organization, that found 35% of adults in the U.S. believe that the gender pay gap in sports is more of an issue after the U.S. Women’s National Team won its fourth World Cup title).

A. The Pay Gap in Professional Sports

Today, the gender pay gap spans across almost every professional sport.⁴³ In addition to lower pay, professional female athletes also receive fewer benefits.⁴⁴ Whether professional female athletes play tennis, golf, basketball, soccer, or hockey, they continue to be paid less and receive fewer benefits than male athletes.⁴⁵ Thanks to the WNT's back-to-back World Cup wins and lawsuits, the campaign to achieve equal pay and benefits in professional sports is gaining support, but it is still not enough to enact change.⁴⁶

Even considering society's desire to see professional female athletes treated equally to professional male athletes, an extremely large pay gap still exists between the two.⁴⁷ In 2018, *Forbes* reported that no female athletes appeared on the list of the 100 highest-earning athletes.⁴⁸ In 2019, the top ten highest-paid female athletes earned a combined \$105 million, while the top three highest-paid male athletes alone earned a combined amount greater than \$105 million.⁴⁹ In 2019,

⁴³ Olivia Abrams, *Why Female Athletes Earn Less than Men Across Most Sports*, FORBES (June 23, 2019, 8:00 AM), <https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/#519f921d40fb> [https://perma.cc/7JZX-ZK9J].

⁴⁴ Moritz-Rabson, *supra* note 18.

⁴⁵ See *infra* Part II.A.

⁴⁶ Moritz-Rabson, *supra* note 18.

⁴⁷ Ross Andrews, *Women's Sports Popularity Is Growing, According to Nielsen Study*, GLOB. SPORT MATTERS (Nov. 13, 2018), <https://globalsportmatters.com/business/2018/11/13/womens-sports-popularity-is-growing-according-to-nielsen/> [https://perma.cc/E8RT-389V] ("The study showed more sports fans today not only enjoy but also believe in the women's sports industry. Of the 84 percent of general sports fans today worldwide with an interest in women's sports, 51 percent of those are men, which shows both men and women can be consumers of women's athletics Another reason for this increase in viewership for women's sporting events is the rise of new media, which provides leagues with niche viewing opportunities, such as free, subscription-based and streaming options. Although 45 percent of the general population now considers attending live women's sports events, 39 percent say they would engage more if these sporting events were available for free online According to the Nielsen study, 66 percent of the people who would be interested in streaming women's sports would be willing to pay up to \$10 for streaming services. Non-traditional ways to watch women's sports could be the key to not only developing a large domestic consumer base, but also an international following as well.").

⁴⁸ Kim Elsesser, *8 Unbelievable Gender Pay Gap Statistics from Top Athletes, Actors and CEOs*, FORBES (Aug. 27, 2018, 4:28 PM), <https://www.forbes.com/sites/kimelsesser/2018/08/27/8-unbelievable-gender-pay-gap-statistics-from-top-athletes-actors-and-ceos/#18b5755c6559> [https://perma.cc/HPW4-LXXG].

⁴⁹ See Steve Fiorillo, *12 Highest Paid Female Athletes in 2019*, THE STREET (Aug. 21, 2019, 6:43 PM), <https://www.thestreet.com/lifestyle/sports/highest-paid-female-athletes-15064096> [https://perma.cc/Q3VK-8SLS].

Forbes also reported that only one female athlete, tennis player Serena Williams, was on the list of the top 100 highest-earning athletes; she tied for 33rd place.⁵⁰ Another example of a large pay gap between male and female professional athletes was the 2019 U.S. Women's Open, which is operated by the United States Golf Association (USGA) and had a prize fund of \$5.5 million. Meanwhile, the prize fund for the Men's U.S. Open was \$12.5 million.⁵¹

In 2017, *Forbes* reported that the National Basketball Association (NBA) paid players about 50% of the league's revenue, while the Women's National Basketball Association (WNBA) paid players less than 25% of the league's revenue.⁵² The top NBA salary in the 2019 season was \$37.4 million while the top WNBA salary in the 2019 season was \$117,500.⁵³ Finally, the top pick of the 2019 NBA Draft, Zion Williamson, signed a four-year deal worth \$44 million with the New Orleans Pelicans.⁵⁴ In contrast, the top pick of the 2019 WNBA Draft, Jackie Young, made a base salary of \$53,537 playing for the Las Vegas Aces.⁵⁵

In the sport of soccer, the highest salary of a female player in the National Women's Soccer League is \$46,200, while the highest salary of a male player in the Men's Major League Soccer is \$7.2 million.⁵⁶ International comparisons of wages according to gender are even more stark.⁵⁷ The highest-paid male soccer player in the world, Lionel Messi, makes \$127 million with \$92 million of that total coming from FC Barcelona.⁵⁸ Alex Morgan is the highest-paid female soccer player in the world, and she makes \$5.8 million—only \$250,000 of that total is from the Orlando Pride and the U.S. National Team.⁵⁹

The WNT is leading the charge against the gender pay gap after earning \$4 million from winning the FIFA Women's World Cup,

⁵⁰ *Id.*

⁵¹ Ewan Murray, *Gulf Between US Open Prize Funds for Women and Men Remains a Chasm*, THE GUARDIAN (May 29, 2019, 10:22 AM), <https://www.theguardian.com/sport/blog/2019/may/29/us-open-women-golf-prize-fund-charleston-country-club> [<https://perma.cc/LN3H-NV3B>].

⁵² Moritz-Rabson, *supra* note 18.

⁵³ Abrams, *supra* note 43; Moritz-Rabson, *supra* note 18.

⁵⁴ *Id.*

⁵⁵ Michelle Kaufman, *How Big Is the Gender Gap in Sports? It's Much Bigger than You Think. Here Is Proof*, MIA. HERALD (Aug. 28, 2019, 11:14 AM), <https://www.miamiherald.com/sports/article234425642.html> [<https://perma.cc/JHG9-SGBE>].

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

while the Men's French team won \$38 million from winning the FIFA Men's World Cup.⁶⁰ Based on those earnings, closing the gender pay gap among professional athletes seems impossible. However, if organizations marketed professional female sports in a similar way to professional male sports and gave professional female sports equal media exposure to professional male sports, then professional female athletes would have a much greater chance at achieving pay equality.

The WNT also alleged that the team received fewer benefits than the MNT in regard to "training, and travel conditions; equal promotion of their game, [sic] equal support and development for their games; and other terms and conditions of employment."⁶¹ For example, the WNT plays on artificial turf fields more than the MNT, and playing on artificial turf can lead to serious injuries and affect the fundamentals of the game.⁶² In 2017, the MNT chartered planes for travel, while the WNT never chartered a plane.⁶³ Additionally, the USSF allocated fewer resources to promote games for the WNT than the MNT.⁶⁴ The USSF also sets WNT ticket prices at a lower price compared to MNT ticket prices, which causes a revenue depression for the WNT.⁶⁵

In order to combat discriminatory conduct similar to what the WNT experienced, the U.S. Women's National Ice Hockey Team (WNH) threatened to boycott playing in the 2017 World Championship.⁶⁶ The WNH reported that the U.S. Men's National Ice Hockey Team (MNH) could bring guests to world championship games while the WNH could not.⁶⁷ The WNH also revealed that the team shared hotel rooms and flew economy class, while the MNH did not share hotel rooms and flew business class.⁶⁸ The WNH's threatened boycott succeeded because USA Hockey began providing the WNH travel arrangements and insurance agreements equal to those given to the MNH.⁶⁹

Some people argue that greater revenue generated by professional male sports justifies the existing pay discrepancies. Salary.com recognized that male leagues usually generate higher revenue, but,

⁶⁰ *See id.*

⁶¹ McCann, *supra* note 29.

⁶² Complaint, *supra* note 5, at 12–13.

⁶³ *Id.* at 13.

⁶⁴ *Id.* at 13–14.

⁶⁵ *Id.* at 14.

⁶⁶ Moritz-Rabson, *supra* note 18.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

“even adjusting for revenue, [Salary.com found] that female athletes are still being short-changed” in a variety of ways.⁷⁰ In 2019, the NBA generated \$9 billion in revenue (in eighty-two games per team), while the WNBA generated \$25 million (in thirty-four games per team).⁷¹ The Men’s World Cup generated \$6.1 billion in revenue, while the Women’s World Cup generated \$131 million.⁷² Major League Soccer (MLS) attracts an average per-game attendance of 21,053 people, while the National Women’s Soccer League (NWSL) averages 7,093 people.⁷³ However, according to *Forbes*, the WNT’s games generated more revenue than the MNT’s games over the past three years.⁷⁴

While the revenue argument appears to justify the gender pay gap in professional sports, this is a flawed argument because professional male athletes receive significantly more sponsorships and media coverage than professional female athletes and sports.⁷⁵ Corporations and the media not only invest in popular athletes but they also contribute to increasing athletes’ popularity.⁷⁶ Consumers invest in what they see. If consumers never see professional female athletes in advertisements or professional female sports in media coverage, then professional female sports will never be as popular as professional male sports. Those female athletes are hidden from the public eye. This hidden nature of female sports occurs regardless of their exceptional performances.⁷⁷ When corporations and media outlets choose not to invest in female sports, that hinders female athletes from ever being able to achieve the fame and pay they deserve.⁷⁸ Regardless of the discrimination, female sports are “on the rise in an ever-changing sports landscape of the present, and the increase in positive ratings and reviews of women’s sports leagues around the world are intriguing

⁷⁰ *Id.*

⁷¹ Kaufman, *supra* note 55.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Abrams, *supra* note 43.

⁷⁵ Nicole Zerunyan, *Time’s Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 LOY. L.A. ENT. L. REV. 229, 241 (2018).

⁷⁶ *Id.*

⁷⁷ See Charlotte Rogers, *Why Brands Must Rethink Their Approach to Women’s Sports Sponsorship*, MKTG. WK. (Feb. 8, 2018), <https://www.marketingweek.com/brands-neglecting-womens-sports-sponsorship/> [<https://perma.cc/Q58P-LF4D>].

⁷⁸ K.S.C., *Why Professional Women’s Sport Is Less Popular than Men’s*, THE ECONOMIST (July 28, 2014), <https://www.economist.com/the-economist-explains/2014/07/27/why-professional-womens-sport-is-less-popular-than-mens> [<https://perma.cc/N5FJ-RQDS>]; Zerunyan, *supra* note 75.

prospects for this new age of sports.”⁷⁹ The sooner that more corporations and the media invest in female sports, the sooner the gender pay gap will close.

B. The Media Gap in Professional Sports

If you turn on any major sports channel right now, there is a high probability that the broadcaster is covering a male sport, male athlete, or male-focused story.⁸⁰ This high probability exists because “women’s sports in the U.S. receive only four percent of sports media coverage.”⁸¹ The most relevant studies on this topic track the media coverage of women’s sports as a whole—both professional and amateur sports.⁸² While the studies referenced in this Section do not focus solely on professional sports, they still help show how media coverage neglects women’s sports. This Article aims to show that closing the gender pay gap among professional sports will require equal media coverage, which studies show would be a significant feat.⁸³

Despite more women playing professional sports today compared to 1989, coverage of women’s sports has actually decreased.⁸⁴ This lack of coverage is not driven by society’s decreased desire to watch women’s sports because viewership numbers demonstrate the opposite is true.⁸⁵ In 2015, the WNT attracted 3.3 million viewers during the World Cup game against the Australian National Team on Fox Sports 1.⁸⁶ Then, in 2019, Fox Sports reported that the total viewership of the

⁷⁹ Andrews, *supra* note 47.

⁸⁰ Shira Springer, *7 Ways to Improve Coverage of Women’s Sports*, NIEMAN REPS. (Jan. 7, 2019), <https://niemanreports.org/articles/covering-womens-sports/> [<https://perma.cc/7LNR-G2JY>].

⁸¹ *Id.*

⁸² *Id.*; MICHAEL A. MESSNER & CHERYL COOKY, GENDER IN TELEVISED SPORTS 4 (2010), <https://dornsife.usc.edu/assets/sites/80/docs/tvsports.pdf> [<https://perma.cc/PC7V-B7NP>] (examining three local Los Angeles networks—KNBC, KCBS, and KABC—as well as ESPN’s SportsCenter); Marcie Bianco, *There Is Less Women’s Sports Coverage on TV News Today than There Was in 1989*, QUARTZ (June 16, 2015), <https://qz.com/428680/there-is-less-womens-sports-coverage-on-tv-today-than-there-was-in-1989/> [<https://perma.cc/MD8B-FNWZ>]; Kristen Gowdy, *The Interest Is There – It’s Past Time to Start Giving Women’s Sports Equal Media Coverage*, SHE NETWORK (Dec. 13, 2018, 1:51 PM), <https://www.womenssportsfoundation.org/education/interest-past-time-start-giving-womens-sports-equal-media-coverage/> [<https://perma.cc/8C9L-Y9NR>].

⁸³ See Springer, *supra* note 80; MESSNER & COOKY, *supra* note 82, at 4–5; Bianco, *supra* note 82; Gowdy, *supra* note 82.

⁸⁴ Bianco, *supra* note 82.

⁸⁵ See *id.*

⁸⁶ *Id.*

WNT's 2019 World Cup game, including online streaming, reached 20 million viewers.⁸⁷ Additionally, Nielsen Sports and Ticketmaster published studies stating that the lack of female sports exposure is not pursuant to a lack of interest in female sports.⁸⁸ Rather, Nielsen Sports found that in eight major markets across the globe, including the United States, United Kingdom, and Australia, 84% of sports fans are interested in women's sports.⁸⁹ Additionally, Ticketmaster found that in the United States, three in five responders agreed that female sports are "on the rise," and 46% of the responders would watch a women's sporting event if it was on television.⁹⁰ Ticketmaster also found that fans under the age of thirty-five are the most optimistic about and most interested in women's sports.⁹¹

Unfortunately, coverage of women's sports has decreased over time.⁹² Researchers at the University of Southern California (USC) and Purdue University conducted a study, titled *Gender in Televised Sports* (the Study), which showed that the media covered female athletes less in 2014 than in 1989.⁹³ Project researcher, Michael Messner of USC, stated the most puzzling part of the data was that the huge growth in women's sports participation did not correlate to an increase in televised women's sports.⁹⁴ He attributed this puzzling data on "the deepening silence about women's sports in general to the networks' blatant inability to respect women as athletes alone."⁹⁵ Messner stated that broadcasting of women's sports spikes when women are competing on the world stage as if the "US media 'discovers' women's sports all over again."⁹⁶

The Study found that in 2014, 3.2% of television coverage featured women's sports, and SportsCenter provided women's sports only 2% of coverage time.⁹⁷ During a six-week period of sports news on three network affiliates aired in the early evening and late night, the Study found that "men's sports received 96.3% of the airtime, women's sports

⁸⁷ Hess, *supra* note 22.

⁸⁸ Gowdy, *supra* note 82.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Bianco, *supra* note 82.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

1.6%, and gender neutral topics 2.1%.⁹⁸ This showed a decline from 2004, when coverage of women's sports constituted 6.3% of the airtime.⁹⁹ ESPN's nationally televised program, "SportsCenter, devoted only 1.4% of coverage to women's sports," which was a decline from 1999 at 2.2% and 2004 at 2.1%.¹⁰⁰

The Study also found that 100% of SportsCenter's news shows led with men's sports stories.¹⁰¹ Lead stories tend to be among the longest stories during the broadcast and the most expensive to produce.¹⁰² Consequently, networks deprive women's sports of significant airtime on television and invest less money in their stories when they choose not to lead with women's sports stories.¹⁰³ The Study also found that "72% of all airtime (main and ticker coverage) focused on men's basketball, football, and baseball.¹⁰⁴ Other men's sports, especially most individual sports, were pushed to the margins along with the few women's sports that received any coverage."¹⁰⁵

In response to the lack of women's sports' coverage, the head coach of the WNBA's Minnesota Lynx, Cheryl Reeve, stated that "the more women's sports are covered, the more popular, and mainstream, they will become."¹⁰⁶ Because women's sports are not given the same media coverage as men's sports, fans have to actively seek out their favorite professional women's teams in the news.¹⁰⁷ Some websites regularly cover women's sports: The Equalizer, High Post Hoops, The Victory Press, and espnW.¹⁰⁸ However, major sports channels continue to deprive women's sports, and especially professional women's sports, of the exposure they deserve.¹⁰⁹

⁹⁸ MESSNER & COOKY, *supra* note 82, at 4 (examining airtime devoted to women's sports on three local Los Angeles networks and ESPN's SportsCenter).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Jessica Luther, *The More Women's Sports Are Covered, the More Popular They Will Be*, HUFFINGTON POST (Apr. 3, 2018, 9:00 AM), https://www.huffpost.com/entry/opinion-luther-women-basketball_n_5ac27206e4b09712fec34663.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See supra* Part II.B.

C. *The Sponsorship Gap in Professional Sports*

Not only do networks discriminate by omitting women's sports in media coverage but corporate partners also discriminate against female athletes when awarding sponsorships.¹¹⁰ The top ten athletes who received sponsorship endorsements in 2018 were all male.¹¹¹ But as teams, like the WNT, continue to excel on the field, their bargaining power increases.¹¹² The WNT's success helps its players explore new and higher-paid sponsorship deals, which secures the players' financial futures while battling the USSF for equal pay.¹¹³

In 2018, *Forbes* reported the top ten athletes by sponsorship income: Roger Federer, \$65 million; LeBron James, \$52 million; Cristiano Ronaldo, \$47 million; Stephen Curry, \$42 million; Tiger Woods, \$42 million; Phil Mickelson, \$37 million; Rory McIlroy, \$34 million; Kei Nishikori, \$33 million; Kevin Durant, \$32 million; and, tied for tenth, Usain Bolt, \$30 million; and Jordan Spieth, \$30 million.¹¹⁴ These athletes are all male because women are not receiving equivalent sponsorship deals. For example, WNT member Alex Morgan was the first overall pick in the 2011 Women's Professional Soccer Draft, an Olympic gold medalist, and a two-time World Cup winner.¹¹⁵ She scored a record-setting five goals in one game in the 2019 World Cup and a crucial goal against England in the semifinals.¹¹⁶ She earned \$450,000 while playing for the Portland Thorns (a professional National Women's Soccer League team) and makes around \$1 million a year in sponsorships from Nike, McDonalds, Coca-Cola, and Panasonic.¹¹⁷ Morgan is one of the most accomplished and most recognized athletes today.¹¹⁸ She is leading the charge for equal pay among professional female athletes despite making a mere \$1 million

¹¹⁰ See generally *Ranking the Top 10 Athletes by Endorsement Income for 2018*, SPORTS ILLUSTRATED (Sept. 19, 2018), <https://www.si.com/sports-illustrated/2018/ranking-top-10-athletes-endorsement-deals-income>.

¹¹¹ *Id.*

¹¹² Nicole Lyn Pesce, *The U.S. Women's Team Won the World Cup, and They're About to Get Paid – by Sponsors, Anyway*, MARKETWATCH (July 13, 2019, 9:20 AM), <https://www.marketwatch.com/story/us-womens-soccer-won-the-world-cup-and-theyre-about-to-get-paid-by-sponsors-anyway-2019-07-09>.

¹¹³ *Id.*

¹¹⁴ *Ranking the Top 10 Athletes by Endorsement Income for 2018*, *supra* note 110.

¹¹⁵ *Alex Morgan Biography*, BIOGRAPHY, <https://www.biography.com/athlete/alex-morgan> (May 12, 2020).

¹¹⁶ *Id.*

¹¹⁷ Pesce, *supra* note 112.

¹¹⁸ See generally *id.*

in sponsorship deals a year, while the male athletes previously mentioned make around \$30 million in sponsorship deals a year.¹¹⁹ This is an incredibly large sponsorship gap; however, with exceptional performances and the support of more corporations, female sports teams and athletes, such as the WNT, are slowly gaining more sponsorships.¹²⁰

Sponsorships are nothing new: in the 1920s, Babe Ruth used his own personal brand to sell underpants.¹²¹ While Babe Ruth treated his underwear line sponsorship as a side job, athletes today earn millions through their sponsorship deals.¹²² Some of the biggest sponsors right now include companies such as Under Armor, Nike, Herbalife, EA Sports, Uniqlo, and Adidas.¹²³ Shockingly, athletes like LeBron James and Cristiano Ronaldo have agreed to lifetime deals with Nike, which are projected to exceed \$1 billion each.¹²⁴

On the other hand, corporations do not give female athletes lifetime sponsorship deals.¹²⁵ The disparities between female and male sponsorships are quite extreme.¹²⁶ Ernst & Young reported in 2015 that “less than half of 1 percent of sport sponsorship is invested in women’s sport.”¹²⁷ After defeating Serena Williams at the U.S. Open in 2018, tennis player Naomi Osaka signed an \$8.5 million endorsement deal with Adidas.¹²⁸ This is the largest deal Adidas has ever offered a female athlete.¹²⁹ Osaka’s other endorsements include Nissin Foods, Citizen, Nippon Airways, and Proctor & Gamble.¹³⁰ In 2018, *Forbes* reported that the top ten highest-paid female athletes and sponsorships were

¹¹⁹ *Id.*

¹²⁰ Lebel, *supra* note 31.

¹²¹ Alex de Crespigny, *6 Largest Athlete Endorsement Deals in the Modern Era*, MAN OF MANY (Mar. 2, 2020), <https://manofmany.com/entertainment/sport/athlete-endorsement-deals>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Megan Armstrong, *These 13 Athletes Won the Most Lucrative Endorsement Deals*, GOBANKINGRATES (Feb. 24, 2020), <https://www.gobankingrates.com/making-money/wealth/biggest-sports-endorsement-deals/>.

¹²⁶ See Janet S. Fink, *Sponsorship for Women’s Sports Presents Untapped Opportunity*, SPORTS BUS. J. (Nov. 2, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Opinion/Changing-the-Game-Janet-Fink.aspx>.

¹²⁷ *Id.*

¹²⁸ Armstrong, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ *Id.*

Serena Williams, \$18 million; Maria Sharapova, \$9.5 million; P.V. Sindhu, \$8 million; Angelique Kerber, \$7 million; Caroline Wozniacki, \$6 million; Venus Williams, \$6 million; Sloane Stephens, \$5.5 million; Garbine Muguruza, \$5.5 million; Danica Patrick, \$4.5 million; and Simona Halep, \$1.5 million.¹³¹ In order to bridge the gender pay gap, companies need to equally sponsor professional female and male athletes.

III

THE EQUAL PAY ACT: ESTABLISHING A PRIMA FACIE CASE

The Equal Pay Act (EPA) mandates that employers pay men and women the same amount for equal work. This Part will explore the elements of an EPA lawsuit and the possible defenses. As an amendment to the Fair Labor Standards Act (FLSA), the EPA prohibits sex-based wage differences and requires employers to provide equal pay for equal work.¹³² In order to establish a prima facie case, the employee must prove that (i) an employer pays unequal wages to employees of the opposite sex; (ii) in the same establishment; (iii) for equal work of jobs that require equal skill, effort, and responsibility; and, (iv) which job is performed under similar working conditions.¹³³ If an employee establishes a prima facie case under the EPA, then the employer has the burden to justify the wage difference under one of four statutory defenses.¹³⁴ The four defenses include (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or, (iv) a system based on any factor other than sex.¹³⁵ In sum, the “primary issue of proof in an [EPA] action is to show that the disparate pay practices were based on sex.”¹³⁶

A. Unequal Pay to Employees of the Opposite Sex

The EPA states that an employer cannot pay employees different wages on the basis of sex for equal work in the same establishment

¹³¹ Kurt Badenhausen, *The Highest-Paid Female Athletes 2018*, FORBES (Aug. 21, 2018, 10:13 AM), <https://www.forbes.com/sites/kurtbadenhausen/2018/08/21/the-highest-paid-female-athletes-2018/#7261d4d7405f>.

¹³² 29 U.S.C. § 206(d)(1) (2019).

¹³³ Honey Campbell, *Superior Play, Unequal Pay: U.S. Women’s Soccer and the Pursuit for Pay Equity*, 51 U.S.F. L. REV. 545, 553 (2017); 29 U.S.C. § 206.

¹³⁴ See Campbell, *supra* note 133, at 553–54.

¹³⁵ 29 U.S.C. § 206(d)(1).

¹³⁶ 26 AM. JUR. PROOF OF FACTS 3d *Proof of Violation of Equal Pay Act* § 9 (1994).

under similar working conditions.¹³⁷ The EPA defines “wages” as follows:

All payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payments, 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.¹³⁸

In order to establish a prima facie case, the employee needs only to prove an unequal rate of pay but does not need to prove unequal total remuneration.¹³⁹ Further, the court in *Laffey v. Northwest Airlines, Inc.* held that lodging and cleaning allowances that do not benefit the employer are considered wages.¹⁴⁰

When comparing wages, the employee must choose a comparator of the opposite sex who is paid more on the basis of sex for equal work under similar working conditions.¹⁴¹ In *Beck-Wilson v. Principi*, the court’s analysis of an EPA claim determined that an appropriate comparator is one who has the same job requirements and duties of the plaintiff and not just the same job classification or title.¹⁴² The court further explained that a plaintiff establishes a prima facie case by comparing the jobs between the employees of the opposite sex and showing that those jobs are substantially equal, regardless of the skills and qualifications of the individual employees performing those jobs.¹⁴³ Additionally, when the plaintiff shows that her wages were lower than her comparator’s, but more than some other potential comparator’s, some courts have held that the plaintiff still established a prima facie case.¹⁴⁴

B. The Same Establishment

In order to establish a prima facie case, the plaintiff must show under the EPA that the employer pays different wages to employees of the

¹³⁷ 29 U.S.C. § 206(d)(1).

¹³⁸ 29 C.F.R. § 1620.10 (2020).

¹³⁹ *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027–28 (6th Cir. 1983).

¹⁴⁰ *Laffey v. Nw. Airlines, Inc.*, 642 F.2d 578, 588–89 (D.C. Cir. 1980).

¹⁴¹ 29 U.S.C. § 206(d)(1).

¹⁴² *Beck-Wilson v. Principi*, 441 F.3d 353, 362 (6th Cir. 2006).

¹⁴³ *Id.* at 362–63.

¹⁴⁴ *Campbell*, *supra* note 133, at 555; *see also* *Hutchins v. Int’l Brotherhood of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999).

opposite sex employed by the same establishment.¹⁴⁵ Neither the EPA nor the FLSA define the term “establishment.” However, the EEOC states the term “establishment” acquired a set meaning by the time the EPA was instituted.¹⁴⁶ The EEOC defines “establishment” as a

distinct physical place of business rather than to an entire business or ‘enterprise’ which may include several separate places of business In unusual circumstances, two or more portions of a business enterprise, even though located in a single physical place of business, may constitute more than one establishment.¹⁴⁷

Additionally, in *A.H. Phillips, Inc., v. Walling*, the Supreme Court interpreted the term “establishment” using legislative intent.¹⁴⁸ The Court interpreted “establishment” “as it is normally used in business and government—as a distinct physical place of business.”¹⁴⁹ Also, in *Mulhall v. Advance Security, Inc.*, the Eleventh Circuit held that a single establishment may exist when evidence demonstrates a functional relationship between the plaintiff and other employees at different job sites alongside centralized control over the job sites.¹⁵⁰

C. Equal Work

To establish a prima facie case, the plaintiff must show that she is paid a lower wage than her male comparator for equal work on a job that requires “equal skill, effort, and responsibility.”¹⁵¹ Equal work does not mean identical work.¹⁵² In *Corning Glass Works v. Brennan*, the Supreme Court held that even though the jobs took place at different time periods (such as day versus night), the employer always treated the positions as equal, and therefore the jobs resulted in equal work.¹⁵³ Thus, the work does not have to be identical, but must be equal with regard to the skill, effort, and responsibility required for the job.¹⁵⁴

¹⁴⁵ 29 U.S.C. § 206(d)(1).

¹⁴⁶ 29 C.F.R. § 1620.9(a) (2020).

¹⁴⁷ *Id.* § 1620.9(a)–(b).

¹⁴⁸ *A.H. Phillips, Inc., v. Walling*, 324 U.S. 490, 496 (1945).

¹⁴⁹ *Id.*

¹⁵⁰ *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592 (11th Cir. 1994).

¹⁵¹ 29 U.S.C. § 206(d)(1) (2019).

¹⁵² *See Corning Glass Works v. Brennan*, 417 U.S. 188, 202–03 (1974).

¹⁵³ *Id.* at 203.

¹⁵⁴ *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 299 (1st Cir. 1998) (“[A]lthough the job descriptions that Dr. Gambardella formulated in 1989, without more, are not dispositive, the fact that the job requirements for all of the department heads were substantially the same is supportive of other evidence that the department head positions required substantially equal skill, effort, and responsibility.”).

The Code of Federal Regulations defines “skill,” “effort,” and “responsibility” in regard to the EPA. First, “skill” must be measured according to performance requirements of the job, which includes evaluating factors such as experience, training, education, and ability.¹⁵⁵ Therefore,

if an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the EPA as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job.¹⁵⁶

Second, “effort” is measured by the physical or mental exertion needed to perform the job.¹⁵⁷ When the jobs appear to be equal under the EPA and “there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs.”¹⁵⁸ Third, “responsibility” is measured by the degree of accountability required for the performance of the job, with an emphasis on the importance of the job obligation.¹⁵⁹

Additionally, the plaintiff does not have to show that the employer assigned the employee and her comparator equal work.¹⁶⁰ The employer is liable when the plaintiff shows that she performed equal work compared to her comparator and the employer knew of the plaintiff’s performance, and the employer still paid the plaintiff less than her comparator.¹⁶¹

D. Jobs Performed Under Similar Working Conditions

To complete a prima facie case, the jobs performed by the plaintiff and her comparator must be performed under similar working conditions.¹⁶² The EPA adopts a flexible approach to determine whether the working conditions are similar between the plaintiff and

¹⁵⁵ 29 C.F.R. § 1620.15(a) (2020).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* § 1620.16(a).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* § 1620.17(a).

¹⁶⁰ *Proof of Violation of Equal Pay Act*, *supra* note 136, § 9.

¹⁶¹ *Id.* § 10.

¹⁶² 29 U.S.C. § 206(d)(1) (2019).

her comparator.¹⁶³ Courts must determine whether the “differences in working conditions are the kind customarily taken into consideration in setting wage levels. The mere fact that jobs are in different departments of an establishment will not necessarily mean that the jobs are performed under dissimilar working conditions.”¹⁶⁴

E. An Employer’s Potential Defenses

After the plaintiff establishes her prima facie case, the employer can show the employer’s actions were exempted under one of the four statutory defenses.¹⁶⁵ Under the EPA, the statutory defenses available to employers include (i) a seniority system; (ii) a merit system; (iii) a system which measures earning by quantity or quality of production; or (iv) a differential based on any other factor than sex.¹⁶⁶ However, a wage system that is created by seniority under a CBA “is not insulated from Equal Pay Act liability if the [CBA] itself violates the Equal Pay Act by illegally discriminating on the basis of gender.”¹⁶⁷

To use the seniority system defense, the employer must prove that all employees are paid according to a nondiscriminatory seniority system.¹⁶⁸ For an employer to defend its wages under a merit system, the employer must prove that the merit system is nondiscriminatory, which means an “organized and structured procedure whereby employees are systematically evaluated according to predetermined criteria” must exist.¹⁶⁹ Moreover, the employer must show the employees were aware of the evaluation procedures, which are not required to be in writing.¹⁷⁰ To use the production system defense, the employer must show that the quality or quantity of production by male and female employees are measured by the same standard and that employees are paid equally for equal production.¹⁷¹ But a production system would not qualify as a nondiscriminatory, sex-based system if, for example, females were required to produce more to achieve the same pay as male employees.¹⁷²

¹⁶³ 29 C.F.R. § 1620.18(a).

¹⁶⁴ *Id.*

¹⁶⁵ 29 U.S.C. § 206(d)(1).

¹⁶⁶ *Id.*

¹⁶⁷ *Proof of Violation of Equal Pay Act*, *supra* note 136, § 15.

¹⁶⁸ Campbell, *supra* note 133, at 557.

¹⁶⁹ *Id.* at 558.

¹⁷⁰ *Id.* at 558.

¹⁷¹ *Id.*

¹⁷² *Id.*

The last statutory defense is the most controversial because courts find it vague and susceptible to various interpretations.¹⁷³ An employer may defeat a plaintiff's prima facie case by proving that a wage differential is based on any factor other than sex.¹⁷⁴ The court in *Wernsing v. Department of Human Services* allowed an employer to rely on competitive markets to set salaries. The court explained that "the equal pay act forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent."¹⁷⁵ Therefore, this explanation allows employers to avoid discriminatory practices in setting wages.¹⁷⁶ In short, courts have interpreted this statutory defense too loosely, which allows employers to find excuses for setting wages in a discriminatory manner.

However, employers cannot rely on a CBA to escape liability.¹⁷⁷ A CBA of unequal rates of pay "does not constitute a defense available to either an employer or to a labor organization."¹⁷⁸ Therefore, when a CBA provides unequal rates of pay that "conflict with the requirements of the EPA, [the CBA is] null and void and of no effect."¹⁷⁹ If an employer proves one of the four defenses above, the employer defeats the plaintiff's prima facie case and her claim will fail.¹⁸⁰

IV

ANALYSIS OF THE WNT'S CASE UNDER THE EPA

In 2019, the WNT sued the USSF under the EPA.¹⁸¹ Under the EPA, the WNT had to show that the WNT players (i) were paid less than the MNT players; (ii) both teams were employed by the USSF; (iii) both teams performed equal work as professional athletes requiring equal skill, effort, and responsibility; and (iv) both teams performed under similar working conditions.¹⁸² An analysis of the facts indicated to scholars that the WNT was likely able to establish a prima facie case and that the USSF was likely unable to satisfy any of the four statutory

¹⁷³ *Id.*

¹⁷⁴ 29 U.S.C. § 206(d)(1) (2019).

¹⁷⁵ *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 469 (7th Cir. 2005).

¹⁷⁶ *Id.*

¹⁷⁷ 29 C.F.R. § 1620.23 (2019).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See* 29 U.S.C. § 206(d)(1) (2019).

¹⁸¹ Complaint, *supra* note 5, at 1.

¹⁸² *See* Zerunyan, *supra* note 75, at 243.

defenses.¹⁸³ Scholars believed that the WNT had a strong chance at winning its lawsuit under the EPA;¹⁸⁴ however, the end of this Section will explain why Judge Klausner granted the USSF partial summary judgment.¹⁸⁵

A. Unequal Pay

In order for the WNT to have succeeded under its EPA claim, the WNT must have shown that the USSF paid the WNT less than the MNT.¹⁸⁶ The USSF has a practice of discriminating against the WNT.¹⁸⁷ In 2012, the USSF rejected the WNT's request to be paid the same as the MNT.¹⁸⁸ Instead, the USSF offered the WNT compensation only if the team won against FIFA-ranked top ten teams. The team would not get paid if it lost or tied games or if the team won against a team ranked outside of the top ten.¹⁸⁹

The WNT's most recent EPA complaint stated that the WNT earned only 38% of what the MNT earned.¹⁹⁰ Additionally, the complaint stated that

if each team played 20 friendlies in a year and each team won all 20 friendlies, female WNT players would earn a maximum of \$99,000 or \$4,950 per game, while similarly situated male MNT players would earn an average of \$263,320 or \$13,166 per game against the various levels of competition they would face.¹⁹¹

Therefore, "a 20-game winning top tier WNT player would earn only 38% of the compensation of a similarly situated MNT player."¹⁹²

The WNT asserted in its complaint that "the USSF admits to such purposeful gender discrimination even during times when the WNT earned more profit, played more games, won more games, earned more championships, and/or garnered higher television audiences."¹⁹³ The

¹⁸³ Campbell, *supra* note 133, at 559–69; *see also* Zerunyan, *supra* note 75, at 247–49.

¹⁸⁴ *See* Campbell, *supra* note 133, at 569; *see also* Zerunyan, *supra* note 75, at 249.

¹⁸⁵ *See* Cater, *supra* note 36; *see also* discussion *infra* Part IV.F.

¹⁸⁶ *See* Zerunyan, *supra* note 75, at 243.

¹⁸⁷ Complaint, *supra* note 5, at 10 (discussing that in 2016, the USSF representative blamed the WNT pay on "market realities" to explain why the WNT did not deserve equal pay to the MNT).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ McCann, *supra* note 29.

¹⁹¹ *Id.* ("Friendlies," also known as scrimmages, are games that have little to no impact on the teams' rankings).

¹⁹² *Id.*

¹⁹³ *Id.*

complaint contended that “the [WNT] Players’ Association proposed a revenue-sharing model to test the USSF’s ‘market realities’ theory, but the USSF rejected the proposal.”¹⁹⁴ This model would have called for “increased [WNT] player compensation when USSF derived more revenue from WNT activities and decreased compensation when less revenue was derived.”¹⁹⁵ While some of the WNT players earned more than their male counterparts from the 2008 to 2015 seasons, the lower-ranked players’ pay disparities are much larger.¹⁹⁶ Courts in the past have held that stark differences do not have to exist when comparing two groups and outlying salaries to prove a *prima facie* case.¹⁹⁷ Additionally, some courts have found that the plaintiff can satisfy this element with evidence that only one opposite sex comparator receives a higher wage.¹⁹⁸ Therefore, the USSF would likely not have a valid revenue argument.

The WNT could have also combatted the argument that the WNT chose its terms in its CBA and is, therefore, bound to the salary terms in the CBA.¹⁹⁹ A court would likely find that federal regulations state that a prior CBA is not a defense to an EPA claim.²⁰⁰ Therefore, precedent holds that “CBAs that provide for unequal rates of pay in conflict with the EPA are null and void.”²⁰¹ Hence, the WNT would likely meet the unequal pay element.

B. The Same Establishment

Next, the WNT had to show that the WNT and the MNT were employed by the same establishment.²⁰² The USSF employs both the WNT and MNT.²⁰³ Additionally, the USSF employs more than 500 people, including all current and former members of the men’s and women’s national teams.²⁰⁴ The 2019 complaint stated that the USSF “is the single, common employer of female and male professional soccer players who play on the United States Senior Women’s National

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Campbell, *supra* note 133, at 562.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 568.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Zerunyan, *supra* note 75, at 243.

²⁰³ McCann, *supra* note 29.

²⁰⁴ *Id.*

Soccer Team [] and the United States Senior Men’s National Soccer Team [].”²⁰⁵ The complaint further stated that the USSF “centrally manages and controls every aspect” of the WNT and the MNT including the male and female players.²⁰⁶ Since the USSF has controlled and dictated every aspect of the male and female players’ employment, a court would have found that both teams worked under the same establishment.

C. Equal Work

In order to succeed in its lawsuit, the WNT also had to show that the WNT and the MNT performed equal work on jobs requiring equal skill, effort, and responsibility.²⁰⁷ The WNT likely would have succeeded in proving the equal work element. The USSF requires that the WNT and the MNT must (i) be available for training and any games that are requested by the USSF, (ii) maintain their competitive athletic skills, (iii) not use illegal or banned drugs, (iv) serve as spokespersons for the club, (v) perform media interviews and autograph sessions, and (vi) comply with USSF rules.²⁰⁸ The USSF also requires that the WNT and the MNT maintain their competitive soccer skills, condition, and health by adhering to nutrition, exercise, and other regimens.²⁰⁹ The USSF requires both teams to travel nationally and internationally for games and face the same physical and mental conditions.²¹⁰ The USSF also requires both teams to adhere to the same rules of FIFA, which include both teams playing the same soccer game with the same general field size and ball.²¹¹ All this work requires an equal amount of skill, effort, and responsibility.

The USSF could have argued that the WNT had to play fewer games than the MNT to qualify for the World Cup, and, therefore, the WNT’s work was unequal.²¹² However, the WNT could have countered this argument because the WNT competed in more games and sometimes played years with 40–50% more games than the MNT with more victories than the MNT during those years.²¹³

²⁰⁵ Complaint, *supra* note 5, at 1.

²⁰⁶ *Id.* at 6.

²⁰⁷ See Zerunyan, *supra* note 75, at 243.

²⁰⁸ Complaint, *supra* note 5, at 8.

²⁰⁹ *Id.* at 8–9.

²¹⁰ *Id.* at 9.

²¹¹ *Id.*

²¹² Campbell, *supra* note 133, at 563.

²¹³ *Id.* at 564.

The WNT also could have shown that the USSF consistently treated the WNT less favorably than the MNT on the basis of gender.²¹⁴ The USSF does not promote the WNT like it promotes the MNT.²¹⁵ The WNT claimed that the USSF has “allocated less resources promoting WNT games than it has allocated promoting MNT games, has not announced WNT games with sufficient notice to allow for maximum attendance, and has not used all available means to promote WNT games in a manner at least equal to MNT games.”²¹⁶ The lack of promotion affects the WNT’s ability to generate revenue.²¹⁷ The USSF sets WNT ticket prices at lower prices compared to the MNT’s ticket prices, which, coupled with the USSF’s fewer marketing promotions, resulted in a revenue depression for the WNT.²¹⁸ The USSF used this revenue depression to justify paying the WNT lower wages.²¹⁹ Since the USSF has no legitimate, nondiscriminatory reason for treating the WNT and MNT differently other than on the basis of sex, a court likely would have agreed with the WNT on its EPA claim.²²⁰

D. Similar Working Conditions

Lastly, the WNT had to show that the WNT and the MNT performed their jobs under similar working conditions.²²¹ First, the WNT and the MNT were both required to travel nationally and internationally for games and face the same physical and mental conditions.²²² Second, the WNT played in not equal but in far worse working conditions than the MNT.²²³ The WNT played more games on artificial turf than the MNT.²²⁴ Artificial turf can lead to career-threatening injuries and affects the fundamentals of the game, including, but not limited to, the speed of the ball and how the ball bounces.²²⁵ The USSF had complete control over the surfaces that the WNT and MNT played on for home

²¹⁴ Complaint, *supra* note 5, at 8.

²¹⁵ *Id.* at 13–14.

²¹⁶ *Id.*

²¹⁷ *Id.* at 14.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ 29 U.S.C. § 206(d)(1) (2019).

²²² Complaint, *supra* note 5, at 9.

²²³ *See id.* at 13.

²²⁴ *Id.*

²²⁵ *Id.* at 12–13.

matches.²²⁶ From January 2014 to December 2017, the WNT played on artificial turf for 21% of its domestic games.²²⁷ During the same period, the MNT played on artificial turf for 1% of its domestic games.²²⁸ Consequently, the USSF created unfair working conditions for the WNT because frequently playing on artificial turf threatens the WNT's players' health and fitness while decreasing the WNT's quality of play.

Additionally, in 2017 the MNT chartered a plane on at least seventeen occasions, while the WNT never chartered a plane.²²⁹ Again, the USSF has complete control over whether the teams take commercial or chartered flights.²³⁰ Chartered flights provide more physical comfort, reduce the risk of lost baggage or missed connections, and provide an opportunity for more rest before and after games.²³¹ The WNT could have easily established that the WNT not only performed under similar conditions as the MNT but, actually, under worse conditions.²³²

E. Statutory Defenses

The USSF would likely be unable to satisfy any of the four statutory defenses and, therefore, would not have defeated the WNT's EPA claim. First, the USSF could not use the seniority system defense because the USSF has never claimed to pay players based on seniority.²³³ Therefore, the seniority system defense is irrelevant.²³⁴ Second, the USSF could not use the merit system defense because the USSF would have to prove that the MNT and WNT were systematically evaluated according to predetermined criteria of merit and that the players were aware of this merit system.²³⁵ The USSF has never claimed to pay players based on a merit system, so this defense is also irrelevant.²³⁶ Third, the USSF could attempt to assert the production defense, but this assertion would most likely fail because the WNT has been more successful than the MNT.²³⁷ The WNT has

²²⁶ *Id.* at 12.

²²⁷ *Id.* at 13.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 13–14.

²³³ Campbell, *supra* note 133, at 563.

²³⁴ *Id.*

²³⁵ *Id.* at 565–66.

²³⁶ *Id.*

²³⁷ *Id.*

won four World Cup titles and four Olympic medals and is currently ranked number one in the world.²³⁸ Thus, the production defense would likely fail.²³⁹

Fourth, the USSF's strongest argument would be that it paid the WNT based on any factor other than sex, such as revenue generation, the WNT's CBA, or unequal awards from FIFA.²⁴⁰ The USSF's strongest argument would be that the MNT generated more revenue than the WNT.²⁴¹ However, this defense depends on how a court classifies and calculates revenue.²⁴² If a court accepts the USSF's method "of viewing revenue over a longer time period, and not in terms of the most recent cycle, then it could possibly find this to be a valid defense."²⁴³

The USSF could also argue that the WNT chose to negotiate its salary under the terms of its CBA, which is binding.²⁴⁴ However, this argument would likely fail because employers cannot rely on CBAs to escape liability.²⁴⁵ Using a CBA to try to justify unequal rates of pay "does not constitute a defense available to either an employer or to a labor organization. Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect."²⁴⁶

The USSF's last argument under this defense would be that the difference in pay was the result of the unequal award money from FIFA to the WNT and the MNT.²⁴⁷ This argument would likely fail because the USSF claims it can allocate the money from FIFA however it chooses.²⁴⁸ But, even if a court found this argument was a valid defense, this argument would apply only to the difference in World Cup compensation. Thus, the USSF could not use this defense to justify differences in pay from other forms of compensation.²⁴⁹

²³⁸ *Id.*; see also Moritz-Rabson, *supra* note 18.

²³⁹ Campbell, *supra* note 133, at 566–67.

²⁴⁰ See *id.* at 567.

²⁴¹ *Id.* at 567–68.

²⁴² *Id.* at 568–69.

²⁴³ *Id.* at 568.

²⁴⁴ *Id.* at 568–69.

²⁴⁵ 29 C.F.R. § 1620.23 (2020).

²⁴⁶ *Id.*

²⁴⁷ Campbell, *supra* note 133, at 569.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

F. Judge Klausner's Partial Summary Judgment Ruling

Regardless of what scholars believed, on May 1, 2020, Judge Klausner granted partial summary judgment for the USSF and held the WNT failed to establish a prima facie case that it was paid at a rate less than the MNT.²⁵⁰ The WNT argued that its CBA provided lower bonuses than the MNT's CBA for friendlies, World Cup matches, and other tournaments.²⁵¹ The WNT also argued that the WNT would have been compensated more under the MNT's CBA.²⁵² However, Judge Klausner held that the WNT failed to produce evidence that the reason "the WNT was paid more than the MNT was due solely, or in material part, to the WNT working more than the MNT."²⁵³ According to Judge Klausner and the USSF's math, 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 did not make more money than the MNT solely because they played more games. Rather, the WNT both played more games and made more money than the MNT per game.²⁵⁴

Judge Klausner held that while the WNT was paid smaller bonuses than the MNT, the WNT's calculations ignored the other benefits the WNT received in its CBA, such as guaranteed annual salaries and severance pay, which are benefits that the MNT does not receive under its CBA.²⁵⁵ Judge Klausner held that to ignore these other forms of compensation would "run afoul" of the EPA because the rate of pay under the EPA includes wages and other forms of compensation.²⁵⁶

Additionally, Judge Klausner disagreed with the WNT's argument that the WNT would have been paid more under the MNT's CBA.²⁵⁷ Judge Klausner held that the WNT

cannot now retroactively deem their CBA worse than the MNT CBA by reference to what they *would have made* had they been paid under the MNT's pay-to-play structure when they themselves rejected such a structure. This method of comparison not only fails to account for the choices made during collective bargaining, it also ignores the

²⁵⁰ *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635, 656 (C.D. Cal. 2020).

²⁵¹ *Id.* at 654.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 654–55.

economic value of the “insurance” that the WNT players receive under their CBA.²⁵⁸

Judge Klausner further explained that “merely comparing what WNT players received under their own CBA with what they would have received under the MNT CBA discounts the value that the team placed on the guaranteed benefits they received under their agreement, which they opted for at the expense of higher performance-based bonuses.”²⁵⁹ However, co-captain of the WNT, Megan Rapinoe, contradicted Judge Klausner’s statement that the WNT turned down the same deal that the MNT negotiated stating, “[W]e asked to be under the men’s contract, and it was repeatedly refused to us, not only in the structure but in the total compensation. If we were under that contract, we would have earned at least three times higher.”²⁶⁰ Spokesperson for the WNT, Molly Levinson, agreed with Rapinoe’s statement:

[I]n the most recent CBA negotiation, USSF repeatedly said that equal pay was not an option regardless of pay structure. USSF proposed a “pay to play structure” with less pay across the board. In every instance for a friendly or competitive match, the women players were offered less pay than their male counterparts. This is the very definition of gender discrimination, and of course the players rejected it.²⁶¹

In sum, Judge Klausner held that the WNT failed to create a genuine issue of material fact; Judge Klausner granted summary judgment to the USSF on the WNT’s EPA claim.²⁶² However, Judge Klausner allowed the WNT’s claims of unequal treatment in terms of travel, medical staff, and training equipment to proceed to trial.²⁶³ It appears that Judge Klausner tried to avoid meddling with CBAs in order to

²⁵⁸ *Id.* at 655.

²⁵⁹ *Id.* at 656.

²⁶⁰ Kim Elsesser, *Judge Dismisses U.S. Women’s Soccer Equal Pay Case — Here’s Why*, FORBES (May 4, 2020, 2:18 PM), <https://www.forbes.com/sites/kimelsesser/2020/05/04/judge-dismisses-us-womens-soccer-equal-pay-case---heres-why/?sh=11f6b482728d> [<https://perma.cc/4767-W3ST>].

²⁶¹ Jeff Carlisle, *USWNT Players, U.S. Soccer File Opposing Motions in Equal Pay Lawsuit*, ESPN (Feb. 20, 2020), <https://www.espn.com/soccer/united-states-usaw/story/4057161/uswnt-playersus-soccer-file-opposing-motions-in-equal-pay-lawsuit> [<https://perma.cc/A5F8-7KH6>].

²⁶² Liz Clarke, *Judge Rules Against U.S. Women’s National Soccer Team in Equal Pay Lawsuit*, WASH. POST (May 1, 2020, 8:26 PM), <https://www.washingtonpost.com/sports/2020/05/01/judge-rules-against-us-womens-national-soccer-team-equal-pay-lawsuit/> [<https://perma.cc/R5SH-7Y8B>].

²⁶³ *Id.*

protect the integrity of CBAs. However, soccer historians explain the instability women face when bargaining CBAs:

Women have not always had the strongest bargaining position with their federations, and . . . there are decades of context around the things the US women have asked for to date, namely that the women have always bargained with one eye on the possibility that their entire sport will experience a setback at any time, or that they will find themselves set aside, and that they have to establish gains wherever they can find them because their careers have been, until very recently, highly unstable.²⁶⁴

While the court denied the WNT's immediate appeal, Judge Klausner scheduled a trial on the WNT's remaining claim of discriminatory work conditions for September 15, 2020.²⁶⁵

G. What's the Problem?

Even though the WNT's case was unsuccessful, the WNT was able to use the EPA to fight for equal pay. But, the EPA is not an available avenue for other professional female sports. The WNT could sue the USSF because the WNT and the MNT share the same employer—the USSF. Thus, the WNT could satisfy the “same establishment” element of a prima facie EPA claim. But, not every professional female sports team shares a common employer with a male comparator. The following professional female associations cannot meet the EPA's same establishment element and therefore cannot use the EPA to fight for equal pay: Ladies Professional Golf Association, Women's National Basketball Association, National Women's Soccer League, Women's Tennis Association, and the National Women's Hockey League.²⁶⁶

So, how do professional female athletes receive equal pay for equal work when they do not share a common employer with a male comparator? It starts with changing the entire sports ecosystem, which includes changing the culture of women's sports within sports

²⁶⁴ Stephanie Yang, *US District Court Rules Partly in Favor of USSF in USWNT Equal Pay Case*, SB NATION (May 1, 2020, 5:24 PM), <https://www.starsandstripesfc.com/2020/5/1/21244825/ussf-partly-wins-summary-judgment-uswnt-equal-pay-case>.

²⁶⁵ Associated Press, *supra* note 40. Due to the COVID-19 pandemic, a jury trial would not be available until January 29, 2021. *Id.* But, the jury trial was unnecessary since the WNT and USSF agreed to a settlement on the WNT's inequitable working conditions claim on December 1, 2020. *Id.*

²⁶⁶ Zerunyan, *supra* note 75, at 250; *see also, e.g., About the NWHL, NAT'L WOMEN'S HOCKEY LEAGUE*, <https://www.nwhl.zone/about> [<https://perma.cc/9ELW-MKR2>] (last visited Dec. 29, 2020).

organizations, the government, the media, and corporate sponsors. In addition to pay, sponsorships and media coverage of women's sports inhibit female athletes' ability to reach equality. An Australian coalition, the Male Champions of Change Institute (MCC), created a framework that has reduced the pay gap between male and female athletes. The United States could adopt a similar framework to achieve pay equality among professional female and professional male sports when the EPA is not a viable option.

V

THE AUSTRALIAN REVOLUTION

The battle for gender equality in sports is not exclusive to the United States and its professional sports teams. Like female professional sports teams in the United States, female professional sports teams in Australia also experience a gender pay gap.²⁶⁷ Most Australian female athletes, regardless of their professional level, are unable to participate in their sport full-time because their pay is insufficient to support themselves. Therefore, they have to work second jobs.²⁶⁸ In addition to the gender pay gap, in 2016, Australian female and male athletes in basketball, cricket, and soccer traveled in different classes on airplanes and stayed in different standard accommodations during sporting events.²⁶⁹ However, the Australian initiative, Pathway to Pay Equality (PPE), has significantly changed the culture of the Australian sports ecosystem and helped chip away at the gender pay gap.²⁷⁰

A. Inequalities in Australian Professional Female Sports

Various gendered inequalities exist in Australian sports. Most notably, professional teams do not compensate female athletes at the same rate as their male counterparts.²⁷¹ In Australia, female netball players recently doubled their minimum wage to AUD \$27,375 (USD

²⁶⁷ See generally Hazal Gacka, *Levelling the Playing Field: Discrimination Against Women in Sport in Australia*, GRIFFITH J.L. & HUM. DIGNITY 189, 198–99 (2017) (Austl.).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 201.

²⁷⁰ MALE CHAMPIONS OF CHANGE, PATHWAY TO PAY EQUALITY 30 (2019), <https://malechampionsofchange.com/wp-content/uploads/2019/02/MCC-Sport-Pathway-to-Pay-Equality-Report-2019.pdf> [<https://perma.cc/L93X-NW3V>].

²⁷¹ See generally, e.g., Gacka, *supra* note 267; Ian Ransom, *Australian Sports Sign Up to Gender Pay Equality Scheme*, REUTERS (Feb. 17, 2019, 6:32 PM), <https://www.reuters.com/article/us-sport-australia-equality/australian-sports-sign-up-to-gender-pay-equality-scheme-idUSKCN1Q704T> [<https://perma.cc/5JZS-KWHL>].

\$19,210) with the highest wage at AUD \$67,500 (USD \$47,369).²⁷² In 2014, the Women's National Rugby League's team, the Jillaroos, received their first match fee of AUD \$500 (USD \$350), while the men's team consistently received AUD \$12,500 (USD \$8,772) per match.²⁷³ From 2021–22, female cricketers will earn a minimum annual retainer of AUD \$87,609 (USD \$62,600) during the final year of their CBA.²⁷⁴ In contrast, male cricketers will earn over AUD \$313,000 (USD \$226,652.69).²⁷⁵ This pay disparity also exists in Australian soccer.²⁷⁶ The minimum annual salary in player contracts in the top women's soccer league was AUD \$12,287 (USD \$8,593.53), while men enjoyed a minimum annual salary of AUD \$64,113 (USD \$44,840.63).²⁷⁷ However, a glimmer of hope exists in Australia because Tennis Australia offers equal prize money for male and female tennis players at the Australian Open.²⁷⁸

In 2014, the Australian Sports Commission found that media coverage of women's sports in Australia was 7% of the total television sports coverage while Australian men's sports comprised 81% of the total coverage.²⁷⁹ This disparity in statistics exists despite proof that consumers want to watch women's sports.²⁸⁰ For example, 50 million people worldwide watched the Australian women's team win the 2013 Cricket World Cup.²⁸¹ This was a 50% jump in ratings from the quarterfinal game.²⁸²

When analyzing sponsorships, Australian female professional athletes also suffer from gender discrimination.²⁸³ In Australia, corporate support for female athletes "lags substantially behind at just 8 per cent, meaning women 'earn just a fraction of their male counterparts.'"²⁸⁴ The lack of media coverage and sponsorships dedicated to professional female sports stifles any chance women have at closing the gender pay gap.

²⁷² Gacka, *supra* note 267, at 198.

²⁷³ *Id.*

²⁷⁴ Ransom, *supra* note 271.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Gacka, *supra* note 267, at 203.

²⁸⁰ *Id.* at 205.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 202.

²⁸⁴ *Id.*

B. The Pathway to Pay Equality

Unlike sports organizations in the United States, Australian sports organizations are taking action to close the gender pay gap in professional sports with the Pathway to Pay Equality (PPE).²⁸⁵ Leading sports organizations in Australia have worked together to create the PPE, which details the specific actions needed to close the gender pay gap in professional sports.²⁸⁶ Astonishingly, this initiative was created by the Male Champions of Change Institute (MCC), a group founded by a woman—Elizabeth Broderick—but made up of men.²⁸⁷

Australia's gender pay gap struggle is similar to the struggle in the United States. In both countries, professional female athletes are not paid the same for equal work compared to professional male athletes.²⁸⁸ The difference is that Australia has implemented solutions to achieve pay equality, something that the United States has not implemented yet.²⁸⁹ The United States could use an initiative like Australia's PPE to help combat the professional athlete gender pay gap.

MCC focuses on working with influential leaders in Australia to redefine the male role in fighting gender inequality.²⁹⁰ The MCC began in 2010 as a single group with eight Australian leaders and has since grown into a coalition of thirty chief executive officers, boards of directors, government departments, university leaders, and military leaders.²⁹¹ MCC now has fifteen groups with over 230 leaders across Australia.²⁹² MCC uses men in positions of power and their influence over professional sports to aid professional female athletes to earn what they deserve.²⁹³ MCC's goal is to "create the operating environments, system and cultures which will make equality, pay equity and sustainable pay equality the norm rather than the exception across all

²⁸⁵ See *Australia's Sporting Chief Executives Join Forces to Push for Equal Pay for Elite Women Athletes*, ABC NEWS (Feb. 17, 2019, 7:52 PM), <https://www.abc.net.au/news/2019-02-18/sports-team-up-to-close-the-gender-pay-gap/10821018> [https://perma.cc/ZLG2-8XUC].

²⁸⁶ *Id.*

²⁸⁷ Elizabeth Broderick, *Closing the Pay Gap in Sports: Q&A with Elizabeth Broderick*, BROAD AGENDA (Feb. 20, 2019), <http://www.broadagenda.com.au/home/pay-equity-in-sports-q-and-a-with-elizabeth-broderick/> [https://perma.cc/L7Y3-VXC3].

²⁸⁸ See generally Ransom, *supra* note 271.

²⁸⁹ *Id.*

²⁹⁰ *About the Male Champions of Change*, MALE CHAMPIONS OF CHANGE, <https://malechampionsofchange.com/about-us/> [https://perma.cc/5R7G-2FYN].

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

elite sports.”²⁹⁴ MCC’s initiative, the PPE, aims to address the gender pay gap in professional sports.²⁹⁵ The PPE lists reasons why addressing the gender pay gap is so important and provides a framework to achieve pay equity in different “sports ecosystems.”²⁹⁶

At a minimum, the PPE aims for female professional athletes to “have access to a fair and reasonable base pay and equal terms and conditions to their male counterparts.”²⁹⁷ The PPE recognizes that women’s sports have been historically undervalued and therefore have been invested in less than male sports.²⁹⁸ In order to achieve pay equality, the PPE proposes “a significant shift in the mindset across the entire sports ecosystem.”²⁹⁹ The PPE argues that with a changed mindset within the sports ecosystem, women’s sports will have the same value as male sports and, therefore, be invested in just the same.³⁰⁰ Changing the entire ecosystem mindset includes changing the perception of women’s sports within “sports organizations, governments, news media, fans, broadcasters, corporate supporters, athletes, players’ associations, and international sports bodies.”³⁰¹

The PPE proposes three key steps to achieve pay equality.³⁰² The PPE’s “first step is to distinguish between the payments that the sport itself can directly control . . . and the determinants of pay that the sport cannot directly control.”³⁰³ Payments that the sport can control include training fees, match payments, and prize money.³⁰⁴ The PPE proposes that organizations’ controlled costs should be equal between male and female athletes.³⁰⁵ The PPE also proposes that organizations create programs to earn vast community support and ensure that sponsorship deals are equal between male and female athletes.³⁰⁶ But, the PPE recognizes sponsorship equality will take time.³⁰⁷ Consequently, the PPE urges sports organizations to make payments within their control

²⁹⁴ MALE CHAMPIONS OF CHANGE, *supra* note 270, at 7.

²⁹⁵ *Id.* at 5.

²⁹⁶ *See id.*

²⁹⁷ *Id.* at 8.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 12.

³⁰³ *Id.*

³⁰⁴ *Id.* at 13.

³⁰⁵ *See id.* at 12.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

equal between male and female athletes until sponsorship equality exists.³⁰⁸

The second step includes having organizations define the different types of work that athletes perform.³⁰⁹ The PPE proposes that “[a]thletes’ duties should be broken down into components such as training, competing, media appearances and community work.”³¹⁰ Each type of work would have its own corresponding pay rate determined by a match fee or an hourly rate.³¹¹ This pay system would account for the different types of work that athletes complete and the value that athletes deliver.³¹²

The third step includes organizations calculating the pay for each type of work described above.³¹³ Since the rate of pay would be based on the type of work rather than gender, this pay system would treat male and female athletes equally.³¹⁴ This system ensures that organizations do not compensate men more than women for the same amount of work.³¹⁵

The PPE also addresses the costs and parts of the sports ecosystem that the PPE cannot control directly.³¹⁶ The PPE aims to increase the value of women’s sports across the sports ecosystem.³¹⁷ The PPE addresses eight facets of the sports ecosystem including (i) sports organizations, (ii) government, (iii) media, (iv) fans, (v) broadcasters, (vi) corporations, (vii) players’ associations, and (viii) international bodies.³¹⁸ Table 1 on the following pages describes the potential of each of these facets to change the sports ecosystem.³¹⁹

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *See id.* at 18.

³¹⁷ *See id.*

³¹⁸ *Id.* at 19.

³¹⁹ *Id.* at 18–19.

Table 1. *Sports Ecosystem Facets*

Ecosystem Facet	Goal	Responsibility	Actions
Sports Organizations	Offer genuine and equitable high-performance pathways.	Strive for equality of investment.	<ul style="list-style-type: none"> • Develop a strong pipeline of elite-level talent. • Take immediate action to close the gender pay gap.
Government	Support the development of gender equal infrastructure.	Prioritize funding for measures that promote equal access, inclusion, and grassroots participation facilities.	<ul style="list-style-type: none"> • Increase investment in broadcasting women's sports to help build investment. • Make pay equity in like-for-like roles a condition for funding.
Media	Build the profile of women's sports.	Develop community, fan interest, and engagement in women and girls' sports.	<ul style="list-style-type: none"> • Achieve equal coverage of men's and women's elite sports. • Engage the community in pay equity goals and timelines.
Fans	Create demand for professional women's sports.	Attend and watch games and competitions.	<ul style="list-style-type: none"> • Offer commercial incentives for corporations, media, and broadcasting to promote women's sports.
Broadcasters	Build the profile of women's sports.	Attract corporate advertising for women's sports.	<ul style="list-style-type: none"> • Provide broadcast deals that enable and facilitate pay improvements.

Ecosystem Facet	Goal	Responsibility	Actions
Corporate	Identify and pursue commercial opportunity to change the current sports business model.	Invest in the development of women's elite sports.	<ul style="list-style-type: none"> • Offer flexible work and sponsorships for elite athletes transitioning from amateur to professional. • Accept equality in distribution of sponsorship funding.
Players' Associations	Help build the case for change on pay equity and pay equality.	Engage with all athletes regarding pay equality goals.	<ul style="list-style-type: none"> • Prioritize pay equity and necessary tradeoffs in enterprise bargaining agreement negotiations.³²⁰ • Develop and support innovative and entrepreneurial models for pay particularly when elite women's competitions are in "start-up" mode.
International Bodies	Champion pay equality goals globally.	Ensure equal terms and conditions for participants in men's and women's elite-level international sports.	<ul style="list-style-type: none"> • Schedule national competitions so that elite athletes can play in other countries in the off-season, and support the transition from off-season to professional season.

³²⁰ *Enterprise Agreements*, EMPLOYSURE, <https://employsure.com.au/guides/employment-contracts-and-legislation/enterprise-agreements/> (last visited Nov. 19, 2020) (explaining that an "enterprise bargaining agreement" is an agreement negotiated between employers, employees, and bargaining representatives to create fair wages and conditions of employment, and that Australia's Fair Work Act (2009) and the standards of the Fair Work Commission govern these agreements).

In addition to the eight facets listed, the PPE strives for equal investments in men's and women's professional sports and describes practical actions that need to be taken to close the gender pay gap.³²¹ In striving for equal investments, the PPE proposes investing in building communities, audiences, and fan engagement.³²² The goal is to promote women's sports, build fan engagement, and obtain broadcast deals.³²³ Broadcast deals are important because they connect the sport and team with the fans, which is a major source of revenue to pay athletes basic wages and premium payments.³²⁴ The PPE proposes (a) making additional investments in women's sports in order to develop their infrastructure and talent programs and (b) creating profiles that deliver commercial revenue.³²⁵ Governing bodies and media outlets can play an important role in getting female professional athletes on television.³²⁶

The PPE proposes gender equal sponsorships.³²⁷ These sponsorships would focus on corporate sponsorships and partnerships that support a sport's overall development, profit, and sustainability, regardless of gender.³²⁸ The PPE also proposes that professional "female athletes should have access to the same conditions as their male counterparts"³²⁹ in areas including, but not limited to, class of travel, accommodations, development resources, and allowances.³³⁰ The PPE policies should be implemented so that female and male athletes will be rewarded equally in their sport.³³¹ Players' associations will have a major role in representing athletes to achieve equality and equal conditions.³³²

The PPE also created a plan to simultaneously take practical actions to close the pay gap.³³³ First, the PPE seeks to create a sophisticated public campaign for gender equality using professional male and female athletes to communicate with key stakeholders to explain the

³²¹ MALE CHAMPIONS OF CHANGE, *supra* note 270, at 24, 26.

³²² *See id.* at 24.

³²³ *See id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 26.

sport's goals.³³⁴ The PPE believes that involving well-recognized men and women of professional sports teams will help champion the change and encourage key stakeholders to invest more to bridge the gender pay gap.³³⁵ Second, the PPE suggests open disclosures about salaries to promote competition for the best talent and provide transparency into the true gender pay gap.³³⁶ Third, the PPE proposes setting clear timelines to achieve pay equality.³³⁷ These timelines would include details of proposed increases toward pay equality, different investments in women's teams, efforts to increase sponsorships and competitions, and strategies to build fan engagement.³³⁸ Once commercial revenue is generated to fund female sports teams at a competitive level, then women can earn stand-alone pay.³³⁹

The PPE's proposed strategies have resulted in success for many female athletes throughout Australia.³⁴⁰ Tennis Australia used a gender-balanced and inclusive approach to close the gender pay gap by awarding male and female tennis players equal prize money.³⁴¹ Tennis Australia also launched an event called the *Inspirational Series* that celebrates women's achievements in all aspects of life.³⁴² The event attracted sponsors such as KIA, Rolex, Barilla, Uber, MasterCard, and many more.³⁴³ As a result of Tennis Australia's approach, the Australian Open features women's matches on major courts at peak viewing times, commits equal resources to male and female athletes, markets female tennis players as role models to increase retention rates of young female athletes, and almost equalizes the number of young men and women that participate in its official junior tennis program.³⁴⁴ Cricket Australia is also taking an approach similar to the PPE to introduce gender-neutral contracts to ensure that men and women are treated equally when it comes to hourly base wages, retainers, salary caps, match fees, and international premiums.³⁴⁵ The Football

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *See generally id.* at 10, 16, 21, 25, 27.

³⁴¹ *Id.* at 10.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 16.

Federation of Australia also took action with the Professional Football Association to deliver a significant pay increase and improve employment conditions for Westfield W-League players.³⁴⁶ In 2018, for the first time, fans could watch every match of the W-League's season, which Fox Sports, SBS Viceland, and My Football Live App broadcasted.³⁴⁷ Additionally, Golf Australia has taken steps toward gender equality by having men and women play on the same course and on the same week for an identical share of the total prize pool at the ISPS Handa Vic Open.³⁴⁸ This is the only golf event to award the same prize money to men and women.³⁴⁹ The prize money was AUD \$300,000 (USD \$221,309) in 2013 and increased to AUD \$3 million (USD \$2,213,085) in 2019.³⁵⁰ These cases show that the strategies proposed in the PPE work; therefore, the United States should mimic the PPE to close the gender pay gap in professional sports in the United States.

VI SOLUTIONS

The following Section provides potential solutions on how to close the gender pay gap in professional sports. The solutions include (a) amending the EPA, (b) adopting a new bill that addresses pay equality, (c) mandating equal broadcasting for women's sports, and (d) creating tax incentives encouraging businesses to sponsor more professional female athletes.

A. Changes to the EPA

In order to provide all professional female athletes with the ability to bring claims under the EPA, Congress must amend parts of the EPA to allow plaintiffs to compare "similar" establishments instead of the same establishments.³⁵¹ The definition of "similar" in this context would mean a plaintiff-athlete could choose a comparator that plays a comparable sport at a comparable level. This change would give all professional female athletes the ability to choose a comparator when that female athlete and the male comparator do not have the same

³⁴⁶ *Id.* at 23.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 27.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ See Zerunyan, *supra* note 75, at 252.

employer.³⁵² This change would also allow professional female athletes of the organizations listed in Part IV of this Article, like the WNBA, to file an EPA complaint against their employer for what a similar employer, the NBA, pays its professional male basketball players.³⁵³ Therefore, to establish a prima facie case under the EPA, the elements would read as follows: (i) the employer pays its female employees less than what male employees are paid in a *similar establishment*; (ii) by a *similar employer*; (iii) for equal work of jobs that require equal skill, effort, and responsibility; and (iv) which is performed under similar working conditions.³⁵⁴

B. New Statutes

In July 2019, two U.S. Senators introduced a bill that would further equality among male and female athletes.³⁵⁵ Senator Dianne Feinstein of California and Senator Patty Murray of Washington introduced the Athletics Fair Pay Act,³⁵⁶ which mandates equal pay by law for Olympic and amateur athletes.³⁵⁷ The bill would update the Ted Stevens Olympic and Amateur Sports Act (Ted Stevens Act), which mandates that “national sports bodies pay female athletes equally and to report annually to Congress on efforts to end pay discrimination.”³⁵⁸ However, the Ted Stevens Act does not help professional female athletes who are not part of national sports teams earn equal pay because they do not share an employer with a comparator.

In further support of equal pay among professional athletes, the United States House of Representatives introduced the Give Our Athletes Level Salaries Act (GOALS Act) in 2019.³⁵⁹ The GOALS Act would block federal funding for the 2026 Men’s World Cup, which will

³⁵² *Id.* at 252–53.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ Martin Macias, Jr., *Senators Propose Equal Pay Bill for US Athletes*, COURTHOUSE NEWS SERV. (July 10, 2019), <https://www.courthousenews.com/senators-feinstein-and-murray-propose-equal-pay-bill-for-u-s-athletes/> [<https://perma.cc/92DH-KS72>].

³⁵⁶ Athletics Fair Pay Act of 2019, S. 2083, 116 Cong. (2019). The Athletics Fair Pay Act of 2019 was introduced on July 10, 2019, and was “read twice and referred to the Committee on Commerce, Science, and Transportation,” but no other actions have been taken. *Id.*

³⁵⁷ *Id.*

³⁵⁸ Macias, *supra* note 355.

³⁵⁹ Give Our Athletes Level Salaries Act, H.R. 3971, 116th Cong. (2019). The GOALS Act was introduced and referred to the House Committee on Foreign Affairs on July 23, 2019, but no further actions have been taken. *See id.*

be hosted jointly by the United States, Mexico, and Canada, until the WNT receives “fair and equitable wages.”³⁶⁰ However, the GOALS Act is a short-term threat rather than a long-term solution. Hence, the GOALS Act will likely not have a long-term, positive effect on professional female athletes.

C. Media Mandate: The Proposed Equal Athletic Broadcasting Act

Like the MCC’s plan under the PPE, the U.S. government should support developing a gender-equal infrastructure by increasing investments in broadcasting women’s sports to close the gender pay gap.³⁶¹ The plan also asks broadcasters to build the profile of women’s sports by offering broadcast deals that enable and facilitate pay improvements.³⁶² In the United States, broadcasters have taken no action to televise women’s professional sports as often as men’s professional sports.³⁶³ Media coverage should mirror the investment available in women’s sports, and this has simply not happened yet.³⁶⁴

Due to the discrepancies in sports coverage of men’s and women’s professional sports, the effect the discrepancy has on the gender pay gap, and the fact that studies show that there is a market to invest in professional female sports, Congress should act.³⁶⁵ Congress should encourage equal sports coverage on television of men’s and women’s professional sporting events through additional legislation. For example, ESPN would not have to air the WNBA as much as it airs the NBA; rather, ESPN would air men’s and women’s professional sports as a whole for equal amounts of time. This overall ratio avoids the issue that some professional male sports have more games in a season than professional female sports and provides professional female athletes the same opportunity for television exposure as professional male athletes. Broadcasters should also be more than willing to invest in professional female sports because broadcasters could easily capitalize on a profitable female sports market and use it as a long-term investment. Mandating an equal coverage ratio between men’s and women’s sports expands on one purpose of the Ted Stevens Act, which is to support female athletes and end pay discrimination.³⁶⁶

³⁶⁰ Moritz-Rabson, *supra* note 18.

³⁶¹ MALE CHAMPIONS OF CHANGE, *supra* note 270, at 18–19.

³⁶² *Id.*

³⁶³ Gowdy, *supra* note 82.

³⁶⁴ *Id.*

³⁶⁵ See *supra* Part II.B.

³⁶⁶ See 36 U.S.C. § 220503 (2019); see also Macias, *supra* note 355.

This Article proposes the *Equal Athletic Broadcasting Act*, which would mandate equal broadcasting of men's and women's professional sports. At the end of the year, an audit would determine whether each major sports broadcasting channel aired women's professional sports as much as men's professional sports. The major broadcasting channels would include Entertainment and Sports Programming Network (ESPN), Fox, National Broadcasting Company (NBC), Columbia Broadcasting System (CBS), CBS Sports Network, American Broadcasting Company (ABC), Turner Network Television (TNT), Turner Broadcasting System (TBS), Olympic Channel, and Univision Deportes. If any of the broadcasting channels failed to give equal airtime to male and female professional sports, the channel would be fined based on the discrepancy between how often the channel aired men's professional sports compared to women's professional sports.

D. Sponsorship Credits: The Proposed Equal Sponsorship Act

Today in the United States, professional female sports account for only 0.4% of sports sponsorship spending.³⁶⁷ While some corporations, such as Budweiser, Proctor & Gamble, Visa, and Luna Bar, are taking a stand to sponsor the WNT, more companies need to sponsor female sports and athletes in order to close the gender pay gap.³⁶⁸ Through the PPE, the MCC proposes creating gender-equal sponsorships with partners that support a sport's overall development, profit, and sustainability, regardless of gender.³⁶⁹ Tennis Australia has successfully implemented the PPE by using a gender-balanced and inclusive approach to close the gender pay gap.³⁷⁰ Tennis Australia has awarded male and female tennis players equal prize money and has provided female athletes exposure through the *Inspirational Series*,³⁷¹ which has attracted sponsors such as KIA, Rolex, Barilla, Uber, MasterCard, and many more.³⁷² The United States should adopt the suggestions proposed by the PPE to attract more sponsorships for all professional women's sports. But given the reluctance of corporations to invest in professional women's sports, which is evidenced by statistics previously mentioned in Part II, corporations need an

³⁶⁷ Lebel, *supra* note 31.

³⁶⁸ *Id.*

³⁶⁹ MALE CHAMPIONS OF CHANGE, *supra* note 270, at 24.

³⁷⁰ *Id.* at 10.

³⁷¹ *Id.*

³⁷² *Id.*

incentive to sponsor professional female sports. Consequently, this Article proposes that Congress implement a tax credit, similar to the energy tax credit, incentivizing corporations to allocate more of their sports sponsorship spending on professional female sports.

The federal tax code currently incentivizes businesses to reduce their taxes³⁷³ through tax deductions and tax credits.³⁷⁴ A tax deduction reduces the amount of income subject to taxes and is more advantageous to taxpayers in higher income brackets.³⁷⁵ In contrast, tax credits reduce the amount a company owes in taxes by allowing it to subtract certain expenses from its income tax liability on a dollar-for-dollar basis.³⁷⁶

The federal government grants tax credits for specific corporate activities that the federal government wants to promote.³⁷⁷ There are two types of tax credits: nonrefundable and refundable.³⁷⁸ A nonrefundable tax credit means businesses receive a refund up to the amount that they owe in taxes.³⁷⁹ A refundable tax credit allows businesses to receive a refund even if the refund is more than what a business owes.³⁸⁰ Tax credits are advantageous because they lessen businesses' tax obligations.³⁸¹ Businesses attempt to use all the tax credits they qualify for to reduce the amount of taxes they owe to the federal government.³⁸² If businesses exceed their tax credits for the current year but not the prior year, businesses can carry those credits backwards and apply them to previously filed returns.³⁸³ Businesses can also carry tax credits forward.³⁸⁴ When comparing a tax deduction

³⁷³ See *Tax Credits vs. Tax Deductions*, NERDWALLET (Nov. 7, 2019), <https://www.nerdwallet.com/blog/taxes/tax-credit-vs-tax-deduction/> [<https://perma.cc/9KTM-R85E>].

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Corporate Income Tax Credits*, GOOD JOBS FIRST, <https://www.goodjobsfirst.org/accountable-development/corporate-income-tax-credits> [<https://perma.cc/B6ME-2F7H>].

³⁷⁷ *Id.*

³⁷⁸ *Credits and Deductions for Individuals*, INTERNAL REVENUE SERV., <https://www.irs.gov/credits-deductions-for-individuals> [<https://perma.cc/L5MM-PBCS>].

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Julia Kagan, *Business Tax Credits*, INVESTOPEDIA (May 26, 2020), <https://www.investopedia.com/terms/b/business-tax-credits.asp> [<https://perma.cc/4DWT-RNAW>].

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

and tax credit, tax credits save businesses more money.³⁸⁵ Consider the example below:³⁸⁶

	\$10,000 Tax Deduction	\$10,000 Tax Credit
Adjusted Gross Income	\$100,000	\$100,000
Subtract: Tax Deduction	(\$10,000)	
Taxable Income	\$90,000	\$100,000
Tax Rate	25%	25%
Calculated Tax	\$22,500	\$25,000
Subtract: Tax Credit		(\$10,000)
Total Tax Bill	\$22,500	\$15,000

In order to fix the lack of sponsorships for professional female athletes, this Article proposes the *Equal Sponsorship Act* to provide an incentive for corporations to sponsor professional female athletes. Congress should use the energy tax credit as a template to create the *Equal Sponsorship Act*. In the United States, a 10% energy tax credit is available to businesses that invest in solar and wind energy.³⁸⁷ When Congress enacted the energy tax credit, it recognized that the energy industry had relied on oil and natural gas for two decades, which decreased the industry's use of renewable resources.³⁸⁸ To avoid disrupting the supply of oil and natural gas and to enhance savings, Congress enacted the energy tax credit for a limited time, which was "designed to encourage conservation and conversion and the development of advanced energy technology."³⁸⁹ Congress believed that providing a positive incentive in the form of tax credits would motivate the energy industry to make significant efforts to conserve scarce oil and natural gas supplies.³⁹⁰

In 1990, Congress made the tax credits permanent to provide certainty to potential investors in long-term projects that the tax credits would continue.³⁹¹ In 2005, Congress increased the energy credit from

³⁸⁵ *Tax Credits vs. Tax Deductions*, *supra* note 373.

³⁸⁶ *Id.*

³⁸⁷ Thomas W. Giegerich, *The Monetization of Business Tax Credits*, 12 FLA. TAX REV. 709, 726 (2012).

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.* at 758.

10% to 30% for solar energy property.³⁹² And, in 2008, small wind energy property was eligible for a 30% tax credit.³⁹³ As a result of state and federal government requirements and incentives to use renewable energy, the consumption of biofuels and other nonhydroelectric renewable energy sources has more than doubled from 2000 to 2018.³⁹⁴ The United States Energy Information Administration projects that the consumption of renewable energy will continue to increase through 2050.³⁹⁵

Congress should implement a mechanism similar to the energy tax credit to equalize sponsorship pay among professional athletes. Professional female athletes want to achieve equality: equal pay and equal benefits, which stem from equal treatment. Bridging the gap in corporate sponsorships, which can be done through implementing tax credits, will help solve the puzzle of achieving equality. A permanent tax credit to all organizations, regardless of size, will increase investment in professional female athletes through sponsorships and will help bridge the pay gap. This tax credit will create opportunities for professional female athletes to earn more money through sponsorships and acquire greater bargaining power. With greater bargaining power, female athletes will have the ability to leverage their employers to receive better pay, benefits, and treatment. The PPE suggests using sponsorships to achieve equality, but tax credits are a similarly good vehicle.

The *Equal Sponsorship Act* proposes a 2% permanent tax credit for the amount spent on each professional female athlete. The tax credit would be nonrefundable; therefore, if the company does not have any tax liability, then the company would not receive money back. The credit would apply to female sponsorship expenses up to \$30 million.³⁹⁶ Consider an example where Nike is in the twenty-first tax bracket and would have to pay federal taxes of \$210,000. If Nike sponsored professional wrestler and mixed martial artist Ronda Rousey, spending \$100,000 on her sponsorship, then Nike would receive a \$2,000 tax

³⁹² *Id.* at 764.

³⁹³ *Id.*

³⁹⁴ *Renewable Energy Explained*, U.S. ENERGY INFO. ADMIN. (June 22, 2020), <https://www.eia.gov/energyexplained/renewable-sources/> [https://perma.cc/ZZL6-JSDT].

³⁹⁵ *Id.*

³⁹⁶ The \$30 million chosen as the maximum tax credit for sponsorship expenses is a rough baseline for future research. There is little to no publicly available information as to the amount corporations spend on female endorsements or what percentage of their sponsorship budget they dedicate to female athletes; therefore, the maximum tax credit amount is solely an example.

credit. Therefore, Nike's tax liability would be reduced by \$2,000, and its new tax liability would be \$208,000. While this may seem like an incremental change, it is not. This tax credit would apply to every female athlete that Nike sponsors. Thus, this tax credit would be far from an incremental change because it would be permanent and would make investing in women's professional sports a long-term commitment instead of a short-lived trend.

CONCLUSION

In Australia, the MCC has been successful in implementing the PPE to close the gender pay gap in professional sports.³⁹⁷ Using the PPE framework would help the United States close the gender pay gap in professional sports through increasing investments in broadcasting and sponsorships for professional women's sports. However, the United States lacks an organization, like the MCC, to lead the charge to implement the PPE and change the sports ecosystem and infrastructure.

Therefore, this Article proposes adopting the *Equal Athletic Broadcasting Act* and the *Equal Sponsorship Act* to achieve equal broadcasting of women's professional sports on television and to incentivize businesses to sponsor professional female athletes through tax credits. These efforts will help women achieve pay equality in professional sports. The two proposed Acts function the same as the PPE but solve the problem of not having a governing body like the MCC to implement that change. Hopefully, with these changes and the WNT's continued fight, female athletes, like me, will no longer have to accept a smaller slice of the pizza at the end of the game.

³⁹⁷ See *supra* Part II.B.

