

No. 21-55356

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALEX MORGAN, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES SOCCER FEDERATION, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California, Los Angeles (Hon. Gary Klausner)
Dist. Ct. No. 2:19-cv-01717-RGK-AGR

**BRIEF OF AMICUS CURIAE INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION IN SUPPORT OF PLAINTIFFS-
APPELLANTS AND FOR REVERSAL**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
CORPORATE DISCLOSURE STATEMENT	1
INTRODUCTION.....	2
ARGUMENT	4
USSF Has An Express Congressional Mandate To Advance Gender Equality In Soccer, And Its Opposition To Equal Pay For The Women’s National Team Violates That Duty.....	4
A. National governing bodies like USSF are creations of statute with a duty to serve the public interest.	4
B. USSF has a special statutory responsibility to grow the sport by promoting gender equality in American soccer.	8
C. USSF’s obligation to support gender equality is even more important when USSF fields teams that represent the United States and its values on the world stage.	14
D. USSF is not living up to its obligations by failing to give the U.S. Women’s National Team equal pay.....	16
CONCLUSION	17
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Page(s)

Cases

Behagen v. Amateur Basketball Ass’n of the U.S.,
884 F.2d 524 (10th Cir. 1989)7

Gold Medal LLC v. U.S.A. Track & Field,
899 F.3d 712 (9th Cir. 2018)7

S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.,
483 U.S. 522 (1987).....4, 7

Statutes

Ted Stevens Olympic and Amateur Sports Act of 1998,
36 U.S.C. §§ 220501, *et seq.*..... *passim*

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20 U.S.C. § 168112

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Gov’t Relations of the H. Comm. on the Judiciary*, 95th Cong. (1978)...12, 15, 16

*Amateur Sports Act: Hearings Before the S. Comm. on Commerce, Science, and
Transp.*, 95th Cong. (1977).....10, 11, 12, 15

Even Playing Field Act, H.R. 4163, 117th Cong. (2021)8

Even Playing Field Act, S. 2288, 117th Cong. (2021).....8

H.R. Rep. No. 95-1627 (1978)5

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Consumer of the S. Comm. on Commerce, Science, and Transp.*, 103d Cong.
(1994).....7, 12

S. Rep. No. 105-325 (1998).....6, 12

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*The Final Report on the President’s Comm’n
on Olympic Sports* (1977)10, 11, 17

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Bylaws of the U.S. Soccer Federation, Inc. (May 1, 2021),
<https://cdn.ussoccer.com/-/media/project/ussf/governance/2021/202021-bylaw-bookfinal-2021-amendments-final.ashx?>2, 13

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Henry D. Fetter, *How the 1960 Olympics Changed America*, The Atlantic (Sept. 4, 2010), <https://www.theatlantic.com/entertainment/archive/2010/09/how-the-1960-olympics-changed-america/62471/>14

How Did Mia Hamm Inspire Women to Play Sports?, Smithsonian Inst. (May 18, 2021), <https://womenshistory.si.edu/news/2021/05/how-did-mia-hamm-inspire-women-play-sports>15

Joan Benoit Samuelson, ‘*Title IX is why the women of Team USA continue to earn the most medals at the Olympic Games*,’ ESPN (June 21, 2017), https://www.espn.com/espnw/voices/story/_/id/19696803/joan-benoit-samuelson-first-female-olympic-marathon-winner-importance-title-ix14

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https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/ussf_2018_990_pd-copy.ashx (last visited July 27, 2021)13

United States Soccer Federation Form 990 for the Year Ended March 31, 2020,
<https://cdn.ussoccer.com/-/media/project/ussf/governance/2021/fy20-united-states-soccer-federation-form-990-pd.ashx> (last visited July 27, 2021)13

INTEREST OF AMICUS CURIAE

The Institute for Constitutional Advocacy and Protection (“ICAP”) is a nonpartisan, public-interest law group based at Georgetown University Law Center.¹ ICAP’s mission is to use the power of the courts to defend Americans’ constitutional and statutory rights. ICAP has broad experience litigating civil-rights cases in federal and state courts throughout the United States. In addition, ICAP offers vital understandings of the Constitution and federal legislation that draw on scholarship and a wide range of practical experience, including its attorneys’ extensive service in all three branches of the federal government. ICAP is therefore well positioned to aid the Court in understanding the Ted Stevens Olympic and Amateur Sports Act of 1998, 36 U.S.C. §§ 220501, *et seq.*, under which the U.S. Soccer Federation is the national governing body for soccer in the United States.

CORPORATE DISCLOSURE STATEMENT

ICAP is a nonprofit organization with no parent corporation and in which no person or entity owns stock.

¹ In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae certifies that (1) this brief was authored entirely by counsel for amicus curiae and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than amicus curiae contributed money to the preparation or submission of this brief. Both parties consent to the filing of this brief.

INTRODUCTION

When American athletic teams compete on the world stage, they should showcase the best of America. As the U.S. Olympic and Paralympic Committee has told Congress, American teams should display not only “competitive excellence,” but also “character,” with “equality . . . at the forefront.”² Seeing these American values modeled in international competitions like the Olympic Games both inspires Americans and sets an example for the world. But when the United States fields women’s teams that are paid less than their male counterparts, it fails to live up to these ideals and sends the wrong message to the world that gender discrimination is both justified and acceptable.

Partly for these reasons, the United States Soccer Federation (“USSF”), as the national governing body for the sport of soccer in the United States,³ has a special statutory responsibility to treat its women’s and men’s teams equally—which makes it even more important that USSF comply with federal antidiscrimination laws like the Equal Pay Act and Title VII of the Civil Rights Act of 1964. Far from an ordinary private business whose primary goal is to

² United States Olympic Committee, Quad Report 2 (2017) (“USOPC Quad Report”), <https://www.teamusa.org/-/media/TeamUSA/Documents/Legal/Quad-Report/2013-16-USOC-Quad-Report.pdf>.

³ See *Bylaws of the U.S. Soccer Federation, Inc.*, 1 Bylaw 103 § 2 (May 1, 2021) (“USSF Bylaws”), <https://cdn.ussoccer.com/-/media/project/ussf/governance/2021/202021-bylaw-bookfinal-2021-amendments-final.ashx?>

maximize its own profit, USSF is a nonprofit entity with a congressional mandate to serve the public interest, including an express responsibility to promote gender equality in sport.

USSF derives its status as a national governing body from several acts of Congress, culminating in the Ted Stevens Olympic and Amateur Sports Act of 1998, 36 U.S.C. §§ 220501, *et seq.* In that Act, Congress granted national governing bodies like USSF an effective monopoly over the development, selection, and promotion of national teams in their respective sports. *Id.* § 220523. In return, national governing bodies must fulfill certain statutory obligations to the greater public, including encouraging public participation in sports at all levels and developing promising athletes from a young age. *Id.* § 220524.

Throughout the Act and its legislative history, Congress made clear that national governing bodies must perform these functions in a nondiscriminatory manner and make special efforts to grow their sports by supporting and promoting gender equality. A national governing body has an even stronger obligation to fulfill these obligations when it is fielding a team to represent the best of the United States and uphold its values on the world stage. USSF's insistence that the members of the U.S. National Women's Soccer Team outperform their male counterparts before they are entitled to the same amount of overall compensation

violates the spirit of the Act and conflicts with Congress's intent that national governing bodies be leaders in promoting women's athletics.

ARGUMENT

USSF Has An Express Congressional Mandate To Advance Gender Equality In Soccer, And Its Opposition To Equal Pay For The Women's National Team Violates That Duty

A. National governing bodies like USSF are creations of statute with a duty to serve the public interest.

USSF is no ordinary employer: It is a nonprofit entity that serves a quasi-public role as the United States' national governing body for soccer. This statutory designation provides USSF with nearly total control over the sport of soccer in this country, including fielding teams to represent the United States in international competition. Congress has mandated that, in return for these benefits, national governing bodies like USSF have an obligation to serve the public interest. This responsibility to the public only heightens USSF's duty to comply with generally applicable federal antidiscrimination laws like the Equal Pay Act and Title VII.

1. National governing bodies like USSF are part of a larger statutory scheme that governs the development of Olympic athletes in the United States. In the Amateur Sports Act of 1978, as amended by the Ted Stevens Olympic and Amateur Sports Act of 1998, 36 U.S.C. §§ 220501, *et seq.* ("Sports Act"), Congress sought "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." *S.F. Arts & Athletics*,

Inc. v. U.S. Olympic Comm., 483 U.S. 522, 544 (1987) (quoting H.R. Rep. No. 95-1627, at 8 (1978)). By the late 1970s, turf wars among competing athletic organizations had led to an “overall decline of American achievement in Olympic and international competition,” and Congress assessed that the country was “falling seriously below our potential to both field strong international teams and to guarantee greater opportunities at the grassroots level.” S. Rep. No. 95-770, at 3 (1978).

To remedy that situation, the Sports Act created a vertical organizational structure to govern the development of Olympic sports. At the top sits the U.S. Olympic and Paralympic Committee (“USOPC”), a federally chartered corporation with statutory authority to act as a coordinating body for American Olympic athletics. 36 U.S.C. §§ 220502-220503. A “quasi-governmental entity,” the USOPC is “not-for-profit and grouped in the United States Code along with other ‘patriotic and national organizations[.]’”⁴ To encourage the development of strong sport-specific programs, Congress granted the USOPC authority to recognize and oversee one national governing body to govern each sport included in the Olympic Games. *Id.* § 220521(a).

To be certified by the USOPC, a national governing body must satisfy a

⁴ Dionne Koller, *Amateur Regulation and the Unmoored United States Olympic and Paralympic Committee*, 9 Wake Forest L. Rev. Online 88, 90-91 (2019).

series of statutory requirements. *See id.* §§ 220521, 220522. In addition to being registered “as a not-for-profit corporation having as its purpose the advancement of amateur athletic competition,”⁵ a national governing body must, among other things, demonstrate that “it is prepared to meet the obligations imposed on a national governing body” under the Sports Act. *Id.* § 220522(1), (16).

2. As the national governing body for soccer, USSF enjoys substantial statutory benefits, including an effective monopoly over most aspects of American recreational and international competition in that sport.⁶ *See* 36 U.S.C. § 220523. In particular, USSF has sole authority to “represent the United States” in FIFA, the international governing body for soccer; “establish national goals” for the U.S. soccer program “and encourage the attainment of those goals”; “serve as the

⁵ The term “amateur,” as used in the Sports Act, encompasses members of the U.S. Women’s National Team, whom USSF selects to represent the United States in international competition, including the Olympics, according to USSF eligibility criteria. *See* 36 U.S.C. § 220501(b)(1) (“[A]mateur athlete’ means an athlete who meets the eligibility standards established by the national governing body . . . for the sport in which the athlete competes.”). The term is a vestige from the Amateur Sports Act of 1978, which was passed when all Olympic athletes were required to be unpaid. However, by the mid-1990s, Olympic competition was opened up to paid athletes, a fact Congress recognized when it changed the Act’s official name to the *Olympic and Amateur Sports Act* “to reflect the participation of professional as well as amateur athletes in the Olympic games.” S. Rep. No. 105-325, at 2 (1998).

⁶ The Sports Act’s broad scope reaches from the promotion of recreational sports to the development of world-class athletes to represent the United States in international competition; however, it generally does not grant national governing bodies authority over high school or college sports. *See* 36 U.S.C. § 220526(a).

coordinating body for [soccer] in the United States”; exercise jurisdiction over or sanction various international and domestic soccer competitions; and field teams to represent the United States in the Olympics and other high-level international soccer competitions. *Id.*

Indeed, national governing bodies possess such “monolithic control” in these areas that this Court and several others have recognized that these entities are entitled to an implied antitrust exemption when acting within the scope of their statutory authority. *Gold Medal LLC v. U.S.A. Track & Field*, 899 F.3d 712, 715-16 (9th Cir. 2018) (quoting *Behagen v. Amateur Basketball Ass’n of the U.S.*, 884 F.2d 524 (10th Cir. 1989)).

3. In return for these benefits, USSF has an obligation to serve the “broader public interest,” *S.F. Arts & Athletics*, 483 U.S. at 537, by promoting and growing public participation in soccer. *See Oversight of Activities of the Olympic Comm.: Hearing Before the Subcomm. on Consumer of the S. Comm. on Commerce, Science, & Transp.*, 103d Cong. 51 (1994) (“1994 Senate Hrg.”) (statement of Nancy Hogshead) (although national governing bodies “were given broad powers by Congress[,] . . . it was also the . . . clear intent of Congress” that national governing bodies, “in return for such power, would have to fulfill higher order responsibilities”). In particular, the Sports Act requires that national governing bodies “develop interest and participation throughout the United States and be

responsible to the persons and organizations [they] represent[],” 36 U.S.C. § 220524(a)(1), as well as carry out USOPC’s mandate to “promote and encourage physical fitness and public participation in amateur athletic activities” at the grassroots level, *id.* § 220503(6). Such an obligation to serve the public interest not only underscores USSF’s general duty to comply with federal antidiscrimination laws but, as explained below, it also includes a specific duty to support and advance gender equality in soccer.⁷

B. USSF has a special statutory responsibility to grow the sport by promoting gender equality in American soccer.

Congress has long recognized that America’s athletic success at both the international and grassroots levels depends on the equal treatment of women athletes. Accordingly, as part of their broader duty to serve the public, national governing bodies like USSF have a special statutory responsibility under the Sports Act to grow their sports by eschewing discrimination and promoting gender equality.

1. Several provisions in the Sports Act impose obligations on USSF to

⁷ In recent years, some members of Congress have introduced legislation to clarify the Sports Act by including an express guarantee of equal pay. *See, e.g.*, Even Playing Field Act, S. 2288, 117th Cong. (2021); Even Playing Field Act, H.R. 4163, 117th Cong. (2021). These bills seek to underscore what the Sports Act already mandates: As explained below, the Sports Act already places an obligation on national governing bodies to act in a nondiscriminatory manner, grow and develop women’s sports, and promote gender equality in athletics.

refrain from discrimination and encourage the development of women's sports. Most prominently, national governing bodies like USSF have an express statutory mandate to "provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis." 36 U.S.C. § 220524(a)(6).

The Sports Act also requires that national governing bodies develop their sports by promoting women's participation from the ground up. To receive USOPC certification, a national governing body like USSF must "provide[] an equal opportunity to amateur athletes . . . to participate in amateur athletic competition, without discrimination on the basis of . . . sex"⁸ and be governed by a board that provides "reasonable representation of both males and females." *Id.* § 220522(8), (9). Once certified, the national governing body must "compl[y] with and implement[] . . . the policies and procedures of" USOPC," *id.* § 220503(16), including USOPC's mandate "to encourage and provide assistance to amateur athletic activities for women," *id.* § 220503(12).

To ensure that USOPC and the national governing bodies live up to these obligations, Congress also requires USOPC to submit to Congress and the President regular reports including, among other things, "[d]ata concerning the

⁸ As explained above, when playing under the auspices of USSF, U.S. Women's National Team members are "amateur athletes" for purposes of the Sports Act. *See supra* note 5.

participation of women . . . in the amateur athletic activities and administration of the corporation and national governing bodies” and “[a] description of the steps taken to encourage the participation of women . . . in amateur athletic activities.” *Id.* § 220511(2)(B), (C).

2. In addition to the statutory text, the legislative history of the Sports Act is rife with evidence that promoting gender equality in sports has long been an overriding congressional priority. For example, the 1978 enactment drew heavily on recommendations made by the President’s Commission on Olympic Sports, which was “established to determine what factors impede . . . the United States from fielding its best teams in international competition.” *The Final Report on the President’s Comm’n on Olympic Sports* at ix (1977) (“Comm’n Report”); see *Amateur Sports Act: Hearings Before the S. Comm. on Commerce, Science, & Transp.*, 95th Cong. 1 (1977) (“1977 Senate Hrg.”) (statement of Sen. Stevens) (Sports Act “is based on the recommendations of the President’s Commission on Olympic Sports”).

Among other findings, the Commission directly connected the success of American national teams with the equal treatment of women athletes. Comm’n Report at 6, 94, 99, 109-11. It recognized that “opportunities for women in [athletic] programs still fall far short,” *id.* at 109, and specifically cited financial support as an “area in which women’s programs suffer great inequities,” *id.* at 110;

see also id. at 99 (“Women do not have the same access to . . . scholarships and funding as men.”). Such “inequities and discrimination so long unchallenged” had hindered “the country’s athletic efforts and damage[d] the sports environment.” *Id.* at 109. As a result, “the United States, with its vast wealth and potential talent, comes nowhere near developing the number and variety of world class athletes commensurate with its size and sporting traditions.” *Id.* at 99.

The Commission therefore recommended that Congress require USOPC to give “high priority to the many issues concerning women’s role in athletics,” including by establishing “equal hiring/employment practices” and ensuring “all athletic planning and policy decisions and established sets of criteria (such as . . . funding qualifications) are consistent with the ultimate objective of assuring that discrimination is eliminated in the treatment of women’s programs.” *Id.* at 110-11.

Hearings on the bill made clear that Congress took seriously these recommendations to combat gender inequality. For example, Senator Culver, who served on the Commission, acknowledged the “widespread and disturbing” problems of gender discrimination that the Commission identified, noting that “[t]his legislation addresses such inequities.” 1977 Senate Hrg. at 50. Similarly, Representative Metcalfe, another Commission member, explained that the bill was intended to “complement” the goals of the then-recently enacted Title IX of the

Education Amendments Act of 1972,⁹ which prohibits sex discrimination in most school athletics. *Amateur Sports Act of 1978: Hearings Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 95th Cong. 3 (1978) (“1978 House Hrg.”).

Indeed, several of the Sports Act’s antidiscrimination provisions discussed above were added in response to testimony from the Association of Intercollegiate Athletics for Women (“AIAW”), which emphasized that equitable treatment of women athletes was crucial given that “[n]o area exists in our society where women have endured more obvious discrimination than in sports.” 1977 Senate Hrg. at 196; *see* 1978 House Hrg. at 278 (noting that AIAW’s suggested changes had been incorporated into the final bill).

After the Sports Act was passed, Congress held oversight hearings on “whether the purposes of [the] act, particularly with respect to progress in amateur athletic opportunities for women . . . are being fulfilled.” 1994 Senate Hrg. at 2. In 1998, Congress reaffirmed its commitment to the goal of gender equality by amending the Sports Act to add enhanced reporting requirements regarding national governing bodies’ efforts to advance women’s athletics. S. Rep. No. 105-325, at 2 (1998).

3. In addition, USSF’s own official statements and policies confirm that

⁹ Codified at 20 U.S.C. § 1681.

USSF has a broad duty to support gender equality in American soccer, including complying with all federal antidiscrimination laws. In its annual Form 990, which USSF must file with the Internal Revenue Service to maintain tax-exempt status, USSF has repeatedly represented that its “mission” is “to promote and govern soccer in the United States in order to make it the preeminent sport recognized for excellence in participation, spectator appeal, international competitions *and gender equality*.”¹⁰

Moreover, USSF’s bylaws assert that USSF “shall comply with all applicable laws governing non-discrimination” and “shall not discriminate on the basis of . . . sex.” *USSF Bylaws* at 2, Bylaw 105, §§ 2, 3. USSF has also told Congress that it was “educat[ing] employees on current Equal Employment Opportunity policies through the U.S. Soccer Handbook.” USOPC Quad Report, Ex. D at 14.

¹⁰ *United States Soccer Federation Form 990 for the Year Ended March 31, 2020*, <https://cdn.ussoccer.com/-/media/project/ussf/governance/2021/fy20-united-states-soccer-federation-form-990-pd.ashx> (emphasis added) (last visited July 27, 2021); *see also, e.g., United States Soccer Federation Form 990 for the Year Ended March 31, 2019*, https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/ussf_2018_990_pd-copy.ashx (last visited July 27, 2021).

C. USSF’s obligation to support gender equality is even more important when USSF fields teams that represent the United States and its values on the world stage.

USSF’s responsibility to promote gender equality, including complying with federal antidiscrimination laws like the Equal Pay Act and Title VII, becomes even more crucial when USSF is representing the United States as an ambassador in international competition.

As a national governing body, USSF has been entrusted with a duty to showcase the best of America on the world stage. *See* 36 U.S.C. § 220523(a)(1), (6). In international competitions, U.S. national teams have a unique opportunity to influence the world by demonstrating American values—including, in the words of USOPC, “competitive excellence,” “character,” and “equality.” USOPC Quad Report at 2. U.S. women athletes have a proud tradition of leading by example: from Wilma Rudolph breaking down racial and gender barriers to win three gold medals in track and field in 1960;¹¹ to Joan Benoit decisively winning the first Olympic women’s marathon in 1984 despite questions about women’s ability to run long distances;¹² to the U.S. Women’s National Soccer Team winning the gold

¹¹ Henry D. Fetter, *How the 1960 Olympics Changed America*, *The Atlantic* (Sept. 4, 2010), <https://www.theatlantic.com/entertainment/archive/2010/09/how-the-1960-olympics-changed-america/62471/>.

¹² Joan Benoit Samuelson, ‘*Title IX is why the women of Team USA continue to earn the most medals at the Olympic Games*,’ *ESPN* (June 21, 2017), https://www.espn.com/espnw/voices/story/_/id/19696803/joan-benoit-samuelson-first-female-olympic-marathon-winner-importance-title-ix.

medal in the first women's Olympic tournament in 1996 and ushering in a wave of interest in soccer among young girls.¹³ And these opportunities have only continued to grow. An estimated 1.12 billion people worldwide watched the 2019 Women's World Cup, with 263.62 million viewers tuning in to see the U.S. Women's National Team win the championship game.¹⁴

Leading by example on gender equality issues also furthers national governing bodies' statutory duties to field the best teams in international competition and to encourage the American public to participate in athletics. As a practical matter, "since American Olympic success depends half on its men and half on its women[,] . . . to deny full participation to American women is to deny full participation to the United States." 1977 Senate Hrg. at 201. Moreover, treating the women's teams equally sends a strong message of support to the athletes, who "want to be the best and represent this country with pride, knowing that they really had an equal chance to develop their potential and that our country stood behind them when they competed in the international sports arena." 1978 House Hrg. at 175. Seeing American athletes succeed in international competition

¹³ *How Did Mia Hamm Inspire Women to Play Sports?*, Smithsonian Inst. (May 18, 2021), <https://womenshistory.si.edu/news/2021/05/how-did-mia-hamm-inspire-women-play-sports>.

¹⁴ *FIFA Women's World Cup 2019 Watched by More Than 1 Billion*, FIFA (Oct. 18, 2019), <https://www.fifa.com/tournaments/womens/womensworldcup/france2019/news/fifa-women-s-world-cup-2019tm-watched-by-more-than-1-billion>.

in turn can inspire greater athletic participation among the American public, who view “the example of the heroes of the Olympics and World Games as a goal” and “wish to feel that they are a part of a winning team.” *Id.* at 169.

D. USSF is not living up to its obligations by failing to give the U.S. Women’s National Team equal pay.

By denying the U.S. Women’s National Team equal pay, USSF is breaching its longstanding and clear obligations to serve the public interest and advance gender equality in U.S. soccer. USSF’s position in this case—that the Women’s National Team must work harder and have greater success than the Men’s National Team in order to receive the same compensation—is flatly contrary to the language, spirit, and intent of the Sports Act. By fielding a national team that it does not deem worthy of equal pay, USSF is also sending the wrong message to the world that discrimination is justified and gender equality is not an important goal. And USSF’s actions are showing millions of American girls that women’s athletic achievements and aspirations are worth less than those of men, even at the highest levels of competition.

More than 40 years ago, the President’s Commission on Olympic Sports concluded that “[d]evelopmental and participation activities for women athletes receive much less financial assistance than do men’s activities. According to any scale of measurement—absolute or relative, in substance or in kind—women’s programs in most cases do not get an adequate or equitable share of the pie.”

Comm'n Report at 110. Despite Congress's decades-long efforts to rectify this fundamental inequality, USSF's continued refusal to give the U.S. Women's National Team equal pay perpetuates this injustice and harms America's best athletes—as well as future generations of female athletes who are watching them compete in the Olympics this summer.

CONCLUSION

For the foregoing reasons, amicus urges this Court to reverse the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) because it contains 3,768 words, exclusive of the portions of the brief that are exempted by Rule 32(f).

I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point roman-style Times New Roman font.

/s/ Annie L. Owens
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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Annie L. Owens

ANNIE L. OWENS