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# The Butterfly Effect? Title IX and the USWNT as Catalysts for Global Equal Pay

Sarah Carrick, Alex Culvin, and Ali Bowes

## Introduction

It is commonly believed that Title IX has had one of the greatest impacts on women and girl's involvement in sport in the United States and beyond. In 2021, 50 years on from its inception, the development of women's sport and women's opportunity within the sporting sphere has increased dramatically. It is doubtless that Title IX has increased participation opportunities and "the question is no longer, 'can women play?' The critical question is 'at what level?' That's the 21st century question."<sup>1</sup>

However, while the positive impacts of Title IX are undisputed, women continue to face significant challenges and inequality. Thus, women continue to challenge persistent barriers regarding opportunity, treatment, and access. More recently, this has manifested into pay and working disputes at the international level. The current U.S. Women's National (Soccer) Team's (USWNT) equal pay lawsuit has sparked interest and debate from sporting federations, athletes, and the media alike. More specifically, it can be argued that the lawsuit has acted as a catalyst for global equal pay disputes across a number of different countries and sporting federations. For example, Denmark, Norway, and New Zealand have all embarked upon discussions and negotiations as to equal pay in relation to their men's and women's soccer teams. Thus, Part I of this article will illustrate that although Title IX has increased participation and opportunity for female athletes within the educational sphere in the U.S., it has also created, in the form

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<sup>1</sup> Staurowsky, E. (2003a). Title IX and college sport: The long and painful path to compliance and reform. *Marquette Sports Law Review*, 14(1), 95-121, at 96.

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of the USWNT in particular, a generation of athletes who have an appetite for equality beyond education and participation, in respect of equal pay, treatment, and working conditions, which has transcended into Europe and beyond.

Although the USWNT's lawsuit has sparked equal pay disputes across the globe, their downfall was that they ultimately could not prove a breach of the Equal Pay Act. Thus, in order to accelerate and win the battle for equal pay, Part II of this article will illustrate that a push for legislative reform is instead required. The USWNT will continue to struggle to claim a breach of the EPA under their current collective bargaining agreement, which supports the argument that legislative reform can aid in closing the gender pay gap, as seen in the Icelandic model.

## Part I.

### Title IX: A Brief Overview

In 1972, under President Richard Nixon, the U.S. Congress enacted the Education Amendments Act, an amendment to the 1964 Civil Rights Act. Title IX states: "No person in the U.S. shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."<sup>2</sup>

This specifically applies to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."<sup>3</sup> Put simply, Title IX seeks to combat gender discrimination in education and prohibits discrimination on the basis of sex in state-funded educational institutions.

Sport was one of the only aspects of education where strict sex integration, as expected by Title IX, would not work. In Dunkel's study on gender equality in sport, the pervasiveness of gender inequality in the U.S. collegiate system prior to Title IX was stark: Often women's sport programs had no institutional funding, compared to seven-figure financial reserves for the men's programs.<sup>4</sup> Coaches of women's teams were often unpaid volunteers, compared to salaried coaches of men's teams. In many instances, solving these were simple: women's teams were to receive institutional funding, and their coaches were to be paid. The biggest challenge was determining what was 'equitable,' given that having equal and identical programs of sports was not necessarily going to be desirable.

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<sup>2</sup> Civil Rights Act, 20 U.S.C.D. §1681(a) (1972).

<sup>3</sup> Civil Rights Act, 20 U.S.C.D. §1681(a)(1) (1972).

<sup>4</sup> Sandler, B. R. (2007). Title IX: How we got it and what a difference it made: Celebrating thirty-five years of sport and Title IX. *Cleveland State Law Review*, 55(4), 473-490.

Under the Education Amendments of 1974, section 844 gave the United States Department of Health, Education and Welfare a mandate to develop regulations that would aid the implementation and adherence to Title IX regulations. It stated it should create:

proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.<sup>5</sup>

By 1978, the Department had received close to 100 complaints relating to 50 educational institutions. Thus, in response, the Department issued a policy interpretation:

to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements of compliance with Title IX in intercollegiate athletic programs.<sup>6</sup>

The Policy split the requirements into three different sections: accommodation of interests and abilities, athletic financial assistance, and other program areas.<sup>7</sup> Under the ‘accommodation and interests’ section, a three-part test was being developed. This test provides institutions with three different ways to comply with their obligations, while schools can choose which one it meets, and these can differ from year to year.<sup>8</sup> Test one requires proportionality, in that participation opportunities for all genders are proportionate to full-time undergraduate enrolment.<sup>9</sup> Test two requires continued expansion of athletic opportunities for the underrepresented sex, while test three requires full and effective accommodation of the underrepresented sex, taking into account their interests and abilities.<sup>10</sup>

In relation to ‘athletic financial assistance,’ compliance under this heading states that financial assistance (i.e., scholarships) must be proportionate to the participation of male and female athletes.<sup>11</sup> When complying with ‘other program

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<sup>5</sup> Title IX 1979 Policy Interpretation on Intercollegiate Athletics. (2020, August 26). Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

areas’ a number of key aspects are to be assessed. Thus, Title IX also requires the equal treatment of men and women in the provisions of (a) equipment and supplies, (b) scheduling of games and practice times, (c) travel and daily allowance/per diem, (d) access to tutoring, (e) coaching, (f) locker rooms, (g) medical and training facilities and services, (h) housing and dining facilities and services, (i) publicity and promotions, (j) support services, and (k) recruitment and student-athletes.<sup>12</sup> Thus, students who go on to turn professional, who have previously enjoyed equal treatment under Title IX, now seek that equality beyond the educational sphere—and the USWNT’s lawsuit epitomizes this point.

## Early Legal Challenges and the Continued Fight for Compliance

Since its inception, Title IX “has provoked intense public interest and scrutiny when applied to federally funded, school sponsored athletic programmes.”<sup>13</sup> Birch Bayh, the principal sponsor in the Senate, stated the purpose of Title IX was to be a “strong and comprehensive measure [that would] provide women with legal protection from the persistent, pernicious discrimination’ that had relegated women to second class status as citizens.”<sup>14</sup> While there is no doubt that the legislation has improved the status and opportunities of women, resistance to such change has been evident since the inception of Title IX. Thus, this section will briefly outline some of the key challenges and lawsuits concerning violations of Title IX throughout the years.

Challenge and resistance to Title IX was spearheaded by the National Collegiate Athletic Association (NCAA), the governing body responsible for the overseeing of college athletes. The then all-male association was concerned about the implementation of Title IX, over a fear that it would lead to the purported demise of male sport.<sup>15</sup> By means of example, in 1974, Senator John Tower carried forward the NCCA’s objections through the ‘Tower Amendment,’ which sought to remove athletics from the scope of Title IX completely.

In 1981, the first Title IX case in the context of sport was heard. In *Haffer v. Temple University*,<sup>16</sup> eight female undergraduate athletes filed a class action suit on the basis that Temple University had subjected them to discriminatory athletic policies. The University denied that any policy was discriminatory, and in any

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<sup>12</sup> *Id.*

<sup>13</sup> Staurowsky, E. (2003b). Title IX in its third decade: The Commission on Opportunity in Athletics. *Entertainment Law*, 2(3), 70-93.

<sup>14</sup> *Id.*, at 72.

<sup>15</sup> Staurowsky, *supra* note 15.

<sup>16</sup> *Haffer v. Temple University* [1981] 1524 F. Supp. 531 (E.D. Pa. 1981).

case, Title IX only applied to academic programs that received federal funding and not athletics. It was held Title IX covered any activity that benefitted from federal funds, including athletics.<sup>17</sup>

However, the decision of *Haffer* and its effect was short lived. In 1984, the case of *Grove City College v. Bell*<sup>18</sup> represented a setback and could potentially have affected Title IX's ability to transcend into the world of athletics long-term. The decision was illustrative of the NCAA's continued resistance to the implementation of Title IX. While policy and interpretations were being developed, the NCAA had been actively seeking a college that would instigate litigation questioning the applicability of Title IX to college sports. Such was its resistance, the NCAA provided legal counsel support for the college.<sup>19</sup> *Grove City College*, a small, church-affiliated private institution, had refused to directly accept any forms of government assistance on the basis that the compliance with the government rules required for such a system would compromise its independence.<sup>20</sup> However, in 1976, the Department of Education (formally the Executive Branch Department) required an assurance of compliance to be filed in respect of Title IX regulations. This was due to the fact that a small number of students received direct grants through the Basic Educational Opportunity Grant (BFOG), which was operated by the federal government.<sup>21</sup> *Grove* refused to file the assurance of compliance, arguing that it did not receive federal financial assistance, resulting in the loss of these grants. Thus, the college brought proceedings in the District Court for the Western District of Pennsylvania requesting that the court overturn the termination of the grants and order the Department of Education to withdraw the request for compliance. It was held the Department could remove the financial assistance based upon the college's refusal to file a notice of compliance, even in the absence of a finding of discrimination.<sup>22</sup> In the Supreme Court, a 6-3 majority held that in instances where students themselves directly receive federally funded grants, Title IX requirements only apply to the specific program for which the grant was used.<sup>23</sup> Thus, the requirement of gender equality did not transcend across an educational institution as a whole, but somewhat more narrowly, only to the program for which the grant was being used. Since little or no federal grants went directly into athletic programs, the *Grove* ruling had the

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<sup>17</sup> *Id.*, at 535.

<sup>18</sup> *Grove City College v. Bell* [1984] 465 U.S. 555.

<sup>19</sup> Staurowsky, *supra* note 1.

<sup>20</sup> *Grove City College v. Bell*, at 559

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, at 602-604.

<sup>23</sup> *Id.*

potential to make it particularly difficult to regulate and implement Title IX into high school and college sport. The effect of this ruling was that the Office for Civil Rights (OCR), the body responsible for Title IX regulation, “immediately dropped or narrowed almost forty pending Title IX athletics investigations” and “suspended cases where discrimination had been found [to exist].”<sup>24</sup>

In response to the *Grove* ruling, Congress passed the Civil Rights Restoration Act in 1988,<sup>25</sup> due to concern that the Supreme Court decision had limited the application and scope of Title IX. Dubbed the ‘Grove City Bill,’ the Act fundamentally overturned the ruling in *Grove* and made it clear that where any part of an educational institution receives federal funding, every part of that institution is subject to the Title IX regulations—no longer relying on the Supreme Courts’ interpretation of a ‘specific program.’<sup>26</sup> This bolstering or solidifying of the rights guaranteed under Title IX continued through a number of cases post-*Grove*.

This application of Title IX was enhanced by the creation of a private right of action. In 1979, the case of *Cannon v. University of Chicago*<sup>27</sup> created this private right of action despite the legislation’s failure or omission to expressly authorize one. It was held that it was the intent of the legislation to provide individuals who had been subject to violations this private right,<sup>28</sup> further enhancing the scope of Title IX.

In 1990, *Cohen v. Brown*<sup>29</sup> illustrated a further fight against Title IX violations. Having dominated gymnastics and winning the Ivy League Championship, Brown University cut the women’s team’s funding the following year.<sup>30</sup> As such, the club went from a varsity sport to being completely dependent on donations, in line with several other budget cuts to the men’s golf and water polo teams and the women’s volleyball team.<sup>31</sup> *Brown*’s position was that as a result of having one of the best women’s athletic programs in the country, they were therefore not in breach of their Title IX requirements. One particular gymnast, Amy Cohen, brought together members of both the volleyball and gymnastic team and filed

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<sup>24</sup> Staurowsky, *supra* note 1, at 104.

<sup>25</sup> The Civil Rights Restoration Act, 20 U.S.C. §1687 (1988).

<sup>26</sup> [GovTrack.us](https://www.govtrack.us). (2021). S. 557 — 100th Congress: Civil Rights Restoration Act of 1987. Retrieved from <https://www.govtrack.us/congress/bills/100/s557>

<sup>27</sup> *Cannon v. University of Chicago* 441 U.S. 677 (1979).

<sup>28</sup> *Id.*, at 677.

<sup>29</sup> *Cohen v. Brown*, 101 F.3d. 155 (1991).

<sup>30</sup> *Athletics*. (n.d.). Retrieved from <https://www.protecttitleix.com/athletics>

<sup>31</sup> *Id.*

a class action suit against the university.<sup>32</sup> The *Cohen* litigation spanned across four court cases. In the first, the U.S. District Court granted a preliminary injunction that required Brown to fund the women's team and prevented further cuts to women sports until the case could be heard.<sup>33</sup> Following this, the First Circuit Court of Appeals upheld the decision of the lower court following the appeal by Brown.<sup>34</sup> In 1994, the trial began in which Judge Pettine found in favor of the plaintiffs. The parties agreed to a partial settlement, which recognized many of Brown's practices were non-discriminatory such as access to facilities and assignment of coaches, leading Brown to agree to continue this for a period of three years.<sup>35</sup> However, in the last of the *Cohen* litigation, Brown appealed the District Court's ruling. In this decision, the court held:

we find no error in the district court's factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court's analysis and rulings on the issue of liability.<sup>36</sup>

It is notable that across all four cases, each court consistently protected the rights given to individuals under Title IX—illustrative of the continued pursuit of compliance post-*Grove*.

Further enhancing the protections under the legislation was the 1992 *Franklin v. Gwinnett Public Schools*<sup>37</sup> litigation. Although concerning the sexual harassment of a pupil and not sport-specific, the ruling meant that schools and institutions who failed to comply with Title IX regulations could be sued for both compensatory and punitive damages.<sup>38</sup> The acceptance of both classes of damages is arguably telling in illustrating the courts' approach to violations of Title IX, thus forcing institutions to take compliance seriously. As Staurowsky explains, this was "heralded as a wake-up call for athletics administrators and institutions that had previously faced virtually no meaningful penalties for not

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<sup>32</sup> *Id.*

<sup>33</sup> *Cohen v. Brown University*, 809 F Supp. 978 (D.R.I) (1992) at 1001.

<sup>34</sup> *Cohen v. Brown University*, 991 F.2d, 888, (1st Circ. 1993) at 907.

<sup>35</sup> For the settlement agreement, see *Cohen v. Brown University - Settlement Agreement and Stipulation of Dismissal in Regard to Equality of Treatment*. (1994). *Civil Rights Litigation Clearinghouse*. Retrieved from <https://www.clearinghouse.net/chDocs/public/ED-RI-0001-0006.pdf>

<sup>36</sup> *Cohen v. Brown University*, 101 F.3d, 155 (1996).

<sup>37</sup> *Franklin v. Gwinnett Country Public Schools*, 503 U.S. 60 (1992).

<sup>38</sup> *Id.*, at 75



complying with the law.”<sup>39</sup> Prior to this ruling, authorities were only obliged to end the discrimination.

Title IX compliance breaches and, as such, lawsuits have continued throughout the 21st century, despite over 30 years that had passed since its inception. In 2001, in the *Communities for Equity v. Michigan High School Athletic Association*<sup>40</sup> (MHSAA) female athletes from Michigan High School initiated proceedings after their school had refused to allow additional sports, provided inferior practice and playing facilities, and required girls to play sports out of season (e.g., volleyball was played in the winter).<sup>41</sup> This avoided competition with the corresponding male teams for things such as equipment and funding. The effect of this meant reduced participation by having shorter seasons and preventing participation in competitions involving other states, thereby lowering their chances of being chosen for college level sports. Interestingly, while outlining the job of the court, it stated it did not have to prove:

the MHSAA intended to hurt girls and chose the scheduling system as a way to do that ... the Court’s task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated.<sup>42</sup>

In 2003, the three-part test of Title IX compliance was the subject of controversy and resistance, led by those representing college football, and male non-revenue (minor) producing sports. Within a framework of Title IX compliance, they instigated an allegation that such mechanisms amounted to a quota system and could subsequently injure male sport.<sup>43</sup> The strength in this argument stemmed from the platform given to it by President George W. Bush’s presidential campaign in 2000 when he stated that he did not support “a system of quota’s or strict proportionality that pits one group against another”<sup>44</sup> and rather, preferred a “reasonable approach to Title IX.”<sup>45</sup> In 2002, the National Wrestling Coaches Association, together with representatives from other minor male sports, sued the U.S. Educational Department arguing that the three-part test was “arbitrary,”

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<sup>39</sup> Staurowsky, *supra* note 1, at 104

<sup>40</sup> *Communities for Equity v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805 (W.D. Mich. 2001).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, at 856-857.

<sup>43</sup> Griffith, C. C. (2003). Comments on Title IX. *Marquette Sports Law Review*, 14(1), 57-63, at 60.

<sup>44</sup> Staurowsky, *supra* note 1, at 106.

<sup>45</sup> *Id.*

“capricious,” and the result of a flawed process of law-making.<sup>46</sup> In spite of the U.S. Department of Justice view that the case should be dismissed, the White House supported the creation of a Commission on Opportunity in Athletics by the Department of Education.<sup>47</sup> The criticism of the Commission was inarguably warranted, given that there was an absence of any civil rights experts, the composition was created in favor of the major powers in intercollegiate sports (two-thirds were associated with Division I institutions), and those who were chosen demonstrated a lack of knowledge of Title IX compliance and basic principles.<sup>48</sup> Unsurprisingly, the Department of Education issued a letter that affirmed the Title IX regulations and policy, while the U.S. District Court dismissed the case.<sup>49</sup>

It is somewhat difficult to outline the impact, controversy, and challenges the enactment of Title IX instigated. However, the aforementioned overview of a handful of case law and, in the main, the courts’ continued application and requirement of compliance with Title IX is illustrative of the accomplishment of the statutory purpose. However, simply outlining the legal challenges is not sufficient to truly understand the impact of Title IX and the catalytic effect in which it has had on the pursuit for equality within the world of sport. Thus, the next section will examine the USWNT’s equal pay lawsuit, which is arguably a result of a generation of athletes who have experienced the positives of Title IX equality within the educational sphere, who now seek to extend that equality into the realm of professional sport.

## The USWNT and Their Fight for Equality

The U.S. Women’s National Team is the most successful international soccer team in history. Of the 23 players on the USWNT that won the Women’s World Cup in 2019, 21 played NCAA Division I soccer.<sup>50</sup> These are women, or ‘Title IX babies,’<sup>51</sup> who have grown up in an education system that has emphasized equality of access, opportunity, and resource. Thus, these athletes are part of a cohort of women for whom opportunities to play and excel in sport have been present

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<sup>46</sup> *National Wrestling Coaches Association v. Department. of Education.*, 263 F. Supp. 2d 82, 85 (D.D.C. 2003) at 98.

<sup>47</sup> Staurowsky, *supra* note 1.

<sup>48</sup> *Id.*, at 106.

<sup>49</sup> *Id.*

<sup>50</sup> [NCAA.com](https://www.ncaa.com/news/soccer-women/article/2018-10-27/heres-where-every-member-uswnt-roster-played-college-soccer), S. S. (2019, July 08). Here’s where every member on the USWNT roster played college soccer. Retrieved from <https://www.ncaa.com/news/soccer-women/article/2018-10-27/heres-where-every-member-uswnt-roster-played-college-soccer>

<sup>51</sup> Schultz, J. (2018). *Womens sports: What everyone needs to know*. Oxford University Press.

since birth.<sup>52</sup> It must be acknowledged from the outset that the USWNT equal pay lawsuit is *not* based on the Title IX legislation, but upon Equal Pay legislation. However, it must also be acknowledged that had these athletes not experienced the gender equality in sport that Title IX affords, these same athletes may not have been so forthcoming in their pursuit of equality in professional sport.

The filing of the 2019 lawsuit was not the first time the USWNT has engaged in legal proceedings to secure improved working conditions and equality as professional athletes. In 2014, a number of national team players including Alex Morgan, Abby Wambach, and Heather O'Reilly (as well as those from other countries) initiated proceedings against both the Canadian Soccer Association and FIFA concerning the use of artificial pitches for the World Cup (the Men's World Cup is played on grass).<sup>53</sup> The case was eventually dropped, with FIFA citing Canadian weather conditions as justification,<sup>54</sup> yet the controversy surrounding the use of artificial pitches "marred this high-profile event before a ball had been kicked."<sup>55</sup>

In 2016, the USWNT's pursuit of equal pay and working conditions commenced through an Equal Employment Opportunity Commission (EEOC) complaint. This 'Equal Play, Equal Pay' campaign sought to bring these issues into the forefront of the media. Carli Lloyd published an article in *The New York Times* while other members of the team appeared on the Today Show and the Daily Show to discuss their fight for equal pay.<sup>56</sup> However, the complaint was to a certain extent administrative. Under U.S. federal law, employees must exhaust their potential remedies through the EEOC before seeking remedy through the courts.<sup>57</sup> During the investigation, in 2017, a year after the initial complaint and after a series of negotiations, the USWNT signed a five-year collective bargaining agreement (CBA) with the United States Soccer Federation (USSF) that guaranteed increased pay, base salaries for 20 squad members, and greater per diems on par with what their male counterparts received. However, after failed mediation

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<sup>52</sup> *Id.*

<sup>53</sup> Fletcher, J., & Yang, S. (2017, February 3). The USWNT lawsuit timeline. *Stars and Stripes FC*. Retrieved from <http://www.starsandstripesfc.com/2017/2/3/14498152/complete-update-uswnt-ussf-cba-negotiation-timeline>

<sup>54</sup> Kessel, A. (2015, May 30). Biggest Women's World Cup to kick off in Canada amid surface tension. *The Guardian*. Retrieved from <http://www.theguardian.com/football/2015/may/30/womens-world-cup-canada-artificial-pitches>

<sup>55</sup> Carrick, S. N. (2019). Athlete image rights and the potential tax consequences in the UK and Canada [Thesis]. Stirling University.

<sup>56</sup> Fletcher, *supra* note 53.

<sup>57</sup> McCann, M. (2019, March 8). How USWNT's CBA, EEOC impact new equal pay lawsuit. *Sports Illustrated*. Retrieved from <http://www.si.com/soccer/2019/03/08/uswnt-lawsuit-us-soccer-equal-pay-cba-eoec-gender-discrimination>

and exhaustion of EEOC remedies, the investigation ended on Feb. 5, 2019, and the USWNT were issued with a ‘right to sue’ letter, which signified that there were sufficient grounds to bring the issue to federal court.<sup>58</sup> The USWNT had 90 days to file a complaint to the court and did so on March 8, 2019, aptly known as International Women’s Day. Following further failed mediation in August of 2019, the USWNT was certified as a class in November of the same year.<sup>59</sup>

In February of 2020, both the USSF and the USWNT filed motions for a summary judgment. In civil cases such as the one at hand, either party may make a pre-trial motion for such a judgment. Under the Federal Rules of Civil Procedure, for a summary judgment, the party must show that there is “no genuine dispute as to any material fact” and that the party is “entitled to the judgment as a matter of law.”<sup>60</sup> The court may offer either a full summary judgment or a partial one, where some factual issues are ruled upon while judgment on others is reserved for court. The USWNT’s motion presented the work of an economic expert, who stated they could be owed \$66 million in damages.<sup>61</sup> The USSF’s motion caused particular controversy, suggesting that the men’s game required a higher level of skill, speed, and strength than the women’s game.<sup>62</sup> Following the backlash from such language, USSF president Carlos Corderio resigned. On May 1, 2020, the summary judgment in relation to the alleged violations was held in the District Court of California. The outcome and legal implications of this matter will be discussed in more detail; suffice to say, this case represents the most significant and high-profile legal challenge of gender discrimination in women’s sport to date.

## The USWNT Lawsuit

On March 8, 2019, the USWNT launched a class action suit against the USSF on the basis of two claims. This was heard on May 1, 2020, in California. The first claim asserted that the USSF had breached section 206 of the Equal Pay Act,

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<sup>58</sup> *Id.*

<sup>59</sup> Fletcher, *supra* note 53.

<sup>60</sup> Federal Rules of Civil Procedure (2018) Motion for Summary Judgment, Rule 56(a), [https://www.uscourts.gov/sites/default/files/cv\\_rules\\_eff\\_dec\\_1\\_2018\\_0.pdf](https://www.uscourts.gov/sites/default/files/cv_rules_eff_dec_1_2018_0.pdf)

<sup>61</sup> United States District Court, For the Central District of California Western Division, Case Number 2:19-cv-01717. (2020, February 4). Economic expert damages report of Finnie B. Cook, Ph.D. Retrieved from <https://reason.com/wp-content/uploads/2020/05/WNT-Damage-Calculations.pdf>

<sup>62</sup> United States District Court, For the Central District of California Western Division, Case Number 2:19-cv-01717, Defendant’s Memorandum of Points and Authorities in opposition to plaintiffs’ motion for partial summary judgment (2020, March 30). Retrieved from <https://assets.documentcloud.org/documents/6807270/USSF-Arguments.pdf>

which prohibits discrimination on the basis of gender. The second claim was that the USSF had breached the Civil Rights Act (1964), specifically Title VII, which prohibits discrimination during employment on the basis of sex.<sup>63</sup>

Before assessing the outcome of these claims, it is useful to broadly outline the women's and men's (USMNT) national teams' CBAs. The 'current' CBA for the USMNT was agreed to on Nov. 20, 2011, and expired on Dec. 31, 2018 (although the USMNT has continued to be compensated on the basis of this agreement).<sup>64</sup> The agreement is founded upon the 'pay-to-play' principle. Thus, players are only compensated when they attend training camps or make the team roster, while the USSF is under no obligation to schedule matches or enter teams in particular tournaments.<sup>65</sup> Players receive bonuses based upon performance. The highest bonuses are available in the World Cup, where qualification sees the player pool receive \$2.5 million plus an additional \$68,750 bonus for each rostered player.<sup>66</sup> A semifinal appearance would earn the player pool over \$5 million, while making the final would see this increase to more than \$9 million.<sup>67</sup>

In comparison, the USWNT's CBA, valid from the Jan. 1, 2017, until Dec. 31, 2021, is not based upon this 'pay-to-play' model. Rather, 20 contracted athletes earn a base salary of \$100,000 and an additional salary of between \$62,000–67,000 for playing in the National Women's Soccer League (NWSL).<sup>68</sup> The rejection of the men's model is primarily due to the precarity of their occupation, which makes a guaranteed salary a necessity—women do not have the same earning power as men in club soccer. To put this into context, male soccer player Christian Pulisic earns a reported \$200,000 per week playing in the English Premier League for Chelsea FC,<sup>69</sup> while many of the USWNT players do not make that in a year and must supplement their soccer income with jobs elsewhere. That said, it must be noted that the current CBA was agreed to by both parties. The USWNT also receives performance-related bonuses. Like the USMNT, the highest of such is in relation to the World Cup. The USWNT receive a qualification bonus of \$37,500 and the same sum for appearing on the roster.

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<sup>63</sup> Civil Rights Act (1964), s701(e).

<sup>64</sup> *Alex Morgan et al v. United States Soccer Federation, Inc* (2020) Case No. 2:19-cv-01717-RGK-AGR, at 2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*, at 3

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, at 13.

<sup>69</sup> Mojeed, O. (2020, July 5). Christian Pulisic weekly salary, net worth. *Futball News*. Retrieved from <https://futballnews.com/christian-pulisic-weekly-wages-net-worth/>

A gold medal brings \$110,000 per player, silver \$50,000, and bronze \$25,000.<sup>70</sup> These figures are significantly lower to what the men's team receives, and this is further exemplified by the fact that FIFA paid the winners of the men's World Cup \$38 million in 2018 and the women's winners \$4 million in 2019. The provisions for health insurance, maternity pay, and a good faith clause to schedule a minimum number of games<sup>71</sup> only serve to reinforce the argument that women athletes require these guarantees because the women's game is not as well supported as the men, who have ample opportunities to play and earn significantly higher salaries, which lessen the need for such benefits. On the other hand, such benefits are benefits that their male counterparts do not receive, which should also be acknowledged.

## The Equal Pay Act Claim

The Equal Pay Act (EPA) represents the biggest hurdle for the USWNT—a hurdle they have yet to overcome. For a successful claim under the EPA, the plaintiff must establish that they performed equal work, under similar working conditions, and that the USMNT was paid more.<sup>72</sup> The latter was addressed first. The USWNT ascertained that it was paid less on the basis that the USWNT CBA provides lower bonuses for friendlies, World Cup appearances, and other tournaments, and enhanced this argument by illustrating what the players would have received should they have been compensated under the same CBA as the USMNT, even when fringe benefits such as health insurance were included.<sup>73</sup> The USSF argument focused on total compensation paid to players under their respective CBAs. By assessing total compensation paid during the contested period between 2015 and 2019, the USWNT earned \$220,747 per game while the USMNT earned \$212,639 per game.<sup>74</sup> This argument is strengthened by the fact that U.S. employment law defines wages as:

all forms of compensation ... and whether called wages, salary, profit sharing, expense account, monthly minimum, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name.<sup>75</sup>

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<sup>70</sup> *Alex Morgan, supra* note 64, at 13.

<sup>71</sup> *Id.*, at 14.

<sup>72</sup> Equal Pay Act. (1963), s206(d)(1).

<sup>73</sup> *Alex Morgan, supra* note 64, at 16.

<sup>74</sup> *Id.*

<sup>75</sup> Electronic Code of Civil Regulations, Regulations Relating to Labor, The Equal Pay Act. (1998, July 1). Meaning of wages (Chapter 29, s1620.10). Retrieved from <https://www.govinfo.gov/content/pkg/CFR-1998-title29-vol4/pdf/CFR-1998-title29-vol4-sec1620-10.pdf>

Wages also include fringe benefits such as “medical, hospital, life insurance and retirement benefits.”<sup>76</sup> However, at the class certification stage, the court had ruled:

it could not conclude that no discrimination had occurred solely on the fact that the WNT players received more compensation because to do so would lead to an absurd result where an employer who pays a woman \$10 per hour and a man \$20 per hour would not violate the EPA ... as long as the women negated the disparity by working twice as many hours.<sup>77</sup>

This point is pivotal: *The USWNT earned more because they worked more and won more*. However, since the class ruling, the court held the plaintiffs had sufficient time to prove the aforementioned point. At the summary judgment, the evidence presented did not do so. During class period, the USWNT played 111 games and made \$24.5 million, \$220,747 per game. The USMNT played 87 games and made \$18.5 million, \$212,639 per game.<sup>78</sup> Thus, the downfall of the EPA claim was based upon the reality that during the class period in question, the USWNT earned more than the USMNT and a successful claim requires the plaintiff to prove they earned less than their male counterparts. This downfall is rooted in the differing CBAs and the success of the USWNT. It is a legitimate argument that if the USWNT was not as successful, thereby lowering its win bonus total, a successful EPA claim may well have been possible. However, the ‘takeaway’ here is that in law, there was no breach of the EPA, the consequences and solutions to which will be discussed in Part II of this article.

## The Title VII Claim

The second part of the USWNT claim provided more success. Title VII prohibits discrimination in employment on the basis of sex (among others).<sup>79</sup> The USWNT claim was based upon unequal working conditions in relation to field surfaces and travel conditions.<sup>80</sup> Under Title VII, the burden of proof falls upon the plaintiff. If this burden is proven, then it transfers to the defendant to provide a legitimate, non-discriminatory reason for the difference in working conditions.<sup>81</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Alex Morgan, supra* note 64, at 17.

<sup>78</sup> *Id.*

<sup>79</sup> Civil Rights Act (1964), s701(e). Other characteristics include race and religion.

<sup>80</sup> *Alex Morgan, supra* note 64, at 22.

<sup>81</sup> *Id.*, at 25-26.

In the case of field surfaces, the USWNT contended that the players were made to compete on inferior surfaces (artificial turf) more often than their male counterparts who had temporary grass installed on a more regular basis.<sup>82</sup> From 2015–2019, there were two periods on which the USWNT played more frequently on turf. The first was after the 2015 World Cup during the Victory Tour, where the USWNT played seven of 10 matches on turf.<sup>83</sup> The USSF provided the defence that the rationale for this was to play games across various cities, the large number of games to be played in a short period of time, and the preference to use venues with grass fields in preparation for the 2016 Olympics.<sup>84</sup> The second period was for three friendlies between July and October 2017. The reason provided for the turf on these occasions was that the USSF did not anticipate generating enough revenue to justify the cost of installing temporary grass, nor was it necessary to secure opponents.<sup>85</sup> These were both held to be legitimate and non-discriminatory reasons.

In relation to charter flights, the USWNT contended that the USMNT was provided with charter flights more frequently and more money was spent on airfare and hotels, despite the fact that the USWNT played more.<sup>86</sup> From 2015–2020, the USSF spent \$9 million on flights for the USMNT and \$5 million for the USWNT. On this basis, the court ruled the USWNT had established a prima facie case of discrimination.<sup>87</sup> Thus, the burden of proof shifted to the USSF to provide a legitimate, non-discriminatory reason. Various reasons were put forward, the most prominent being that charter flights were used more often for the USMNT to give the struggling side a competitive advantage. This argument is perhaps the ultimate example of the price of success the USWNT was paying for its performances. The struggling USMNT's performances were used as an excuse for the discriminatory treatment, despite the USWNT's unprecedented success. This argument was described as “weak” and “implausible”<sup>88</sup> and due to the evidence provided by the plaintiff, was sufficient to raise a genuine dispute. In April 2021, both parties came to a settlement on these issues, which guaranteed the women's team equal working conditions.<sup>89</sup>

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<sup>82</sup> *Id.*, at 25.

<sup>83</sup> *Id.*, at 26.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, at 29.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, at 31.

<sup>89</sup> Carlisle, J. (2021, April 12). USWNT granted working conditions settlement. [ESPN.com](https://www.espn.com). Retrieved July 22, 2021, from <https://www.espn.co.uk/football/united-states-usaw/sto.y/4358330/judge-grants-uswnt-unequal-working-conditions-settlement>



It has been claimed that the USSF v. USWNT dispute “serves as a cautionary tale for future CBAs and contract negotiations within the labor context.”<sup>90</sup> It has also been contended that the dispute serves as a cautionary tale in a different way—to the patriarchal structures inherent in sport.<sup>91</sup> Women will only continue to further assert that their worth within elite sports cultures is valued. While the next step in their battle of equal pay remains to be seen, the impact of their battle for equality can be seen across the globe.

## Global Equal Pay Disputes

The USWNT Equal Pay debate was considered a landmark case for women’s soccer, and the issue of gender equal pay is being rectified across a variety of contexts. The 2019 FIFA Women’s Football Convention, held before the 2019 Women’s World Cup, was convened to discuss the key pillars of the FIFA Women’s Football Strategy. One pillar was to establish gender pay equity.<sup>92</sup> However, the conversation was very much started by the USWNT, since it first made a call for action in 2016. At this time, the environment for women in elite level soccer was less than satisfactory. In 2017, the International Federation of Professional Footballers (FIFPRO) reported that written and detailed contracts were rare, and players had concerns over childcare, economic remuneration, contract length, and post-career playing options. Women soccer players were stated to rely heavily on their national team income, as 49.5% of players are not remunerated by their clubs.<sup>93</sup> For those that are salaried, 60% received less than \$600 per month.<sup>94</sup> Since then, however, there have been multiple challenges to the gender pay gap in international women’s soccer.

In 2017, Finland’s Ombudsman for Equality investigated the issue of unequal pay at the national team level but decided that the pay discrepancy was not a breach of the national Equality Act.<sup>95</sup> In June of 2017, the Scotland women’s team demanded equal pay for equal work, going on strike in order to improve wages and work conditions from the Scottish Football Association. It was reported

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<sup>90</sup> Hutcherson, D. (2019). Striker no striking: U.S. Soccer Federation Inc. v. U.S. Women’s National Soccer Team Players Ass’n: A clearance in the courtroom. *Sports Lawyers Journal*, 26, 109-140.

<sup>91</sup> Culvin et al, forthcoming.

<sup>92</sup> FIFA. (n.d.). Women’s football strategy. Retrieved February 25, 2021, from <https://resources.fifa.com/image/upload/women-s-football-strategy.pdf?cloudid=z7w21ghir8jb9tguvbcq>

<sup>93</sup> Hutcherson, *supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> Nicholson, P. (2017, September 25). Argentinean women refuse to play as AFA funding barely covers expenses. *Inside World Football*. Retrieved from <http://www.insideworldfootball.com/2017/09/25/argentinean-women-refuse-play-afa-funding-barely-covers-expenses/>

that they won some concessions, but not equality.<sup>96</sup> In September of 2017, the Argentinian women's national team was reported to be on strike, citing a lack of payment and basic resources to train and play properly.<sup>97</sup> In the same month, it was announced that the Danish women's national team was in dispute with Denmark's football association (DBU) over unequal pay, having reportedly been in negotiations since November of 2016.<sup>98</sup> The players went on strike, resulting in a friendly and a World Cup qualifier being cancelled. The Danish men's team offered the women's team 500,000 DKK (approximately £60,000), an offer that was declined by the Danish FA as the dispute persisted<sup>99</sup> In October, a 'partial agreement' was announced that enabled matches to resume as the players and the DBU worked out a more permanent solution,<sup>100</sup> with a four-year CBA later agreed upon by the parties.<sup>101</sup> Simultaneously, the Norwegian FA declared that men and women were to receive the same pay for representing Norway, spurred in part by a donation of commercial income by the men's team,<sup>102</sup> the first national federation to do so.

In 2018, more disputes emerged across the globe. In May, the New Zealand FA and the New Zealand Professional Footballers Association agreed on equality and parity for their senior men's and women's teams. This involved "pay parity, equal prize money, equal rights for image use and, most notably, parity across travel while representing New Zealand."<sup>103</sup> More countries followed suit in 2019, a year that is widely perceived a landmark year for women's soccer following the high-profile success of the 2019 FIFA Women's World Cup. In June, the Dutch

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<sup>96</sup> Bell, A. (2019, June 7). Equal pay for equal work? The Scotland women's World Cup squad will be paid a fraction of male counterparts. *The Courier*. Retrieved from <https://www.thecourier.co.uk/fp/opinion/alex-bell/908848/alex-bell-equal-pay-for-equal-work-the-scotland-womens-world-cup-squad-will-be-paid-a-fraction-of-male-counterparts/>

<sup>97</sup> Nicholson, *supra* note 95.

<sup>98</sup> Denmark Women's World Cup qualifier in Sweden called off in pay dispute. (2017, October 18). *The Guardian*. Retrieved from <https://www.theguardian.com/football/2017/oct/18/denmark-womens-world-cup-qualifier-sweden-called-off-pay-dispute>

<sup>99</sup> Gwilliam, L. (2017, September 17). Denmark men's team offer wages to women after pay dispute. *BBC.com*. Retrieved from <https://www.bbc.com/sport/football/41300291>

<sup>100</sup> DW. (2017, October 20). 'Partial agreement' saves Danish Women's World Cup qualifier in Croatia. Retrieved from <https://www.dw.com/en/partial-agreement-saves-danish-womens-world-cup-qualifier-in-croatia/a-41048882>

<sup>101</sup> Ames, N. (2021, February 4). Pernille Harder: 'We weren't proud of striking but we had to make a change'. *The Guardian*. Retrieved from <https://www.theguardian.com/football/2021/feb/04/pernille-harder-denmark-chelsea-womens-super-league-euro-2022>

<sup>102</sup> Reuters. (2017, October 7). Norway FA agrees deal to pay male and female international footballers equally. *The Guardian*. Retrieved from <https://www.theguardian.com/football/2017/oct/07/norway-football-pay-male-female-internationals-equally>

<sup>103</sup> Equality for elite male and female footballers. (n.d.). Retrieved from <https://www.nzfootball.co.nz/newsarticle/62265>

FA (KNVB) announced that it would move toward alignment of pay for the women's and men's national teams over the next four years, reaching parity in 2023.<sup>104</sup> In September, the Finnish FA announced new player contracts, meaning that Finland's men's and women's national teams would receive the same pay,<sup>105</sup> the result of a long battle for equal pay by Finland's women. In November, the Australian women's national team, the Matildas, agreed to a deal with the Football Federation Australia that placed them on the same pay scale as the men's team. It was stated that players were to be valued equally, receiving the same cut of commercial revenue as well as parity in their training conditions and travel. However, prize money would continue to work on a percentage, which meant the men would still receive more.<sup>106</sup>

The trend continued in 2020. In England, the Football Association declared England's men's and women's teams have been paid equally in terms of match fees and match bonuses since the start of the year, estimated at £1,000 per game.<sup>107</sup> The Brazilian FA (CBF) announced that their women's national team had been paid the same as their men's team since March, in terms of prizes and daily rates.<sup>108</sup> In August, Sweden's Equality Ombudsman—the government agency promoting equal rights—ruled that the Swedish Football Association had not discriminated against the women's team by paying them lower wages than the men's team. In September, similar to Denmark, the Swedish men's national team decided to forego their wages for the remainder of the year to support the women's team in negotiating for equal pay.<sup>109</sup> In December, Nepal become the latest national soccer association to make a public announcement regarding pay equality for their men's and women's teams. The decision went into effect in January of 2021, a significant move for the women's team, which previously

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<sup>104</sup> KNVB Media. (2019, June 3). KNVB further raises compensation OranjeLeeuwinnen. Retrieved from <https://www.knvb.nl/nieuws/oranje/oranjeleeuwinnen/55997/knvb-trekt-vergoeding-en-oranjeleeuwinnen-verder-op>

<sup>105</sup> Nicholson, P. (2017, September 25). Argentinean women refuse to play as AFA funding barely covers expenses. *Inside World Football*. Retrieved from <http://www.insideworldfootball.com/2017/09/25/argentinean-women-refuse-play-afa-funding-barely-covers-expenses/>

<sup>106</sup> FFA, & PFA. (2019, November 6). Historic CBA to close football's gender pay gap. *Football Australia*. Retrieved from <https://www.footballaustralia.com.au/news/historic-cba-close-footballs-gender-pay-gap>

<sup>107</sup> England men and women paid same match fees since January. (2020, September 3). *BBC.com*. Retrieved from <https://www.bbc.com/sport/football/54016885>

<sup>108</sup> Glass, A. (2020, September 03). Brazil announces equal pay for women's and men's national teams. *Forbes*. Retrieved from <https://www.forbes.com/sites/alanaglass/2020/09/02/brazil-announces-equal-pay-for-womens-and-mens-national-teams/?sh=fa32b739084d>

<sup>109</sup> DW. (2020, April 9). Swedish men's football team forgoes pay to support women's team on pay equality: Retrieved from <https://www.dw.com/en/swedish-mens-football-team-forgoes-pay-to-support-womens-team-on-pay-equality/a-54822910>

earned less than 50% of the men’s salary.<sup>110</sup> It appears that the equal pay trend in international soccer will continue, although the extent to which these discussions will permeate across the whole soccer landscape are questionable. The 2020 FIFPRO women’s soccer report, titled ‘Raising Our Game,’ built on the 2017 research and highlighted women soccer players’ call to action: fair treatment, decent work, equal opportunities, and the right to viable career paths as professionals in the industry.<sup>111</sup> While pay conditions were improving for women in the game, FIFPRO reported that 3.6% of the 186 players who participated in the survey—women competing at the World Cup and playing at the top of the game—were not receiving any money to play. There is clearly some way to go.

From the preceding analysis, it is clear the inception of Title IX created an opportunity for female athletes to experience equality in sport within the educational sphere, and the USWNT is a product of that equality. As such, their desire for equality now goes beyond education, and demands equality, certainly in terms of pay, within the professional game. Part II of this article will examine the gender pay gap, as well as an opportunity to embark upon a fight for legislative reform.

## Part II.

### Closing the Gender Pay Gap: A Lesson from Iceland?

The gender pay gap in sport is arguably larger than that in other professions, with male athletes earning millions of dollars while many female athletes struggle to make a living out of sport, and often have to subsidize their income with secondary employment. For example, in 2019, the highest paid men’s soccer player, Lionel Messi, earned in excess of \$120 million, while the highest paid female soccer player, Alex Morgan, earned \$5.8 million.<sup>112</sup> Quite simply, there is “no other industry that has such a wage gap . . . Depending on the country context and sport, a man can be a billionaire and a woman [in the same discipline] cannot even get a minimum salary.”<sup>113</sup>

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<sup>110</sup> In landmark decision, women national football players to get same salary as men. (2020, December 11). Retrieved from <https://kathmandupost.com/football/2020/12/11/new-year-gift-women-national-football-players-to-get-same-salary-as-men>

<sup>111</sup> FIFPRO. (n.d.). ‘Raising our game’: Lifting up women’s professional football. Retrieved from <http://www.fifpro.org/en/industry/raising-our-game/raising-our-game-launched>

<sup>112</sup> Johnson, M. (n.d.). Equal pay for equal play: An analysis of the gender wage gap in professional sports. University of Saskatchewan. Retrieved July 22, 2021, from <https://law.usask.ca/create-justice/documents/meghan-johnson---equal-pay-for-equal-play.pdf>

<sup>113</sup> *Id.*

This article advocates that the most obvious argument, and perhaps also the most moral argument, for equal pay is rooted in employment legislation across the globe—‘Equal Pay for Equal Work.’ For example, in the United Kingdom, the Equality Act (2010) gives men and women the right to equal pay for equal work.<sup>114</sup> The idea is simple in nature: men and women should be paid the same for doing the same job, regardless of the profession. Opponents of equal pay in sport often present the ‘business model’ argument—that it is not the same work because men’s sport usually generates more income. As Syed argues, “Norwegian male footballers are effectively doing a different job. In economic terms, they are more productive, persuading more fans and TV viewers to watch them, and more companies to sponsor them.”<sup>115</sup> However, and perhaps unsurprisingly, this argument is nullified by the USWNT. In the 2015 World Cup, the women’s team generated a profit of over \$6 million, while their higher paid male counterparts generated a profit of \$2 million.<sup>116</sup> Likewise, the USWNT jersey is the best-selling jersey of all time on Nike.com.<sup>117</sup> If the business-model argument is the ‘way forward’ then the USWNT’s claim for equal pay is very much valid.

Equal pay in soccer, and sport generally, is clearly an issue that is here to stay. The preceding analysis shows that by offering athletes a ‘taste’ of equality in sport within the educational sphere through Title IX, these athletes now seek equality, not just for themselves, but for future generations of female athletes in the realm of professional sport. As Hope Solo put it, “we believe it’s a responsibility for women’s sport, specifically women’s soccer, to really do whatever it takes for equal pay and equal rights and to be treated with respect.”<sup>118</sup> As the aforementioned discussion related to global pay illustrates, the USWNT has started a conversation that certainly isn’t over. However, for the reasons outlined in the analysis of the equal pay lawsuit, it is clear that the USWNT will struggle in their fight for equal pay under the Equal Pay Act given there is no breach of the legislation. Thus, this article proposes that the USWNT should adopt an approach that fights for legislative reform, using Iceland’s 2018 Equal Pay legislation as an example of a fair, equitable, and robust system.

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<sup>114</sup> Equality Act (UK), 2010.

<sup>115</sup> Syed, M. (2017, October 10). Norway FA’s wage decision is opposite of gender equality. *The Times*. Retrieved, July 22, 2021, from <https://www.thetimes.co.uk/article/why-norways-fa-are-wrong-to-pay-women-same-as-men-7sq65xch3>

<sup>116</sup> Archer, A., & Prange, M. (2019). ‘Equal play, equal pay’: Moral grounds for equal pay in football. *Journal of the Philosophy of Sport*, 46(3), 416-436.

<sup>117</sup> Young, S. (2019, July 3). Women’s USA football shirt becomes Nike’s bestselling top. *Independent*. Retrieved July 22, 2021, from <https://www.independent.co.uk/life-style/fashion/womens-world-cup-2019-usa-soccer-shirt-bestseller-nike-buy-price-a8986481.html>

<sup>118</sup> Archer, *supra* note 116.

In 2018, Iceland took a major step forward in the fight for gender equality, enacting new legislation. Iceland, which has a population of around 350,000, is ranked number one in the world for gender equality.<sup>119</sup> Similar to the U.S., soccer is among its most popular sports in Iceland, alongside handball and basketball. Iceland's new equal pay act, 'Equal Pay Certification,' contains amendments to the 2008 Gender Equality Act and is aimed "to reduce gender-based pay discrimination and promote greater equality in wages between women and men, equality of economic standing which will result among other things, eventually, in more equal pension payments for women and men."<sup>120</sup> It is hoped that by 2022, Iceland will have eradicated the gender pay gap completely.<sup>121</sup>

The first notable point is that under Article 4, jobs are not to be designated gender specific, nor should there be a gender gap in positions of authority. It states:

employers and trade unions shall systematically work towards equalising the position of women and men in the labour market. Employers shall specifically work towards equalising the position of women and men within their companies or institutions and promote a classification of jobs that does not designate them as specifically women's or men's jobs. Special emphasis shall be placed on equalising the positions of women and men as regards managerial and influential positions.<sup>122</sup>

Also of importance is the fact that as per Article 6, "women, men and persons whose gender is registered as neutral in Registers Iceland shall be paid equal pay and enjoy equal terms of employment for the same jobs or jobs of equal value."<sup>123</sup> The Act goes further to state that employees should receive the same terms of employment for jobs of equal value, and allows workers to discuss these terms, including pay, openly with one another. As Perras explains, "this alone will help employees to more easily determine when they are being discriminated against. There will be more transparency in the pay process, and therefore, more accountability for companies that practice wage discrimination."<sup>124</sup>

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<sup>119</sup> Rubery, P. J. (2019, February 22). Is equal pay actually possible? Retrieved from <https://www.bbc.co.uk/news/business-47212342>

<sup>120</sup> Equal Pay Certification. (n.d.). Retrieved from <https://www.government.is/topics/human-rights-and-equality/equality/equal-pay-certification/>

<sup>121</sup> Perras, C. (2020). Moving towards equal pay for professional female athletes: What we can learn from equal pay legislation in Iceland. *Indiana International and Comp. Law Review*, 30(2), 319-348. Retrieved July 22, 2021, from <https://mckinneylaw.iu.edu/iiclr/pdf/vol30p319.pdf>

<sup>122</sup> Act on Equal Status and Equal Rights Irrespective of Gender, Article 4, Retrieved July 21, 2021, from <https://www.government.is/library/04-Legislation/Act%20on%20Equal%20Status%20and%20Equal%20Rights%20Irrespective%20of%20Gender.pdf>

<sup>123</sup> *Id.*

<sup>124</sup> Perras, *supra* note 121, at 340.

The new legislation also requires a systematic approach to compliance. Article 7 requires that companies with 25 or more employees, thus including most sports teams, obtain equal pay certification from the government or an approved agency. This process is rigorous and examines companies' internal policies, the way in which they classify and value jobs, and the objectivity of their pay structure.<sup>125</sup> This certification must be renewed every three years, ensuring the gender pay legislation is consistently applied and followed. This is perhaps in the most proactive section of the legislation, the burden is on the employer to ensure that they are paying genders equally, rather than requiring the employee to prove that they are being discriminated against, as the USWNT had to do. If a company fails to receive the required certification or is in violation of the legislation, the Centre for Gender Equality can impose per diem fines.<sup>126</sup> Likewise, there are no defenses to a breach of the new legislation, and companies must prove that any difference in wages is justified, otherwise discrimination is assumed.<sup>127</sup>

The aforementioned overview illustrates how proactive legislation can provide a vital piece of armory in the fight for equal pay, in spite of the fact that the legislation is not specific to sports. By means of example, the Icelandic male and female soccer teams have received equal pay since 2018.<sup>128</sup> As discussed previously, the downfall of the USWNT's lawsuit was that they could not satisfy the court that the EPA had been breached, primarily due to the CBA that they themselves had signed. It is unlikely that the fight for equal pay will succeed under the current legislation, so it is the proposal of the authors that the USWNT use the Icelandic model as a springboard in the push for legislative reform.

## Looking Back and Moving Forward

Title IX is inarguably one of the most important pieces of legislation in U.S. history. It guarantees equality within the educational sphere as a whole, not just within sport. As this article's analysis illustrates, the introduction of legislation caused significant controversy, and ensuring compliance has brought many legal challenges. Cases such as *Grove*, *Haffer*, and *Cohen* all serve to illustrate this very point. However, 50 years on from the inception of Title IX, the USWNT epitomizes its very meaning. The majority of those athletes are products of Title IX, or are rather 'Title IX babies' and have experienced equality within the college environment and now stand as the most successful national soccer side, male or

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<sup>125</sup> Act on Equal Status, *supra* note 122.

<sup>126</sup> *Id.*

<sup>127</sup> Perras, *supra* note 121, at 342.

<sup>128</sup> Equal bonuses for women's and men's national football teams. (2018, January 4). *Icelandic Review*. Retrieved from <https://www.icelandreview.com/news/equal-bonuses-womens-and-mens-national-football-teams/>

female, in history. In becoming these successful athletes and by experiencing the equality that Title IX affords, the USWNT now seeks equality beyond Title IX and education into the professional realms, specifically, in relation to equal pay. Had it not been for Title IX, these conversations and debates around equal pay may not be happening, or happening on such a global scale.

Although the USWNT's lawsuit guaranteed equal treatment in relation to working conditions, and this should be heralded as a success, their equal pay claim ultimately failed because in law, there was no breach of the EPA, primarily by virtue of their CBA. It must be acknowledged that these athletes ultimately agreed to this CBA and do enjoy benefits that their male counterparts do not receive (e.g., an annual salary and injury protection).

In order to continue the conversations and succeed in the pursuit of equal pay, it is arguable that the USWNT must now push for more substantive change, by way of legislative reform. Put simply, in absence of proving a breach of the EPA, the USWNT needs to adopt a different approach. In analyzing the Icelandic legislation, it is clear that there is scope and appetite for reducing the gender pay gap. By championing legislative reform, the USWNT has an opportunity to not only address the gender pay gap within sport, but across all professions. In doing so, that legislative reform has the potential to enjoy a similar impact on gender equality as Title IX has done in the U.S.