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# **TIME'S UP: ADDRESSING GENDER-BASED WAGE DISCRIMINATION IN PROFESSIONAL SPORTS**

*Nicole Zerunyan\**

Gender-based wage discrimination in professional sports is widespread. Female athletes, competing individually or as part of a team, are consistently paid substantially less than their male counterparts. To combat such discrimination and eliminate the gender pay gap, Congress passed the Equal Pay Act (“Act”) in 1963. While born of good intentions, the Act falls drastically short of its intended goal. Its restrictive language—specifically, its “same establishment” requirement—excludes separately owned teams. As most men’s and women’s professional sports teams are separately owned, their players are effectively barred from bringing wage-discrimination claims. This Note proposes two ways of addressing that issue: (1) eliminating the “same establishment” requirement or (2) adding a sports-specific provision treating separately owned teams as the same. After more than fifty years, it is time to finally close the pay gap. Time’s up!

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## I. INTRODUCTION

“No more silence. No more waiting. No more tolerance for discrimination, harassment or abuse.”<sup>1</sup> So reads the call to action at the heart of the Time’s Up movement—the Hollywood-led response to the “systemic inequality and injustice in the workplace.”<sup>2</sup> For centuries, women have struggled to achieve equality with men.<sup>3</sup> From being denied their fundamental right to vote<sup>4</sup> to being paid less than men for equal work,<sup>5</sup> women in the United States have been repeatedly marginalized.<sup>6</sup> Nonetheless, women have continually fought for equal treatment through both constitutional and legislative reforms such as the Nineteenth Amendment and the Equal Pay Act of 1963 (the “Equal Pay Act” or the “Act”).<sup>7</sup>

In the United States, the last decade proved monumental in this regard. Women can now serve in military combat positions; women now run “51 of the world’s top 1000 companies”; women currently hold twenty-six CEO positions at Standard & Poor’s 500 Index Companies; and, for the first time ever, a woman ran as a major political party’s presidential nominee.<sup>8</sup> While

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1. *Time’s Up Now*, TIME’S UP, <https://www.timesupnow.com/> [https://perma.cc/WWA7-NUY8].

2. *Id.*

3. Amy Aronson & Emma Watson, *Great Moments in the History of Gender Equality*, ESQUIRE (Mar. 18, 2016), <https://www.esquire.co.uk/culture/news/a9675/gender-equality-history-moments/> [https://perma.cc/L2M3-75KR].

4. *See Women’s Suffrage*, HIST. CHANNEL, <https://www.history.com/topics/womens-history/the-fight-for-womens-suffrage> [https://perma.cc/XF5C-QWAT].

5. *See* Charlotte Alter, *Here’s the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), <https://time.com/3774661/equal-pay-history/> [https://perma.cc/DN9E-YHA8].

6. *See Women’s Suffrage*, *supra* note 4; Alter, *supra* note 5 (discussing the historical events and atmosphere that gave rise to the fight for equal pay).

7. 29 U.S.C. § 206(d) (2018); *see Women’s Suffrage*, *supra* note 4; Alter, *supra* note 5 (discussing the historical events and atmosphere that gave rise to the fight for equal pay).

8. Amanda Duberman, *10 Ways Women’s Lives Have Changed for the Better Since 2005*, HUFFINGTON POST (May 5, 2015, 12:59 PM), [https://www.huffingtonpost.com/2015/05/05/10-ways-womens-lives-have-changed\\_n\\_7189216.html](https://www.huffingtonpost.com/2015/05/05/10-ways-womens-lives-have-changed_n_7189216.html) [https://perma.cc/X8ET-3PKC]; *Statistical Overview of Women in the Workforce*, CATALYST (Aug. 18, 2017), <https://www.catalyst.org/>

these statistics show a growing trend toward gender equality in the workforce, women continue to face systemic discrimination and institutional barriers to equal participation and equal pay.<sup>9</sup>

The gender pay gap is especially prevalent in the historically male-dominated industry of professional sports.<sup>10</sup> Wage discrimination among professional athletes is widespread, affecting female athletes competing individually or as part of a team.<sup>11</sup> In 2014, fifty-two National Basketball Association (NBA) players were each paid more individually than all of the Women's National Basketball Association (WNBA) players' salaries combined.<sup>12</sup> That same year, the Professional Golf Association (PGA) awarded its winner more than five times the amount awarded to the winner of the Ladies Professional Golf Association (LPGA) tour.<sup>13</sup> Tennis sensation Serena Williams earned a smaller prize for winning than her male peer competing in the same tournament.<sup>14</sup> And the United States Women's National Soccer Team (USWNT) received thirty-three million dollars less in

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knowledge/statistical-overview-women-workforce#footnote304hkxu80 [https://perma.cc/RUX4-2QK6].

9. See *Women's Rights*, ACLU, <https://www.aclu.org/issues/womens-rights> [https://perma.cc/TR2K-XGFX].

10. Elle Hunt, 'Vast' Gender Wage Gap Still Exists Within Billion-Dollar Sports Industry, *GUARDIAN* (Sept. 14, 2016, 9:05 PM), <https://www.theguardian.com/sport/2016/sep/15/vast-gender-wage-gap-still-exists-within-billion-dollar-sports-industry> [https://perma.cc/5GAG-L3SV].

11. Gabriella Levine, *Analysis: The Law and Legal Standing of U.S. Women's National Team EEOC Complaint, Explained*, *EXCELLE SPORTS* (Apr. 1, 2016), <https://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-team-eeoc-complaint/> [https://perma.cc/2YWV-6E8R].

12. John Walters, *Taking a Closer Look at the Gender Pay Gap in Sports*, *NEWSWEEK* (Apr. 1, 2016, 12:23 PM), <https://www.newsweek.com/womens-soccer-suit-underscores-sports-gender-pay-gap-443137> [https://perma.cc/3GAR-WVVC].

13. Andrew Brennan, *Which Sports Have the Largest and Smallest Pay Gaps?*, *FORBES* (May 5, 2016, 2:09 AM), <https://www.forbes.com/sites/andrewbrennan/2016/05/05/the-pay-discrimination-in-sports-we-wish-didnt-exist-will-only-dissipate-with-womens-leadership/#558aa66b7919> [https://perma.cc/98FF-MSZ8].

14. Ben Rothenberg, *Roger Federer, \$731,000; Serena Williams, \$495,000: The Pay Gap in Tennis*, *N.Y. TIMES* (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/sports/tennis/equal-pay-gender-gap-grand-slam-majors-wta-atp.html> [https://perma.cc/34X7-5WVH].

prize money for winning the World Cup than their male peers on the German National Team.<sup>15</sup>

Improving women's rights in the workplace continues to be a complicated issue,<sup>16</sup> and, despite the legislature's noble attempts, legislation addressing this issue continues to be fraught with loopholes.<sup>17</sup> The Equal Pay Act is one such example. Enacted by Congress in 1963, the Act seeks to address the vast pay discrepancies between men and women in the workplace.<sup>18</sup> When the Act was first signed into law, women were paid, on average, 58.9 cents for every dollar paid to men.<sup>19</sup> Although workplace conditions for women have since improved, the gender pay gap remains substantial.<sup>20</sup> In 2010, women were paid 77.4 cents for every dollar paid to men,<sup>21</sup> and by 2015, that number only rose to eighty cents on the dollar.<sup>22</sup> This twenty-percent pay gap means a woman loses \$10,470 in median earnings per year.<sup>23</sup> That adds up to \$418,800 over a forty-year career.<sup>24</sup> To close that gap, a woman would have to work ten more years than a man.<sup>25</sup>

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15. Walters, *supra* note 12.

16. *See Women's Rights, supra* note 9.

17. *Id.*

18. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

19. Abby Lane & Katherine Gallagher Robbins, *The Wage Gap Over Time*, NAT'L WOMEN'S CTR. (May 3, 2012), <https://nwlc.org/wage-gap-over-time/> [<https://perma.cc/DZ7X-SXXJ>].

20. *See id.*

21. *Id.*

22. *Women and the Lifetime Wage Gap: How Many Woman Years Does It Take to Equal 40 Man Years?*, NAT'L WOMEN'S LAW CTR. 1 (March 2017), <https://nwlc.org/wp-content/uploads/2017/03/Women-and-the-Lifetime-Wage-Gap-2017-1.pdf> [<https://perma.cc/7Q5M-WX8D>] [hereinafter *Women and the Lifetime Wage Gap*].

23. *Id.*

24. *Id.*

25. *Id.*

Although the Equal Pay Act seeks to eliminate the gender pay gap,<sup>26</sup> its narrow language hampers its ability to do so. The Act provides in pertinent part:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.<sup>27</sup>

By its language, therefore, the Act requires the pay-discrimination to occur in the same establishment for it to be actionable.<sup>28</sup> Yet, male and female professional athletic teams are generally owned by separate employers.<sup>29</sup> As a result, female athletes paid less than their male counterparts are frequently left with no legal recourse.<sup>30</sup>

This Note examines the current state of the Equal Pay Act and its effect on gender pay inequity in professional sports. Specifically, it addresses the Act's narrow language and how it hinders female professional athletes' ability to fight for equal pay. Part II explores the evolution of the pay gap from its first rise to saliency to the present day. Part III identifies the Act's elements and explores several legal defenses employers rely on in wage discrimination suits. Part III also examines a complaint filed by the USWNT, which highlights the systemic discrimination the Equal Pay Act enables. Finally, Part IV proposes two ways of fixing the Act's limiting language and its unintended effect on professional sports.

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26. See 29 U.S.C. § 206(d) (2018).

27. *Id.*

28. *Id.* (providing that an employer shall not discriminate against employees, based on their gender, in "such establishment"); see also Levine, *supra* note 11.

29. Levine, *supra* note 11.

30. *Id.*

## II. THE GENDER PAY GAP: THEN AND NOW

Congress enacted the Equal Pay Act in an effort to eliminate pay discrimination based on gender<sup>31</sup>—the so-called gender “pay gap.”<sup>32</sup> The pay gap has become a statistical indicator used to compare men’s and women’s wages.<sup>33</sup> Although the pay gap has narrowed since 1963, when the Act was first enacted, it still persists, and its effect on working women remains substantial.<sup>34</sup>

### A. *The Pay Gap Prior To 1963*

Gender-based wage discrimination has existed since well before the twentieth century.<sup>35</sup> Concern over it, however, was not a salient issue back then because the number of working women during the eighteenth and nineteenth centuries was low.<sup>36</sup> This changed during the twentieth century when war necessitated women’s entry into the workforce.<sup>37</sup> With so many men leaving their jobs to fight in World War I and World War II, employers were forced to hire women to fill their positions.<sup>38</sup> By 1945, women made up thirty-seven percent of the civilian workforce—up from twenty-four

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31. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

32. Rosa Cho & Abigail Kramer, *Everything You Need to Know About the Equal Pay Act*, INT’L CTR. FOR RES. ON WOMEN 1, 5 (Feb. 23, 2018, 12:56 PM), <https://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf> [<https://perma.cc/467T-ZZEY>] (discussing the various means and methods of calculating the gender pay gap).

33. Elise Gould et al., *What Is the Gender Pay Gap and Is It Real?*, ECON. POLICY INST. (Oct. 20, 2016), <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/> [<https://perma.cc/VQR5-V3UV>].

34. *The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap*, NAT’L COMM. ON PAY EQUITY, <https://www.pay-equity.org/info-time.html> [<https://perma.cc/FU9Z-7EHB>].

35. *See Equal Pay Act of 1963*, NAT’L PARK SERV., <https://www.nps.gov/articles/equal-pay-act.htm> [<https://perma.cc/4VG4-UF92>].

36. *Id.*

37. Charlotte Alter, *Here’s the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), <https://time.com/3774661/equal-pay-history/> [<https://perma.cc/DN9E-YHA8>] (discussing the historical events and atmosphere that gave rise to the fight for equal pay).

38. *See id.*

percent prior to the start of the wars.<sup>39</sup> Because women were now doing the work men had ordinarily done, the National War Labor Board, as well as male workers and unions, began advocating for equal pay for men and women.<sup>40</sup> Their advocacy, however, was not entirely altruistic; many feared that this growing source of cheap labor—women—would lead employers to reduce men's wages or replace men entirely.<sup>41</sup> To protect men's salaries and jobs, it, therefore, became necessary that women be paid the same.<sup>42</sup>

After the wars ended, however, the demand for equal pay tapered.<sup>43</sup> As men reentered the workforce, women were expected to resume their role in the home.<sup>44</sup> Despite zealous advocacy by women's groups, legislation introduced in 1945—to achieve equal pay for women engaged in work of “comparable quality and quantity”—failed.<sup>45</sup> In the 1950s, several similar bills met the same fate,<sup>46</sup> and by the early 1960s, women were still being paid more than a third less than their male counterparts.<sup>47</sup>

### B. *The Pay Gap Today*

National legislation finally succeeded in 1963, when President John F. Kennedy signed the Equal Pay Act into law.<sup>48</sup> Although the law finally recognized women's basic right to equal pay for substantially equal work, the problem did not disappear.<sup>49</sup> Instead, following the Act's passage, the

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39. *Equal Pay Act of 1963*, *supra* note 35.

40. Alter, *supra* note 37.

41. *Id.*; *Equal Pay Act of 1963*, *supra* note 35.

42. Alter, *supra* note 37; *Equal Pay Act of 1963*, *supra* note 35.

43. Alter, *supra* note 37.

44. *Id.*

45. *Equal Pay Act of 1963*, *supra* note 35.

46. *Id.*

47. *Id.*

48. Alter, *supra* note 37.

49. Nat'l Equal Pay Task Force, *Fifty Years after the Equal Pay Act: Assessing the Past, Taking Stock of the Future*, OBAMA WHITE HOUSE ARCHIVES 6 (June 2013), <https://www.whitehouse.gov/the-press-office/2013/06/13/equal-pay-act-50th-anniversary-report>

gender pay gap began to slowly narrow.<sup>50</sup> When the Act was first signed into law, women working full-time were paid fifty-nine cents on average for every dollar paid to men.<sup>51</sup> In the past decade, that number reached seventy-seven cents per dollar.<sup>52</sup> Based on this average increase of less than four cents per decade, women will have to wait until the year 2059 to reach pay equality with men.<sup>53</sup>

### C. *The Pay Gap in Professional Sports*

Throughout history, female athletes have had more limited professional opportunities than their male counterparts.<sup>54</sup> This gender inequality has been most prevalent in the realm of athlete pay, existing throughout major professional sports, including golf, basketball, soccer, and tennis.<sup>55</sup> In 2014, the PGA awarded \$340 million in prize money to its male athletes.<sup>56</sup> The LPGA, its female counterpart, awarded about five times less to its female athletes in 2015.<sup>57</sup> At each of the four PGA majors in 2015, the purse was \$10 million, and the winner got a check for \$1.8 million.<sup>58</sup> During the U.S. Women's Open that same year, the top purse for an LPGA major was only

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obamawhitehouse.archives.gov/sites/default/files/equalpay/equal\_pay\_task\_force\_progress\_report\_june\_2013\_new.pdf [https://perma.cc/J55G-B9Z5].

50. *The Wage Gap Over Time*, *supra* note 34.

51. *Id.*

52. Cho & Kramer, *supra* note 32.

53. *Id.*; *The Wage Gap Over Time*, *supra* note 34.

54. Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 210 (1993).

55. John Walters, *Taking a Closer Look at the Gender Pay Gap in Sports*, NEWSWEEK (Apr. 1, 2016, 12:23 PM), <https://www.newsweek.com/womens-soccer-suit-underscores-sports-gender-pay-gap-443137> [https://perma.cc/3GAR-WVVC].

56. Andrew Brennan, *Which Sports Have the Largest and Smallest Pay Gaps?*, FORBES (May 5, 2016, 2:09 AM), <https://www.forbes.com/sites/andrewbrennan/2016/05/05/the-pay-discrimination-in-sports-we-wish-didnt-exist-will-only-dissipate-with-womens-leadership/#558aa66b7919> [https://perma.cc/98FF-MSZ8].

57. *Id.*

58. Walters, *supra* note 55.

\$4.5 million, and the winner took home just \$810,000.<sup>59</sup> The 2015 PGA Tour's leader in prize money pocketed \$12 million.<sup>60</sup> The 2015 LPGA Tour's leader in prize money took home just \$2.8 million.<sup>61</sup> During that year, the PGA Tour's twenty-fifth ranked player earned more than the LPGA Tour's leader and about five times more than the LPGA Tour's twenty-fifth ranked player.<sup>62</sup>

Basketball is similarly unequal.<sup>63</sup> In 2015, the minimum salary in the NBA was \$525,000, while the minimum salary in the WNBA was just \$38,000.<sup>64</sup> On average, the lowest-paid NBA player makes roughly five times the salary of the highest-paid WNBA player.<sup>65</sup> As a result, unlike NBA players, most WNBA players are forced to play year-round, including overseas, just to make a living.<sup>66</sup>

The same is true with Soccer.<sup>67</sup> In 2014, the German Men's National Team received \$35 million after winning the Men's World Cup.<sup>68</sup> The next year, the USWNT—the winner of the Women's World Cup—received just \$2 million in prize money.<sup>69</sup> Even the United States Men's National Team (USMNT), which finished eleventh place in 2014, pocketed nearly five times more than their championship-winning female counterparts did the next

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59. Brennan, *supra* note 56.

60. Walters, *supra* note 55.

61. *Id.*

62. *Id.*

63. Brennan, *supra* note 56.

64. *Id.*

65. *Id.*

66. See Barbara Barker, *For WNBA Players, the Real Money Is Overseas*, NEWSDAY, <https://www.newsday.com/sports/columnists/barbara-barker/wnba-players-are-underpaid-shouldn-t-have-to-play-overseas-1.12639553> [<https://perma.cc/E8AD-K2PC>].

67. Brennan, *supra* note 56.

68. *Id.*

69. *Id.*

year.<sup>70</sup> Likewise, every men's team eliminated in the 2014 World Cup's first round received four times the amount awarded to the USWNT for winning its respective tournament.<sup>71</sup> Moreover, the average Major League Soccer (MLS) salary for men is \$326,129.23,<sup>72</sup> with the minimum being \$53,000.<sup>73</sup> In contrast, the *maximum* National Women's Soccer League (NWSL) salary is just \$37,800, with the minimum being \$6,842.<sup>74</sup> For context, the poverty threshold in 2018 for a single individual in the United States is \$12,140—more than double the minimum salary in the NWSL.<sup>75</sup>

Tennis, on the other hand, is somewhat more equitable.<sup>76</sup> Prize money is equal for men and women at all four grand-slam events: the Australian Open, the French Open, the U.S. Open, and Wimbledon.<sup>77</sup> But the equity stops there.<sup>78</sup> The male winner of the Western & Southern Open, Roger Federer, earned \$731,000; the female winner, longtime women's tennis leader Serena Williams, left with just \$495,000.<sup>79</sup> As for salaries, female

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70. *Id.*

71. *Id.*

72. Jeff Carlisle, *MLS Pumping Money into Salaries Causes Ripple Effect Throughout League*, ESPN (Apr. 25, 2017), <https://www.espn.com/soccer/major-league-soccer/19/blog/post/3112526/major-league-soccer-pumping-money-into-salaries-causes-ripple-effect-throughout-league> [https://perma.cc/D94P-LT3R].

73. Laura Wagner, *Here Are the 2017 Salaries for MLS Players*, DEADSPIN (Apr. 25, 2017, 7:39 PM), <https://deadspin.com/here-are-the-2017-salaries-for-mls-players-1794648467> [https://perma.cc/DAY4-N3CB].

74. Jeff Kassouf, *NBC SportsWorld: NWSL Salaries and Chasing Dreams*, EQUALIZER (Apr. 13, 2015), <https://equalizersoccer.com/2015/04/13/nwsl-salaries-minimum-maximum-retirements/> [https://perma.cc/59EW-PJNZ].

75. Poverty Guidelines, U.S. DEP'T OF HEALTH & HUMAN SERVS, <https://aspe.hhs.gov/poverty-guidelines> [https://perma.cc/JL8N-EX69].

76. Walters, *supra* note 55.

77. *Id.*

78. *Id.*

79. Ben Rothenberg, *Roger Federer, \$731,000; Serena Williams, \$495,000: The Pay Gap in Tennis*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/sports/tennis/equal-pay-gender-gap-grand-slam-majors-wta-atp.html> [https://perma.cc/34X7-5WVH].

tennis players are paid just eighty cents for each dollar paid to their male counterparts.<sup>80</sup>

*D. Typical Explanations for the Pay Gap in Professional Sports*

Efforts to eliminate the gender pay gap in professional sports have proven largely unsuccessful.<sup>81</sup> Scholarly articles often attribute the wage disparity to the commercial nature of sports and its attendant media rights.<sup>82</sup> Media coverage of female sports is extremely limited.<sup>83</sup> In 2014, for example, only about four percent of sports media coverage focused on female sports.<sup>84</sup> Media companies also contribute to the gender pay gap by paying different leagues strikingly different amounts for their broadcasting rights.<sup>85</sup> For example, ESPN and Turner Sports pay the NBA a combined \$2.6 billion a year to televise its basketball games; ESPN pays the WNBA just \$12 million for those same rights.<sup>86</sup>

Limited support and attendance of female sporting events exacerbate the problem.<sup>87</sup> Again, some of this can be attributed to the media's treatment of female sports. When it comes to scheduling, media outlets do not prioritize female sports.<sup>88</sup> This limited coverage results in limited

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80. *Id.*

81. Valeria Perasso, *100 Women: Is the Gender Pay Gap in Sport Really Closing?*, BBC NEWS (Oct. 23, 2017), <https://www.bbc.com/news/world-41685042> [<https://perma.cc/JQZ8-E28K>].

82. *See Id.*

83. *See* Frank Deford, *Why Women's Sports Get So Little Attention*, NPR (Sept. 30, 2015, 5:05 AM), <https://www.npr.org/2015/09/30/444523020/why-womens-sports-gets-so-little-attention> [<https://perma.cc/7JVH-7LXC>].

84. Perasso, *supra* note 81.

85. Brennan, *supra* note 56.

86. *Id.*

87. Shira Springer, *Why Do Fans Ignore Women's Pro Sports?*, BOS. GLOBE (Sept. 24, 2014), <https://www.bostonglobe.com/magazine/2014/09/23/why-fans-ignore-women-pro-sports/A37CAUWxMvOcvF5xkkAe1J/story.html> [<https://archive.is/CjhHm>].

88. Andrew Good, *When It Comes to Women in Sports, TV News Tunes Out*, USC NEWS (June 5, 2015), <https://news.usc.edu/82382/when-it-comes-to-women-in-sports-tv-news-tunes-out/> [<https://perma.cc/PY5Y-SMQW>].

viewership.<sup>89</sup> In turn, the media uses this limited viewership as an excuse to continue de-emphasizing female sports.<sup>90</sup> So goes the vicious cycle.

Some try to justify the gender pay gap by contending that men deserve higher pay because of their superior athleticism.<sup>91</sup> It is generally undisputed that biological differences between men and women affect their athletic performance.<sup>92</sup> On average, men are faster and stronger than women.<sup>93</sup> Usain Bolt, the fastest male sprinter in the world, completed a 100-meter dash in 9.58 seconds; the world's fastest female sprinter, Florence Griffith-Joyner, is almost a full second behind Bolt, at 10.49 seconds.<sup>94</sup> Similarly, the average driver-swing for men on the PGA Tour is 113 miles per hour; the average women's swing is ninety-five miles per hour.<sup>95</sup> Yet, women tend to excel in other regards.<sup>96</sup> For example, averages across the PGA and LPGA Tours show that women's driving accuracy is greater than men's.<sup>97</sup> And regardless of how the two genders match up, women's performances in these games and events is way above the capabilities of any "weekend warrior" of

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89. Perasso, *supra* note 81.

90. *Id.*

91. Miguel Morales, *Tennis' Gender Pay Gap Problem Looms on the Sidelines*, FORBES (Feb. 21, 2014, 10:59 AM), <https://www.forbes.com/sites/miguelmorales/2014/02/21/tennis-gender-pay-gap-problem-looms-on-the-sidelines/> [<https://archive.today/M4vY1>]; Jeanette Kwakye, *Female Sport Stars Should Earn the Same as Their Male Counterparts*, GUARDIAN (Oct. 31, 2014, 3:00 AM), <https://www.theguardian.com/commentisfree/2014/oct/31/female-sport-stars-male-prize-money> [<https://perma.cc/NU3W-UTTH>].

92. Anya Alvarez, *Men Are Stronger than Women. But That Doesn't Make Them Better Athletes*, GUARDIAN (June 6, 2017, 5:00 AM), <https://www.theguardian.com/sport/2017/jun/06/male-female-athlete-comparison-golf> [<https://perma.cc/NLJ2-PX2J>].

93. *Id.*

94. Charles Bethea, *How Fast Would Usain Bolt Run the Mile?*, NEW YORKER (Aug. 1, 2016), <https://www.newyorker.com/news/sporting-scene/how-fast-would-usain-bolt-run-the-mile> [<https://perma.cc/YLV3-9PTR>].

95. *Id.*

96. *See* Alvarez, *supra* note 92.

97. *Id.*

either gender.<sup>98</sup> So, while some biological differences between the sexes may exist, this hardly justifies such a wide pay disparity.

Another explanation proffered for the gender pay gap in sports is that women's games are less exciting and, therefore, generate less revenue than men's games.<sup>99</sup> According to the Wall Street Journal, the men's 2014 World Cup generated \$529 million in sponsor revenue; the women's 2015 World Cup brought in just \$17 million.<sup>100</sup> This disparity is further exacerbated by the unequal distribution of corporate sponsorships.<sup>101</sup> Male athletes receive significantly more sponsorships and advertising dollars than their female counterparts.<sup>102</sup> But this is not a one-way street.<sup>103</sup> Corporate sponsors do not just invest in popular athletes or sports—they help create them.<sup>104</sup> Thus, by not investing in female athletes, corporate sponsors are *choosing* to not promote female sports.<sup>105</sup>

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98. *Id.*

99. Gabriella Levine, *Analysis: The Law and Legal Standing of U.S. Women's National Team EEOC Complaint, Explained*, EXCELLE SPORTS (Apr. 1, 2016), <https://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-team-eeoc-complaint/> [<https://perma.cc/2YWV-6E8R>].

100. Mike Shields, *Women's World Cup Draws Strong Advertiser Demand for Fox Sports*, WALL ST. JOURNAL (June 5, 2015, 1:29 PM), <https://blogs.wsj.com/cmo/2015/06/05/womens-world-cup-draws-strong-advertiser-demand-for-fox-sports/> [<https://perma.cc/JHW7-4FFR>].

101. Janet S. Fink, *Sponsorship for Women's Sports Presents Untapped Opportunity*, SPORTS BUS. JOURNAL (Nov. 2, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Opinion/Changing-the-Game-Janet-Fink.aspx> [<https://perma.cc/5Q2T-9A6Y>].

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

### III. THE EQUAL PAY ACT: THE PROMISE AND THE PROBLEM

#### A. *The Goals of The Equal Pay Act*

By the end of World War II, women made up a quarter of the workforce in the United States.<sup>106</sup> Yet, despite various movements by the labor unions, women continued to be paid far less than men for the same jobs.<sup>107</sup> Attention to this social justice issue grew in the early 1960s when President John F. Kennedy was in office.<sup>108</sup> In 1963, with the support of prominent women such as former First Lady Eleanor Roosevelt and Head of the Women's Bureau of the Department of Labor Esther Peterson, Congress passed the Equal Pay Act.<sup>109</sup>

The Equal Pay Act was “among the first federal laws in American history aimed at reducing gender discrimination.”<sup>110</sup> Its purpose was to remedy “a serious and endemic problem of employment discrimination,”<sup>111</sup> and assure that “those who perform tasks which are determined to be equal shall be paid equal wages.”<sup>112</sup> Although the Act faced heavy opposition from powerful business groups such as the Chamber of Commerce and the Retail Merchants Association, on June 10, 1963, President Kennedy signed it into law.<sup>113</sup> At the signing, President Kennedy called attention to the “unconscionable practice of paying female employees less wages than male

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106. See *Equal Pay Act*, HIST. CHANNEL, <https://www.history.com/topics/equal-pay-act> [<https://perma.cc/3LBH-ASVW>].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (discussing Congress's intent to eradicate wage structures based on “outmoded” beliefs that men should be paid more because of their role in society).

112. S. REP. NO. 88-176 (1963).

113. *Equal Pay Act*, *supra* note 106. The Equal Pay Act amended the Fair Labor Standards Act, under which employees can recover from both public and private employers. H.R. REP. NO. 88-309 (1963).

employees for the same job,” and declared the Act “a significant step forward.”<sup>114</sup>

In its final form, the Equal Pay Act requires employers to pay equal wages and benefits to men and women working jobs that require “equal skill, effort, and responsibility, and which are performed under similar working conditions.”<sup>115</sup> Unequal pay is only allowed on the basis of seniority, merit, quality or quantity of work, and factors other than gender.<sup>116</sup>

### B. *Establishing a Claim under the Equal Pay Act*

Both the Equal Employment Opportunity Commission (EEOC) and the courts serve as the Equal Pay Act’s enforcement mechanism.<sup>117</sup> To establish a prima facie case for discrimination under the Act, an employee must show that: “(1) she was paid less than a male employed in the same establishment; (2) for equal work on jobs requiring equal skill, effort, and responsibility; (3) which were performed under similar working conditions.”<sup>118</sup>

#### 1. Unequal Pay

The first element of a prima facie case under the Act is that the employer pays a woman “less than a male employed in the same establishment.”<sup>119</sup> Wages include all forms of compensation made to or on behalf of the employee as payment for employment, including—but not limited to—“salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of a

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114. *Equal Pay Act*, *supra* note 106.

115. 29 U.S.C. § 206(d)(1) (2018).

116. *Id.*

117. *Id.*

118. *Knapp v. Ruser*, 297 Neb. 639, 660 (2017) (citing *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021 (8th Cir. 2002)); *see also The Equal Pay Act of 1963*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/epa.cfm> [<https://perma.cc/MQ32-U32G>] (explaining that the Act “prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions”).

119. *Knapp*, 297 Neb. at 660 (2017) (citation omitted).

company car, [and] gasoline allowance.”<sup>120</sup> The value of goods or services bestowed on employees, such as lodging or uniforms, that are not provided predominantly for the benefit or convenience of the employer, are also considered wages for the purposes of the Act.<sup>121</sup>

Although the Act does not define the term “establishment,” the Supreme Court has held it to mean “a distinct physical place of business.”<sup>122</sup> “[T]wo or more distinct physical portions of a business enterprise” may be considered a single establishment where “a central administrative unit” controls certain aspects of hiring, setting wages, and assigning duties.<sup>123</sup> Thus, for example, in a wage discrimination suit against a school district that paid male janitors at one school more than female janitors at another school, the Fifth Circuit held that both schools constituted a single establishment because the district controlled all the schools’ business aspects—including hiring, firing, and setting wages.<sup>124</sup>

## 2. Equal Work

The second element of a *prima facie* case under the Act is that the unequal pay is for “equal work on jobs requiring equal skill, effort, and responsibility.”<sup>125</sup> Equal work does not require the jobs to be identical in every aspect.<sup>126</sup> They need only be *substantially* equal.<sup>127</sup> When determining whether two jobs are substantially equal, courts focus on the actual duties performed by the employees rather than the job title or description used by

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120. 29 C.F.R. § 1620.10 (2018).

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

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

123. 29 C.F.R. § 1620.9(b) (2018).

124. *Brennan v. Goose Greek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 56 (5<sup>th</sup> Cir. 1975).

125. *Knapp v. Ruser*, 297 Neb. 639, 660 (2017) (citing *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021 (8<sup>th</sup> Cir. 2002)).

126. *E.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 202 n.24 (1974).

127. *See, e.g., McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 299 (1<sup>st</sup> Cir. 1998).

the employer.<sup>128</sup> As part of their determination, courts consider whether the jobs require substantially equal skill, effort, and responsibility.<sup>129</sup>

“Skill” is measured in terms of the job’s performance-requirements, including education, training, experience, and ability.<sup>130</sup> For the purpose of measuring skill, it is irrelevant whether one employee exercises the required skill more or less frequently than the other employee.<sup>131</sup> “Effort” refers to the measure of mental or physical exertion needed for the job’s performance.<sup>132</sup> In determining a job’s required effort, job factors that either create or alleviate mental fatigue or stress may be considered.<sup>133</sup> As with skill, it is irrelevant for measuring purposes whether two employees exert effort in the same way.<sup>134</sup> Lastly, “responsibility” concerns the degree of accountability required in the job’s performance.<sup>135</sup> Particular emphasis is placed “on the importance of the job obligation.”<sup>136</sup>

### 3. Similar Working Conditions

The third element of a *prima facie* case under the Act is that the jobs are “performed under similar working conditions.”<sup>137</sup> For the purpose of determining whether working conditions are similar, a loose standard of similarity based on general knowledge and practical judgment is used.<sup>138</sup>

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128. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945); *see also Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 700 (7th Cir. 2003).

129. *See, e.g., McMillan*, 140 F.3d at 299.

130. 29 C.F.R. § 1620.15 (2017).

131. *Id.*

132. 29 C.F.R. § 1620.16 (2016).

133. *See id.*

134. *Id.*

135. 29 C.F.R. § 1620.17 (2017).

136. *Id.*

137. *Knapp v. Ruser*, 297 Neb. 639, 660 (2017) (citing *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021 (8th Cir. 2002)).

138. 29 C.F.R. § 1620.18(a) (2018).

Working conditions are similar if the jobs are performed in the same surroundings and expose employees to the same hazards.<sup>139</sup> “Surroundings” measures the frequency and intensity of the elements employees regularly encounter.<sup>140</sup> “Hazards” looks to the physical hazards employees face, the frequency of those hazards, “and the severity of injury that [those hazards] can cause.”<sup>141</sup> Typically, if a job requires equal skill, effort, and responsibility, it is likely to be performed under similar working conditions as well.<sup>142</sup>

### C. Employer Defenses

Once a plaintiff establishes a prima facie case for gender-based wage discrimination, the burden shifts to the employer to justify the pay differential on grounds other than the employees’ gender.<sup>143</sup> An employer may escape liability where the wage differences are a result of a system based on seniority or merit, quantity or quality of work, or “any other factor other than sex.”<sup>144</sup>

To justify paying employees different wages based on a seniority system, an employer must prove that the pay standards are objectively neutral and that sex is not a reason for the pay differential.<sup>145</sup> For a merit-system defense to work, the system must be legitimate and fair-minded, providing terms and criteria by which employee merit is rewarded.<sup>146</sup> To show the merit system meets these criteria, an employer must provide evidence of an organized and structured procedure “whereby employees are evaluated systematically according to predetermined criteria.”<sup>147</sup>

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139. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

140. 29 C.F.R. § 1620.18(a).

141. *Id.*

142. *Id.*

143. *See Corning Glass Works*, 417 U.S. at 196.

144. 29 U.S.C. § 206(d)(1).

145. *See Brennan v. Victoria Bank & Tr.*, 493 F.2d 896, 901 (5th Cir. 1974).

146. *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142–43 (2000).

147. *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980).

Justifications based on differences in quantity or quality of work are fact-specific and decided on a case-by-case basis.<sup>148</sup> The same is true for justifications based on “any other factor other than sex.”<sup>149</sup>

#### D. *The USWNT's Pursuit of Pay Equality*

The USWNT's battle for pay equality illustrates the Equal Pay Act's severe shortcomings. On March 29, 2016, five of the USWNT's key players filed a complaint with the EEOC accusing the United States Soccer Federation (“Federation”) of wage discrimination.<sup>150</sup> In their complaint, the women alleged that despite their on-field accomplishments<sup>151</sup> and revenue generation,<sup>152</sup> USWNT players are paid considerably less than their male counterparts on the USMNT.<sup>153</sup> This pay disparity, they alleged, was based solely on their sex, and was therefore unfair and illegal under the Equal Pay Act and Title VII of the Civil Rights Act of 1964.<sup>154</sup>

According to the complaint, the Federation paid its female players a base salary of \$72,000 annually to play at least twenty friendlies per year, plus a bonus of \$1,350 for each friendly they won.<sup>155</sup> Female players were not paid any additional compensation if they tied or lost the games.<sup>156</sup> Thus, if the women won all twenty games, each female player would receive

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148. *See* *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029–31 (6th Cir. 1983) (narrowing its holding to the facts of its case and refusing to either endorse or reject other cases' broad reading of this exception).

149. *Id.*

150. Due to EEOC procedures, case citations are not made public. Nonetheless a version of the complaint is available online. *See EEOC Charge: Attachment A*, HUFFINGTON POST 1, 3, <https://big.assets.huffingtonpost.com/EEOCCharge.pdf> [<https://perma.cc/2Q6W-CFK6>].

151. *Id.* at 1 (alleging that the women's team had won four Olympic gold medals (three consecutively) and three FIFA Women's World Cup titles).

152. *Id.* (alleging that the women's team produced nearly \$20 million in revenue for the Federation in 2015).

153. *See id.* at 2–3.

154. *Id.* at 3.

155. *Id.* at 2.

156. *Id.*

\$99,000 as total compensation for the year.<sup>157</sup> In contrast, male members of the USMNT receive \$5,000 at minimum per game played, regardless of the outcome.<sup>158</sup> In other words, the men made at least \$100,000 for the twenty friendlies played, even if they lost.<sup>159</sup> If they won all twenty games, the men received an average of \$263,320 per year—\$164,320 more than their female counterparts.<sup>160</sup>

That pay disparity is even more striking when it comes to the World Cup.<sup>161</sup> According to the complaint, USWNT players receive a total of just \$30,000 for making the World Cup roster, while their male counterparts make \$68,750.<sup>162</sup> In the 2014 Men's World Cup Tournament, the USMNT earned \$9 million for losing in the sixteenth round, while the women earned just \$2 million for winning the World Cup the following year.<sup>163</sup> "The numbers speak for themselves," said goalkeeper Hope Solo, one of the female plaintiffs.<sup>164</sup> "We are the best in the world, have three World Cup championships, four Olympic Championships, and the USMNT [still] get[s] paid more just to show up than we get paid to win major championships."<sup>165</sup>

Even the smaller aspects of the player-Federation relationship are subject to this unequal treatment.<sup>166</sup> According to the complaint, the Federation pays women a per diem of \$50 for domestic venues and \$60 for international venues; for the men, it pays \$62.50 and \$75, respectively.<sup>167</sup>

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157. *Id.*

158. *Id.*

159. *See id.*

160. *See id.*

161. *See id.* at 3.

162. *Id.*

163. *See id.*

164. Anne M. Peterson, *Women Accuse US Soccer Federation of Wage Discrimination*, SEATTLE TIMES (Mar. 31, 2016, 5:25 AM), <https://www.seattletimes.com/nation-world/5-players-accuse-us-soccer-federation-of-wage-discrimination/> [<https://archive.is/6g1bf>].

165. *Id.*

166. *See EEOC Charge: Attachment A, supra* note 150, at 3.

167. *Id.*

Under federal law, the USWNT players argued, the Federation is bound to compensate the women at a rate equal to the men, given that both perform the same job duties; have jobs that require equal skill, effort, and responsibilities; perform their jobs under similar working conditions; and are employed in the same establishment.<sup>168</sup> Additionally, the USWNT players maintained that there were no legitimate, non-discriminatory reasons for this gross wage-disparity and that it could not be justified by “any bona fide seniority, merit or incentive system, or any other factor other than sex.”<sup>169</sup>

At first glance, the USWNT’s lawsuit appears to be a classic wage discrimination case—one where female athletes are paid substantially less than their male counterparts on the grounds that women’s sports are less profitable and popular than men’s sports.<sup>170</sup> But, in fact, the opposite is true for the USWNT who generate more revenue, have a larger fan base, and have been more successful than the USMNT.<sup>171</sup> Their case is also unique for another reason: the Federation employs both the men’s and women’s teams,<sup>172</sup> and so, the USWNT were able to meet the hardest element for a prima facie case under the Act—being part of the same establishment.<sup>173</sup> Thus, unlike most other female professional athletes, the USWNT was able to file a viable wage discrimination suit against their employer.<sup>174</sup>

### E. The Problem

Despite the Equal Pay Act’s stated objective—to dismiss the archaic notion that men deserve to be paid more than women because of their societal role—the Act has fallen short of its intended purpose.<sup>175</sup> As mentioned

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168. *Id.*

169. *Id.*

170. See Gabriella Levine, *Analysis: The Law and Legal Standing of U.S. Women’s National Team EEOC Complaint, Explained*, EXCELLE SPORTS (Apr. 1, 2016), <https://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-team-eeoc-complaint/> [<https://perma.cc/2YWV-6E8R>].

171. See *EEOC Charge: Attachment A*, *supra* note 150, at 1.

172. See *id.*

173. See 29 U.S.C. § 206(d)(1).

174. See generally *EEOC Charge: Attachment A*, *supra* note 150.

175. S. REP. NO. 88-176.

previously, one of the elements of a prima facie case under the Act is that the employees work for the same establishment.<sup>176</sup> This restrictive requirement limits the Act's ability to effect systematic change, because, unlike the USWNT players, most female professional athletes do not work for the same establishment as their male counterparts.<sup>177</sup>

Unlike the USMNT and USWNT, which both belong to the Federation, most other professional men's teams belong to separate owners from their female counterparts. Golf has the PGA<sup>178</sup> and LPGA,<sup>179</sup> basketball has the NBA<sup>180</sup> and WNBA,<sup>181</sup> Soccer has the MLS<sup>182</sup> and NWSL;<sup>183</sup> and Tennis has the Association of Tennis Professionals (ATP)<sup>184</sup> and Women's Tennis Association (WTA).<sup>185</sup> Thus, most female professional athletes facing wage discrimination cannot satisfy the Equal Pay Act's "same establishment" requirement and, therefore, lack any legal recourse under the Act.<sup>186</sup> By all

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176. See 29 U.S.C. § 206(d)(1); *Brennan v. Goose Greek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 56 (5th Cir. 1975) (holding that two establishments operated by a single school district constituted one establishment for the purpose of the Act).

177. See 29 U.S.C. § 206(d)(1); *Brennan*, 519 F.2d at 56 (5th Cir. 1975) (holding that two establishments operated by a single school district constituted one establishment for the purpose of the Act).

178. *The Official Home of the PGA of America*, PGA, <https://www.pga.com/home> [<https://archive.today/Y7tMg>].

179. *Ladies Professional Golf Association*, LPGA, <https://www.lpga.com/> [<https://perma.cc/24TV-JBWZ>].

180. *Official Site of the NBA*, NBA, <https://www.nba.com/#/> [<https://perma.cc/9GBV-7U5Z>].

181. *Official Site of the WNBA*, WNBA, <https://www.wnba.com/> [<https://perma.cc/439K-8KJU>].

182. *MLSSoccer.com*, MLS, <https://www.mlssoccer.com/> [<https://perma.cc/PZ4N-YZ98>].

183. *National Women's Soccer League*, NWSL, <https://www.nwslsoccer.com/> [<https://perma.cc/CV8U-VHPS>].

184. *Official Site of Men's Professional Tennis*, ATP, <https://www.atpworldtour.com/> [<https://perma.cc/BAZ8-JLEM>].

185. *Home | WTA Tennis*, WTA, <https://www.wtatennis.com/> [<https://perma.cc/H35B-9S5E>].

186. See 29 U.S.C. § 206(d)(1).

accounts, this is an unintended consequence.<sup>187</sup> But if Congress truly wants to provide women with a means of fighting wage discrimination, it must remedy this situation.

#### IV. FIXING THE EQUAL PROTECTION ACT

Congress can increase the Equal Pay Act's efficacy in two ways. First, it could eliminate the "same establishment" requirement by changing the terms "same" to "similar."<sup>188</sup> This slight change would open the door for female professional athletes and allow them a chance to prove their claim. Second, Congress could target professional sports directly by enacting a provision treating separate but similar entities in sports as the same for purposes of wage-discrimination claims.

##### A. *First Proposed Change: Eliminate the "Same Establishment" Requirement*

In passing the Equal Pay Act, Congress noted that sex discrimination:

(1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.<sup>189</sup>

The policy guiding the Act's enactment indicates the Congressional intent to fashion a broad remedial framework to protect employees from wage discrimination on the basis of sex.<sup>190</sup>

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187. S. REP. NO. 88-176 (1963) (declaring that the Act's purpose was to assure that "those who perform tasks which are determined to be equal shall be paid equal wages").

188. Although the Act uses the phrase "such establishment" as opposed to "same establishment," the meaning is the same. See *Knapp v. Ruser*, 297 Neb. 639, 660 (2017) (citing *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021 (8th Cir. 2002)) (stating that to prove a prima facie case under the Act, a plaintiff must prove, inter alia, that "she was paid less than a male employed in the same establishment").

189. *Declaration of Purpose*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/thelaw/epa.html> [<https://perma.cc/57T6-ALBJ>].

190. See *id.*

Congress reaffirmed its goal of eliminating the gender pay gap by enacting the Lilly Ledbetter Fair Pay Act in 2009 as an amendment to Title VII of the Civil Rights Act of 1964.<sup>191</sup> This was the first legislation signed by President Barack Obama.<sup>192</sup> In his second term as President, President Obama urged Congress to pass the Paycheck Fairness Act so that women would have the necessary tools to fight pay discrimination.<sup>193</sup> But even these attempts to change the Equal Pay Act to better serve women have not fully addressed the gender-based wage disparity in the workplace. The recommendation below builds on those attempts and better serves that goal.

### 1. Change “Same” to “Similar”

A simple way to remedy the Equal Pay Act’s shortcoming would be to change the term “such establishment” to “similar establishment” and add the term “similar employers” to the statute’s language. The Act would then read in pertinent part:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [*similar employers pay*] wages to employees of the opposite sex in [*similar establishments*,] for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.<sup>194</sup>

A prima facie case under the Act would then consist of the following four elements: (1) the employer pays females less than males are paid in a

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191. *Lilly Ledbetter Fair Pay Act*, NAT’L WOMEN’S LAW CTR. (Jan. 29, 2013), <https://nwlc.org/resources/lilly-ledbetter-fair-pay-act/> [<https://perma.cc/JM3P-6LSJ>] (explaining that Congress passed the Lilly Ledbetter Fair Pay Act after a Supreme Court decision for an employer that, Congress believed, conflicted with Title VII’s goals).

192. Office of the Press Secretary, *FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act*, OBAMA WHITE HOUSE ARCHIVES (Jan. 29, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly> [<https://perma.cc/U2QW-JZ3T>].

193. *Id.*

194. *See* 29 U.S.C. § 206(d) (2018) (emphasis added).

*similar establishment* (2) by a *similar employer* (3) for equal work (4) under similar working conditions.<sup>195</sup>

This proposed change would provide female professional athletes the means to challenge their employers where their male counterparts are paid more while working for a similar employer in a similar establishment, even though it be in a different “physical place of business.”<sup>196</sup> With this change, a female WNBA basketball player would be able to challenge her employer for paying her less than a similar employer—the NBA—pays its male basketball players. The change would be narrow enough, however, to prevent a female basketball player from claiming wage disparity by comparing her wages to a non-similar employer—the National Football League, for example.

## 2. The California Fair Pay Act

While the Equal Pay Act’s language continues to restrict female athletes from filing wage discrimination claims, state legislation has performed better in this regard.<sup>197</sup> Take California, for example.<sup>198</sup> In its original form, the California Equal Pay Act of 1949 read in pertinent part:

No employer shall pay any individual in the employer’s employ at wage rates less than the rates paid to employees of the opposite sex in the *same establishment* for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.<sup>199</sup>

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195. *See generally* Knapp v. Ruser, 297 Neb. 639, 660 (2017) (citation omitted).

196. *See* Halima Kazem, *California Equal Pay Bill Shields Women from Retaliation for Discussing Wages*, GUARDIAN (Apr. 21, 2015, 10:59 AM), <https://www.theguardian.com/us-news/2015/apr/21/california-fair-pay-act-wage-gap-women-men> [<https://perma.cc/B4G8-ES25>] (observing that a court dismissed a plaintiff’s wage-discrimination claim under the Act because, although her employer paid her less than her male counterpart, the female plaintiff worked at her employer’s San Francisco office while her male counterpart worked at the Fresno office).

197. *See* S.B. 358, 2015–2016 Reg. Sess. (Cal. 2015).

198. *See id.*

199. *Jones v. Tracy Sch. Dist.*, 27 Cal. 3d 99, 103 (1980) (emphasis added) (quoting the statute’s original language).

The California Fair Pay Act (CFPA)—also known as “SB 358”—eliminated the “same establishment” requirement.<sup>200</sup> As amended, the statute now reads in pertinent part:

An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.<sup>201</sup>

In its legislative commentary to SB 358, the California legislature recognized the former language’s harmful effect: “[I]f a female manager at a department store discovered that a similarly situated male manager at a branch across town earned higher wages, she could not invoke the protection of the [C]FPA because she and the male manager did not work at the ‘same establishment.’”<sup>202</sup>

At the CFPA signing ceremony, California Governor Jerry Brown proclaimed: “The inequities that have plagued our state and have burdened women forever are slowly being resolved with this kind of bill.”<sup>203</sup> By eliminating geographic location as a criterion for a pay-disparity claim, the CFPA made clear that employees must be paid equal to other employees doing substantially similar work, even if they work in different establishments.<sup>204</sup> Moreover, the statute’s language allows a female

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200. *Id.*; *California Equal Pay Act: Frequently Asked Questions*, CAL. DEP’T OF INDUS. RELATIONS, [https://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm) [<https://perma.cc/67HE-8KE4>].

201. CAL. LAB. CODE §1197.5 (West 2018).

202. Christopher Olmsted, *California’s New Fair Pay Law: What It Means for Your Business*, CAL. HR CONFERENCE, [https://cahrconference.org/wp-content/uploads/Chris\\_Olmsted\\_Handout-CA-New-Fair-Pay-Law-What-it-Means-for-Your-Business.pdf](https://cahrconference.org/wp-content/uploads/Chris_Olmsted_Handout-CA-New-Fair-Pay-Law-What-it-Means-for-Your-Business.pdf) [<https://perma.cc/7XSU-7SN8>].

203. Patrick McGreevy & Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. TIMES (Oct. 26, 2015, 8:15 AM), <https://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html> [<https://perma.cc/QG7R-V6CF>].

204. Keith I. Chrestonson, *California’s Fair Pay Act Will Likely Impact Employers Beyond the Golden State*, FOX ROTHSCHILD LLP (Jan. 22, 2016), <https://www.foxrothschild.com/publications/california%E2%80%99s-fair-pay-act-will-likely-impact-employers-beyond-the-golden-state/> [<https://perma.cc/E3DX-Y7WZ>].

employee who is paid less than a male employee doing substantially similar work to sue her employer even if the male employee works in a different state.<sup>205</sup> California's CFPA is therefore much more effective than the federal Equal Pay Act at reducing the gender pay gap.

Nonetheless, the CFPA still falls short in one fundamental area. To get around the CFPA, women's sports teams need only register as separate employers from their male counterparts.<sup>206</sup> As a separate employer, and not merely a separate establishment, a women's team—such as the WNBA—could still pay its players less than its male counterpart—such as the NBA—pays its players.<sup>207</sup> To prevent employers from circumventing the Equal Pay Act, Congress would therefore need to add to it the term “similar employer,” as discussed above.

### 3. The Advantage of Eliminating the “Same Establishment” Requirement

Aside from justice, fairness, and equity, Congress has another reason to take California's lead and broaden the Equal Pay Act's scope: the economic security of millions of women depends on it.<sup>208</sup> Because state legislation is often the testing ground for future federal legislation,<sup>209</sup> California's motive for amending its equal-pay statute is worth considering. When the CFPA was being debated in the California legislature, proponents noted that by ending gender-based wage discrimination, California would cut its poverty rate for working women by nearly half—from 28.7 percent to fifteen percent.<sup>210</sup> If California is correct, and Congress followed suit by broadening the Equal Pay Act's scope, the national poverty rate for working women would likely see a similar drop. The beneficial results would be

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205. *Id.*

206. *See* CAL. LAB. CODE § 1197.5.

207. *See id.*

208. *See Conditions of Employment: Gender Wage Differential: Hearing on S.B. 358 Before the S. Comm. on Labor and Indus. Relations*, 2015–2016 Reg. Sess. 4 (Cal. 2015) (statement of Roger Hernández, Chair, S. Comm. on Labor and Indus. Relations) [hereinafter *Hearing on S.B. 358*, Hernández].

209. *See* Matthew Jason, *Immigration Reform and the California Testing Ground*, PUB. OP. STRATEGIES (Nov. 15, 2013), <http://pos.org/immigration-reform-and-the-california-testing-ground/> [<https://perma.cc/5PNV-CP2L>] (observing that, in the context of litigation, “California often serves as the ‘testing ground’ for new ideas”).

210. *Id.*

substantial and widespread—from decreased government spending on federal, state, and local welfare programs<sup>211</sup> to increased access to better education for families on the economic ladder’s lower rungs.<sup>212</sup>

*B. Second Legislative Proposal: Treat Similar Sports Entities as the Same*

1. A Sports-Specific Provision

The second solution to the Equal Pay Act’s limitations would involve Congress characterizing gender-based pay differences in professional sports as “per se discrimination.” In other words, Congress could make it illegal for separate entities—who are so similar that they could be considered the same entity despite separate ownership—to pay athletes different wages based on gender, where those athletes are engaged in similar work based on equal skill, effort, and responsibility.

Accomplishing this would require more than just a few changes to the Equal Pay Act’s current language. Instead, it would require a new provision prohibiting professional sports leagues from paying athletes—engaged in the same sport—differently based on gender. This provision would be unaffected by the Act’s current “same establishment” requirement, as it would treat different but similar professional sports leagues as the same. For example, under this proposed provision, the NBA and the WNBA, despite being different establishments and employers, would be considered the same establishment and employer for the purposes of wage discrimination claims. Such a provision would allow a female WNBA player to sue her employer if it pays her less than the NBA pays a male player. The language of such a provision would read:

For the purposes of wage discrimination claims, no professional sports organization in the United States shall be considered a

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211. Ron Haskins, *Helping Work Reduce Poverty*, BROOKINGS (Jan. 3, 2017), <https://www.brookings.edu/opinions/helping-work-reduce-poverty/> [https://perma.cc/F9GC-DVYJ] (observing that “[t]he government spends \$1 trillion a year at the federal, state, and local levels” in its attempt to alleviate poverty in the United States).

212. *Effects of Poverty on Health, Children & Society*, HABITAT FOR HUMANITY, <https://www.habitatforhumanity.org.uk/what-we-do/building-and-renovating-homes/effects-of-poverty/> [https://perma.cc/TS6Z-8F3Q] (indicating that children who live in unsafe shelters have much lower school attendance and completion rates).

separate establishment or employer from its opposite-sex counterpart.

## 2. The Advantages of a Sports-Specific Provision

Although this proposed legislative solution may seem more far-reaching, its effect would actually be more narrow and targeted. Unlike the first proposed solution—which would require Congress to change the Equal Pay Act's current language, thereby affecting every industry—this proposal would keep the Act's language intact. The added provision, expressly limited to professional sports, would allow women to more effectively fight for equal pay in an industry that uses separate ownership as a means of circumventing the Equal Pay Act's requirements. If Congress truly wants to end gender-based wage discrimination in professional sports, this provision would be an effective option. And similar to how state legislation is often the testing ground for future federal legislation, this targeted sports-specific provision could be the testing ground for a more expansive provision, targeting other industries too.

### C. *The Ripple Effects of Expanding the Equal Pay Act*

With every legislative amendment comes the possibility of increased lawsuits. In this case, the goal of these amendments would be to *encourage* more lawsuits. The increase in lawsuits would likely cost more time, money, and judicial resources. But the benefits of affording more women the ability to challenge wage discrimination would lead to tremendous financial benefits.<sup>213</sup> And soon, those benefits would far outweigh any temporary surge in costs.

Female athletes are not the only ones affected by the gender pay gap.<sup>214</sup> Women across the United States continue to experience higher poverty rates and lower earnings than men.<sup>215</sup> Research suggests that nearly sixty percent of women, or three out of every five, are paid less than their male

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213. Jonathan Woetzel et al., *How Advancing Women's Equality Can Add \$12 Trillion to Global Growth*, MCKINSEY GLOBAL INST. (Sept. 2015), <https://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth> [<https://perma.cc/9US6-VTZ8>].

214. *See id.*

215. *See* Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy*, INST. FOR WOMEN'S POLICY RESEARCH 1, 1 (Apr. 2017), <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf> [<https://perma.cc/PSW8-BA2V>].

counterparts.<sup>216</sup> And that loss is more than just a few dollars.<sup>217</sup> Were the pay gap to disappear, the average woman's wages would rise by \$6,870, from \$38,972 to \$45,842.<sup>218</sup> In the United States alone, that would amount to a total of \$512.6 billion a year.<sup>219</sup>

But women would not be the only ones to benefit from eliminating the gender pay gap. High poverty rates strip the government of limited resources it could invest in other areas to promote economic growth.<sup>220</sup> Equalizing women's pay would cut the poverty rate in half—from eight percent to 3.8 percent among working women, and from 10.8 to 4.4 percent for the 15.3 million single women.<sup>221</sup> The effect in the United States would be in the billions of dollars.<sup>222</sup> The effect globally would be in the trillions.<sup>223</sup> Considering the enormous positive impact that would have on the economy, the cost of paying women unequally is one we can no longer afford.

## V. CONCLUSION

In the world of professional sports, the current Equal Pay Act falls drastically short of its goal of closing the gender pay gap. To truly achieve “equal pay for equal play,” the Act must provide female professional athletes a framework to demand justice. The USWNT's case called attention to the striking wage disparity between male and female professional soccer players. It also highlighted the Act's limitation when applied to female professional athletes who neither work for the “same establishment” nor

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216. *See id.*

217. *See id.*

218. *Id.*

219. *See id.*

220. Desmond Brown, *10 Reasons Why Cutting Poverty Is Good for Our Nation*, CENTER FOR AM. PROGRESS ACTION FUND (Dec. 6, 2011, 9:00 AM), <https://www.americanprogressaction.org/issues/poverty/news/2011/12/06/10771/10-reasons-why-cutting-poverty-is-good-for-our-nation/> [<https://perma.cc/GHR4-RUA9>].

221. *Id.*

222. *See id.*

223. Woetzel et al., *supra* note 213 (observing that, according to a McKinsey Global Institute report, “\$12 trillion could be added to global GDP by 2025 by advancing women's equality”).

share the same employer as their male counterparts. The Act's "same establishment" requirement is unrealistic and untenable. Its restrictive language denies female professional athletes the justice they so desperately seek—and deserve.

If Congress hopes to eradicate the gender pay gap, change is required. This Note's proposed amendments to the Equal Pay Act provide the legal recourse for such change, and thereby, promote an egalitarian American workplace. Allowing women to effectively fight gender-based wage discrimination would bring us closer to achieving pay equality and inspire women to maximize their potential, knowing they will earn what they rightfully deserve. This would be a major step toward realizing the Act's full purpose: equal pay for equal play. After more than fifty years, it is time to finally close the gap. Time's up!