No. 06-1038

In the

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF PETITIONER

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

James W. Davis
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

February 28, 2007

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

JOHN SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
Denver, CO 80203

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER OF TENNESSEE
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

QUESTION PRESENTED

Whether the Sixth Circuit misinterpreted the legal standards governing proof of intentional discrimination in the context of constitutionally authorized single-sex programs, and erroneously determined that Petitioner violated the Equal Protection Clause and Title IX. *See* Pet. at i.[1]

[1] The petition raises a second question concerning whether plaintiffs' equal protection claim under 42 U.S.C. § 1983 should be dismissed because Title IX's comprehensive remedial scheme is exclusive. *See* Pet. at i. Amici agree with Petitioner's position in that respect, but write here only to express an interest in the first question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provision

Other Authorities

INTEREST OF AMICI CURIAE

In the decision below, the Sixth Circuit held, in contrast with the Third, Fourth, Eighth, and D.C. Circuits, that any distinction between parallel programs that are themselves validly separated by gender is presumed to be an unconstitutional gender classification subject to heightened equal-protection scrutiny. *Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006). Critically, the plaintiffs did not take issue with the initial decision to establish separate programs for men and women – in this case, separate high school athletic teams. Instead, they challenged Petitioner's subsequent decisions concerning, *e.g.*, when to schedule seasons and tournaments for the different teams. The Sixth Circuit held that all such subsequent decisions are themselves facial gender classifications and, accordingly, that Petitioner had the burden of proving an "exceedingly persuasive justification" for any difference in scheduling the seasons for the boys and girls' teams. That cannot possibly be the law.

The amici States have a keen interest in this case because the Equal Protection Clause and Title IX apply to state governments and their officers. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); 20 U.S.C. § 1681(a) (prohibiting discrimination "under any education program or activity receiving Federal financial assistance ...."). The Equal Protection Clause, of course, limits the States whenever they place men and women into separate programs or facilities. Courts have applied Title IX to two of the most quintessential and pervasive spheres of operation for state governments: education (*e.g.*, the case below) and prisons (*e.g.*, *Women Prisoners of the District of Columbia Department of Corrections v. District of* Columbia, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997)).

States are in many cases permitted, advised, or even required to separate men and women, and if the decision below is correct, then States will face a never-ending stream of lawsuits challenging every detail of every single-sex program. Alabama law, for instance, requires corrections officials to provide separate housing for male and female prisoners. Ala. Code (1975) §§ 11-14-13, 14-6-13, 14-6-103. *See also Dothard v. Rawlinson*, 433 U.S. 321, 326 (1977) ("Like most correctional facilities in the United States, Alabama's prisons are segregated on the basis of sex."). So, too, as this case demonstrates, many States sponsor separate athletic teams for men and women, at least in some sports. In fact, Title IX and its regulations expressly permit separate teams for men and women: "[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

In the educational realm, a policy debate rages concerning the wisdom of dividing schools or classes by gender. *See, e.g.*, Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 Harv. J.L. & Pub. Pol'y 227 (Fall 1994); Ashley Elizabeth Johnson, *Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students*, 57 Vand. L. Rev. 629 (March 2004). In *United States v. Virginia*, this Court was "not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females." 518 U.S. 515, 534 n.7 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982)). Accordingly, at least for now, States remain free as a constitutional matter to make the policy choice to provide single-sex public schools or classes. (And, indeed, the U.S. Department of Education recently amended the Title IX regulations to provide schools greater flexibility to offer single-sex classes and extracurricular activities. *See* 34 C.F.R. § 106.34 (revisions effective Nov. 24, 2006).)

The examples go on and on – public restrooms, college dormitories, health care programs geared specifically to one gender, and housing for National Guard units. In each case, States are making constitutionally valid distinctions between the sexes. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U. L.Q. 161, 165 (arguing that even the unadopted Equal Rights Amendment "would coexist peacefully with separate public restrooms, separate sleeping and bathroom facilities for male and female military personnel and prisoners").

As discussed more fully below, in any case where a State decides – legally – to provide separate programs or facilities for men and women, many other decisions regarding implementation will necessarily follow. These subsequent, "downstream" decisions include not only when to schedule the seasons for different sports, but also where to locate prisons and what vocational services to offer there; whom to appoint principal, warden, or coach; which restroom to locate nearest the exit; and many, many like decisions. States and state officials have a compelling interest in not having to come up with an "exceedingly persuasive justification" for each and every such decision. Indeed, the problem is that, in most cases, there simply is no justification that, however sensible and efficient, would satisfy that rigorous standard.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Resolve the Clear Circuit Split Concerning the Appropriate Standard of Review of Decisions Made to Implement Valid Single-Sex Programs.

As the petition persuasively demonstrates, the decision below presents a clear split with other courts of appeals concerning how, when a State constitutionally provides separate programs or facilities for men and women, a court should examine subsequent decisions the State makes to implement those programs. According to

the Sixth Circuit, all subsequent decisions, no matter how trivial, are facial gender classifications and have the same constitutional import as the initial decision to divide men from women. 459 F.3d at 694-95. Therefore, even if a plaintiff challenges only the scheduling of sporting events and not the antecedent decision to schedule the girls' games and the boys' games at different times, the plaintiff is freed of his or her traditional burden to prove discriminatory intent, and the defendant instead must demonstrate an "exceedingly persuasive justification" – when all it may be doing is simply trying to get the most use out of a single gymnasium. *Id.*

Other circuits have taken a more reasonable view, providing a starkly different standard for state actors. As Petitioner points out, in the realm of education, the decision below conflicts with the Fourth Circuit's decision in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), in which both the majority and the dissent agreed that the question was whether the men's and women's programs at issue afforded "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 1240; *cf. id.* at 1250 (Phillips, J. dissenting).[2] The decision below likewise conflicts with the Third Circuit's decision in *Vorchheimer v. School District*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which found single-sex public high schools constitutional when the men's and women's schools were of "similar and of equal quality" – though different (of course) in some respects.

[2] For the same reason, the Sixth Circuit's decision also conflicts with this Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996). There, both the majority and dissent agreed with the Fourth Circuit that the issue was whether the programs afforded "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 547 n. 17, 553-54. This Court never suggested – in the VMI case or any other – that every difference between the men's and women's schools must independently satisfy heightened scrutiny.

Petitioner also correctly points out the split between the decision below and prison-related decisions from the Eighth and D.C. Circuits. In *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 513 U.S. 1185 (1995), the court held that just because a woman is sent to women's prison because of her gender, that does not mean that the vocational and educational services she is offered there are so offered because of her gender, even if those programs differ from the ones offered at the men's prisons. *Id.* at 734. The Eighth Circuit correctly distinguished the facial gender classification in the initial decision to separate male and female prisoners from the subsequent gender-*neutral* decisions concerning what programs to offer to which prison. *Id. Accord Keevan v. Smith*, 100 F.3d 644, 649, 651 (8th Cir. 1996) (rejecting a program-by-program comparison, holding that the placement of a particular prison industry at a particular prison is a gender neutral decision, and requiring the plaintiffs to prove a discriminatory purpose).

Similarly, the D.C. Circuit held that in a challenge to programs offered to men's and women's prisons, it need not engage in a detailed "program-by-program" comparison. *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910, 926-27 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997). The court there held that the plaintiffs could not prevail simply by pointing to any difference in the programs offered and arguing that one is "better" than the other, or even by arguing that the women, in smaller institutions, were offered fewer educational options than the men: In the real world, "[m]ore than that is required." *Id.* at 925-927.

The Eighth and D.C. Circuits have it right. A classification is gender-neutral if "the classification itself, covert or overt, is not based upon gender ...." *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979). The division of prisons by gender is a facial gender classification, but the myriad decisions made in

implementation of that initial (and eminently reasonable) decision to operate dual programs are not. Those subsequent decisions are not ordinarily – let alone necessarily – based on gender at all, and the burden should be on the plaintiff to prove otherwise. The decision below is in direct conflict with this sensible standard.

The Sixth Circuit's decision, then, presents a stark conflict among the courts of appeals and, indeed, is inconsistent with the best understanding of this Court's own equal-protection jurisprudence. What is more, as explained below, the divide in the circuits is not academic or a matter of mere semantics. It has a direct impact on a State's ability to steward scarce resources and to provide important services. In short, it is a split that matters greatly to state officials' day-to-day decisionmaking.

II. The Court Should Grant Certiorari Because This Case Raises Issues of National Importance.

For better or worse, every State in the union spends a substantial portion of its resources on two line-items: prisons and education.[3] Unfortunately, those are two of the areas in which the reasoning of Sixth Circuit has the potential to create the most mischief.

A few examples will illustrate the precarious position in which state officials are placed by the reasoning of the decision below. Consider the position of a corrections official in a State within the Eighth or D.C. Circuits, where the rule is that a complaining inmate must

[3] A 2002 survey shows that education and corrections expenditures account for a significant percentage of the budget of every U.S. state and territory. *See* 2002 Census of Governments, Table 1: State and Local Government Finances by Level of Government and by State: 2001 – 02, found at http://ftp2.census.gov/govs/estimate/02slsstab1a.xls, and http://ftp2.census.gov/govs/estimate/02slsstab1b.xls (as of February 19, 2007).

demonstrate that a difference in male and female prison programs was in fact motivated by discriminatory animus. The official may learn that her budget allows for the purchase of one new weight machine, and she must then decide whether to place it in the women's prison or the men's prison. She may exercise her discretion and common sense and determine which institution is more in need of an upgrade, where there is greater demand, or other factors. So long as she does not intend to discriminate against men as men or women as women, she can freely make the decision that she is quite certainly more qualified than a federal judge to make.

The same official in the Sixth Circuit, however, will be hamstrung. If she places the new machine in the men's prison, a female prisoner will point to the difference – standing alone – and credibly argue that the men's prison offers "better" weight-room facilities than the women's prison. A male prisoner could, of course, raise the exact same claim if the new machine went to the women's prison. Either way, it will be up to the State to prove that the official had an "exceedingly persuasive justification" for her choice of a weight machine's final destination. That, of course, will not be easy – particularly because, according to the courts below, maximizing opportunities for all prisoners or recognizing differences in demand is not an "exceedingly persuasive justification." 459 F.3d at 694 (rejecting MHSAA's desire to maximize athletic opportunities as a justification for scheduling differences). The safest decision by far – if also the most unfortunate – will be to forego purchasing a new machine at all.

A difference in weight-room facilities is hardly the only distinction that prisoners might point to between a men's prison and a women's prison. The list of possible distinctions is, quite literally, endless. There will always be different wardens with different levels or types of experience. Different correctional officers with different dispositions. Different locales (one will always be nearer the State's population center). Different vocational and educational offerings. Different populations (one is

certain to be more crowded than the other). If the decision below stands, each and every one of these distinctions, in and of itself, becomes the stuff of a constitutional case – for one gender or the other – and imposes upon the State the impossible burden of showing an "exceedingly persuasive justification" for its discretionary management choices.

The problem is no less pressing in the world of education. Petitioners thoroughly discuss the many differences that may exist between the athletic teams that schools field for boys and girls. One team will inevitably have a more experienced coach. Perhaps the teams play in different seasons. And if, for instance, the boy's and girl's basketball teams play the same season, there will be questions about how the two teams will share a school's single gym. If the teams play games on different days, members of one team may argue that the other day is better suited to draw fans. If they play on the same day but at different times of day, one team will complain that more people attend 7:00 p.m. games than 5:00 p.m. games. The problem, of course, is that there is not even conceivably any justification that is "exceedingly persuasive" for scheduling one game at 5:00 and another at 7:00 (at least, none that would apparently "persua[de]" the Sixth Circuit), no matter which team plays when. The programs cannot be identical, so one team or the other – or both – will be able to point to *some* way in which the other team has it "better."

Consider, also, the president of a state university that has a perfectly permissible policy against coeducational dormitories. At the beginning of each school term, he needs to decide which dorms will house men and which will house women. Some, of course, are nicer than others – one might even be brand new. In making assignment decisions, the president might attempt to cluster men's and women's dorms together, or he might try to strike some reasonable balance concerning the dorms' proximity to classrooms and other campus facilities. Common sense suggests that such considerations should justify the

president's decision, but it is not at all clear that they would withstand scrutiny under the Sixth Circuit's reasoning. At the end of the day, one gender or the other will have, on balance, newer, nicer dorms, and that, according to the Sixth Circuit, is a facial gender classification subject to heightened scrutiny.

There is no need to multiply examples. These are just a few of the ways in which state officials will be placed in impossible situations if the decision below stands. The point is that similar problems will arise every time a State provides separate facilities for men and women, be they public restrooms, military barracks, orphanages, etc. Because the separate facilities will never be absolutely identical, a good lawyer will always be able to devise an argument that the other gender's facilities are "better" in some sense, and the burden will then be the State's to show an "exceedingly persuasive justification" for a decision that may have been made, as Petitioner points out, by a "flip of a coin." Impossible.

While some of these examples may seem trivial, there is no principle in the Sixth Circuit's decision that would exclude de minimis differences between programs offered to different genders. Perhaps recognizing the slippery slope its decision sets in place, the Sixth Circuit tries to suggest that trivial differences would be beyond the reach of its holding:

> The issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment.

459 F.3d at 694-95. The amici States take little comfort in this supposed limitation. As the examples above demonstrate, where there is a difference in two programs, a plaintiff can always argue that the difference results in "unequal treatment" of the genders. That is enough,

according to the decision below, to prove a *prima facie* case of sex discrimination and to require the State to come forward with an "exceedingly persuasive" justification.

The holding casts far too wide a net. Instead, a plaintiff who challenges a difference between comparable programs should be required to prove that the defendant acted with a discriminatory intent (or that the programs are so unequal overall that they are not truly comparable, as this Court decided in the context of the VMI and VWIL programs in *United States v. Virginia, supra.*) That rule would not in any way, shape, form, or fashion let government actors off the hook, so to speak. It would not permit discrimination against any person on the basis of his or her gender. It would simply require a plaintiff to prove his or her case and give States the freedom they need to fairly and efficiently administer valid single-sex programs.

* * *

There is one final point worth making. Oftentimes, of course, it will be difficult to tell which, if either, gender is actually "disadvantaged" by a particular policy. Imagine, for instance, that relative to a State's men's prison the women's prison (1) has a more experienced warden and (2) is closer to the population center but (3) has fewer vocational offerings and (4) is slightly more crowded. Who is on the short end of that deal – men or women? Tough to say. Under the Sixth Circuit's rationale, it is entirely possible that male and female plaintiffs will *both* raise complaints.

Of course, under a proper understanding of the Equal Protection Clause, federal courts would never have to grapple with such questions, because the existence of a good-faith disagreement concerning the locus of the "disadvantage" would negate any inference of discriminatory intent. One of the bizarre byproducts of the Sixth Circuit's decision here is that it puts federal courts in the business of deciding which of two groups has, in some objective sense, been "disadvantaged" even

in circumstances where advantage and disadvantage may be entirely debatable and subjective. Worse, from amici's perspective, the Sixth Circuit's decision exposes States and their officials to liability for supposed gender discrimination even when they may actually have thought, in good faith, that they were doing members of the complaining gender a real favor.

It is, then, both the seriousness of the error and the sheer breadth of the decision below that make this a case one of national importance. The Sixth Circuit's rationale presumptively invalidates virtually every decision made by state officials in implementing lawful single-sex programs, including those most common and fundamental to the operation of state governments.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record*

James W. Davis
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

February 28, 2007