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

AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Michigan Association of School Boards ("MASB") respectfully submits this brief *amicus curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States.[1] Founded in 1949, the MASB is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of the boards of education of over 600 local school boards and intermediate school boards in this state. The activities of the MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of the MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

The MASB Delegate Assembly is responsible for adopting resolutions that are the driving force behind the positions taken by the MASB on issues important to public education and Michigan schools. The Delegate Assembly has adopted the following resolution on student participation in extra curricular activities:

> The Michigan Association of School Boards urges every board of education to encourage student

[1] *Amicus* files this brief with the consent of all parties. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, MASB states that no counsel for any party authored this brief in whole or in part, and no person or entity other than MASB and its counsel made any monetary contribution to the preparation or submission of this brief.

> participation in co-curricular activities. There are many valuable programs, both athletic and non-athletic, that schools offer to their students, and any additional involvement beyond academic classes can add to a student's total educational experience.

Thus, the MASB is concerned with the effect that the Court of Appeals' decision will have on the ability of local school boards to maximize participation in high school athletics. The authority of school districts to schedule sports in the seasons they choose in order to maximize participation and the quality of those opportunities for girls and boys needs to be preserved. For this reason, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

We adopt the Statement of the Case as presented by Petitioner.

QUESTIONS PRESENTED FOR REVIEW

We adopt the Questions Presented as presented by the Petitioner.

SUMMARY OF THE ARGUMENT

Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls, is a 2004 report published by the Women's Sport Foundation[2] that discusses

[2] Founded in 1974 by Billie Jean King, the Women's Sport Foundation is a national charitable educational organization seeking to advance the well-being and leadership skills of girls and women through sports and physical activity.

the impact of physical activity on the physical, psychological and cultural health of girls. While the report includes a compendium of research that points to physical activity and sport as fundamental solutions for many of the serious health and social problems faced by American girls, its primary message emphasizes the importance of providing access and participation opportunities in athletics for females:

> A tidal shift is occurring in discussions of Title IX....The issue is no longer whether girls are assured the same access to facilities, scholarships and social support as boys. Rather, there is rising concern that girls, their families and communities do not have full access to the educational, social and health benefits that sports and physical activity can provide. Increasingly the debate is not so much about equal gym time as it is about a healthy lifetime. Sport is about a great deal more than fun and games.

Don Sabo, et al., *Her Life Depends On It: Sport, Physical Activity and the Health Well-Being of American Girls* (Women's Sports Foundation, May 2004) at 6.[3]

Likewise, Michigan school boards are aware of the intrinsic benefits of participating in interscholastic athletics, and particularly the benefits received by female athletes. Thus, the members of *Amicus* have strived to remove barriers and restrictions that may limit participation opportunities for interscholastic female athletes. And, presently, Michigan

[3] Available at http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/article.html?record=990

school boards are utilizing limited resources to maximize athletic participation opportunities.

Regrettably, the decision of the Court of Appeals strips school boards of the capacity to take full advantage of existing capital and human resources to provide extracurricular athletic opportunities. At a time when the number of female interscholastic athletes reached an all-time high in Michigan, school boards will be faced with the reality of eliminating athletic teams to accommodate the demands on facilities, coaches, and game officials as a result of combining girls' and boys' athletic seasons as directed by the Court of Appeals.

The decision also undermines the local control of school boards at an unprecedented level by overruling over 30 years educational decision-making that determined what interscholastic sports will be conducted, how those sports will be conducted and when those sports will be conducted. Courts have traditionally been reluctant to supplant educational judgment when doing so would interfere with a school board's good faith performance of its core academic functions.

Lastly, the Court of Appeals' application of the Equal Protection Clause invites constitutional claims over every detail of how single-gender educational programs are administered. The Court's misclassification of any difference between male and female programs as a presumptively unconstitutional facial gender classification opens the door for school districts to be besieged with claims of discriminatory treatment relating to even the smallest differences between separate programs.

ARGUMENT

I. The Decision Of The Court Of Appeals Will Hinder The Ability Of Michigan School Boards To Maximize Athletic Participation Opportunities For Students.

According to a survey conducted by the National Federation of State High School Associations ("NFHS"),[4] Michigan school districts set all-time highs for participation in high school athletics during the 2005-06 school year.[5] While Michigan ranks eighth nationally in high school age population,[6] it has the fifth highest participation number of 321,250 student-athletes. Furthermore, the number of female interscholastic athletes in Michigan increased to 135,377, which is the fourth highest participation number in the country for female athletics, trailing only the largest populated states of California, Texas and New York and remaining ahead of the more densely populated states of Illinois, Ohio, Pennsylvania and New Jersey.

While the results of the survey clearly indicate that male and female students in Michigan make athletics a top priority, board of education members might view the results from a different perspective. The board member who is focused on the educational mission of the school district will look beyond the wins and losses and individual achievements that most

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[4] Founded in 1920, the NFHS provides leadership for the 50 state high school athletic/activity associations in the administration of education-based interscholastic activities, which support academic achievement, good citizenship and equitable opportunities.

[5] http://www.nfhs.org/core/contentmanager/uploads/2005_06NFHSparticipationsurvey.pdf

[6] According to 2005 U.S. Census Bureau figures.

community members associate with interscholastic athletics. Such board members see high school sports not just as an extracurricular activity, but as an extension of a good educational program that supports the academic mission of the school district. For example, sports programs are capable of promoting responsible social behaviors and greater academic success, confidence in one's physical abilities, an appreciation of personal health and fitness, and strong social bonds with teammates. Research has found that students who spend no time in extracurricular activities are 57 percent more likely to have dropped out of school by the time they would have been seniors; 49 percent more likely to have used drugs; 37 percent more likely to have become teen parents; 35 percent more likely to have smoked cigarettes; and 27 percent more likely to have been arrested than those who spend one to four hours per week in extracurricular activities. *Adolescent Time Use, Risky Behavior, and Outcomes: An Analysis of National Data*, Department of Health and Human Services, September 1995.

Understandably, *Amicus* celebrated the results of the recent NFHS athletics participation survey. The survey proves that Michigan students are currently able to take full advantage of the extra educational opportunities that boards of education are offering to them. The results also justify the decisions by boards of education to offer a full-range of athletic opportunities during difficult economic times for Michigan school districts. In many cash-strapped school districts, athletic programs are usually spared while budget cuts lead to the elimination of pupil transportation and pink-slipped teachers. Although, under such circumstances, the athletic teams are usually subsidized by participation/activity

fees paid by students, which makes Michigan's interscholastic athletic participation ranking even more impressive.[7]

The ability of boards of education to maximize athletic opportunities for students is facilitated by the current athletic scheduling system. Specifically, the decision to schedule girls' basketball in the fall and girls' volleyball in the winter maximizes participation in these sports with expanded opportunities to play on junior varsity and freshman teams. Because of demands on facilities, coaches and officials, if girls' basketball is moved to the winter to align with boys' basketball, as directed by the District Court and Court of Appeals, school districts would be faced with the reality of eliminating junior varsity and freshman teams. A school district with one high school gymnasium would experience a scheduling nightmare trying to accommodate practices and games for six different basketball teams. Further, finding six different qualified coaches to lead the teams would also be problematic. Over three hundred Michigan basketball coaches presently coach both boys' and girls' teams. Thus, aligning the girls' and boys' basketball seasons could immediately result in three hundred coaching vacancies if junior varsity and freshman teams were not eliminated. The workload of registered basketball officials would also be doubled under a scheduling system that included simultaneous seasons. Currently, basketball officials are able to spread their workload by finding assignments for two or three games per week over a period of six months. Moving to simultaneous seasons would require officials to compress their schedules and work the same amount games in a three-month

[7] According to the MHSAA's 2005 Participation Fee Survey, 159 schools assessed a student-athlete participation fee in 2004. The survey is available at http://www.mhsaa.com/resources/06feesurvey.pdf.

period. It is unlikely that the current number of registered officials would be able or willing to carry out the demands of such a schedule.

Based on the foregoing circumstances, it is not a mystery as to why Michigan ranks third and fourth nationally in boys' and girls' high school basketball participation. Logically, other states that have girls and boys contested in the same season may have been forced to eliminate either freshman or junior varsity squads to accommodate the demands on facilities, coaches and officials, resulting in lower participation rates in high school basketball, which is illustrated by the recent NFHS high school athletics participation survey. According to the survey, Michigan currently averages twenty-nine girls' basketball players per school, far more than in other states.[8] For example, Iowa, Kentucky, Missouri, and Ohio average twenty-three players, Florida averages nineteen players, Tennessee averages eighteen players, and Oklahoma averages sixteen players per school.

However, what is most alarming to school boards in Michigan are the decreased participation numbers of states that have switched girls' volleyball and basketball seasons in recent years as indicated by previous NFHS surveys. In North Dakota, in the year of the change, there was a 10.67 percent drop in girls' basketball participation, 7.0 percent drop in girls' volleyball participation, and a 2.5 percent drop in boys' basketball participation. In South Dakota, within two years of the change, the number of participants in girls' and boys' basketball dropped 13.1 percent and 9.5 percent respectively. In Montana, within two years of the change, the number of participants in girls' basketball and girls' volleyball

[8] Michigan averages thirty boys' basketball players per school.

dropped 10.9 percent and 6.1 percent respectively. In West Virginia, since the change was made in 1995-96, the number of girls' and boys' playing high school basketball has dropped 19.4 percent and 27.4 percent respectively.

All the data relating to the participation rates should discount any claim that Michigan's current scheduling system discriminates against females. In fact, the current athletic seasons approved by Michigan school boards arguably provide *greater* athletic and learning opportunities than the other states that offer a "traditional" schedule. Rather than being scrutinized, Michigan school districts should be applauded for resisting to "follow the crowd" by blindly falling in line with other states and switching to the "traditional" athletic seasons schedule. Admirably, Michigan school boards have remained independent when determining sports seasons, focusing on the needs and interests of all student-athletes, not just the small percentage of those who may receive an additional benefit from participating during "traditional" seasons.

II. The Decision Of The Court Of Appeals Undermines The Local Control Of Michigan School Boards.

Judicial deference to academic judgment in a range of areas is consistent with the principle of academic independence that the Court of Appeals' decision disregards. Courts have been chary to supplant educational judgment when doing so would interfere with a school board's good faith performance of its core functions.

In particular, this Court has repeatedly recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley,* 418 U.S. 717, 741 (1974); *see e.g.,*

Dayton v. Brinkman, 433 U.S. 406, 410 (1977) ("[O]ur cases have...firmly recognized that local autonomy of school districts is a vital national tradition."). This Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 226 (1985). That reluctance is grounded both in federalism concerns and in a healthy awareness of limited judicial competence in educational administration. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and expertise" in educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic decisions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying out their educational missions. *Ewing*, 474 U.S. at 226 n. 11 (internal quotation omitted).

On a number of occasions, this Court has affirmatively passed at opportunities to second-guess the educational decisions of school officials. In *Wood* v *Strickland*, 420 U.S. 308 (1975), for example, this Court opined that

> [i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion....This system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members.

Wood, supra at 326.

And more recently, this Court was asked to interpret the Family Educational Rights and Privacy Act ("FERPA"), 20

U.S.C. § 1232g, to determine if the federal law prohibits students from grading one another's papers. This Court used the opportunity to again acknowledge that it will hesitate before interpreting a federal statute to effect a substantial change in the balance of federalism, unless that is the manifest purpose of the legislation. In emphasizing this point, this Court stated:

> We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it.

Owasso Indep. Sch. Dist. v *Falvo*, 543 U.S. 426 (2002).

Likewise, under Title IX of the Education Amendments of 1972, 20 U.S.C § 1681, *et seq.* ("Title IX"), it is unlikely that Congress would mandate uniformity of athletic seasons for all of the States' schools, in terms of combining boys' and girls' seasons in the same sport and following "traditional" seasons set by a majority of states. If there is no indication of discriminatory intent in developing and maintaining separate and "non-traditional" seasons, the manifest purpose of Title IX does not necessitate the courts to interfere with the scheduling of such seasons.

If this Court grants the petition for a writ of certiorari and reverses the decision of the Sixth Circuit, the scheduling of interscholastic sports in Michigan will once again be left up to local school districts. School boards will make a local policy decision based on the best interests of the school

district, the student body and the community. Accordingly, the MHSAA will periodically survey and then accommodate school districts by scheduling its post-season tournaments at the time of year when schools are conducting their seasons.

The most recent survey conducted by the MHSAA in 2002 indicates how strongly local school districts feel about realigning athletic seasons. The survey was returned by 86 percent of the schools that belong to the MHSAA. Of the schools that responded, a resounding 75.8 percent declared that basketball is the sport that they would least want combined in the same season for boys and girls. Further, 78.4 percent of the schools stated that basketball is the girls' sport that they would least want moved to a different season.

The results of the survey clearly indicate that Michigan school districts wish to continue the status quo in regards to scheduling athletic seasons. Granted, the status quo is overwhelmingly in the minority when compared to the athletic seasons of other states. However, data suggests that it currently produces greater participation opportunities for both female and male student athletes. Eventually, Michigan school districts may decide to switch to "conventional" or "traditional" athletic seasons, but that decision should be based on the best interests of the local school district and not forced due to non-conforming with the athletic seasons schedules of other states.

The decision of the Court of Appeals necessitates this Court to reaffirm the educational discretion properly vested in state and local education officials to practice their core educational mission, which, in this case, involves providing a unique and effective athletic scheduling option that maximizes the amount of athletic opportunities for all students.

III. The Decision Of The Court Of Appeals Will Cause Irreparable Harm To Single-Gender Athletic Teams and Educational Programs.

It is safe to say that almost all interscholastic athletic programs operate with separate-sex athletic teams. The reasons for single-gender teams vary from citing the physical and psychological differences between males and females to concerns that there would be a substantial risk that males would dominate the female programs and deny females an equal opportunity to compete in interscholastic events without a gender-based classification. *See O'Conner v. Board of Education of School District 23,* 449 U.S. 1301 (1980). In any event, there is clearly a need for separate-sex athletic teams in public schools.

However, the decision of the Court of Appeals to classify any difference between single-gender teams as a facial gender classification serves to possibly threaten the existence of having separate high school sports teams for males and females. Because every decision that results in even the smallest difference between single-gender teams has now the potential of turning into a constitutional battle in court, schools may rethink whether offering separate teams is actually worth the risk of violating the Equal Protection Clause.

The operation of just two single-gender athletic teams has the potential of creating a multitude of differences between the two teams, each carrying the threat of an Equal Protection claim that compels the school district to now provide an exceedingly persuasive justification for the distinction. For example, a school district can easily establish substantially equal boys' and girls' basketball teams, but the administration

of the two teams could lead to several other minor differences in addition to playing in different seasons, such as:

- If the two teams play during the same season, the teams will have a different coach.
- The teams will have different practice schedules if a gymnasium must be shared.
- The teams will likely have their games officiated by different referees.[9]
- The teams will have different locker rooms.
- The teams will have different uniforms.
- The length of practices may vary between the two teams.
- The teams may play on different days of the week.
- Cheerleaders may perform at games for one team, but not the other.
- The pep band may play at games for one team, but not the other.
- The athletic boosters may operate a concession stand at games for only one team.

Thus, the differences that result from administering two separate single-gender teams are limitless. Like the scheduling of the teams' seasons, the differences relate to the operation of the two teams from a gender-neutral perspective. In other words, the teams have different uniforms because they are different teams, not because one team is made up of boys and the other consists of girls. Likewise, cheerleaders

[9] Ironically, the first three differences that are noted are exacerbated by the change of seasons that the lower courts have mandated. Thus, the Court of Appeals' decision not only provides a greater opportunity for challenging single-gender athletic programs, it also serves to create additional circumstances that will be ripe for Equal Protection claims.

may perform only at boys' basketball games because those games traditionally draw larger crowds; the gender of the team is, once again, not a factor in making a determination that results in a disparity between the boys' and girls' teams. And, when such a difference is treated as a facial gender classification, it is unlikely that the school district's justification for the different treatment – that the cheerleaders simply like performing before larger crowds – would achieve the "exceedingly persuasive" standard. Further, it would be an administrative nightmare for a school district to even attempt to operate boys' and girls' teams without creating even the slightest difference. Sadly, as a result of the Court of Appeals' decision, the only infallible approach for school districts that wish to avoid future facial gender discrimination claims is to eliminate separate-gender athletic teams entirely.

In the past, colleges and universities were placed in the unenviable position of eliminating athletic teams in order to comply with the equality requirements of Title IX. The discourse that this practice created eventually led to a new interpretation of complying with Tile IX by the Department of Education, Office of Civil Rights.[10] Now, high schools may have to consider the same difficult decisions in order to comply with the Equal Protection Clause, as interpreted by the Court of Appeals.

Ironically, the decision of the Court of Appeals comes at a time when schools are being encouraged to consider establishing single-gender educational programs. Recently,

[10] United States Department of Education, Office of Civil Rights, July 11, 2003, *Dear Colleague Letter* ("OCR hereby clarifies that nothing in Title IX requires the cutting or reduction in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice.").

the U.S. Department of Education issued regulations implementing Title IX that give educators more flexibility to offer single-gender classes, extracurricular activities and schools at the elementary and secondary education levels.[11] Additionally, the Michigan Legislature recently passed two bills that removed state restrictions that hindered the establishment of K-12 single-gender educational programs.[12] These changes were prompted by a provision in the No Child Left Behind Act of 2001, 20 U.S.C. 7215(a)(23) (Supp. I 2003), which provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms."

For most school districts, however, the risk of costly litigation relating to minor differences between all-boys and all-girls schools or classrooms will likely outweigh the prospect of receiving whatever additional funding the federal government can provide. It is difficult to see how a school could prove an exceedingly persuasive justification for different lunch menus, for example, between two single-gender schools. Much like scheduling seasons for single-gender athletic teams, establishing lunch menus for a school

[11] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106).

[12] *See* Mich. Comp. Laws § 380.1146, *amended by* Public Act 303 of 2006 (permits establishing a school, class, or program within a school in which enrollment is limited to pupils of a single gender); Mich. Comp. Laws § 37.2404a, *added by* Public Act 348 of 2006 (provides that Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, does not prohibit the board of a school district from establishing a single-gender school, class, or program within a school).

is one of many administrative decisions that must be made in managing the school. Such decisions will inevitably create minor differences between two programs or schools, while overall, they remain substantially equal.

This Court has advised lower courts "to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District,* 411 at 42-43. The Court of Appeals, however, has ignored this guidance by not requiring proof of intentional discrimination in accepting the plaintiffs' Equal Protection and Title IX claims. Because Michigan's interscholastic athletic seasons are "non-traditional" or "non-conforming" compared to other states, the Sixth Circuit presumed intentional discrimination and therefore found Establishment Clause and Title IX violations. However, this presumption creates an "inflexible restraint" that will abolish a unique and innovative scheduling system that is embraced by Michigan school districts and maximizes athletic participation opportunities. Because being different should not automatically amount to being discriminatory, the judgment of the Court of Appeals must be reversed.

CONCLUSION

For the reasons set forth above, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

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