No. 02-1127

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, *et al.*,

Plaintiffs-Appellees

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case poses a question regarding the application of the state action doctrine of the Fourteenth Amendment to a state high school athletic association that sets rules for athletic programs throughout the State of Michigan. This case also involves the proper interpretation and application of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, to a high school athletic association. The Department of Education promulgates regulations interpreting and enforcing Title IX. 34 C.F.R. Pt. 106. The Department of Justice coordinates the enforcement of Title IX by executive agencies. Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. 0.51. The United States has participated as amicus in this

case in the district court and in this Court.

QUESTIONS PRESENTED

The United States addresses the following issues:

1. Whether the district court erred in finding that MHSAA's scheduling of girls' athletic seasons violates the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the district court erred in finding that MHSAA's scheduling of girls' athletic seasons violates Title IX of the Education Amendments of 1972.

STATEMENT OF THE CASE

1. The Michigan High School Athletic Association (MHSAA) regulates interscholastic athletics in Michigan secondary schools. MHSAA is comprised of over 700 public and private secondary schools. See *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 810 (W.D. Mich. 2001) (citing Tr. Exh. 9(a) at 13 (2000-2001 MHSAA Handbook); Tr. Exh. 12 (1999-2000 MHSAA Member School Directory); Tr. Exh. 26 (Michigan Department of Education's list of public schools)). Eighty percent of MHSAA's member schools are public schools, and all public secondary schools with interscholastic programs in the State are MHSAA members. *Ibid*. "To join the MHSAA, a school's board of education must agree to adopt MHSAA rules and regulations 'as its own and agree[] to primary enforcement of such rules as to its own schools.'" See *id.* at 811 (quoting Tr. Exh. 9(a) at 15 (MHSAA Constitution, art. II, § 2)).

MHSAA is governed by a Representative Council, consisting of fourteen

representatives from member schools who are elected by the member schools, four members appointed by the Representative Council, and one representative of the state superintendent of education. See *id*. at 812 (citing Tr. Exh. 9(a) at 15 (MHSAA Constitution, art. IV, § 1)). During the 2000-2001 academic year, seventeen Representative Council members were representatives of public schools and school districts. *Ibid*. (citing Tr. Exh. 9(a) at 6-7). MHSAA also has a five-member Executive Committee, comprised of Representative Council members. *Ibid*. (citing Stip. Fact 6). The Representative Council has "[g]eneral control of interscholastic athletic policies," while the Executive Committee has power to "[m]ake all rules necessary for the effective control and government of interschool activities * * *." *Ibid*. (citing Tr. Exh. 9(a) at 18). As a whole, MHSAA is responsible for promulgating eligibility and competition rules – including rules prescribing "when practice may begin, when competition may begin, when competition must end, and the maximum number of games that may be played" (*id*. at 814 (citing Tr. Exh. 9(a) at 54-55 (Regulation II, § 11(A))) – and disciplining member schools for rule violations. *Id*. at 812.

Historically, MHSAA has scheduled six girls' sports in seasons that are not the traditional playing season or in a disadvantageous season for those sports. *Id*. at 817-836. The following girls' sports are scheduled in a non-traditional season: girls' basketball is played in the fall instead of the traditional winter season when the boys' teams play; volleyball is played in the winter o instead of the fall (MHSAA does not currently sponsor boys' volleyball); soccer is played in the spring instead

of the fall; tennis is played in the fall instead of the spring; and swimming and diving in Michigan's Lower Peninsula is played in the fall instead of the winter. *Id.* at 807. In 1990, MHSAA moved girls' swimming and diving in Michigan's Lower Peninsula to the winter to increase sports selections for girls in the winter, but moved swimming and diving back to the fall when member schools objected. *Id.* at 833-834. Although MHSAA scheduled girls' golf in the Lower Peninsula in the spring, the traditional season for golf, fall in Michigan is a better season for playing golf because of Michigan's climate. *Id.* at 831-832. "Lower Peninsula's boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses" and better course conditions, and because the National Collegiate Athletic Association's letter of intent signing date is in early November (thus, boys have four years of golf experience and scores on which to be evaluated while girls have only three years because their season occurs after the signing date). *Ibid.*

2. In 1998, parents of female student-athletes and an organization of parents and students sued MHSAA under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. 1983, and Title IX,[1] alleging that MHSAA discriminates

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[1] Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, to eliminate gender discrimination in educational institutions. Title IX provides, in pertinent part, that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." 20 U.S.C. 1681(a). The Department of Education's regulations expressly apply Title IX's "program or activity" requirements to educational sports

(continued...)

against female athletes and curtails their opportunities to participate in athletics. The complaint also contains a claim under Michigan's Elliot-Larsen Civil Rights Act, which prohibits discrimination in the provision of a public service.

In 2000, the district court denied MHSAA's summary judgment motion, holding that MHSAA was a state actor for purposes of the Fourteenth Amendment. See *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 742 (W.D. Mich. 2000). The court also held that Title IX applies to any entity that exercises controlling authority over a "program or activity receiving Federal financial assistance," but found a genuine issue of material fact concerning whether MHSAA exercised such controlling authority over its member schools' athletic programs. *Id*. at 733. Thereafter, the parties settled all claims except for the issue of whether "MHSAA schedules athletic seasons and tournaments for six girls'

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[1](...continued)

programs. Specifically, 34 C.F.R. 106.41(a) states that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." The regulations further state that recipients of federal funds who operate an educational program or activity "shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. 106.41(c). Factors to be considered in determining whether an institution is complying with Title IX's mandate of equal athletic opportunity include "[s]cheduling of games and practice time," and the provision of equipment, supplies, and practice and competitive facilities. *Ibid*. Disadvantageous playing seasons violate Title IX when the resulting harms are substantial enough to deny equal educational opportunities and benefits in athletics to students of one sex, see Office for Civil Rights, Title IX Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979), and Title IX compliance with respect to scheduling is determined by "comparing the availability, quality, and kinds of benefits, opportunities, and treatment afforded members of both sexes," *id*. at 71,415.

sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling of girls' athletic seasons constitutes legally inequitable treatment." *Communities for Equity*, 178 F. Supp. 2d at 807.

3. Following a bench trial, the district court held that MHSAA's girls' athletic schedules for volleyball, basketball, soccer, swimming and diving, tennis, and golf violated the Fourteenth Amendment, Title IX, and state law. *Id.* at 861-862. The court also made detailed factual findings that the girls' sports at issue are played in seasons that disadvantage girls by, *inter alia*:

> (1) reducing the length of the girls' playing season, which decreases their playing experience and adversely affects their ability to compete against more experienced female student-athletes for college scholarships, *id*. at 820 (basketball), 825 (volleyball), 834 (swimming/diving), 836 (tennis);
> (2) reducing their ability to participate in special promotional events or college games that take place in traditional seasons, *id*. at 819, 820 (basketball); 826 (volleyball);
> (3) reducing their ability to be nationally ranked and thereby reducing their college recruiting opportunities, *id*. at 819-820, 822 (basketball), 826 (volleyball), 830 (soccer);
> (4) preventing girls from playing in league and club programs where college recruiters often scout new players because those programs are played at the same time as the same high school girls' sport in Michigan, *id*. at 824, 826 (volleyball), 830 (soccer);
> (5) reducing their playing level in league or club programs because there is a gap of several months between their season and the season when the club program begins, *id*. at 834 (swimming/diving), 836 (tennis);
> (6) reducing their opportunities for college athletic scholarships because the traditional college recruiting season or signing date takes place earlier in the academic year before the girls' sport is played in Michigan, *id*. at 825 (volleyball), 829 (soccer);
> (7) eliminating the opportunity to play against nearby teams in neighboring States because those States schedule girls' sports in the

> traditional seasons and, as a result, girls' teams must travel farther within Michigan in order to play other in-state teams, *id*. at 820 (basketball), 826 (volleyball); and
> (8) making it more difficult for the girls' teams to get sports equipment because schools in other States have already depleted supplies, *id*. at 827 (volleyball).

See also *id*. at 836-839. The court also found that, although girls play golf in the traditional spring season, playing in the fall in Michigan is more advantageous because students can get better tee times, the courses are in better shape, and college recruiting occurs in November. *Id*. at 807, 832. Lastly, the court found that the discriminatory treatment of female athletes affects the girls' self-worth and harms boys by sending them a message that girls are inferior. *Id*. at 836-838. The district court ordered MHSAA to propose a remedial plan. *Id*. at 862.

4. The district court rejected MHSAA's proposed Compliance Plan as insufficient for achieving gender equity and ordered MHSAA to submit another proposal. See Aug. 1, 2002, order at 11-12. MHSAA then proposed to move girls' basketball to the winter; girls' volleyball to the fall; boys' soccer in the Upper Peninsula to the spring; girls' golf in the Lower Peninsula to the fall and boys' golf in the Lower Peninsula to the spring; and girls' tennis in the Lower Peninsula to the spring and boys' tennis in the Lower Peninsula to the fall. See MHSAA's Amended Compliance Plan, dated Oct. 30, 2002, at 2. The court adopted MHSAA's Amended Compliance Plan. See Nov. 8, 2002, order at 2.

SUMMARY OF ARGUMENT

1. The judgment against MHSAA should be affirmed on equal protection grounds. MHSAA is a state actor under *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 305 (2001), and thus is subject to the Equal Protection Clause of the Fourteenth Amendment. In addition, MHSAA has failed to challenge the district court's detailed findings concerning how MHSAA's sports seasons eliminate various opportunities for girls to participate in athletics, such as shorter seasons and their inability to participate in club sports and interstate competitions. Instead, MHSAA incorrectly argues that plaintiffs must show that MHSAA acted with discriminatory animus. It is well established, however, that only discriminatory intent, not animus, is required in proving gender discrimination. Here, MHSAA intentionally treated boys and girls differently by scheduling separate seasons in such a way that girls alone played in disadvantaged seasons. Because MHSAA failed to show how the current seasons schedule is substantially related to an important governmental interest, the Court should affirm the district court's judgment.

2. Alternatively, the district court correctly held that MHSAA's scheduling of the girls' sports seasons at issue violates Title IX. First, MHSAA's reliance on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), a disparate impact case, is misplaced because the Title IX claim in this case is premised on intentional discrimination. Second, MHSAA should be covered by Title IX under a "ceded controlling authority" theory. Under this theory, when a recipient cedes virtually all

controlling authority over a program receiving federal financial assistance to another entity, and that entity subjects an individual beneficiary to discrimination under the program, the entity ceded authority violates Title IX. Application of the ceded controlling authority theory is uniquely appropriate in this context, where virtually all controlling authority has been ceded to MHSAA and there has been substantial entwinement of state actors and recipients of federal assistance with MHSAA. The district court's determination that MHSAA's members, many of which received federal funding, have ceded controlling authority over their sports seasons schedules to MHSAA is not clearly erroneous. Indeed, MHSAA does not challenge the court's factual findings; instead, it impermissibly cites evidence that was either excluded or never introduced at trial. Third, the district court did not err in finding that MHSAA intended to treat female athletes differently because of gender by scheduling their seasons to fit around boys' sports and providing girls unequal athletic opportunities.

ARGUMENT

I

MHSAA'S ATHLETIC SEASONS SCHEDULE VIOLATES EQUAL PROTECTION

The court should affirm the judgment on equal protection grounds.[2]

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[2] MHSAA incorrectly contends (Br. 23-24) that the constitutional dispute here is whether there exists a constitutional right to participate in high school sports as opposed to unequal treatment. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 35, 55 (1973) (stating that although a right to an education is not a

(continued...)

A. MHSAA contends (Br. 28-32) that it is not a state actor subject to the Equal Protection Clause. In *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 305 (2001), the Supreme Court held that the state high school athletic association in that case, TSSAA, was a state actor for purposes of the Equal Protection Clause. The Court stated that TSSAA's "nominally private character * * * is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." *Id*. at 298. In finding that TSSAA is a state actor, the Supreme Court relied on the following facts: eighty-four percent of TSSAA's membership consists of public schools; TSSAA's bylaws allow member schools to vote on the association's governing legislative council and board of control among eligible school officials; member schools give sources of their own income (gate receipts at tournaments) along with dues to TSSAA; State Board members have ex officio status to serve on the legislative council and board of control; and TSSAA's ministerial employees are treated as state mployees for purposes of the state retirement system. *Id*. at 298-300. In sum, the TSSAA was simply a mechanism by which public school officials acted together to implement interscholastic sports schedules and competition rules. *Id*. at 299.

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[2](...continued)
constitutional right, once a State provides such a program, it must do so in a manner consistent with the Constitution); see also *Butler* v. *Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1110 n.3 (E.D. Wis. 2001) ("[A] program of interscholastic sports, *after having been provided*, must be administered without violation of the Fourteenth Amendment, at least if the case involves an equal protection claim arising from gender-based discrimination.").

The district court correctly determined that MHSAA is virtually identical to TSSAA and is a state actor. Like TSSAA, MHSAA was created as a voluntary association whereby public school officials act together to implement interscholastic sports schedules and competition rules statewide; eighty percent of its members are public high schools and every public high school with an interscholastic athletic program in the State is a MHSAA member; the Representative Council and Executive Board are comprised of mostly public school officials; MHSAA's revenue is derived from gate receipts at tournaments and broadcast fees, money to which the member schools would otherwise be entitled; some MHSAA employees continue to qualify for the state retirement system; and MHSAA has the authority to investigate and penalize its members. See *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 847 (W.D. Mich. 2001); see also Mich. Comp. Laws § 38.1347 (MHSAA employees with teaching certificates who started working for MHSAA prior to January 1, 1988, are eligible to participate in the state retirement system).

Before the Supreme Court reversed this Court's determination that TSSAA was not a state actor, MHSAA had argued that it was very similar to TSSAA. See 178 F. Supp. 2d at 847. But MHSAA now asserts (Br. 29) that it differs from TSSAA because the Michigan Attorney General had issued an opinion that MHSAA is not a state actor. This opinion was excluded at trial and MHSAA does not challenge exclusion of that evidence on appeal. See Mar. 26, 2001, order; see also *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d

729, 743-744 (W.D. Mich. 2000) (holding that MHSAA is a state actor for equal protection purposes under the state compulsion and symbiotic relationship tests). Moreover, the Attorney General's opinion not only preceded *Brentwood Academy*, but also lacked any legal analysis in support of its assertion that MHSAA is not a state actor. See Opinion No. 6352, 1986 WL 233291 (Apr. 8, 1986).

MHSAA also emphasizes (Br. 31-32) that it has no authority under state law to regulate interscholastic sports and that that power remains with the member schools. The Supreme Court flatly rejected this argument in *Brentwood*. In that case, when the State of Tennessee originally incorporated TSSAA, it designated, by regulation, that the association be "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." 531 U.S. at 292. The state Board of Education later removed this designation and simply recognized TSSAA as a voluntary organization that coordinates interscholastic athletics. *Id*. at 292-293. MHSAA has undergone a similar designation change. When MHSAA was incorporated in 1972, the Michigan Legislature amended the School Code to designate MHSAA as the "official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and [decreed that it] shall be responsible for the adoption and enforcement of rules relating to eligibility of athletes in schools for participation in interschool athletic events, contests, and tournaments." 178 F. Supp. 2d at 811. In 1995, the Michigan Legislature amended the School Code again to remove the official

designation, but confirmed that school districts were still authorized to "join organizations [such as the MHSAA] as part of performing the functions of the school district." *Ibid.* As in *Brentwood*, the removal of the official designation under state law did not result in any "substantive changes in the structure or operation of the MHSAA or in its relationships with its member schools." *Ibid.* Because determining state actor status is "necessarily fact-bound," *Brentwood*, 531 U.S. at 298, the change in legal status without any corresponding change in the facts does not preclude finding that MHSAA is a state actor.

B. MHSAA argues (Br. 24-28, 32-38) that it is not liable under the Equal Protection Clause because there is no evidence that MHSAA acted with discriminatory intent, and the district court erred in concluding the current seasons schedule does not maximize participation by girls in Michigan athletics. When a state actor maintains a facial gender classification and that classification, such as MHSAA's separate sports seasons for girls and boys, is challenged as denying opportunity based on gender, as in this case, the burden shifts to the defendant to show that the classification serves "important governmental objectives and must be substantially related to achievement of those objectives." See *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Plaintiffs need not show discriminatory animus. See *id.* at 198-199 (benign gender classifications that are not substantially related to an important governmental interest violate equal

protection).[3] "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996). The district court correctly concluded that MHSAA has not carried this heavy burden.

As MHSAA has admitted, it scheduled girls' sports to fit around boys' sports. *Communities for Equity*, 178 F. Supp. 2d at 815 (citing Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-1991 MHSAA Bulletin)). Although MHSAA asserts (Br. 35) that "the original purpose of separate seasons was to maximize participation," it failed to reconcile, at trial or on appeal, that purported goal with a 1990-1991 article written by its current executive director, John Roberts, about the history of boys' and girls' sports in Michigan. Roberts wrote in MHSAA's Bulletin, which is published regularly during the school year and contains the minutes of all MHSAA committee meetings and official MHSAA policies, that "[b]oys' sports were in [MHSAA member schools] first and girls' sports, which came later, were fitted around the pre-existing boys program. While this allowed for the best use of facilities, faculty and officials, it also led to an imbalance of girls' athletic opportunities across the three seasons of the school

[3] The cases MHSAA cites (Br. 5-6 are inapposite because they involve facially neutral – not facially gender-based – classifications, see *Hernandez* v. *New York*, 500 U.S. 352, 355 (1991), and *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979), or do not involve a gender-based classification at all, see *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 271, 273 n.4 (1993).

year." 178 F. Supp. 2d at 815 (citing Tr. Exh. 81 at 1). It is plain from this evidence that MHSAA sought to maximize participation in sports only to the extent that the girls' sports could be scheduled around the seasons in place for boys' sports rather than, as MHSAA contends here, that it sought to maximize participation for boys and girls.

Indeed, MHSAA did not provide any evidence at trial to explain why, despite MHSAA's knowledge since the early 1990s that girls' sports were disadvantaged, MHSAA did not change the girls' playing seasons to maximize participation. For example, MHSAA was aware in the early 1990s that "girls' participation opportunities in the winter season were lacking." *Id*. at 816 (citing Tr. Exh. 81 at 1). As a result of the lack of winter sports for girls, MHSAA moved girl's swimming and diving in the Lower Peninsula from the fall to the winter, *ibid*., but reversed this decision a few months later due to opposition by member schools, *ibid*. (citing Tr. Exh. 45 at 236; Tr. 1196). Subsequently, the Representative Council considered an internal MHSAA proposal to conduct a comprehensive study of sports seasons, switch the girls' and boys' swim seasons in the Lower Peninsula by 2000, move the girls' volleyball and basketball seasons by 2000, combine boys' and girls' golf by 2000, and consider combining boys' and girls' tennis by 2000. See *id*. at 817 (citing Tr. Exh. 95 at 11 (Memorandum Regarding "Pro-Active Approach to Expanding Athletic Opportunities for Girls in the Winter Season," dated Apr. 23, 1991)). The purpose of the proposal was "to do what is needed for girls, but also * * * to keep the MHSAA in a position of

choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon." *Ibid*. (citing Tr. Exh. 95 at 9). At trial, as the district court noted, MHSAA did not present any evidence that it "studied the sports season issue as recommended" in the memorandum. *Ibid*. Nor has MHSAA implemented any of the proposed changes contained in the memorandum. *Ibid*.

Thus, MHSAA's justification for the current playing seasons falls far short of meeting the Supreme Court's standard. Even if maximizing participation in sports was the actual purpose of the sports seasons, there would be no actual facilities conflict if the girls' basketball and volleyball seasons were switched; the gyms today are being used concurrently by boys' basketball and girls' volleyball. *Id*. at 839-842. At most, MHSAA's asserted justification only explains why boys and girls should play the same sports in *different* seasons. But the Fourteenth Amendment requires MHSAA to schedule these sports in a manner whereby the burdens (and benefits) of playing in those seasons must be shared by boys and girls. MHSAA has not shown why girls alone should play in disadvantageous seasons in order to maximize participation. And MHSAA has not offered any evidence that boys are disadvantaged in any way by the playing seasons. Golf, the one sport in which boys play in a non-traditional season, actually benefits boys by providing them better access to golf courses than playing in the spring, when girls in the Lower Peninsula play. *Id*. at 831-832. Although MHSAA faults the district court for placing undue importance on mere "byproducts of participation

opportunities," such as "college recruitment and athletic scholarships" (Br. 38), it provided no evidence at trial to show that college recruitment and scholarships are not important to student athletes or that the current seasons schedule does not disadvantage female athletes in these areas.

More importantly, MHSAA has failed to address the district court's detailed findings concerning how the MHSAA's sports seasons eliminate various opportunities for girls to participate in athletics, such as shorter seasons and their inability to participate in club sports and interstate competitions. See, *supra*, at pp. 6-7. MHSAA has also failed to show that the current seasons are substantially related to its goal of maximizing participation. The fact that Michigan's participation rate is eighth nationwide when it ranks eighth in population does not show a causal link between the seasons schedule and the State's participation rate for high school female athletes. As the district court noted, it is not surprising that Michigan has a large number of students participating in sports considering that Michigan ranks eighth in population nationwide. 178 F. Supp. 2d at 841-842. Moreover, because many factors aside from seasons (*e.g.*, school funding, number of schools in a State sponsoring a particular sport, cultural attitudes in a State, and weather) affect participation rates, this evidence does not support MHSAA's contention. *Id*. at 812. Without more, MHSAA has failed to show that the seasons schedule is substantially related to an important governmental interest.

II

MHSAA'S ATHLETIC SEASONS SCHEDULE VIOLATES TITLE IX

If the Court finds no Fourteenth Amendment violation, the Court should nevertheless affirm the district court's holding that MHSAA's seasons schedule violates Title IX. MHSAA raises three arguments concerning plaintiffs' Title IX claim, all of which are without merit. See Br. 39-46.

A. MHSAA argues (Br. 39-41) that *Alexander* v. *Sandoval*, 532 U.S. 275, 293 (2001), precludes finding "a private right of action to enforce federal regulations promulgated under Title VI, and by necessary implication, Title IX." Not so. In *Sandoval*, the Supreme Court held that a Title VI regulation prohibiting conduct having a racially discriminatory impact was not privately enforceable because it exceeded the scope of Title VI's prohibition on intentional discrimination. *Id*. at 284. Here, plaintiffs' Title IX claim is premised solely on intentional discrimination; thus, *Sandoval*'s holding concerning a private cause of action to enforce disparate impact claims is inapposite. Indeed, the Court in *Sandoval* noted that Congress intended to provide a private cause of action to enforce Title IX. *Id*. at 279-280 (citing *Cannon* v. *University of Chicago*, 441 U.S. 677, 696, 699 (1979)). Because nothing in *Sandoval* disturbed the availability of a private cause of action to enforce a claim of intentional discrimination, the district court did not err in allowing plaintiffs to pursue their intentional discrimination claim under both Title IX and its implementing regulations. See *id.* at 284 ("A Congress that intends the statute to be enforced through a private cause of action

intends the authoritative interpretation of the statute to be so enforced as well.").

B. MHSAA contends (Br. 41-45) that it is not subject to Title IX because Title IX applies only to recipients of federal assistance and MHSAA does not receive such funding. Although it is true that MHSAA does not receive federal funding, as the United States argued below, a "ceded controlling authority" theory should be an alternative basis from recipient status for establishing Title IX coverage. Under this theory, when a recipient cedes essentially all controlling authority over a program receiving assistance to another entity, and that entity subjects an individual beneficiary to discrimination under the program, the entity ceded authority violates Title IX even though the entity ceded authority is not itself a recipient of federal funding. In *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999), the only time the Supreme Court has had the opportunity to address the ceded controlling authority theory, it declined to consider this issue as it had not been decided below. Whether Title IX's prohibition on sex-based discrimination in federally assisted programs extends to an entity to which a recipient has ceded controlling authority over a program is a question of first impression in this circuit. Cf. *Horner* v. *Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 268-270 (6th Cir. 1994) (applying Title IX to the Kentucky High School Athletic Association, which managed high school interscholastic athletics statewide, because the association, which collected dues from member schools, was an indirect recipient of federal funds).

To date, the Third Circuit is the only court of appeals to have addressed the

ceded controlling authority theory. See *Cureton* v. *NCAA*, 198 F.3d 107 (3d Cir. 1999). In *Cureton*, which involved a challenge to the NCAA's minimum SAT requirement, the court held that the NCAA was not an indirect "recipient of Federal funds by reason of * * * its 'controlling authority' over programs or activities receiving Federal financial assistance." *Id.* at 116, 118. The Third Circuit, contrary to MHSAA's contention (Br. 44-45), did not reject the validity of the ceded controlling authority theory altogether; rather, it held that the theory did not apply to the facts of *Cureton*. 198 F.3d at 117-118 ("We emphasize that the NCAA members have not ceded controlling authority to the NCAA by giving it the power to enforce its eligibility rules directly against students.").

The Court need not wrestle with difficult questions regarding the limits of a ceded controlling authority theory in this case.[4] Here, MHSAA's member schools have ceded to MHSAA virtually all authority in the scheduling of interscholastic sports seasons in Michigan. The district court heard testimony at trial that after MHSAA moved girls' basketball from the winter to fall, some schools tried to continue playing girls' basketball in the winter but ultimately had to move the season to the fall because "they 'didn't have anybody to compete against.'" 178 F. Supp. 2d at 815. Thus, MHSAA's effective control over statewide high schools'

[4] The United States declines to address whether other factual situations, where less than virtually all controlling authority has been ceded, will trigger Title IX coverage. Nor does the United States take a position on whether a private damages action would be permitted against a non-recipient party who has been ceded virtually all control over a federally funded activity; plaintiffs here seek only injunctive relief.

interscholastic athletics is in practice total. And withdrawing from MHSAA would result in not simply girls' playing fewer games; rather, boys and girls would not be able to compete in interscholastic sports at all because the school's entire athletic program would be penalized.

The district court's conclusion that MHSAA exercises controlling authority over its members' interscholastic athletic programs is further supported by MHSAA's Handbook, which contains MHSAA's Constitution and rules and regulations. *Id*. at 811-814. MHSAA's rules and regulations establish MHSAA's power to schedule playing seasons, sanction additional sports, and adopt other competition rules for its member schools. For example, the court's findings were based on the fact that MHSAA has adopted playing rules and regulations for each MHSAA-sanctioned sport, *id*. at 811 (citing Tr. Exh. 9(a) at 50 (Regulation II, § 8)); MHSAA must approve of any meet or tournament in Michigan sponsored by nonmember schools and those competitions must be conducted pursuant to MHSAA rules, *ibid*. (citing Tr. Exh. 9(a) at 47-48 (Regulation II, § 5(A) & Interpretation No. 157)); MHSAA imposes requirements for coaches, *id*. at 811-812 (citing Tr. Exh. 9(a) at 46 (Regulation II, § 3); member schools must use only MHSAA-registered game officials, *id*. at 812 (citing Tr. Exh. 9(a) at 49 (Regulation II, § 7)); MHSAA determines when seasons begin and end, *id*. at 814 (citing Tr. Exh. 9(a) at 54-55 (Regulation II, § 11(A))); member schools cannot schedule practice or competitions outside of the dates set by MHSAA, *ibid*. (citing Tr. Exh. 9(a) at 54-61, 109-110 (Regulation II, § 11(A)); Tr. Exh. 63, 83); member

schools' athletes cannot participate in both interscholastic sports and amateur club sports in the same sport in the same season, *ibid*. (citing Tr. Exh. 14 at 4); and member schools who violate any of MHSAA's rules are subject to a wide range of penalties, including censure, probation, bans from regular season competition and MHSAA tournaments, forfeiture, and expulsion, *id*. at 812 (citing Tr. Exh. 9(a) at 78 (Regulation V, § 4)). While member schools belong to athletic leagues, these conferences require that their member schools be members of MHSAA and follow MHSAA's rules and regulations, *id*. at 813-814 (citing Tr. 863-864; Tr. 164; Tr. Exh. 222 at 2, 6-9).

MHSAA did not refute this evidence at trial and, on appeal, argues (Br. 5-16), mostly by referring to evidence that was not admitted at trial, that MHSAA simply acts according to the preference of the member schools and member schools are not bound by MHSAA's rules.[5] Such assertions are contradicted by the text of MHSAA's regulations and by the testimony of MHSAA's own witness at trial, Kathy McGee, the athletic director and basketball coach at a MHSAA member school, who testified that member schools are obligated to follow all of MHSAA's rules and that "it's a take it or leave it proposition." 178 F. Supp. 2d at 813 (citing Tr. 867). Without more, MHSAA has not demonstrated that the district court's

[5] Indeed, throughout its brief, MHSAA inappropriately cites to attachments to its summary judgment motion (see, *e.g.*, Br. 5 (John Roberts Aff.), 6 (Mary Leiker Dep.), 7 (James Glazer Dep.), 8 (Joyce Seals Dep.), 9 (John Roberts Dep., 10 (Jock Ambrose Dep.)) that were never admitted at trial and cannot be the basis for finding clear error.

findings – based primarily on MHSAA's own rules and regulations – are clear error. In addition, contrary to MHSAA's representation (Br. 5, 29-30, 41, 43, 45), the Michigan Supreme Court has found that the member schools have "cede[d] to the MHSAA full authority to regulate interscholastic athletics." *Kirby* v. *Michigan High Sch. Athletic Ass'n*, 585 N.W.2d 290, 296 (Mich. 1998).

C. MHSAA argues (Br. 46) that the district court erred in finding Title IX liability because plaintiffs failed to present any evidence of discriminatory animus. As expressly provided by Title IX's statutory language and as stated by the Supreme Court in *Davis* v. *Monroe County Board of Education*, 526 U.S. 629, 641-642 (1999), an entity violates Title IX if it excludes persons from participation in, denies persons of benefits, or subjects persons to discrimination because of gender under its programs. See 20 U.S.C. 1681(c), 1687. Thus, plaintiffs need only show that MHSAA "intended to treat [female athletes] differently on the basis of their sex by providing them unequal athletic opportunity." *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 882 (5th Cir. 2000). Plaintiffs have made this showing.

In concluding that MHSAA violated Title IX, the district court relied on the fact that MHSAA, in an article written by its current executive director, John Roberts, had known since 1990 that MHSAA's athletic schedule disadvantaged female athletes. 178 F. Supp. 2d at 815 (citing Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-1991 MHSAA Bulletin)). See also, *supra*, at pp. 14-16. There was also ample evidence showing that the current sports seasons limit girls' college athletic opportunities, amateur athletic opportunities, high

school athletic opportunities, and disadvantage girls in other ways that boys do not experience (*e.g.*, increased travel time to games, increased expenses for travel which limit the number of students who could afford to play, playing more games on weeknights, lower perceptions of self-worth and lower expectations for themselves). See *id*. at 817-839 (detailed findings of disadvantage to girls in each challenged sport due to the seasons schedule). MHSAA does not challenge these findings. Instead, it contends (Br. 16, 36) that the fact that MHSAA ranks eighth in the nation with respect to student participation in sports and that the girls' sports teams are ranked high nationwide shows that the girls' athletic seasons are actually advantageous for girls. As discussed, *supra*, at p. 17, the district court properly rejected this argument because many factors aside from seasons (*e.g.*, school funding, number of schools in a State sponsoring a particular sport, cultural attitudes in a State, and weather) affect participation rates; thus, this evidence does not support MHSAA's contention. 178 F. Supp. 2d at 812. Accordingly, the Court should affirm the district court's liability finding under Title IX.

CONCLUSION

The Court should affirm the district court's holding that MHSAA's scheduling of sports seasons violates the Fourteenth Amendment and Title IX.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(C). The brief was prepared using WordPerfect 9.0 and contains 6,362 words in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2003, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE were served by overnight mail, postage pre-paid, on:

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