No. 99-901

IN THE SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER,
Executive Director and Individually,
Respondents.

BRIEF OF THE FLORIDA HIGH SCHOOL ACTIVITIES ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Filed June 20, 2000

STATEMENT OF ISSUES PRESENTED

The Florida High School Activities Association, Inc. (FHSAA) agrees with and supports the arguments that TSSAA is not a state actor contained in the Brief of the Tennessee Secondary School Athletic Association (TSSAA) and the Brief of *Amicus Curiae* Interscholastic Associations, et al, in support of the affirmance of the decision of the United States Court of Appeals for the Sixth Circuit. This Brief is filed specifically in response to arguments made in the *Amicus* Briefs of the National Women's Law Center and of the Tennessee Lawyers Association for Women (TLAW). Those arguments contend that there exist a potential for sex or gender discrimination in the event TSSAA is determined not to be a state actor.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, similar to the TSSAA, is a private, voluntary interscholastic (as opposed to intercollegiate) association.[1] While *Amicus'* structure may vary slightly from that of TSSAA, it shares significant key traits with TSSAA which renders the present case of critical importance to its historical status as a private association subject to the laws of the State of Florida. If the Sixth Circuit decision is affirmed, the decision will provide clear guidance in Florida in connection with disputes arising between and among the private school and public school members of FHSAA relative to the enforcement of its policies and bylaws. Affirmance will result in the treatment of interscholastic associations, like all other private associations under Florida law, consistent with and pursuant to the terms of its Constitutions, Bylaws and Policies, freely adopted by and between the FHSAA members.

SUMMARY OF ARGUMENT

The issue before this Court in this case is whether TSSAA is a state actor for constitutional purposes. There is no issue related to gender equity. Therefore, this Court's opinion in *United States v. Virginia*, 518 U.S. 515 (1996) is not relevant to any issue in this case.

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[1] The parties' written consent to the filing of this Brief has been filed with the Court. No counsel for any party authored this Brief in whole or in part, and no person or entity other than the *Amicus Curiae* and its counsel made any monetary contribution to the preparation or submission of this Brief.

ARGUMENT

The argument contained in this Brief is limited to a response to the argument presented in the Brief of *Amicus Curiae* The Tennessee Lawyers' Association for Women (TLAW) in Support of Petitioner and the argument alluded to in the Brief of The National Women's Law Center, et al, as *Amicus Curiae* in Support of Petitioner, both related to gender equity. Until the filing of TLAW's *Amicus* Brief, gender equity has never been an issue in this case. Gender equity is raised for the first and only time in this case by the *Amicus* Brief of TLAW.

Obviously the parties have not been concerned with gender equity in this case, neither should this Court be. In Section VI of its Brief, TLAW asserts that *United States v. Virginia*, 518 U.S. 515 (1996) (referred to hereafter as the "VMI case") is relevant to an understanding of this case. TLAW then immediately acknowledges that the relevance of the VMI case is not apparent at first blush. In an attempt to show relevance TLAW, referring to the VMI case, then states: "The Court held that the Commonwealth of Virginia must make available to 'her daughters' the same opportunity that it had made available since 1839 to 'her sons' . . .." *TLAW Brief*, page 22. No claim has been made in this case that TSSAA has not made available to "her daughters" the same opportunities to participate in interscholastic athletics that it made available to "her sons."

The issue before this Court in this case is whether TSSAA acted under the color of state law for purposes of 42 U.S.C. § 1983 when it enforced its recruiting rule against Brentwood Academy, a private school that voluntarily joined TSSAA and agreed in its membership

contract to comply with TSSAA rules and decisions. *Brief of Respondent*. The issue stated by this Court in the VMI case is as follows:

> The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women "capable of all of the individual activities required of VMI cadets," 766 F.Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, id., at 1413—as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement?"

United States v. Virginia, 518 U.S. 515, 530, 531 (1996). When the issues in both cases are compared, it is obvious that the relevance of the VMI case is not only "not apparent at first blush," as TLAW admits; it is nonexistent.

The VMI case was clearly decided on a question of equal protection of the law. The VMI case began as a result of a complaint filed with the Attorney General by a female high-school student seeking admission to VMI. As a result of this complaint, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusive male admission policy violated the equal protection clause of the Fourteenth Amendment. *Id.* at 523. The District Court ruled in favor of VMI and rejected the equal protection challenge made by the United States.

This judgment was appealed to the Court of Appeals for the Fourth Circuit. The Fourth Circuit vacated the District Court's judgment and held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." *Id.* at 524, 525. The Fourth Circuit suggested three options for Virginia to follow: "Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution." *Id.* at 525, 526.

"In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL)." *Id.* at 526. VWIL would be a state-supported undergraduate program located at Mary Baldwin College, a private liberal arts school for women, and would be open initially to about 25 to 30 students. VWIL would share VMI's mission — to produce "citizen-soldiers" —; however, the VWIL program would differ from VMI in academic offerings, methods of education, and financial resources.

Virginia sought approval in the District Court of the proposed remedial plan and the District Court decided the plan met the requirements of the equal protection clause. *Id.* at 527. This judgment of the District Court was affirmed by a divided Fourth Circuit Court of Appeals and the case arrived at this Court.

This Court found that Virginia had shown no "exceedingly persuasive justification" for excluding women from the citizen-soldier training afforded by VMI and therefore affirmed the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth

Amendment Equal Protection Clause. *Id.* at 534. This Court then reversed the Fourth Circuit Final Judgment because the remedy proffered by Virginia — the Mary Baldwin VWIL program — did not cure the constitutional violation by providing equal opportunity. *Id.* at 534.

From this analysis of the VMI case, it is obvious that the VMI case has no relevance to the issues presented in this case. Clearly Virginia, and therefore, VMI were state actors. No issue of recruiting was presented in that case. In fact, VMI did not want the involvement of the female students.

TLAW argues that schools and students should not be deprived of a viable choice. They reject TSSAA's argument that membership in it is voluntary and that a dissenting school can simply withdraw from the Association if it does not like its rules. It then states: "Of course, if this happened, the students at that school would have no opportunity whatsoever to participate in a full program of interscholastic sports. They would have no chance to become state champions at any sport." *TLAW Brief,* page 23. This argument is not supported by any facts. This argument made by TLAW was rejected by this Court in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988). In that case, this Court stated:

> "Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true, [FN19] but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under the color of state law."

> FN19. The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and non-membership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

Id. at 198, 199.

TLAW's attempt to compare the constitutional right of the Virginia women students to enjoy the same system of education provided for the Virginia male students at VMI with a private school's student's desire to participate in interscholastic activities (which has never been held to be a constitutionally protected right or privilege) is misplaced. This argument is not relevant to any issues before this Court in this case.

TLAW's next statement: "Likewise, Tennessee high school students, be they women students or private school students, should not be deprived of the possibility of playing interscholastic sports because the TSSAA imposes arbitrary or punitive rules." *TLAW's Brief*, page 23. First, there is no support for the statement that TSSAA imposes arbitrary or punitive rules. In addition, there is no comparison between women students (not at issue here) who are members of a protected class and private school students who are not members of a protected class. *United States v. Virginia*, 518 U.S. at 532.

TLAW then states: "Many court decisions have addressed the need to protect women's access to athletics." And: "Additionally, by enacting Title IX, Congress enunciated that it is the public policy of this nation that women shall be treated fairly in their access to athletic

opportunities." *TLAW Brief*, page 26. In this argument TLAW refers to the statistical data provided in the Brief of *Amicus Curiae* The National Women's Law Center. Although this information is interesting, it is irrelevant to any issue in this case. There is no claim in this case that women are being denied access to athletics or that TSSAA has violated Title IX. The issue in this case is whether TSSAA is a state actor for constitutional purposes.

Without any support, TLAW argues that: "The most likely forms of discrimination to occur if the TSSAA is not held to be a state actor will be gender and racial discrimination, or at least discrimination that unfairly burdens and discriminates against female athletes." *TLAW Brief*, page 28. Then again, without support TLAW argues: "If this Court affirms the Sixth Circuit, then, since other states surely have clever people watching this case, the progress that has been made will begin eroding before the ink is dry on this Court's opinion." *TLAW Brief*, page 28. This argument certainly requires a quantum leap in logic and attributes unjustified bad faith, without any supporting record proof, to associations such as *Amicus* FHSAA.

TLAW's gender discrimination argument overlooks many factors and, once analyzed, is easily rejected. First, students in public schools, both male and female, will continue to have rights under Section 1983 against the school that they attend. Female students who attend public schools will continue to have rights against that school under Title IX. Membership in TSSAA or in any of the other *Amicus* interscholastic activities associations will not relieve the public school from its constitutional duties or from its responsibilities under Title IX.

These schools will not be able to avoid their constitutional duties or their responsibilities under Title IX by an argument that they are following the TSSAA rule or their Association's rules. If a member school of TSSAA determines that it is potentially subjected to liability under either Title IX or Section 1983 for complying with a TSSAA rule, that member school has the choice of terminating its membership in TSSAA or of securing a change of the rule. One would expect the rule to be changed because if one school is being subjected to liability by a TSSAA rule, other similarly situated schools would be affected.

The analysis of TLAW's argument as to non-public schools is different but does not support TLAW's argument. If the non-public school receives federal funds, as many non-public schools do, that school would be subject to the provisions of Title IX as it relates to the females attending that school, although there may be no Section 1983 exposure for those schools. It must be remembered that the student at the non-public school chooses to attend the non-public school. The student knowingly and voluntarily risks the loss of constitutional rights that the student would have if he or she attended a public school. That is the choice the student makes and should not be of concern to this Court.

If this Court were to reverse the Sixth Circuit and hold that TSSAA is a state actor, the incongruous result would be that a student at a nonpublic school would have no constitutional rights against the school; but by virtue of the school's decision to join TSSAA, the student would have constitutional rights against TSSAA. The student would have no constitutional rights related to the regular school curriculum at the non-public school, or with respect to other school-related activities; however, he or she would have constitutional rights with respect to the extracurricular activities of athletics. The student would not be able to sue his school under Section 1983 for violation of his rights as a result of the school's decision declaring the student ineligible to participate in interscholastic activities, but the student would be able to sue TSSAA under Section 1983 if the association declared the student ineligible. It is easily seen that these are results which should not occur.

In the final analysis, under the Sixth Circuit's decision students in private schools have no fewer rights if TSSAA is not a state actor, and students in public schools have all the usual federal law protection available to them as against the school itself because it is ultimately the school's voluntary decision to follow TSSAA rules.

CONCLUSION

There is no valid gender based argument in either the Brief of *Amicus* The National Women's Law Center or the Brief of *Amicus* The Tennessee Lawyers Association for Women that would justify this Court's reversal of the Sixth Circuit's opinion determining that TSSAA is not a state actor. The Sixth Circuit should therefore be affirmed.

Respectfully submitted,

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