

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TENNESSEE SECONDARY SCHOOL :

4 ATHLETIC ASSOCIATION, :

5 Petitioner :

6 v. : No. 06-427

7 BRENTWOOD ACADEMY. :

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 Washington, D.C.

 Wednesday, April 18, 2007

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:22 a.m.

15 APPEARANCES:

16 MAUREEN MAHONEY, ESQ., Washington, D.C.; on behalf of
17 the Petitioner.

18 DAN HIMMELFARB, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioner.

22 JAMES F. BLUMSTEIN, ESQ., Nashville, Tenn; on behalf of
23 the Respondent.

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P R O C E E D I N G S

(10:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in 06-427, Tennessee Secondary School Athletic Association versus Brentwood Academy.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN MAHONEY

ON BEHALF OF THE PETITIONER

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

If this Court adheres to its State-action ruling, it should now hold that the TSSAA has broad discretion to adopt and to enforce contractual restrictions on athletic recruiting as a condition of membership. Under this Court's cases, Brentwood cannot escape the contractual bargain it's made under the First Amendment, because the Association offered it a reasonable choice as measured by the three criteria that this Court has used to identify unconstitutional conditions.

First, participation in the State tournaments is entirely voluntary. Second, the restrictions at issue here are germane to the legitimate goals of the Association. And third, enforcement of the rule here imposed only a minimal burden on speech of

1 private concern.

2 I would like to turn first to the issue of
3 voluntariness, because that's a core issue in every case
4 involving allegedly unconstitutional conditions.

5 JUSTICE GINSBURG: May I ask you a
6 preliminary question, Ms. Mahoney?

7 And that is, we are told that at the time
8 this issue arose, the practice itself was all right,
9 it was all right for one school to invite students from
10 another school to join the invitee school's practice.
11 And now I take it that is no longer permissible, that
12 one school -- one school's practice is reserved for its
13 own students and not -- others are not invited. But if
14 it was permissible under the Association's rules to
15 invite students from other schools, then why is it
16 impermissible to talk it up? I mean, you can do it, but
17 you can't talk about it?

18 MS. MAHONEY: Your Honor, actually the
19 record indicates that it would be permissible to give
20 the information about the date for the spring practice
21 to the students who had signed an enrollment contract.
22 And that's at CAJA-705. It could have been sent in an
23 enrollment packet, for instance. It could have been
24 sent just as a schedule.

25 But instead the problem here was that it was

1 sent from the coach in a personal solicitation to the
2 students that really subtly pressured them to come to
3 practice. This was a form of recruiting. Under
4 question 3, which is the interpretive guidance for the
5 recruiting rule, it very expressly says that
6 coach-initiated contact with students who are enrolled
7 at another school is not supposed to occur. And so this
8 fell within the terms of the rule. As the Sixth Circuit
9 said, it would strain credulity to say that Brentwood
10 didn't know that it shouldn't have sent this letter.
11 And their own headmaster acknowledged that it certainly
12 should have been the kind of thing that they would have
13 called about before doing it, and he was surprised that
14 Coach Flatt had not done so.

15 So I think, Your Honor, that the first point
16 is that, yes, this information could have been
17 communicated to the students, but not in this way. And
18 certainly the Association could recognize that this was
19 still a form of recruiting.

20 JUSTICE KENNEDY: So in speech terms, there
21 were alternative means to get the message out.

22 MS. MAHONEY: Absolutely. This was speech
23 of private concern. It was about the time for football
24 practice. And there were other ways that that
25 information could be communicated. But the Association

1 has an interest in having prophylactic rules that
2 prevent coaches from initiating communications with
3 students before they have started school, because even
4 though they --

5 JUSTICE KENNEDY: I think the briefs are --
6 I think it's fair to characterize the Respondent's brief
7 this way, or fair to concentrate on Pickering. It seems
8 to me that Pickering is the key here, and I took away
9 that impression from your brief.

10 If we said that it's commercial speech, I
11 think that's a little far off the mark. If we said it's
12 an unconstitutional condition, I'm not sure that helps
13 either side that much, either.

14 MS. MAHONEY: Your Honor, I think Pickering
15 is really an example of an unconstitutional-conditions
16 analysis just in the employment context. What the Court
17 really says in a broad group of cases where the
18 Government or the State actor is not exercising
19 sovereign power, if it's offering a benefit, if it's
20 using funding to encourage activity, if it is engaging
21 in a contractual relationship as it does in Umbehr, that
22 what this Court has said in Umbehr very explicitly is
23 that when the Government uses contractual power the
24 constitutional concerns are not as great.

25 JUSTICE KENNEDY: In Umbehr we said, the

1 Court said, that in the independent contractor cases the
2 interests of either party, the Government or the
3 contractor, are not quite so intense as they are with a
4 public employee. I thought that made sense when I read
5 it. I'm not so sure it does anymore.

6 MS. MAHONEY: Well -- and in fact though this
7 Court said in *Umbehr* that even though the interests were
8 what different, the standards that had been applied in
9 *Connick* and *Pickering* could easily accommodate the
10 circumstances of dealing with --

11 JUSTICE KENNEDY: Well, I suppose we could
12 construct a hypothetical where we could say there's a
13 very strong interest in the contractor. So I'm not sure
14 that that works as a general theorem.

15 MS. MAHONEY: But I think that the key from
16 all the cases, whether we look at *Cornelius*, which
17 involved access to the charitable campaign, or if
18 we look at *Rust* and *American Library*, which involved
19 access to funding, or *Grove*, access to funding, that the
20 strain across these cases is that you're really looking
21 at is the restriction germane. What kind of a burden --

22 CHIEF JUSTICE ROBERTS: What about if -- what
23 if the Association had a rule that members, school
24 officials, shall not criticize the decisions of the
25 Association?

1 MS. MAHONEY: I think then it would be --

2 CHIEF JUSTICE ROBERTS: It's germane. In
3 other words, you can criticize other things, but if
4 you're going to join this group we think it's important
5 for their public stature not to be criticized by
6 members.

7 MS. MAHONEY: I think that would probably be
8 viewed as speech of public concern, and at that point
9 under Connick balancing you'd have --

10 CHIEF JUSTICE ROBERTS: It's no more
11 public concern about when spring practice is. If -- say
12 you think there should be, you know, two playoff tiers
13 rather than three and you criticize the Association for
14 that and they say well, you're suspended for a year and
15 all that.

16 MS. MAHONEY: Your Honor, in Connick this
17 Court said that in assessing whether something is a
18 issue of public concern you look at not just the topic,
19 but also the way in which that topic is discussed. And
20 if what happened was the Association decided that it was
21 going to penalize a member or have a broad rule that
22 says it would tolerate no criticism and even if
23 Brentwood had taken an ad out in the paper to talk about
24 how terrible the Association's policies were, I think
25 this Court could readily find that that was not a

1 reasonable choice because it would impact --

2 CHIEF JUSTICE ROBERTS: What about
3 criticizing officials?

4 MS. MAHONEY: On the field, Your Honor? I
5 think that the interests in essentially controlling that
6 kind of speech would always outweigh the interests of an
7 athlete or a coach in engaging in any kind of speech on
8 the field.

9 CHIEF JUSTICE ROBERTS: No, I mean three
10 days later, you know, the school -- the coach writes an
11 editorial saying there were lousy calls in the game last
12 week.

13 MS. MAHONEY: I think that would probably be
14 treated as speech of public concern, which would then
15 give rise to Connick balancing.

16 JUSTICE KENNEDY: And how would you balance
17 it?

18 MS. MAHONEY: What Connick says is you look
19 at how core is the speech, what's it about?

20 JUSTICE KENNEDY: And how would you
21 come out?

22 MS. MAHONEY: Probably find that that would not
23 be a reasonable restriction, that it's probably not germane
24 to the important educational goals of the Association.
25 But it could -- I mean, I think that what we have here

1 is the recruiting rule has been applied to speech that's
2 of private concern that can be delivered in another way;
3 and the choice to join is entirely voluntary.

4 JUSTICE SOUTER: Ms. Mahoney, on that point,
5 can I just take you back to square one for a second?
6 I'm with you in your explanation that the speech at
7 issue here probably was fairly understood as being for,
8 you know, the communication here as being a violation of
9 the rule. Could you, though, tell me, would it have
10 been -- I guess I have two questions.

11 Would it have been a violation of the rule
12 if the coach had sent the letter to 8th-grade
13 students in the school itself, those who were already
14 formally enrolled and who might be going out for
15 football the next fall? And number two, what is exactly
16 the interest in preventing recruiting, as you describe
17 it, when the letters are aimed at people who have
18 already signed, I think you referred to it as an
19 enrollment contract? So there's every reason to believe
20 they're going to be in that school next year.

21 What is the interest? And would that
22 interest have supported a ban on letters to the already
23 enrolled 8th-grade kids?

24 MS. MAHONEY: First, I think that this
25 letter, which was not sent to Brentwood's own eighth

1 grade middle school students, probably could have been,
2 because under the rule those students were not enrolled
3 at another school. And what is really restricted is
4 coach-initiated contact with students enrolled at
5 another school.

6 This letter was instead sent to students
7 who were still enrolled at another school. And the
8 interest I would --

9 JUSTICE SOUTER: Okay. They had signed
10 up to go to Brentwood. So where does the recruiting
11 come in?

12 MS. MAHONEY: Your Honor, the contracts
13 weren't binding. We have the contracts in the record at
14 CAJA-1889. But more importantly, whether it was or not,
15 the record demonstrates that some student do sign
16 multiple contracts. Some students do not come. And so
17 efforts to get -- of the coach -- to get them to come to
18 practice, to be with him, to entice them, to give them
19 his personal home phone number, that's still a form of
20 recruiting.

21 In fact, one of the top basketball athletes
22 in the eighth grade in the city of Nashville in the 1997
23 was named Jacques Curry. He signed one of these
24 contracts. He did not ultimately come to Brentwood.
25 And yet he was exactly the kind of person that still

1 could have been subject to recruiting if during that
2 period --

3 JUSTICE SOUTER: So it boils down to saying
4 that when they've signed the enrollment contract that's
5 not the end of the, in effect, the issue.

6 MS. MAHONEY: No.

7 JUSTICE SOUTER: And there is a sensible,
8 practical way in which recruiting goes on even among
9 those who have signed up. Okay.

10 MS. MAHONEY: It certainly could, and so
11 there's an interest in stopping that. This Court
12 certainly has said that even in the commercial speech
13 area, in *Ohralik* for instance, that it's fine to have
14 prophylactic rules as long as the rule continues to
15 advance the interest. The fact that the interest may be
16 less strong at the point when they sign an enrollment
17 contract doesn't mean there is still no legitimate
18 interest.

19 CHIEF JUSTICE ROBERTS: And what is the
20 interest behind the anti-recruiting rule?

21 MS. MAHONEY: Several, Your Honor. This is
22 a group of individuals involved in an educational
23 activity in the State of Tennessee, and they have
24 determined that athletic recruiting is harmful to young
25 adults, that it puts too much emphasis on athletics,

1 that it also --

2 CHIEF JUSTICE ROBERTS: They could have
3 determined that it's particularly harmful to the public
4 schools who don't have the option of recruiting while
5 the private schools do?

6 MS. MAHONEY: Well, Your Honor, in 1997
7 there were five violations -- five penalties for
8 violations of the recruiting rule, and four of them were
9 against public schools, one against a private school.
10 That's at the transcript at 2705. Public schools have
11 to bear the burden of these rules because they do try to
12 recruit.

13 JUSTICE KENNEDY: Could the Association bar
14 Brentwood from contacting public school students
15 altogether?

16 MS. MAHONEY: About anything? I think that
17 that -- again --

18 JUSTICE KENNEDY: About enrollment. About
19 enrollment.

20 MS. MAHONEY: -- I think, Your Honor, that it
21 would be hard to say that that is germane, and it would
22 also put a very large burden on speech if they imposed a
23 flat contact. They've done nothing of the kind. There
24 have been --

25 JUSTICE KENNEDY: Well, Brentwood,

1 let's assume -- I think it's true -- is rather
2 well-known in the State, and if they send you a
3 solicitation form to enroll, everybody knows that they've
4 got a great athletic program, so we say you can't solicit
5 any high school students.

6 MS. MAHONEY: I think that they haven't done
7 it. It would certainly be far less reasonable. I
8 don't -- I think that that would be much more of a
9 burden on speech.

10 Here it's undisputed -- I shouldn't say it's
11 undisputed, but the record certainly establishes that
12 academic targeting is not prohibited -- that's in the
13 transcript at 2202 -- that if Brentwood Academy or any
14 other school wants to initiate contact for the purpose
15 of trying to persuade them to come for academics, it's
16 entirely free to do so. This rule is not designed to in
17 any way stifle those kinds of communications.

18 JUSTICE KENNEDY: I haven't kept track of
19 your time, but if we're going to rule for you we have to
20 reach the due process problem. And at some point after
21 you finish discussing what you wish to on free speech, I
22 actually find that a somewhat more difficult issue.

23 MS. MAHONEY: Your Honor, if I could just --
24 one thing I do want to make clear about the
25 voluntariness of the choice and then I'll turn to due

1 process, is that, as we set out in our brief, one of the
2 things that Brentwood and some of its amici have tried
3 to say is that there simply is no ability to play
4 interscholastic sports in Tennessee if you're not a member
5 of this association. And it's important to emphasize that
6 for regular season play, for instance, members of TSSAA
7 are free to play any non-member schools they want.

8 It used to be that the Association required
9 approval, which was routinely granted. But in 2005 they
10 actually changed the rule. It's in the handbook at page
11 23 on their website.

12 JUSTICE GINSBURG: But they're not part of
13 the trophy, whatever it is when you win at the end of
14 the year, right?

15 MS. MAHONEY: That's right, Your Honor. You
16 could have -- all that TSSAA does is give the
17 opportunity to engage in its State tournaments,
18 post-season competition.

19 CHIEF JUSTICE ROBERTS: Is there any other?

20 MS. MAHONEY: Yes, Your Honor. There is a
21 Christian Athletic League that has 26 private schools,
22 that also conducts State tournaments. There are also
23 State tournaments in other sports, including lacrosse,
24 swimming, that are not run by TSSAA. And there's
25 nothing to stop Brentwood, for instance, from trying

1 to form its own league, which is what independent
2 schools have done in many other States. They also
3 could have regular season play with TSSAA member
4 schools and have invitationals. There's no bar on
5 schools attending those.

6 And if I could quickly turn to Justice Kennedy's
7 question with respect to the issue of due process. I
8 think that the analysis is really quite similar. What
9 occurred here is a contractual agreement to provide
10 certain kinds of process which actually satisfy the
11 standards in *Loudermill*, but in addition Brentwood would
12 have been able to bring a breach-of-contract action under
13 State law if it wanted to allege that it didn't get the
14 notice that the contract required. And this Court held
15 in *Lujan* that you have to take into account the
16 availability of a State breach-of-contract action before
17 jumping to the conclusion that due process rights have
18 been violated. Yet the Sixth Circuit did not take that
19 into account.

20 If I could save the remainder of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Ms. Mahoney.

23 Mr. Himmelfarb.

24 ORAL ARGUMENT OF DAN HIMMELFARB

25 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

1 SUPPORTING THE PETITIONER

2 MR. HIMMELFARB: Mr. Chief Justice, and may
3 it please the Court:

4 The position of the United States is that
5 the court of appeals applied the wrong standard in
6 deciding Brentwood's First Amendment claim. This
7 Court's decisions establish that when the Government
8 offers a benefit that a citizen is free to reject, it
9 has much greater leeway in regulating speech than when
10 it exercises its coercive sovereign power. As in cases
11 where the Government acts as an employer, a contractor,
12 a property owner, a service provider or a benefactor,
13 the TSSAA offers a benefit, access to organized athletic
14 competition, that a school may decline by choosing not
15 to become a member of the Association.

16 Brentwood's First Amendment challenge to
17 the TSSAA recruiting rule, therefore, is subject to
18 deferential review. Deferential First Amendment review
19 is appropriate in these contexts because the Government
20 occupies a middle ground when it is not exercising its
21 sovereign authority. On the one hand the Government
22 remains the Government no matter what authority it's
23 exercising -- so it is subject to the restrictions of
24 the First Amendment.

25 On the other hand, when the Government acts

1 in a non-sovereign capacity, its position is comparable
2 to that of private sector entities and it has to be able
3 to make the same sorts of decisions that they make. It
4 has to be able to decide what conduct is acceptable in
5 its workplace, what activities may take place on its
6 property, and the uses to which its grant money may be
7 put.

8 So the First Amendment can't apply with the
9 same force as when the Government acts in its sovereign
10 capacity. For example, a Government agency can tell its
11 employees not to use offensive language with co-workers
12 or customers, as Justice O'Connor pointed out in her
13 plurality opinion in *Waters versus Churchill*, and that
14 prohibition would not be subject to heightened First
15 Amendment scrutiny. So, too, an athletic association
16 can tell the students at its member schools that they
17 can't use offensive language in dealing with opposing
18 players or referees, as indeed the TSSAA bylaws in fact
19 do. This is at page 202 of the joint appendix. And
20 that prohibition should not be subject to heightened
21 First Amendment scrutiny either. The same is true of
22 other rules that govern membership in and define the
23 character of a voluntary athletic association.

24 As applied to TSSAA's recruiting rule, the
25 deferential standard of review is easily satisfied.

1 Prohibiting the use of undue influence in recruiting or
2 attempting to secure or retain high school athletes we
3 think is self-evidently reasonable in light of the
4 purposes underlying the rule, which include preventing
5 the exploitation of children and ensuring that sports
6 remains subordinate to academics.

7 Prohibiting coaches from contacting students
8 who have not enrolled at the coach's school is likewise
9 reasonable. Either because that prohibition can
10 reasonably be reviewed as an instance of undue influence
11 itself, or because it is a reasonable prophylactic
12 measure to prevent the exertion of undue influence.

13 And finally, defining "enrollment" in the
14 context of the prohibition on coaches contacting
15 students to exclude the situation where a student has
16 somehow announced its intention -- announced his
17 intention to attend its school, for example, as in this
18 case by signing an enrollment contract, is reasonable as
19 well for the reasons Ms. Mahoney mentioned in responding
20 to Justice Souter's question. Somebody who signs an
21 enrollment contract may ultimately not decide -- may
22 ultimately decide to attend a different school, and there
23 is evidence in the record that students sometimes sign
24 multiple enrollment contracts and sometimes decide to
25 attend a different school after signing one. This is at

1 page 240 of the joint appendix and there are additional
2 citations to the record on page 6 of the reply brief.

3 In short, while the First Amendment has a
4 role to play in this case and cases like it, it is a
5 very limited role. And the recruiting rule easily
6 satisfies what we think is the appropriately deferential
7 standard of review that applies in circumstances of this
8 type. The judgment of the court of appeals should be
9 reversed.

10 JUSTICE STEVENS: May I ask this? What is
11 your response to the, one of the earlier questions?
12 Suppose they sent out a general brochure to all the
13 graduating grammar school students to -- advertising
14 the benefits of Brentwood and so forth and so on,
15 and the rule prohibited that? Would that rule be valid?

16 MR. HIMMELFARB: I think that would be close
17 to the line, Justice Stevens. The -- the prohibition on
18 coach contact we think is an easy case. There are, in
19 fact, ways that schools can communicate --

20 JUSTICE STEVENS: But isn't the coach
21 recruiting just a subcategory of a broader soliciting?

22 MR. HIMMELFARB: No. If it is a brochure
23 sent out by the school generally and it doesn't target
24 specific students and it went out to schools generally,
25 and there was a prohibition on that type of thing, I

1 think that might very well be a reasonable restriction
2 on speech. As I say, I think that's close to the line.

3 CHIEF JUSTICE ROBERTS: I'm sorry; you think
4 it might be a reasonable or unreasonable?

5 MR. HIMMELFARB: It might be -- well, I
6 think it's close enough to the line that it could go
7 either way.

8 CHIEF JUSTICE ROBERTS: It's a close call
9 whether a school can send a brochure to 8th graders that
10 is not limited to athletics telling them about their
11 school?

12 MR. HIMMELFARB: Well, the -- in that
13 situation, I think -- I think it probably would be
14 unreasonable, Mr. Chief Justice.

15 The -- the -- the methods of -- the
16 alternative methods of speech here are not all that
17 different -- that are allowed by the rule here -- are
18 not all that different from Justice Stevens'
19 hypothetical. There are a number of ways in which
20 schools can communicate with prospective students and
21 their families about athletics at the school, but it's
22 usually done through intermediaries. And I think as I
23 say, Justice Stevens' hypothetical is not --

24 CHIEF JUSTICE ROBERTS: What if the mailing
25 was limited to people who had signed contracts with --

1 students, not just football players but everyone else
2 who had signed enrollment contracts with the school?
3 General brochure listing all the things you can do at
4 the school including athletics, including -- you know,
5 other extracurricular activities? Is that all right?

6 MR. HIMMELFARB: I think --

7 CHIEF JUSTICE ROBERTS: Or would it be
8 unreasonable for the TSSAA to prohibit that?

9 MR. HIMMELFARB: I think that would be much
10 more problematic. And I don't -- I don't think that
11 this rule prohibits that. And I don't think it
12 prohibits Justice Stevens' example.

13 What the rule allows is for schools to send
14 out information about their athletic programs to other
15 schools to distribute to their students, for example.
16 It also allows them to send it out to real estate
17 brokers, to athletic leagues that aren't associated with
18 the school, to advertise. It allows it to respond to
19 direct inquiries from students.

20 But I think Justice Stevens' hypothetical
21 and your hypothetical, Mr. Chief Justice, are pretty
22 close to the sorts of things that are allowed by this
23 recruiting rule. And I do agree with you that --

24 JUSTICE STEVENS: I'm not asking about
25 the scope of the rule. I'm asking -- trying to figure

1 out what's the scope of the First Amendment protection.

2 MR. HIMMELFARB: Right. I -- I -- I think
3 that if the, if the -- if the recruiting rule -- if
4 there were a recruiting rule that prohibited those types
5 --

6 JUSTICE STEVENS: You do agree that at some
7 point the First Amendment would prohibit some kind of
8 rule?

9 MR. HIMMELFARB: Of course. There is -- we
10 think there is a reasonableness or germaneness
11 limitation. The justifications for the rule are mainly
12 preventing the exploitation of students and ensuring
13 that academics -- that --

14 JUSTICE STEVENS: Is that permissible, in
15 weighing the -- both sides of the equation to consider
16 the advantages -- I mean the justifications for the
17 speech?

18 MR. HIMMELFARB: Sure. Under -- under a
19 reasonableness standard, I think it is appropriate to
20 look at the justifications for the rule and ask whether
21 the -- the rule reasonably furthers those interests.
22 And in making that determination --

23 JUSTICE STEVENS: Is there a difference
24 between the justification for the rule in this case and
25 the justification for a rule that would prohibit the

1 general solicitation I described?

2 MR. HIMMELFARB: I'm sorry?

3 JUSTICE STEVENS: Is it the same
4 justification, but the justification is a little
5 stronger in one hypo rather than the other?

6 MR. HIMMELFARB: Right. I think you, if you
7 -- if you offered those justifications for banning the
8 type of speech you suggested, it might very well be that
9 it would be appropriate to conclude that the rule isn't
10 reasonably related to those justifications because it
11 burdens too much speech.

12 JUSTICE KENNEDY: It seems to me that,
13 turning to State action for a moment, one of the
14 justifications for finding State action is that there is
15 no other real choice that they have, other than to --
16 if they want to play athletics in Tennessee other than
17 to join this association.

18 And yet at the opening of your argument, you
19 said oh, well it's voluntary. So it seems to me that
20 your speech argument is inconsistent with one of the
21 justifications for finding State action to begin with.

22 MR. HIMMELFARB: Well, no, I don't think so,
23 Justice Kennedy. In the types of cases that I mentioned
24 at the outset, employment cases, funding cases,
25 property, ownership cases, I mean there's no dispute

1 that in those cases the Government is a State actor.
2 When the Government employs people it is a State actor
3 subject to the First Amendment, but deferential review
4 is applied to First Amendment challenges because there
5 is a choice.

6 And so too here there is a choice for the
7 reasons mentioned by Ms. Mahoney. There are other
8 athletic associations that schools can join.

9 JUSTICE KENNEDY: But that's somewhat
10 inconsistent with one of the most forceful arguments for
11 finding State action to begin it, i.e., that you have to
12 join the school if you really want to compete with most
13 of the schools. You have to join the Association.

14 MR. HIMMELFARB: Well, I think -- I'm not
15 sure that's true, Justice Kennedy. But I think it's
16 clear that in this Court's decisions in various areas
17 applying deferential First Amendment review, when
18 there's a voluntary relationship between the Government
19 and the citizen, that is precisely the reason that the
20 Court applies deferential review.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Himmelfarb.

23 Mr. Blumstein.

24 ORAL ARGUMENT OF JAMES B. BLUMSTEIN

25 ON BEHALF OF RESPONDENT

1 MR. BLUMSTEIN: Mr. Chief Justice, and may
2 it please the Court:

3 I represent Brentwood Academy in this civil
4 rights case.

5 It's about the regulatory overreaching of
6 the Tennessee Secondary School Athletic Association,
7 what we call the TSSAA. The case involves the First
8 Amendment's interest of the school, its students, its
9 parents, and procedural due process interests.

10 Brentwood was severely punished, and the
11 punishment is listed in footnote 5 of our brief, for
12 communicating with its own incoming male students,
13 informing them of an opportunity, spring football
14 practice, that the students were authorized to attend
15 under the TSSAA rules.

16 JUSTICE KENNEDY: Did it serve the
17 suspension or has that been stayed? Was it suspended
18 from competition for two years? That was the penalty.

19 MR. BLUMSTEIN: Yes.

20 JUSTICE KENNEDY: Did it -- did that take
21 effect?

22 MR. BLUMSTEIN: The first year it did take
23 effect --

24 JUSTICE KENNEDY: One year --

25 MR. BLUMSTEIN: And the second year did not

1 take effect, Justice Kennedy.

2 JUSTICE GINSBURG: And the fine has not been
3 paid. The fine.

4 MR. BLUMSTEIN: Not yet. But we've
5 recognized that if this turns out to be -- if the TSSAA
6 position turns out to be vindicated, the school will be
7 obliged to pay the fine.

8 JUSTICE GINSBURG: Mr. Blumstein, there's
9 one feature of this that I find puzzling. You're making
10 this a First Amendment case. But you joined an
11 association that has such, certain rules and when one
12 joins, one agrees to abide by the rules.

13 Nothing in the world stopped Brentwood from
14 saying this anti-recruiting rule is a really bad rule,
15 it is unfair to us; you could have written op-ed pieces
16 about it, the school could have talked about it, the
17 school could have urged the board of education to drop
18 it. Nothing stopped you from attacking this rule that
19 you don't like. But when you signed on, the First
20 Amendment doesn't give you license not to follow the
21 rules that you disagree with.

22 MR. BLUMSTEIN: Justice Ginsburg, let me say
23 that there's a finding, a stipulation that the school
24 thought it was abiding by the rule. It has no intent to
25 violate the rule. Intent is not a requirement.

1 JUSTICE GINSBURG: But isn't part of what
2 you agree to is an organization that has a certain
3 governance structure, the people in the organization
4 decide, and they make public to all the members of the
5 Association what the rules are and how they're going to
6 be interpreted?

7 MR. BLUMSTEIN: Well, Your Honor, let me
8 first address, in -- in the appendix to our brief is a
9 two page -- a two-sentence letter from Joe Marley to
10 Brentwood Academy. This was in the same year in which
11 this alleged violation occurred; and in the two-sentence
12 letter, Ray Marley, the student's father, said: "It is
13 our intention for Ray to attend Brentwood Academy in
14 1997-98. Ray has my consent to participate in the speed
15 and strength program at Brentwood Academy."

16 The Association then informed the school
17 that it was able to allow this young man to come and
18 lift weights at the school based upon that letter. So
19 when the school wrote a letter and had contact with the
20 student, based upon an enrollment contract, they thought
21 it was an a fortiori circumstance that if they could
22 have Ray Marley lift weights and be there and contact
23 the coach, that a much more elaborate contractual
24 enrollment form with signing of a contract and paying a
25 \$300 deposit would allow them to, in fact, have contact

1 with the coach.

2 JUSTICE STEVENS: Mr. Blumstein, am I not
3 correct that for purposes of our decision, if you're
4 claiming constitutional protection, you're claiming that
5 you'd be constitutionally protected even if you knew in
6 advance that this particular communication would violate
7 the rule and that even if you did it deliberately? That's
8 what your constitutional position is, is it not?

9 MR. BLUMSTEIN: Well, our -- Your Honor, the
10 significance of the voluntariness --

11 JUSTICE STEVENS: Is it or is it not?

12 MR. BLUMSTEIN: Yes.

13 JUSTICE STEVENS: It is.

14 MR. BLUMSTEIN: Yes. I'm sorry. Yes.

15 JUSTICE STEVENS: So that what really,
16 you're -- it is sort of a side issue as to whether they
17 really had adequate notice and so forth, insofar as
18 we're talking about the First Amendment?

19 MR. BLUMSTEIN: Yes, Your Honor. The
20 relevance of the signing up and the voluntary
21 involvement is ultimately whether there's a waiver; and
22 we don't believe that the requirements of waiver have
23 either been pled, which is an obligation, it's an
24 affirmative defense, has not been pled. This has never
25 been treated as a waiver case. It was not in the very

1 beginning. It's not in the --

2 JUSTICE ALITO: What if the State set up two
3 athletic leagues and one had an anti-recruiting rule and
4 the other one didn't, and they were equally strong, and
5 you chose to join the one that had the anti-recruiting
6 league? Would it be a violation of the First Amendment
7 in your opinion?

8 MR. BLUMSTEIN: And both are governmental?
9 Both are governmental, Justice Alito?

10 JUSTICE ALITO: Yes, both are governmental.

11 MR. BLUMSTEIN: Well, I think if a private
12 party subjects itself voluntary -- voluntarily to a
13 regulatory program run by the Government or which is
14 attributable to the Government, then under cases like
15 Ibanez, which we emphasize in our brief, that there is
16 an obligation on the part of the Government to apply the
17 rules fairly, unless there is a waiver of some kind; the
18 waiver standard is the one that makes a difference. But
19 I believe in terms of voluntariness, the only difference
20 is whether there is some kind of waiver.

21 In Ibanez where the lawyer, who was also an
22 accountant, submitted herself to the jurisdiction of the
23 accounting board, there was nothing requiring her to
24 submit herself to that jurisdiction.

25 JUSTICE SCALIA: Your claim here is not

1 that they didn't apply the rules fairly, your claim is
2 that they applied the rules.

3 MR. BLUMSTEIN: Unconstitutionally.

4 JUSTICE SCALIA: That's right. Fairly.
5 Fairly as they were written. But you say even if they
6 did apply them fairly, that's no good.

7 MR. BLUMSTEIN: That's correct,
8 Justice Scalia. That's correct.

9 JUSTICE SCALIA: I just wanted to be clear
10 on that.

11 MR. BLUMSTEIN: But I think perhaps --

12 JUSTICE ALITO: And even if it was purely
13 voluntary and even if you had two choices but you chose
14 the -- you chose to join the Association with the
15 anti-recruiting rule, there would be a First Amendment
16 problem?

17 MR. BLUMSTEIN: Yes, Your Honor. If the
18 Government has a regulatory program providing an
19 imprimatur, certification, accreditation, and you as an
20 individual or an entity, private entity, seek that
21 governmental imprimatur -- it's available and you seek
22 that -- then the Government must respect your First
23 Amendment rights.

24 CHIEF JUSTICE ROBERTS: So what if you
25 decided to offer bonuses to 8th graders, a thousand

1 dollars -- and of course that's, I assume that's against
2 the rules in Tennessee -- would you have -- would that
3 be covered by your First Amendment right?

4 MR. BLUMSTEIN: No, Your Honor.

5 CHIEF JUSTICE ROBERTS: Why not?

6 MR. BLUMSTEIN: That would be conduct, Your
7 Honor. And I think that, again, the problem that we
8 have here is that the TSSAA has not --

9 CHIEF JUSTICE ROBERTS: But that's not the
10 line that we draw elsewhere in the First Amendment.

11 MR. BLUMSTEIN: Between money as an
12 inducing -- an inducement, we would view an inducement
13 or an incentive as conduct, as opposed to speech,
14 communication. Here there was no evidence that any
15 inducement or emolument or promise of future activity
16 was elicited from the school. The only thing that was
17 done was sending them a letter informing them about an
18 activity that was an approved activity.

19 And I think that for our purposes in
20 drafting and implementing the undue influence rule, the
21 Association has never recognized the difference between
22 its authority to regulate speech and its authority to
23 regulate conduct. And as a result, they've never gone
24 through a process of figuring out how can they
25 accommodate their legitimate interest.

1 We -- our school strongly supports a
2 recruiting rule that's aimed at barring these kinds of
3 conducts, Chief Justice, as you've just described. The
4 problem is that the Association, by not recognizing that
5 the First Amendment enters into the analysis, that they
6 have not -- never gone through a process of calculating
7 the cost on speech, as this Court's decisions in cases
8 like the Lorillard case or the Fox case require that
9 they do, that they consider the impact on speech. If
10 you don't agree that there's any difference between
11 speech and conduct, you don't have to engage in that
12 kind of a process.

13 JUSTICE GINSBURG: But if you're making that
14 distinction, then if the Association says no school in
15 this association can invite students enrolled in other
16 schools to its practice, that's okay? Because that's
17 conduct, right? They could just say, there's nothing to
18 recruit for, because we don't allow it period.

19 MR. BLUMSTEIN: Yes, Justice Ginsburg.

20 JUSTICE GINSBURG: That would be okay?

21 MR. BLUMSTEIN: That's correct. We have no
22 problem with the revised rule that the Association has
23 adopted that does not permit spring practice --
24 non-matriculated students to participate in spring
25 practice. That's a regulation of conduct and it doesn't

1 fall within speech. We think that was the right
2 solution, not punishing the school in what --

3 JUSTICE GINSBURG: It's a little odd, isn't
4 it, that they could do -- they could take the stronger
5 measure but not the lesser measure of saying it's
6 available but we don't want you to broadcast it?

7 MR. BLUMSTEIN: Well, under the First
8 Amendment, it is a core principle that speech about
9 lawful or permitted conduct cannot be punished just
10 because of the speech. We have a finding of the
11 district court that the speech was actually beneficial,
12 it was welcomed by the families and by the children who
13 received the information. And in fact, it was
14 effective. The very thing the TSSAA objected --

15 JUSTICE SCALIA: But not beneficial to the
16 system. That's why the organization didn't like it.
17 And I wanted to come back to something you said just a
18 minute ago, that there's an obligation under the First
19 Amendment to weigh the effects of speech. Is there? I
20 mean, suppose a Government organization simply comes out
21 with a rule that is perfectly fair, and that happens to
22 give due weight to the fact that it's restricting
23 speech, but the Government organization has frankly
24 never considered it. They didn't sit down around a
25 table and say now, look, this is going affect speech,

1 let's be careful here. They didn't do that. They just
2 promulgated a perfectly reasonable rule.

3 Wouldn't we uphold that?

4 MR. BLUMSTEIN: Well, Your Honor --

5 JUSTICE SCALIA: They don't have to consider
6 the matter, do they? They just have to get it right,
7 whether they consider it or not.

8 MR. BLUMSTEIN: I believe that under the
9 Lorillard case and under this Court's decision in the
10 Fox case, that there is an obligation to engage in what
11 is called the careful calculation of costs and benefits.

12 JUSTICE SCALIA: Certainly. We have to do
13 that. Certainly we have to do it in assessing whether,
14 what the Government has done is okay. But you're saying
15 it's invalid unless the Government gathers together a
16 group of people just to shoot the breeze about -- I
17 don't know of any of our cases that require that.

18 MR. BLUMSTEIN: Well, Your Honor, there was
19 in the Lorillard case, the tobacco regulation case, the
20 Court was specifically critical that the attorney
21 general of Massachusetts did not consider the cost of
22 speech, particularly with respect to --

23 JUSTICE SCALIA: Well, I mean, you may
24 criticize them when they get it -- when it comes out
25 wrong. Then you can say, when the result is wrong, they

1 should have considered it. But when it comes out right?
2 Do you have any case where it comes out right and it's
3 perfectly reasonable, we say tsk, tsk, oh, but even
4 though it came out right, they didn't consider speech?
5 We've never said anything like that.

6 MR. BLUMSTEIN: But Justice Scalia, in your
7 opinion in the Fox case, one of the safeguards that was
8 articulated for speech protection was the need to have a
9 procedural safeguard. And one of those safeguards was
10 the development of a careful calculation of benefits and
11 costs with respect to freedom of speech.

12 That was the -- that was the case involving
13 the Tupperware parties on the State University campus of
14 New York. And one of the protections that was built
15 into the --

16 JUSTICE SCALIA: That's where you had an
17 approval system where one party would be approved and
18 another one wouldn't. Of course, in that situation, you
19 have to engage case by case in making the weighing. But
20 this is not an approval situation. It's the issuance of
21 a rule that applies to everybody.

22 MR. BLUMSTEIN: Well, in addition, there is
23 an obligation under this Court's decision in the
24 Thompson case for Government to consider non-speech
25 alternatives, where to restrict -- and to achieve its

1 objectives by not regulating speech at all. In the
2 Thompson case --

3 JUSTICE SOUTER: Mr. Blumstein, it seems to
4 me that Ms. Mahoney addressed that in response to a
5 question from me.

6 I said, in effect, that once a student has
7 signed an enrollment contract, where is there any
8 recruiting going on? And she said there is recruiting,
9 and hence there is an interest in regulating recruiting,
10 because not everybody who signs these contracts, or on
11 behalf of whom these contracts are signed, end up going
12 to the school. So that in fact, there is room for
13 recruiting right up to the moment that the kid arrives
14 in the fall and signs on the dotted line.

15 What is your response to her response?

16 MR. BLUMSTEIN: Well, the district court
17 found that the constitutional balance tipped at that
18 point because the evidence suggested that while that
19 does happen, it's not a normal occurrence, fewer than 5
20 percent of cases.

21 JUSTICE SOUTER: Well, how many cases have
22 there got to be before you would recognize the
23 sufficiency of the asserted State interest?

24 MR. BLUMSTEIN: Well, I think that once a
25 family has -- and the evidence in this case established

1 that all these families had made their educational
2 choice. Sometimes --

3 JUSTICE SOUTER: Well, we know that.
4 They've signed the contract. So that's where we start.

5 And you're saying, well, only about 5
6 percent of them weasel out of it later on and go to some
7 other school. But why is 5 percent insufficient?

8 MR. BLUMSTEIN: Well, in this case, the
9 Association allows the underlying practice itself. It
10 permits the underlying practice.

11 And so if there's a concern about
12 recruiting --

13 JUSTICE SOUTER: So that if the kid comes
14 and says, look, I'm going to Brentwood next fall and I'd
15 like to tag along to a spring practice, they say okay.
16 But that's not recruiting. The school hasn't initiated
17 it. In this case, the school has initiated it by the
18 letter. And it does sound like recruiting if you accept
19 the proposition that the students aren't bound to go to
20 the school even though their parents signed up and some
21 of them don't.

22 So I come back to my question. If taking
23 your figure -- let's assume that only 5 percent, in
24 fact, change their minds. Why doesn't -- why isn't
25 there a legitimate interest in preventing recruiting

1 within the 5 percent?

2 MR. BLUMSTEIN: But Ms. Mahoney cited
3 question 3, Justice Souter.

4 JUSTICE SOUTER: No, but would you answer
5 my question? Why isn't that enough?

6 MR. BLUMSTEIN: Well, I think, again, as
7 long as the Association permits this activity and says
8 there is a risk of recruiting at that activity if the
9 students are not firmly committed, irrevocably committed
10 to a place, and that they allow that conduct, then to
11 allow the -- to bar the -- the school from talking about
12 or at least mentioning the -- the activity as an
13 opportunity, then at that point the Association if it
14 wants to protect its interests must act to prohibit the
15 conduct, not the speech.

16 JUSTICE SOUTER: Okay. It certainly can do
17 that. There's no question about it. But it seems to me
18 that the line that is being drawn is a line between
19 contact which is initiated by the prospective student
20 and proselytizing which is initiated by the school. Why
21 isn't that a reasonable line?

22 MR. BLUMSTEIN: Well, because -- Ms. Mahoney
23 cited an example that does not require initiated school
24 contact. Question 3 prohibits all contact, whether it's
25 initiated by the school or initiated by the student.

1 In joint appendix 181 --

2 JUSTICE SOUTER: That's not what we've got
3 before us.

4 MR. BLUMSTEIN: Yes, we do. She cited
5 question 3, and what it says is, no coach -- "No, a
6 coach may not contact a student or his or her parents
7 prior to -- "

8 JUSTICE SOUTER: Okay. We're still talking
9 about athletic contact.

10 MR. BLUMSTEIN: Yes, but not necessarily
11 initiated by the coach. It would be, in fact,
12 impermissible. Under their interpretation of their own
13 rules, it would be impermissible for the coach to speak
14 to people at this practice.

15 JUSTICE SOUTER: Okay. Maybe that would
16 present a different kind of problem, but that's not what
17 we've got here. What we've got here is contact through
18 speech that was initiated by the coach.

19 MR. BLUMSTEIN: Yes.

20 JUSTICE SOUTER: And I am saying that if the
21 rule generally -- maybe quite imprecisely -- but if it
22 generally distinguishes between that kind of
23 proselytizing by a coach, and on the other hand contact
24 that a kid initiates in the first place, isn't that
25 roughly a fair line?

1 MR. BLUMSTEIN: Well, I don't think so,
2 Justice Souter, because once the Association determines
3 that this activity is legitimate, and authorizes this
4 with respect to the feeder pattern, so that all public
5 schools can be --

6 JUSTICE SOUTER: The activity being tagging
7 along with spring practice?

8 MR. BLUMSTEIN: Participating in spring
9 practice. And all the kind of activity that the
10 Association objects to would be permitted if there were
11 a feeder pattern. And in this case, the kind of
12 activity that they say they want to isolate the students
13 from, what you were describing as coach-initiated
14 contact, all of that is permitted in the feeder pattern.

15 JUSTICE SOUTER: But the answer to that is,
16 they're not trying to prevent people, at least under
17 this rule, they're not trying to prevent 8th-grade kids
18 from going to spring practice. They're trying to
19 prevent coaches from proselytizing kids, and that's the
20 distinction. Why isn't it a reasonable distinction?

21 MR. BLUMSTEIN: Well, the proselytization
22 here was found to be a harmless letter sent just
23 informing the kids that they had an opportunity. So I
24 guess it depends on how one characterizes what the
25 communication is.

1 We would characterize --

2 JUSTICE SCALIA: It was a letter from coach.
3 It was a letter from coach. I mean, that to a young
4 kid, that is recruiting. That is showing an interest on
5 the part of the person who's going to decide who plays,
6 an interest in you.

7 I think it's entirely reasonable to consider
8 that recruiting.

9 MR. BLUMSTEIN: But the letter,
10 Justice Scalia, went to all students, not just the
11 athletes. It was not targeted to any particular person.
12 All 12 students who -- male students who were admitted,
13 were incoming students, all of those students got the
14 letter. It wasn't targeted in any type of recruiting
15 mode. Every student who was admitted and signed the
16 contract received the letter.

17 And a 13th student who was admitted but who
18 did not sign the enrollment contract did not receive the
19 letter. So that the school was very careful, so that
20 they sent this to all --

21 JUSTICE GINSBURG: Was it careful to say
22 "your coach"? The letter was signed by "your coach," not
23 just coach.

24 MR. BLUMSTEIN: Well, these were incoming
25 students, Justice Ginsburg, and --

1 JUSTICE SCALIA: And did it say, by the way,
2 everybody got this letter? Did it say that at the
3 bottom? Or your coach (and everybody else's)?

4 (Laughter.)

5 MR. BLUMSTEIN: Again, Justice Scalia, we
6 think that if the practice itself was problematic, was
7 educationally unsound, if there was a risk of any of the
8 interests that were involved, then the school -- the
9 Association could and did prohibit participation in that
10 activity.

11 JUSTICE KENNEDY: Weren't all these things
12 that are being discussed before the factfinder, or was
13 there some ex parte contact later that -- which was the
14 only evidence for what we're talking about now? I'm
15 getting into the due process point.

16 MR. BLUMSTEIN: The information that was
17 before the factfinder had to do with -- on the due
18 process point -- had to do with a person who was not
19 related to the school but who had been, it turns out
20 falsely, accused of offering inducements to students to
21 attend the school.

22 JUSTICE KENNEDY: But I mean, all of these
23 matters were discussed and there was an opportunity to
24 reply to all of these matters that we've just been
25 talking about, correct?

1 MR. BLUMSTEIN: Yes. There was a procedure
2 in which there was an exchange of letters between the
3 Association and the school, in which the Association had
4 some investigation and then the school had an
5 opportunity to respond. Yes, Justice Kennedy.

6 JUSTICE KENNEDY: It doesn't seem to me like
7 there's a very strong case for a flawed hearing for a due
8 process violation.

9 MR. BLUMSTEIN: The problem was that the
10 district court made two findings in this regard that
11 were very important: That the Association misled the
12 school as to what issues were still open and available;
13 and that ultimately a matter involving this Bart King
14 was discussed at the closed after-hearing session, the
15 executive session, and the school had been told that the
16 Bart King allegations were no longer on the table.

17 Now, the school did put forward evidence
18 about one youngster named Jacques Curry who was alleged
19 to have been recruited by Bart King. Again, Bart King
20 had no status with the school at all. And they put
21 Jacques Curry before the hearing panel and the hearing
22 panel wound up restoring his eligibility.

23 But it turns out that they, at the trial,
24 that the Association members, or the board of control,
25 admitted that they considered the Bart King allegations

1 to enhance the penalty. So it must have been something
2 beyond Jacques Curry and that the school was never
3 informed that Bart King's involvement beyond Jacques
4 Curry had anything to do with the proceedings.

5 So the district court found that there was
6 misleading of the school and that they -- the school
7 never had a chance to respond to the evidence that was
8 presented by these investigators for the Association.
9 And so therefore they did not have evidence, they were
10 not aware of evidence, and they didn't have a chance to
11 respond or to reply to that evidence.

12 JUSTICE BREYER: What was the evidence?

13 MR. BLUMSTEIN: I'm sorry?

14 JUSTICE BREYER: What was the evidence?

15 MR. BLUMSTEIN: We don't know what the
16 evidence was.

17 JUSTICE BREYER: I mean, at this late date,
18 you've had trials. You're saying -- did you ask? With
19 all these people under oath, haven't we had trials and
20 everything?

21 MR. BLUMSTEIN: Well, the evidence suggested
22 that --

23 JUSTICE BREYER: Did you ever ask the people
24 who were at the meeting, what was the evidence you
25 considered that we haven't had a chance to see?

1 MR. BLUMSTEIN: And --

2 JUSTICE BREYER: Did you or not?

3 MR. BLUMSTEIN: Yes.

4 JUSTICE BREYER: And then, and what did they
5 say?

6 MR. BLUMSTEIN: The evidence was the notes
7 that was presented were the notes taken by the
8 investigators.

9 JUSTICE BREYER: All right. So there were
10 some notes taken by investigators, which did they have
11 anything new in them you hadn't seen before?

12 MR. BLUMSTEIN: We hadn't seen -- we hadn't
13 seen them before the hearing.

14 JUSTICE BREYER: What was in there that you
15 had not seen before in the notes?

16 MR. BLUMSTEIN: Well, again I think that
17 what was -- what was available to the Association was --
18 excuse me --

19 JUSTICE BREYER: I'm asking you: What was
20 in the notes that were presented to the decisionmaker
21 that you had not previously seen and therefore had no
22 opportunity to rebut? What particularly and
23 specifically? And it's surprising to me that you
24 hesitate at this very late date if this is a serious
25 issue.

1 MR. BLUMSTEIN: Well, we did not know that
2 those issues were even on the table. The executive
3 director testified at trial that the issue of Bart King
4 was no longer on the table, and the notes were not
5 presented to the --

6 JUSTICE BREYER: What did it say in the
7 notes that you -- a factual matter or some other -- that
8 you did not have a chance to reply to specifically?

9 MR. BLUMSTEIN: Well, we learned that the
10 investigators had not spoken to Mr. King.

11 JUSTICE BREYER: Alright. What you learned
12 was the investigators had not spoken to Mr. King, and
13 you previously did not know that, and if you had known
14 that you would have said to the decisionmaker: The
15 investigators did not speak to Mr. King. And if you had
16 said that, how would this case be different?

17 MR. BLUMSTEIN: What we would have been in a
18 position to say, Your Honor, was that we want to
19 understand what your perception, your -- the
20 investigators' perception is of what Bart King's
21 relationship to Brentwood Academy is and how -- and what
22 he is alleged to have done.

23 We have no control, we had no knowledge, of
24 anything that Mr. King did, and if any of those
25 allegations were true the school wanted an opportunity

1 to disassociate itself.

2 JUSTICE BREYER: And the other side says,
3 Mr. Bart King was part of the school and had something
4 to do with this?

5 MR. BLUMSTEIN: No --

6 JUSTICE BREYER: Is that right.

7 MR. BLUMSTEIN: I don't believe that they've
8 taken that --

9 JUSTICE BREYER: Well then, I don't
10 understand what the relevance of this is.

11 JUSTICE STEVENS: I thought your claim was
12 that you had a witness available to testify, but you
13 didn't put him on because you didn't think they were
14 going into this issue. That's all.

15 MR. BLUMSTEIN: This was Mr. King himself
16 was available. And he -- and we put him up, offered
17 him for --

18 JUSTICE BREYER: But I don't understand what
19 Mr. King has to do with this if the other side is not
20 claiming that Mr. King is part of your operation.

21 MR. BLUMSTEIN: But the Association, the
22 Association witnesses testified at trial,
23 Justice Breyer, that in fact they -- that they
24 considered the King allegations. We don't know exactly
25 what that meant at the trial.

1 JUSTICE BREYER: Who considered it?

2 MR. BLUMSTEIN: That the board of control,
3 the TSSAA board.

4 JUSTICE BREYER: Did you ask the people on
5 the board of control, what role did Mr. King play in
6 your decision?

7 MR. BLUMSTEIN: And the answer that was
8 given at trial, and the trial judge found this, was that
9 he played a role, not in the liable but in the penalty.

10 JUSTICE BREYER: So they might have reduced
11 it from \$3,000 to less had they not been under the
12 mistaken impression that Mr. King had something to do
13 with you when he didn't.

14 MR. BLUMSTEIN: And specifically to mention
15 the terms, the length of the probation, is what they
16 said, the probation.

17 JUSTICE BREYER: And the probation was --
18 and the probation, which was for four years?

19 MR. BLUMSTEIN: Yes, Your Honor.

20 JUSTICE BREYER: And have you served the
21 four years?

22 MR. BLUMSTEIN: Well, I believe one year has
23 been served at this point.

24 JUSTICE BREYER: So there is three more
25 years? So if in fact you are correct that they were

1 under a misapprehension on this matter, then the thing
2 to do would to be find out if that extra three years had
3 something to do with this erroneous thing of Mr. King?
4 It's surprising to me all of this is coming up now, but
5 there we are. So but that's your specific claim.

6 MR. BLUMSTEIN: The concern was that the
7 Association had told us, and the district court found
8 this, that the King allegations were not on the table.

9 JUSTICE BREYER: I thought it was a
10 different claim. I thought you were claiming there was
11 a violation of due process because an investigator spoke
12 without you present to the board.

13 MR. BLUMSTEIN: Yes.

14 JUSTICE BREYER: And that I would think was
15 not a violation of the Constitution since it happens
16 every day of the week in administrative agencies. But
17 if you want to claim it is, I'll be happy to listen.

18 And I think in that you're saying the
19 Administrative Procedure Act is unconstitutional, which
20 would be a surprising claim to me.

21 MR. BLUMSTEIN: No, but that we -- that the
22 disclosure of evidence as a basis of decision and an
23 opportunity to respond to that evidence in a
24 disciplinary hearing this Court has held as recently as
25 the Hamdi case and certainly in Loudermill that that is

1 an important procedural protection of due process, and
2 that's what we're seeking in this case as well, Your
3 Honor.

4 JUSTICE BREYER: Thank you.

5 MR. BLUMSTEIN: Again, we think that the
6 First Amendment framework that exists for regulatory
7 cases fits this case well. The only difference is
8 whether or not there's a waiver. We think there's not a
9 waiver. The Government has claimed that they can define
10 away First Amendment rights. In our brief we address
11 that claim. We don't believe that the Government can
12 define away First Amendment rights, and there is not a
13 case that they have cited really that supports the
14 position that the First Amendment should apply
15 differently in this context, where the Government is
16 regulating just because it is the source of authority,
17 is a different source of authority, a non-sovereign
18 source of authority.

19 The Southeastern Promotions case, the Ibanez
20 case, those cases, the Barnett case, and the Fox case,
21 Justice Scalia's opinion in the Fox case, make it clear
22 that the source of authority, in that case universities,
23 is not determinative. The Fox case discussed the
24 elements of commercial speech and that arose in a
25 university context, but it's been applied across the

1 board in all commercial speech cases, regulatory cases,
2 whether there was sovereign power or, as in the case of
3 Fox, it was not sovereign power at all.

4 So we think that the First Amendment
5 doctrine, the rubric that we've described in our brief,
6 is the proper one that should be applied in this
7 circumstance and that there's not a need to carve out a
8 special exception, which is what the Government is
9 asking for and what the TSSAA is asking for, to
10 generally applicable First Amendment doctrine.

11 This is a case of content-based regulation.
12 The time, place, and manner defense therefore cannot
13 work as a defense, and we think therefore, the TSSAA
14 case collapses under First Amendment.

15 Thank you very much.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Ms. Mahoney, you have four minutes
18 remaining.

19 REBUTTAL ARGUMENT OF MAUREEN MAHONEY

20 ON BEHALF OF THE PETITIONER

21 MS. MAHONEY: Thank you.

22 If I could respond to the due process
23 issues, this is still a very important claim because if
24 in fact the Association has violated civil rights by
25 failing to give due process Brentwood would still be

1 entitled to an award of attorney's fees. And I think
2 it's critical that when an association enters into a
3 contract and agrees upon procedures, that if those
4 procedures can -- are not followed, a member of the
5 association can bring a breach of contract action in
6 State court.

7 But Brentwood did not do that. Instead it
8 tried to constitutionalize this contract dispute and
9 assert rights under section 1983.

10 JUSTICE KENNEDY: I thought it had some
11 State claims as pendant claims.

12 MS. MAHONEY: The only State claim they had
13 as a pendant claim was arbitrary action under State law,
14 and the district court dismissed that because it found
15 that the questions were sufficiently novel that he
16 didn't feel that he should entertain jurisdiction over
17 it. But they did not assert a breach of contract claim.

18 And it's important to note that the bylaws
19 actually provide that a member must be given, quote,
20 "notice of the charges and an opportunity to present its
21 case at a hearing." So if they actually did not get
22 notice of the charges involving Bart King, it would have
23 been a breach of contract. So that's the first problem,
24 is that the court of appeals didn't even look at the
25 fact that they had a contract remedy, just like the

1 contractor had in Lujan, and they simply weren't taking
2 advantage of it.

3 Second, the suggestion that they were not
4 actually given notice is contradicted by the record.
5 And it's not issues of credibility. This is just an
6 ultimate conclusion about whether they had sufficient
7 notice. And if you look at the record, the exchange of
8 letters, at JA-205 is the letter that starts by
9 disclosing the charges, and it specifically discloses
10 that the Association investigators have talked to a
11 number of middle school students, have talked to a
12 number of middle school coaches, and details precisely
13 what those witnesses have said about Bart King.

14 Now they say, well, we didn't know that Bart
15 King was still involved by the time we got to the last
16 hearing. But look in fact what they did. They came to
17 the hearing. They submitted the affidavit of Bart King.
18 One of their live witnesses was Jacques Curry and the
19 only thing he testified about was his relationship with
20 Bart King.

21 And then they ran out of time. They ran out
22 of time. They had Bart King there. They were thinking
23 about putting him on live. They had had an allotted
24 period of time. They used it all up without putting --

25 JUSTICE BREYER: Was there anything at the

1 trial that came out that the investigator when they were
2 in the private session said a fact about Bart King of
3 supreme importance that they didn't know about?

4 MS. MAHONEY: Absolutely not, Your Honor.
5 There was absolutely nothing they've said that they
6 didn't know about.

7 JUSTICE STEVENS: Well, didn't one of the
8 decisionmakers testify that they relied on this --

9 MS. MAHONEY: Your Honor, most of them
10 actually testified that they did not.

11 JUSTICE STEVENS: No, but one did.

12 MS. MAHONEY: There was one who had
13 testified --

14 JUSTICE STEVENS: And did not the district
15 court find that his testimony was credible?

16 MS. MAHONEY: He did, Your Honor, and -- but
17 even if that's true, even if the board did rely on
18 evidence about Bart King in deciding what the penalty
19 ought to be, how much probation, whatever, that still
20 does not establish that there was a due process
21 violation because they had notice that the Bart King
22 issues could be considered at this trial. They actually
23 submitted evidence. They submitted Bart King's affidavit
24 and the record shows that the board said they considered
25 all the evidence that had been submitted.

1 And when they -- and the reason they didn't
2 put him on, they say: "It was our intention to put him
3 on, but I don't know if you are all interested in
4 extending for five minutes to hear from Bart King or
5 not. He's here if you want him." Carter responds "No."
6 He doesn't say: The King issues aren't on the table.

7 Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 We're not going to extend for five minutes.

10 (Laughter.)

11 The case is submitted.

12 (Whereupon, at 11:24 a.m., the case in the
13 above-entitled matter was submitted.)

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