IN THE SUPREME COURT OF THE UNITED STATES

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TENNESSEE SECONDARY SCHOOL :

ATHLETIC ASSOCIATION, :

Petitioner :

v. : No. 06-427

BRENTWOOD ACADEMY. :

- x

Washington, D.C.

Wednesday, April 18, 2007

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

APPEARANCES:

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

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

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

C O N T E N T S

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

private concern.

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

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

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

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

But instead the problem here was that it was

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: In Umbehr we said, the

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

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

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

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

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

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

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

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

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

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

reasonable choice because it would impact --

CHIEF JUSTICE ROBERTS: What about criticizing officials?

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

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

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

JUSTICE KENNEDY: And how would you balance it?

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

JUSTICE KENNEDY: And how would you come out?

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. MAHONEY: No.

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

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

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

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

that it also --

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

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

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

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

JUSTICE KENNEDY: About enrollment. About enrollment.

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

JUSTICE KENNEDY: Well, Brentwood,

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Is there any other?

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

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

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

If I could save the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Mahoney.

Mr. Himmelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE PETITIONER

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

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

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

On the other hand, when the Government acts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HIMMELFARB: I think --

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

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

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

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

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

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

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

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

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

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

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

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

general solicitation I described?

MR. HIMMELFARB: I'm sorry?

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Himmelfarb.

Mr. Blumstein.

ORAL ARGUMENT OF JAMES B. BLUMSTEIN

ON BEHALF OF RESPONDENT

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

I represent Brentwood Academy in this civil rights case.

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

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

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

MR. BLUMSTEIN: Yes.

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

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

JUSTICE KENNEDY: One year --

MR. BLUMSTEIN: And the second year did not

take effect, Justice Kennedy.

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

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

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

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

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

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

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

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

with the coach.

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

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

JUSTICE STEVENS: Is it or is it not?

MR. BLUMSTEIN: Yes.

JUSTICE STEVENS: It is.

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

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

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

beginning. It's not in the --

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

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

JUSTICE ALITO: Yes, both are governmental.

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

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

JUSTICE SCALIA: Your claim here is not

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

MR. BLUMSTEIN: Unconstitutionally.

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

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

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

MR. BLUMSTEIN: But I think perhaps --

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

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

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

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

MR. BLUMSTEIN: No, Your Honor.

CHIEF JUSTICE ROBERTS: Why not?

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

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

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

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

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

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

MR. BLUMSTEIN: Yes, Justice Ginsburg.

JUSTICE GINSBURG: That would be okay?

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

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

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

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

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

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

Wouldn't we uphold that?

MR. BLUMSTEIN: Well, Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

What is your response to her response?

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

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

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

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

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

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

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

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

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

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

within the 5 percent?

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

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

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

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

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

In joint appendix 181 --

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

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

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

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

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

MR. BLUMSTEIN: Yes.

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

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

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

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

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

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

We would characterize --

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: What was the evidence?

MR. BLUMSTEIN: I'm sorry?

JUSTICE BREYER: What was the evidence?

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

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

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

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

MR. BLUMSTEIN: And --
JUSTICE BREYER: Did you or not?
MR. BLUMSTEIN: Yes.
JUSTICE BREYER: And then, and what did they say?
MR. BLUMSTEIN: The evidence was the notes that was presented were the notes taken by the investigators.
JUSTICE BREYER: All right. So there were some notes taken by investigators, which did they have anything new in them you hadn't seen before?
MR. BLUMSTEIN: We hadn't seen -- we hadn't seen them before the hearing.
JUSTICE BREYER: What was in there that you had not seen before in the notes?
MR. BLUMSTEIN: Well, again I think that what was -- what was available to the Association was -- excuse me --
JUSTICE BREYER: I'm asking you: What was in the notes that were presented to the decisionmaker that you had not previously seen and therefore had no opportunity to rebut? What particularly and specifically? And it's surprising to me that you hesitate at this very late date if this is a serious issue.

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

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

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

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

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

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

to disassociate itself.

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

MR. BLUMSTEIN: No --

JUSTICE BREYER: Is that right.

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

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

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

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

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

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

JUSTICE BREYER: Who considered it?
MR. BLUMSTEIN: That the board of control, the TSSAA board.
JUSTICE BREYER: Did you ask the people on the board of control, what role did Mr. King play in your decision?
MR. BLUMSTEIN: And the answer that was given at trial, and the trial judge found this, was that he played a role, not in the liable but in the penalty.
JUSTICE BREYER: So they might have reduced it from $3,000 to less had they not been under the mistaken impression that Mr. King had something to do with you when he didn't.
MR. BLUMSTEIN: And specifically to mention the terms, the length of the probation, is what they said, the probation.
JUSTICE BREYER: And the probation was -- and the probation, which was for four years?
MR. BLUMSTEIN: Yes, Your Honor.
JUSTICE BREYER: And have you served the four years?
MR. BLUMSTEIN: Well, I believe one year has been served at this point.
JUSTICE BREYER: So there is three more years? So if in fact you are correct that they were

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

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

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

MR. BLUMSTEIN: Yes.

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

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

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

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

JUSTICE BREYER: Thank you.

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

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

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

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

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

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Mahoney, you have four minutes remaining.

REBUTTAL ARGUMENT OF MAUREEN MAHONEY
ON BEHALF OF THE PETITIONER

MS. MAHONEY: Thank you.

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Was there anything at the

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

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

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

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

JUSTICE STEVENS: No, but one did.

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

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

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

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

Thank you, Your Honor.

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

(Laughter.)

The case is submitted.

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