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IN THE SUPREME COURT OF THE UNITED STATES

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BRENTWOOD ACADEMY, :
Petitioner :
v. : No. 99-901
TENNESSEE SECONDARY SCHOOL :
ATHLETIC ASSOCIATION, ET AL. :

- - - - -X
Washington, D.C.
Wednesday, October 11, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JAMES F. BLUMSTEIN, ESQ., Nashville, Tennessee; on behalf of the Petitioner.

BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

RICHARD L. COLBERT, ESQ., Nashville, Tennessee; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-901, Brentwood Academy v. Tennessee
5 Secondary School Athletic Association.

6 Mr. Blumstein.

7 ORAL ARGUMENT OF JAMES F. BLUMSTEIN

8 ON BEHALF OF THE PETITIONER

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

11 This case involves the State action status of
12 the regulatory conduct of a high school athletic
13 association, the respondent, the Tennessee Secondary
14 School Athletic Association, or what we call the TSSAA.

15 Under the analysis of this Court's decision in
16 NCAA v. Tarkanian, State action exists in this case
17 because first, the regulatory conduct of the TSSAA is
18 attributable to the entity or entities that control the
19 organization and, secondly, Government institutions, in
20 this case public schools, control the TSSAA's conduct and
21 are therefore constitutionally accountable for its
22 regulatory conduct.

23 QUESTION: Mr. Blumstein, the court of appeals
24 in this case went through three different tests that they
25 thought our cases support, a public function, State

1 compulsion, symbiotic, and said this didn't fit into any
2 one of those three. Now, do you disagree with the court
3 of appeals on those points, or do you think we should
4 simply expand the State action concept?

5 MR. BLUMSTEIN: Mr. Chief Justice, the court of
6 appeals did not look at the local level interactions
7 between the TSSAA and the public schools. It looked
8 exclusively at the State-level relationships, and so we
9 think it overlooked the core ingredients of the Tarkanian
10 analysis. It was the local-level interconnections.

11 There are two levels of State interaction with
12 the TSSAA. At the State level, the State Board of
13 Education for 24 years explicitly designated this
14 organization as its agent to regulate interscholastic
15 athletics for all schools in Tennessee.

16 That was repealed, or changed in 1996, and now
17 it recognizes, continues to recognize the role of the
18 TSSAA and specifically authorizes the schools to maintain
19 their membership in the TSSAA and the court of appeals
20 focused exclusively on that State-level relationship.

21 Under the Tarkanian analysis, Your Honor, the
22 local levels, the public schools that control this
23 organization, that comprise 84 percent of the membership,
24 where there's one school, one vote, control the
25 organization and under the Tarkanian analysis we think

1 the --

2 QUESTION: Well, would you state what you think
3 the test is, without being so fact-specific? What's the
4 test for State action, in your view?

5 MR. BLUMSTEIN: Justice O'Connor, in this case,
6 building on the --

7 QUESTION: Not in this case, in all cases.
8 What's the test?

9 MR. BLUMSTEIN: Well, whether the -- in this
10 case whether the governmental institutions, in this case
11 public schools, control the activity and so that it is
12 fair to say that this is attributable to the Government
13 because the Government, or its public schools in this
14 case, control the decisionmaking.

15 This is -- case is unlike many of this Court's
16 other cases, such as *Rendell-Baker v. Kohn*, involving a
17 school, *Blum v. Yaretsky*, involving a nursing home,
18 *Jackson v. Metropolitan Edison*, involving a private
19 utility. In all of those circumstances, Justice O'Connor,
20 the privateness, if you will, the formal privateness of
21 the organization was assumed, and the question was whether
22 the Government as purchaser, or Government as regulator,
23 transformed that private, concededly private entity into
24 State actor status.

25 In this case, that very threshold question is

1 what is at stake. There is nothing really private, except
2 formally private, about this organization. It is
3 controlled by public schools, 84 percent of the membership
4 is public schools, it's run by public --

5 QUESTION: Wait, let's -- it's controlled by
6 public schools. You say that because a majority of its
7 board are public school principals?

8 MR. BLUMSTEIN: Of its members, Justice Scalia.

9 QUESTION: Of -- well, of its -- but principally
10 its governing board. It wouldn't matter if its members,
11 if its governing board, I assume, were overwhelmingly
12 governmental you'd say it's still a governmental agency.

13 MR. BLUMSTEIN: Well, I think that under the
14 control principle --

15 QUESTION: Oh. You're relying on the
16 membership, not -- I thought you were relying on the
17 control.

18 MR. BLUMSTEIN: On the composition. We think
19 both are important, but it's --

20 QUESTION: I see.

21 MR. BLUMSTEIN: -- ultimately the control of the
22 organization in a one-school, one-vote situation is the
23 membership of the organization.

24 QUESTION: So if this organization were composed
25 of 49 percent public school -- public schools and 51

1 percent private schools, it would be okay?

2 MR. BLUMSTEIN: Justice Scalia, we think there's
3 an analogy to the separation of powers cases, the
4 Washington Metropolitan Airports case, and Bowsher v.
5 Synar and the question of control -- there's an effective
6 control question and a formal control question. We're not
7 anywhere close to the effective control question here.

8 QUESTION: But in the Washington Airport case it
9 was the Government which said the decisionmakers here
10 shall be ex officio members of certain committees. It was
11 the Government that said that.

12 Here it is not the Government, it is the
13 organization which has a rule that you have to be a
14 principal to be -- to serve on the governing board, and it
15 is the organization, certainly not the Government, that
16 says, you know, what schools will be a member, members of
17 the organization. It seems to me that's very different
18 from --

19 MR. BLUMSTEIN: But it is the organization
20 that's controlled by governmental institutions, so --

21 QUESTION: Well, Mr. Blumstein, supposing that
22 all the principals, say in Eastern Tennessee, or Middle
23 Tennessee, some area, got together, private schools,
24 public schools, and said we want to form a principals
25 association and get together once a month and we'll have a

1 convention in the summertime, and they don't get paid,
2 they do it on their own time, and they decide they're
3 going to give a principals' award to the best student in
4 Eastern Tennessee, and they give that award. Now, is that
5 State action?

6 MR. BLUMSTEIN: Your Honor, if the
7 organization -- if they're serving in their official
8 capacity as principals, if they're representing the
9 schools, and if they are allowing private and public
10 schools to participate in some awarding process, whether
11 it be a principals' association or a German Club, if the
12 German departments of the State decided that they --

13 QUESTION: Well, my hypothesis was that the
14 principals did it on their own time. They're in the
15 organization because they're a principal of a school, but
16 the Government isn't paying their way, and they're not
17 exercising any State power, really, when they do this.
18 They're just conceiving this award on their own and
19 they're giving it away.

20 MR. BLUMSTEIN: Your Honor, as one moves towards
21 the -- a coaches' association or principals' association,
22 I concede that it is conceivable that public officials
23 will have a nonpublic function, or nongovernmental
24 function that they can perform, and they would not be
25 State actors.

1 I think in this case the public officials are
2 serving because of their relationship to the school,
3 because they are the principals in the school, and the
4 clearest example of that is in the constitutional
5 provision of the TSSAA regarding vacancies.

6 If there is a person who is a member of the
7 board of control, or a member of the legislative council,
8 and that person's school disaffiliates with the
9 organization, then that person's term of office on the
10 board of control or the legislative council terminates, so
11 it is clear that these persons are not there as
12 individuals, but there as -- in their representative
13 capacity of the schools that they represent.

14 QUESTION: You could have had the same rule in
15 the hypothetical that the Chief Justice posed. Would that
16 rule have changed your answer to that question?

17 MR. BLUMSTEIN: Well, Your Honor, in this
18 case --

19 QUESTION: That sure doesn't seem to me to
20 establish whether the principal is serving as an agent of
21 the Government or is serving on his own. It seems to me
22 that's the crucial question.

23 MR. BLUMSTEIN: Well, I agree, Your Honor, and I
24 think that in this case, as the Government argues in its
25 amicus brief, that you have control linked with a

1 functional analysis as to what is the function that is
2 being performed, and here the public schools, all of which
3 have joined this organization, so that if you want to play
4 a game against a public school, you must either be a
5 member of this organization or you must get game-by-game
6 written approval by the organization.

7 QUESTION: Well now, that's a different
8 question. I mean, you have a remedy there.

9 I assume that there could be a constitutional
10 violation in a Government turning over its determination
11 of who will play in intramural sports to an organization
12 that is not providing due process, or to an organization
13 that discriminates on the basis of race, but that's not
14 the argument that you're making here, that it's improper
15 for the schools to deal with this organization. You're
16 saying this organization itself is the State.

17 MR. BLUMSTEIN: Well, we're saying that it's
18 controlled by governmental institutions, whether formally
19 we are -- we want to argue, following the Court's decision
20 in Lebron, that this is an arm of the State, or whether we
21 want to provide a bright-line rule so that we don't have
22 to traverse this difficult area of State action in every
23 case, this case is different from every other case that
24 the Court has decided in this regard because the control
25 is by governmental institutions, and the organization is

1 exercising a governmental function.

2 QUESTION: And it hasn't --

3 QUESTION: You say the control is by
4 governmental institution, and the principal of the school
5 goes to this -- sits on this board, or belongs to the --
6 by reason of the fact he's a principal. What other
7 control does the school he comes from exercise over him?

8 MR. BLUMSTEIN: Over him?

9 QUESTION: Yes, or over his vote in the
10 association.

11 MR. BLUMSTEIN: Well, the --

12 QUESTION: I mean, does the record show?

13 MR. BLUMSTEIN: The record only shows that the
14 vote must -- can only be done by a principal or by a
15 teacher of the school as the representative of the school.
16 We don't know exactly how control is exercised within the
17 institution of the Government, but this person is acting
18 in his or her official --

19 QUESTION: How -- why do you say that?

20 MR. BLUMSTEIN: -- ex officio.

21 Because the schools are the members of the
22 organization. It's not the officials. It's not a
23 coaches' association. It's not an association of
24 principals. This is an association of schools, of public
25 schools and private schools, 84 percent public schools.

1 QUESTION: And -- but the fact that the
2 principals are joined in the organization by private
3 school principals too makes no difference?

4 MR. BLUMSTEIN: Well, the control in this case
5 is with the schools that run the organization and I think
6 under the circumstances the decision is fairly
7 attributable to the State. This is a decision that public
8 schools are making. They control the organization, they
9 drive the agenda, and that they have control over the --

10 QUESTION: Excuse me. You say they control the
11 organization. I -- every issue isn't brought to the whole
12 body. I mean, do they assemble all of the principals? I
13 thought this was run by a governing board, and your
14 complaint is that the governing board is what, elected by
15 all the principals, which come from mostly public schools?

16 MR. BLUMSTEIN: There's both an as-applied and a
17 facial challenge. The facial challenge does not focus
18 upon action of the governing board. It focuses upon the
19 recruiting rule, which is adopted by the body. Then there
20 is the implementation, the disciplinary proceeding --

21 QUESTION: Well, excuse me, which is adopted by
22 the body how? How does the body adopt that rule?

23 MR. BLUMSTEIN: In a one-school, one-vote --

24 QUESTION: Okay. That is done on a floor vote?

25 MR. BLUMSTEIN: Yes, and the as-applied

1 challenge focuses on the implementation, the disciplinary
2 proceeding, and that requires a decision at first by the
3 executive director, and then it was appealed through
4 the -- an internal procedure, appeals procedure,
5 ultimately ending up at the board of control, which is
6 this governing body, and they affirmed the decision and
7 ultimately the disciplinary action was taken by the board
8 of control, which was composed in the relevant time frame
9 of 100-percent public school principals serving ex officio
10 again.

11 QUESTION: Do you have to -- if you're a school
12 that plays in this league, do you have to send somebody to
13 this organization to vote on such things as this rule that
14 you're objecting to?

15 MR. BLUMSTEIN: Is there a duty to vote?

16 QUESTION: Is there a duty to have a person
17 there on the floor?

18 MR. BLUMSTEIN: I don't believe that there is,
19 Your Honor.

20 QUESTION: So -- and although being a principal
21 is a condition of being a member, a voting member, can a
22 principal decide, I'm not interested in this and I won't
23 do it?

24 MR. BLUMSTEIN: Not to participate in --

25 QUESTION: Yes, not to participate in the

1 organization.

2 MR. BLUMSTEIN: I believe the school can
3 exercise its right not to vote in the process, but they
4 have ultimate control and in *Bowsher v. Synar* we were told
5 that it is the ability to control, not how the control is
6 exercised, that is critical.

7 QUESTION: Mr. Blumstein, isn't a question of
8 not simply control, but control over what?

9 For example, returning to the Chief's
10 hypothetical, if this were a group of principals meeting
11 not to make an award to a student for diligence, but were
12 meeting to set the curriculum that would be used in all
13 the schools within the association. If that's what the
14 purpose of the principals' meeting, and what they decided
15 became the curriculum for the school --

16 MR. BLUMSTEIN: Yes, Justice Ginsburg. There
17 has to be a mixture of the control and also an analysis of
18 the function, the governmental function that is being
19 performed and in this case you're quite correct, if it
20 were a curriculum matter, or in this case an
21 extracurricular matter that this Court in the *Santa Fe*
22 case talked about being a highly visible, Government-
23 sponsored school-related activity, under those
24 circumstances the allocation of this resource, the ability
25 to play against the public schools in sports, is the

1 public, or governmental function that is being performed
2 in this case.

3 It's part of the overall educational process of
4 the State of Tennessee, and it's part of the fabric of the
5 educational institution, and in the Santa Fe case this --

6 QUESTION: So you would say it's just like if
7 they were having a body that would decide what will be
8 taught in the math courses in the schools.

9 MR. BLUMSTEIN: Well, Your Honor, if this -- if
10 the lower court is affirmed in this case, then we can
11 expect to have associations of the German department
12 chairs, and of the history department chairs and so forth,
13 and if the court of appeals is right in this, that all
14 that it takes is a formalistic change in a State-wide
15 rule, then we can see delegation and privatization I think
16 of many other areas of our school activity and
17 noneducational activity as well.

18 QUESTION: In this case I suppose it follows
19 from your argument that all of the rules and regulations
20 that are promulgated by the association are promulgated by
21 a State entity, correct?

22 MR. BLUMSTEIN: From the TSSAA, Your Honor?

23 QUESTION: These are just like -- there are --
24 all rules and regulations they pronounce after -- if you
25 prevail will be State rules.

1 MR. BLUMSTEIN: If those rules --

2 QUESTION: Are there parochial schools that are
3 members of this association?

4 MR. BLUMSTEIN: There are religious schools that
5 are members of this association.

6 QUESTION: And so the result would be that all
7 rules and regulations must be governed by the First
8 Amendment, no crucifixes in the locker room. That would
9 be a permissible regulation.

10 MR. BLUMSTEIN: If the -- I'm sorry, if the
11 association promulgated --

12 QUESTION: Under your view, all of the rules and
13 regulations are now the rules of the State actor, and
14 parochial schools are members of this body.

15 MR. BLUMSTEIN: Yes, Your Honor, the parochial
16 schools are members of the body, and if the organization,
17 the TSSAA had a rule that, for example, banned prayer at
18 games in which the organizations participated, then it
19 would be -- the rules would be subject to constitutional
20 scrutiny. The rules of the association would be subject
21 to constitutional scrutiny.

22 QUESTION: But do you agree that the -- even if
23 two parochial schools were playing each other?

24 MR. BLUMSTEIN: Well, under the TSSAA bylaws,
25 schools do not have the authority to undo these rules.

1 They are bound to abide by the rules, and the rules
2 themselves would -- I think would be subject to scrutiny.
3 If a religious organization is uncomfortable with a
4 constraint upon its religious exercise, then it has the
5 ability to choose not to play against the public schools.

6 QUESTION: Well, I suppose we could say the same
7 thing about Brentwood Academy. You can just withdraw from
8 the association if you don't like it.

9 MR. BLUMSTEIN: Well, that's the respondent's
10 position, Your Honor, but if you want to play against the
11 public schools --

12 QUESTION: I thought you just said that was your
13 position with reference to the parochial schools.

14 MR. BLUMSTEIN: Yes, Your Honor, but it
15 wouldn't -- I'm staying with the State actor status. It
16 would be a State actor, and I'm trying to be consistent
17 with our position that the activity of the association as
18 controlled by these governmental institutions would be
19 subject to constitutional scrutiny, and if --

20 QUESTION: You're not arguing that the parochial
21 school would be a State actor?

22 MR. BLUMSTEIN: No.

23 QUESTION: No, okay.

24 MR. BLUMSTEIN: No, no. Just the rules of the
25 association are subject --

1 QUESTION: And you're not claiming -- you don't
2 concede that in Justice Kennedy's hypothetical that the
3 prayer rule would be unconstitutional, do you?

4 MR. BLUMSTEIN: A ban on prayer? No.

5 QUESTION: Yes.

6 MR. BLUMSTEIN: No.

7 QUESTION: And you're saying this is
8 unconstitutional, and as a member of the association you
9 have a right to object to it because the association has a
10 public character.

11 MR. BLUMSTEIN: Yes. The -- whether it be a
12 ban, or whatever the rule would be that would be
13 promulgated by this organization would be subject to
14 constitutional scrutiny. Yes, Justice Souter, that is our
15 position.

16 QUESTION: You're not discussing the merits,
17 whether the First Amendment gives Brentwood a right to
18 recruit outside the rules?

19 MR. BLUMSTEIN: No, Mr. Chief Justice. We're
20 hoping to survive to live another day to fight that issue
21 in the lower court.

22 And I'd like to reserve some time, if I might.

23 QUESTION: Very well.

24 Ms. Underwood, we'll hear from you.

25 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

1 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE PETITIONER

3 MS. UNDERWOOD: Mr. Chief Justice, and may it
4 please the Court:

5 When a group of public schools, all State
6 actors, join together in an association to run a program
7 for students, that association is a State actor, too, and
8 its status should not change when it admits a relatively
9 small number of private school members.

10 QUESTION: What if it admitted a huge number of
11 private school members?

12 MS. UNDERWOOD: Well, if the -- if it
13 admitted -- if the membership were more private school
14 than public school, it would cease to be a public entity
15 on the theory that we're advancing here. One would have
16 to look at other questions. There might be other reasons
17 why its actions should be attributed to the State, or they
18 might not be.

19 QUESTION: Well, assume -- let's assume that it
20 performs the same function that is being performed here in
21 regulating public school contests. Would you say that
22 that was a factor that ought to be considered, even though
23 the membership was predominantly private?

24 MS. UNDERWOOD: It would be a factor that ought
25 to be considered, but it would be a different case and a

1 weaker case, and perhaps more like --

2 QUESTION: Sure.

3 MS. UNDERWOOD: -- NCAA v. --

4 QUESTION: But that's one of the things you'd
5 look to?

6 MS. UNDERWOOD: Absolutely. Absolutely, but
7 this case is easier, because in fact -- well, Tarkanian
8 held that an association of mostly private colleges from
9 many States did not acquire State actor status from one of
10 its members, the member, the public university that was at
11 issue in that case. The court noted that the case would
12 be different if the members were largely public and from
13 the same State, and that's this case.

14 QUESTION: And it would be the case, I take it,
15 any State athletic association, given the current mix of
16 public and private schools.

17 MS. UNDERWOOD: That's correct. The litigation
18 against -- involving these associations in many States
19 across the country where the record shows the numbers,
20 shows similar numbers to this case -- that is, 80 percent,
21 or 85 percent public, the world could, of course, change
22 and then the issues might be different, but that is the
23 case in Tennessee and, as far as the cases show,
24 everywhere else as well.

25 QUESTION: I wanted to see the cases you thought

1 most applicable, and in your brief at page 8 you cite the
2 Gerard College case, Evans and Newton, and Lebron.

3 I think Lebron is not so much in point because
4 there was a lot of top-down governmental delegation there
5 that is different than in this case, precise delegation
6 from the legislature, Pennsylvania and Evans, much closer.

7 In those cases, as I recall, the public trustees
8 were voting in their public capacity. Is it clear that
9 that's happening here as well, to you?

10 MS. UNDERWOOD: It is clear that that's
11 happening here. I mean, each of these cases is slightly
12 different, of course.

13 QUESTION: Sure.

14 MS. UNDERWOOD: But in this case it is the
15 schools that are members, not the individual coaches.
16 They are members in order to provide a program for their
17 students. That's what schools do. That's their general
18 public function, and this is a piece of that function, and
19 they represent their schools.

20 So that it seems to me that there's no other
21 capacity in which they could be acting than in their
22 public capacity as officials of their -- of the public
23 schools. That is, the public school members. Obviously,
24 the private school members are representing their private
25 schools, but they are a very small minority.

1 And on the question whether it's the board or
2 the membership that's important here, it seems to me --
3 and membership isn't entirely the right way to describe
4 it. These are voting members. They choose their board,
5 and they can remove their board members, and so it seems
6 to me that the -- it is the membership. It happens that
7 it's not surprising that this membership has chosen
8 governing boards that are either exclusively or
9 overwhelmingly composed of public members, but --

10 QUESTION: What if the rules were changed so
11 that to be a delegate you didn't have to be a principal,
12 that you were just a parent from the school in question,
13 so there's a representative from each one of the schools?

14 MS. UNDERWOOD: Well, that would be a different
15 sort of association. It would be less clear.

16 QUESTION: I know it would.

17 MS. UNDERWOOD: It would be less --

18 QUESTION: I know it would, but would it --
19 would that still be --

20 MS. UNDERWOOD: It would be like --

21 QUESTION: -- State action?

22 MS. UNDERWOOD: It would depend on what that
23 parent's responsibility was. It would be less -- I
24 understand your hypothetical to say that that parent does
25 not take direction, or cannot be directed by the school in

1 the way --

2 QUESTION: Right.

3 MS. UNDERWOOD: -- the school employee does, and
4 so I think it would be less clear to say then that the
5 schools control the organization.

6 QUESTION: So this hinges on whether the
7 principals take directions from the school. Is there any
8 indication that the principals act in anything other than
9 their own best --

10 MS. UNDERWOOD: I don't think it hinges on
11 whether they in fact do. It hinges on the fact that the
12 schools and, indeed, in this case ultimately the State
13 legislature and the State Board of Education to whom the
14 schools are accountable have the capacity to give them
15 direction, that they act in their official capacity, and
16 whether they in fact give direction as to any particular
17 decision or not is not the point. The point is that they
18 have the ability to do so.

19 QUESTION: Is that conceded, that the principals
20 could be instructed to vote a certain way in this
21 organization?

22 MS. UNDERWOOD: Well, I don't believe the issue
23 was squarely joined, but they are school officials, and
24 the schools are members, and --

25 QUESTION: Who instructs principals? I thought

1 the principals instruct the other people in the schools.

2 MS. UNDERWOOD: They do, but ultimately a
3 principal of a public school is accountable to a Board of
4 Education, and ultimately to the State Board of Education
5 or to the legislature.

6 QUESTION: Oh, but do you think the Board of
7 Education is apt to tell a principal what to do when he
8 goes to these meetings? I mean, is there any finding in
9 the first place?

10 MS. UNDERWOOD: Well, the record establishes
11 that the State Board of Education so recognized the
12 important role of this association in the provision of
13 educational activities to its students that it has sent
14 members ex officio to the board meetings, and it has
15 reserved -- over an extensive period of time it reserved
16 the right to review the rules of the association, so I
17 think --

18 QUESTION: That ceased, did it not, the review?

19 MS. UNDERWOOD: Well, actually the district
20 judge found that nothing changed when the regulation
21 changed, so I'm not sure that it's fair to say that that
22 ceased.

23 It is true that the State Board of Education
24 revised the regulation that it had that expressly reserved
25 the right to review the rules. It isn't clear that they

1 stopped reviewing the rules at all. In fact --

2 QUESTION: Is there any question that if the
3 State board did, in fact, instruct the principals by
4 passing a general standard that would be applicable to
5 these athletic contests that the principals would be bound
6 to follow the State board's rule?

7 For example, a State board says, no athlete will
8 be allowed to play in intramural games who is found
9 drinking beer within a month of the game. I mean, would a
10 principal be free to disregard that?

11 MS. UNDERWOOD: I don't think he would, but if,
12 under the particular structure of education in Tennessee
13 he might be, then it is surely within the power of the
14 Tennessee legislature to arrange things to give the board
15 that power.

16 That is, I don't know whether the board
17 currently has that power, although I would assume so. If
18 it doesn't, Tennessee, as a State, in some capacity
19 certainly does have the power to instruct -- to direct the
20 conduct of public education in Tennessee, including the
21 rules that govern interscholastic athletics.

22 If this association is not a State actor, then a
23 gap will open up in the constitutional coverage of public
24 school programs, because schools may often collaborate in
25 providing programs for their students, not only in

1 athletics but also, for example, in language and travel
2 and music and art, in devising and administering
3 standardized tests, and that collaboration should not
4 shelter the programs from constitutional accountability.

5 QUESTION: You don't think a line can be drawn
6 between German and sports?

7 MS. UNDERWOOD: I do think a line can be drawn,
8 but in fact both the Tennessee Board of Education and
9 Boards of Education in general have regarded sports as
10 part of the educational program. They wouldn't have to do
11 so, but they have done so here, and have typically done
12 so, and it's not -- it was suggested that it would be
13 sufficient to hold each public school accountable, but in
14 fact the individual public schools have no power one by
15 one to change the rules or the actions of the association.

16 Together they control it, but alone no one of
17 them does, so unless the association itself is regarded as
18 a public actor because it is the -- an aggregate of public
19 actors, then collective action by the association could
20 escape constitutional review.

21 QUESTION: Perhaps I should have asked the
22 question of petitioner, but his time was running out, as
23 yours is. On page 8 of the blue brief, the first full
24 paragraph says that for a school to be a member, its coach
25 must be a full-time employee of the Board of Education.

1 Does Brentwood's coach have to be a full-time employee of
2 the Board of Education, as you understand it?

3 MS. UNDERWOOD: Well, that's my understanding of
4 the rules, but I'm really not sure of the answer to that.
5 Perhaps Brentwood --

6 QUESTION: Because it seems to me that would
7 have certainly a bearing on the case.

8 MS. UNDERWOOD: I think that's correct.

9 QUESTION: Thank you, Ms. Underwood.

10 Mr. Colbert, we'll hear from you.

11 ORAL ARGUMENT OF RICHARD L. COLBERT

12 ON BEHALF OF THE RESPONDENTS

13 MR. COLBERT: Mr. Chief Justice, and may it
14 please the Court:

15 TSSAA's authority to enforce rules for high
16 school sports competition comes from the private choice of
17 the schools that join TSSAA to abide by those rules and
18 not from any authority given to TSSAA by the State of
19 Tennessee, and whether the court examines the case as the
20 Sixth Circuit did, using Jackson, and Blum, and Rendell-
21 Baker, and the U.S. Olympic Committee case, and Tarkanian,
22 and Sullivan, the result is the same.

23 The question is, where does the authority for
24 the power exercised by the association come from, and in
25 this case it is quite clear in Brentwood Academy's case

1 and in the case of the other member schools, it comes from
2 the decision, school-by-school, which each school is given
3 the choice to make under State law, of joining the
4 association and abiding by those rules.

5 QUESTION: Suppose all of the schools in the
6 association were public schools. Suppose everything is
7 the same, except that the organization is only for public
8 schools, and only public schools compete in these
9 competitions. Would your answer be the same? Based on
10 what you just said, I take it it would be. It still
11 wouldn't be a State actor, even if it regulated only
12 public schools.

13 MR. COLBERT: My answer would be the same, Your
14 Honor. It would not be a State actor because it is
15 engaging in a function that is not a function that the
16 State of Tennessee has chosen to regulate by statute or by
17 constitution. The function involved is an extracurricular
18 activity, high school sports competition. Like band
19 competition, cheerleading, art competition, forensics --

20 QUESTION: The students get some credit for
21 physical education, toward that requirement, from being on
22 this varsity team?

23 MR. COLBERT: There is a statute, the only
24 statute in Tennessee that addresses interscholastic
25 athletics at all allows a local public school board, if it

1 chooses, to give credit for participation in
2 interscholastic sports or band, either one, to allow that
3 in lieu of physical, the required physical education
4 classes, but Tennessee does not regulate, the State does
5 not regulate, the State says nothing about, in
6 legislation, how interscholastic sports competitions from
7 one school to the next will be conducted.

8 Now, I would agree, Your Honor, that any
9 individual school would be a State actor in the decisions
10 that school makes for its own athletic program, but the
11 school, the principal of school A has no authority from
12 the State of Tennessee to regulate school B's athletic
13 programs.

14 QUESTION: But why wouldn't the principal, when
15 he or she goes to the meeting and casts a vote, it seems
16 to me that that principal, when he or she casts a vote,
17 must be acting in a State capacity because that's why that
18 principal is there.

19 MR. COLBERT: The principal is actually there in
20 a capacity -- and I need to clarify this, because I think
21 there was a misstatement made about how the rules get
22 adopted. The membership at large does not adopt the
23 rules, and this is in the -- part of the TSSAA
24 constitution is in the appendix. There's a separate body.
25 There's a board of control that enforces the rules.

1 There's a legislative council that enacts the rules. It's
2 also a nine-member representative body.

3 The principals who are there, voting, who are on
4 that body, are serving in a representative capacity. They
5 have been elected by the member schools, both public and
6 private, to serve in a representative capacity on that
7 board.

8 QUESTION: Well, the record doesn't tell us, but
9 it's just incredible to me that the principal would not be
10 accountable to the Board of Education for the principal's
11 actions in voting.

12 MR. COLBERT: Well, the --

13 QUESTION: And it seems to me somewhat unlike
14 the Chief Justice's hypothetical of a principals'
15 association, because the principal is there in order to
16 advance the interests of the school as a school.

17 MR. COLBERT: The principal is there on the
18 legislative council or on the board of control in order to
19 advance the interests of the voters who elected him and
20 represent -- to serve in a representative capacity on the
21 legislative council. That may be public schools --

22 QUESTION: So in your view the principal would
23 be quite unconstrained by the Constitution from voting to
24 deny membership to a school because its athletes were
25 black, or Catholic, or something like that?

1 MR. COLBERT: The principal as a representative,
2 as a representative of Brentwood Academy and any other
3 school who elected him, would not be accountable
4 constitutionally for that.

5 Now, if the principal of a public school does
6 not allow his school to participate, refuses to schedule a
7 contest against a school because of -- for
8 unconstitutional reasons, then he, as the principal of his
9 school, makes his school accountable for that, but he is
10 not acting as the principal of his school when he serves
11 on the board of control or the legislative council.

12 He's eligible to be on the board or the council
13 because he is a principal of a member school, just like
14 the headmaster of Brentwood Academy is eligible.

15 QUESTION: Except that's the only reason he's
16 there, is because he is the principal.

17 MR. COLBERT: He -- well, he is there to further
18 the interests of the entire association, which includes
19 the public and private school members as well. He is
20 eligible to be there because he is a principal.

21 QUESTION: Is it theoretically possible that the
22 legislative council could be -- which enacts the rules
23 could be composed of a majority of private school
24 principals?

25 MR. COLBERT: It's entirely possible, Your

1 Honor. It's strictly a function of which principals
2 decide to run for the body and which principals are
3 elected to serve on the body, and there have been private
4 school principals or headmasters who have served on one
5 body or the other, so it's -- you could have -- even
6 though, because in the State of Tennessee, as in any other
7 State at the secondary level, there are more public
8 schools than there are private schools, there are going to
9 be more public schools engaged in extracurricular
10 activities than there are private schools.

11 QUESTION: Mr. Colbert, you told me, and I think
12 you were quite candid in this, that it doesn't matter,
13 that you would be arguing the very same thing if this were
14 an association where the members were all public
15 schools --

16 MR. COLBERT: Right.

17 QUESTION: -- and it excluded private schools.

18 MR. COLBERT: Right.

19 QUESTION: Your argument would be identical to
20 what it is.

21 MR. COLBERT: That's right. That's right, and
22 I'm -- simply, in answer to Justice Scalia's question, you
23 could have an association that has 86 percent public
24 school membership, as TSSAA does, and have the entire
25 board of control consist of private school --

1 QUESTION: But that's surely more hypothetical
2 than real, because at least for this board, and every
3 other similar State association that we've ever heard of
4 either has either all public school on its board or
5 overwhelming majority. That's in -- how these things
6 operate in the real world.

7 MR. COLBERT: That's because there are more of
8 them and they're more --

9 QUESTION: Yes.

10 MR. COLBERT: And they're more likely to run.

11 QUESTION: And they might change, as counsel for
12 the Government told us, if there were a different mix of
13 school at some future time, but right now, these leagues
14 are overwhelmingly public.

15 MR. COLBERT: But Your Honor, I don't know that
16 a different mix of schools would necessarily make a
17 difference in the governing body.

18 QUESTION: No. I think you've clarified that,
19 that if you're dealing with a universe that's all public
20 schools, your argument is still the same, no State action.

21 MR. COLBERT: Well, if you -- and in the
22 Tarkanian case, for example, you were dealing with a
23 universe of, as reflected in the argument transcript,
24 roughly 1,000 schools, a roughly even split between public
25 and private schools, but you had a committee on

1 infractions that made the challenge decision there, and
2 four of the five members of the committee on infractions
3 came from public schools, so the make-up of the membership
4 at large does not necessarily dictate the makeup of the
5 governing body in the organization. It is a function of
6 choice, just like --

7 QUESTION: In that case the Court seemed to be
8 impressed by the fact that it wasn't -- any one State
9 could never have control of that organization. You
10 couldn't belong to one State, because it covered all the
11 States.

12 MR. COLBERT: Well, that's right, Your Honor,
13 but there was also -- there were also some other issues in
14 that case, such as whether UNLV as a single State actor
15 had delegated its authority to regulate its athletic
16 program to the NCAA, and whether that delegation was
17 sufficient to make the NCAA a State actor, and the Court
18 said no, because there was no statutory or constitutional
19 requirement that UNLV engage in interscholastic athletics
20 at all, much less that it defer to the NCAA for the
21 regulation of interscholastic athletics.

22 And you have the same thing in Tennessee. There
23 is no statutory or constitutional requirement that any
24 school, public or private, have an interscholastic
25 athletic program, much less that they defer to the TSSAA

1 to regulate that program.

2 QUESTION: Does the record tell us if there are
3 any private, substantially equivalent league which is --
4 well, any league which is made up of all private schools
5 which is substantially equivalent?

6 MR. COLBERT: The --

7 QUESTION: In the State of Tennessee?

8 MR. COLBERT: The record itself does not --
9 there is some mention of that in the brief, Your Honor,
10 that there is one in East Tennessee, but that's not in the
11 record itself.

12 QUESTION: While I've got you on the facts, is
13 it correct where the blue brief says at page 8 that for a
14 school to be a member its coach must be a full-time
15 employee of the Board of Education?

16 MR. COLBERT: There --

17 QUESTION: Is Brentwood's coach a full-time
18 member of the Board of Education?

19 MR. COLBERT: No, he is not. There is a --

20 QUESTION: Full-time employee.

21 MR. COLBERT: There is a rule that as you read
22 it, and if you apply it to -- in the public school context
23 it would require a public school coach to be an employee
24 of the public school system.

25 QUESTION: Just in the public school context?

1 MR. COLBERT: Not -- right, and the key is so
2 that the coach is not somebody off the street who has no
3 accountability to the member school.

4 In Brentwood Academy's case, the coach would
5 have to be an employee of the member school.

6 QUESTION: So it -- but it wouldn't rule out a
7 part-time coach, I take it, so long as the part-time coach
8 was an employee rather than an independent contractor?

9 MR. COLBERT: That's right. It allows for --
10 and actually the rule -- the rules now do allow some
11 assistant coaching from individuals who are not full-time
12 employees of the school.

13 Every aspect --

14 QUESTION: But the main coach, even in the
15 private school, would have to be a full-time employee?
16 Because the rule as quoted on page 8 says, have a
17 Tennessee State teacher's license, be a full-time
18 employee. How does it work now for the private schools,
19 for the main coach, not the assistant coach? Must the
20 main coach be a full-time employee of Brentwood under
21 these rules?

22 MR. COLBERT: The coach is -- the head coach is
23 expected to be a full-time employee of the school.

24 QUESTION: So that this rule, to the extent that
25 it requires a full-time employee, does apply to private

1 schools as well.

2 MR. COLBERT: It applies to private schools,
3 except that they're not required to be -- the term Board
4 of Education connotes a public school board.

5 QUESTION: Yes.

6 MR. COLBERT: And that's not -- the rule does
7 not apply to private schools in that respect.

8 QUESTION: But it does in other respects. That
9 is, full-time employee --

10 MR. COLBERT: Of the school.

11 QUESTION: Yes.

12 QUESTION: May I ask whether you think your
13 client was a State actor before -- 1995, was it, they
14 changed the rules?

15 MR. COLBERT: 1996.

16 QUESTION: 1996.

17 MR. COLBERT: No, Your Honor, we do not. TSSAA
18 was formed in 1925 without any involvement of the State.
19 TSSAA operated for 47 years, until 1972 without any
20 involvement of the State.

21 In 1972, the State Board of Education on its
22 own, without any legislative action, without any
23 constitutional authority, passed an administrative rule
24 designating -- it doesn't -- the language of the rule is
25 important. It doesn't delegate to TSSAA.

1 It designates TSSAA as the association for
2 public schools to join for their -- for the regulation of
3 their interscholastic athletic programs, but that
4 designation is no more than an authorization, or an
5 acquiescence by the State in the function of the private
6 entity, which this Court has held over and over, back
7 starting with Jackson and Blum and Rendell-Baker, that
8 State acquiescence, State approval of the private actions
9 of a private entity is not tantamount to State action and
10 does not convert the private entity's acts into State
11 action, and that's what you have here.

12 And in fact, analytically speaking, the argument
13 of the petitioner that somehow the makeup of the board of
14 control converts TSSAA's action into State action is
15 really no different than the principle that this Court has
16 rejected in Rendell-Baker, which is extensive State
17 regulation of a private entity does not convert the
18 private entity's --

19 QUESTION: But there's something really
20 different about that Rendell-Baker and -- and here, it's a
21 public official being paid by the State, goes to meetings.
22 It's not out of his own pocket, is it, the principal, when
23 he goes to the board it's on State time, or municipal
24 time, whoever hires him?

25 MR. COLBERT: The record reflects that there

1 have been times when meetings were held during the school
2 days, meetings of the board of control or the legislative
3 council. There are other times when meetings are not.
4 They're held on Saturdays or in the evenings.

5 QUESTION: Is the principal expected, out of his
6 private purse, to fund his participation in this
7 organization?

8 MR. COLBERT: There -- yes. I mean, that's left
9 strictly up to the local people. There is no requirement
10 in the State of Tennessee, in the law, that a principal be
11 reimbursed for service on the board of control.

12 QUESTION: Do you know what the practice, the
13 custom or practice is?

14 MR. COLBERT: I could not tell you what the
15 custom or practice is, Your Honor. I think there are
16 different customs and practices from one person to the
17 next and one school system to the next, and I think in
18 some systems there is some reimbursement, I think in
19 others there is not.

20 QUESTION: Could the State Board of Education,
21 if it so chose, say we're no longer going to rely in any
22 sense upon this organization, and we ourselves will set
23 the rules for intramural contests? Would it have the
24 authority legally to do that?

25 MR. COLBERT: Yes, Your Honor. I believe the

1 State Board of Education would have the authority to do
2 that. The State --

3 QUESTION: So that what this organization, then,
4 is doing in effect is filling the vacuum created by the
5 choice of the State Board of Education not to regulate.

6 MR. COLBERT: That's correct. The State Board
7 of Education, the State of Tennessee has chosen not to
8 regulate interscholastic athletic competition, and let me
9 clarify that. The State Board of Education has the
10 choice, if it wants to regulate interscholastic athletic
11 competition among public schools in Tennessee. It doesn't
12 have the choice to regulate that competition among private
13 schools. It has the choice to regulate among public
14 schools. It has chosen not to.

15 QUESTION: But it could -- if it were the
16 regulator in the first instance it, I presume, would have
17 the authority to say that no public school may engage in
18 an interscholastic contest with a private school unless
19 these rules are observed. That would be within its
20 authority, wouldn't it?

21 MR. COLBERT: Yes, but it has -- the State of
22 Tennessee -- and that's an important part of Fourteenth
23 Amendment jurisprudence, Your Honor, is the entire premise
24 of the State action doctrine is to, a) ensure that private
25 parties are free to conduct themselves as private parties

1 without constitutional restraint, and b) to ensure that
2 the State does not have to take responsibility for every
3 private activity that it allows to occur, simply because
4 it does not exercise its extreme authority to take over
5 certain responsibilities.

6 QUESTION: I suppose in Jackson v. Metropolitan
7 Edison the Pennsylvania legislature could have legislated
8 and controlled what Metropolitan Edison did.

9 MR. COLBERT: The Pennsylvania legislature could
10 have taken over responsibility for providing electric
11 service to residents rather than leaving it up to a
12 privately owned utility to provide that service. The
13 State chose not to involve itself in that activity, and
14 the Fourteenth Amendment State action requirement gives
15 the State that right without the State having to take
16 responsibility simply because it could have taken over
17 something.

18 QUESTION: Isn't there a difference -- and maybe
19 there isn't historically in Tennessee, but isn't there a
20 difference in the fact that intramural athletic contests
21 are sort of accepted as a standard part of the educational
22 scheme, whereas State provision of electric power is not?
23 Is that a fair distinction?

24 MR. COLBERT: No, Your Honor, I don't believe
25 that is a fair distinction. At least in Tennessee I don't

1 believe it is, because interscholastic athletic
2 competition in Tennessee has been something that's been
3 entirely voluntary for the history of that competition,
4 dating back all the way to 1925. There has never been a
5 requirement that any public school have interscholastic
6 athletic competitions --

7 QUESTION: All right, but since 1925, I take it,
8 it has been the common practice of the schools in
9 Tennessee to engage in interscholastic athletic contests.

10 MR. COLBERT: Well, it is, but it varies from
11 one school to the next, and even among public schools,
12 what activities they may engage in for --

13 QUESTION: But nobody in Tennessee would say,
14 when they heard that the X school was having -- was
15 engaging in interscholastic athletics, no one in Tennessee
16 would say, what are they doing that for, that's crazy for
17 a school to be doing that.

18 MR. COLBERT: No. That -- well, they might.
19 They might when they find out they're engaging in swimming
20 competition, for example. There are schools in
21 Tennessee --

22 QUESTION: They think it's crazy to swim in
23 Tennessee?

24 (Laughter.)

25 MR. COLBERT: There are schools in Tennessee --

1 in Tennessee, swimming competition is very unusual.

2 (Laughter.)

3 MR. COLBERT: In Tennessee, hockey competition
4 is very unusual, but there are schools that have it. It's
5 not regulated by TSSAA.

6 QUESTION: Mr. Souter's from New England.

7 (Laughter.)

8 QUESTION: Different mores.

9 MR. COLBERT: It's -- now, football --

10 QUESTION: Yes, what have they got against
11 hockey?

12 MR. COLBERT: It's a bit unusual to say someone
13 doesn't play football, but in Tennessee there are sports
14 like swimming, for example, that some schools have chosen
15 to engage in and to compete in, and compete for
16 championships in. TSSAA doesn't even regulate --

17 QUESTION: Okay, but the basic point is, schools
18 customarily play each other in Tennessee.

19 MR. COLBERT: That's right. That's right. But
20 that, we submit, Your Honor, does not establish State
21 action simply because it is an action that's customarily
22 engaged in.

23 QUESTION: I thought that there was a finding
24 in -- that the principals who attend these meetings are
25 customarily reimbursed.

1 MR. COLBERT: There was not -- there's a --
2 there is a statement in the petitioner's brief about that
3 that suggests that the meetings of the board of control
4 occur during the school day, and that the principals are
5 reimbursed, but there's -- that does not appear in the
6 record, that I'm --

7 QUESTION: Do you dispute that as a matter of
8 fact?

9 MR. COLBERT: Yes, Your Honor. As I said, I
10 think it varies from one -- I do know that the meetings
11 occur at all different times. They may occur on a school
12 day. They may occur on a Saturday. The meeting that led
13 to the filing of this lawsuit took place on a Saturday at
14 a privately owned hotel, and whether there is
15 reimbursement for the members of the board of control or
16 the legislative council varies from one to the next.
17 There is no standard practice in that respect.

18 In this case there are several problems with the
19 rule of law that's proposed by Brentwood Academy, problems
20 that cause that rule of law to run contrary to the
21 Fourteenth Amendment. The first problem is that the
22 rule -- and this is even consistent with the Solicitor
23 General's remark.

24 The rule proposed by Brentwood Academy would
25 mean that if schools in extra -- in any extracurricular

1 activity compete with each other in Tennessee, that -- the
2 regulation of that interscholastic activity is going to
3 amount to State action regardless of how it's conducted.
4 Forensics, band competition, cheerleading competition, any
5 sort of regulation of those activities would all be State
6 action. It would --

7 QUESTION: On the other hand, if your position
8 is right, then this association, where most of the members
9 are public school principals, can decide as far as the
10 Fourteenth Amendment is concerned, we don't want to have
11 any teams for girls. We're going to limit our varsity
12 teams to boys.

13 MR. COLBERT: The -- you have to distinguish
14 between what the association can do and what the
15 individual schools can do. An individual public school
16 could not do that, and if an individual -- and that's one
17 of the problems with the amicus briefs in this case, is
18 they suggest that there's no remedy for any sort of
19 discrimination if you hold that TSSAA is not a State
20 actor, and that's simply not the case, because an
21 individual public school still makes the choice of whether
22 it's going to be a member of the association or not, and
23 whether it's going to abide by the rules or not, and if --

24 QUESTION: No, but that association could impose
25 that rule on Brentwood. It could say, Brentwood, if you

1 want to be a member of our association you can't let women
2 participate in intercollegiate sports, or interscholastic
3 sports.

4 MR. COLBERT: And Brentwood Academy would be
5 free not to join the association.

6 QUESTION: Right.

7 MR. COLBERT: And any public school would be
8 free not to join the association, and if a public school
9 joined the association and followed a rule like that,
10 there would be constitutional recourse against that
11 school, or against that local school board. That does not
12 turn the actions of the association itself into State
13 action.

14 QUESTION: Even though the people who have made
15 up that rule are the very same principals of the schools
16 that would be sued individually?

17 MR. COLBERT: That's right. That's right, but
18 you would also --

19 QUESTION: And even though they're appearing in
20 that body as a representative of their school, not as an
21 individual?

22 MR. COLBERT: Well, that's -- that's where I
23 disagree, Your Honor. They're not appearing as a
24 representative of that school. They're appearing as an
25 elected representative of all the schools, and in that

1 respect you would open a Brentwood Academy up, for
2 example, to constitutional challenge. If you're going to
3 use the association to sweep every member up with it, then
4 you are subjecting the private schools --

5 QUESTION: Oh, but that's not right. I don't
6 think there's any claim that Brentwood is a State actor,
7 is there?

8 MR. COLBERT: Well, I don't think there is a
9 claim that Brentwood is a State actor, but if you allow
10 the Constitution -- if you allow the Fourteenth Amendment
11 to reach the individual schools not by challenge to the
12 action of an individual school, but by challenge to the
13 action of the association, then you're allowing the
14 Fourteenth Amendment to reach the private school members
15 of the association as well.

16 QUESTION: No, you're just allowing it to say
17 that the rules that the association imposes on its members
18 are a State action. That doesn't mean that the individual
19 school -- the -- if Brentwood complied with those rules it
20 would not be a State actor.

21 MR. COLBERT: But the association has no power
22 to impose those rules --

23 QUESTION: Well, but that's one of the issues.

24 MR. COLBERT: -- except to the extent that the
25 schools choose to abide by them.

1 The -- ultimately, this case really goes back to
2 Justice O'Connor's first question when Mr. Blumstein stood
3 up and that is, what should the test be and I think, as
4 Justice O'Connor mentioned in the dissent in the Amtrak
5 case, if you look at Blum, if you look at Rendell-Baker,
6 if you look at Jackson, if you look at all the different
7 cases that have phrased the test in all different ways,
8 they really come back to whether the challenged action
9 results from a matter of private choice, and that's
10 exactly what you have here.

11 Membership in TSSAA, service on the board of
12 control, following the rules or not following the rules is
13 a matter of private choice. Brentwood Academy made the
14 private choice that it wanted to play in the TSSAA and
15 compete for TSSAA championships, and now it doesn't want
16 to follow the rules, and that's what this case is about.

17 QUESTION: Well, surely it's not a matter of
18 private choice whether a public school chooses to join the
19 association or not. I mean, the decision to join the
20 association has to be a -- you don't acknowledge that that
21 decision is an official public school decision?

22 MR. COLBERT: The school itself in the case of a
23 public school makes a -- makes its --

24 QUESTION: Okay.

25 MR. COLBERT: -- own decision, makes a --

1 QUESTION: A decision to join.

2 MR. COLBERT: To join, that's right. It is also
3 free, however, there is no State compulsion -- the school,
4 even a public school is free not to join.

5 If there are no further questions, thank you.

6 QUESTION: Thank you, Mr. Colbert.

7 Mr. Blumstein, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF JAMES F. BLUMSTEIN

9 ON BEHALF OF THE RESPONDENTS

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

12 The TSSAA has been very candid in stating the
13 breadth of its position, but I'd like to point out on page
14 32 of its brief their position seems to be that even a
15 coach who is a public school teacher and a public school
16 official is not a State actor, so their position is that
17 extracurricular activities are so outside of the scope of
18 public accountability that even if there is a decision by
19 a coach about a decision affecting athletic contests, that
20 that does not fall within State action.

21 The other -- another point on the question of
22 control, in the joint appendix at page 89 and page 92 it
23 makes it pretty clear that the principals are
24 representatives of the school in voting on the legislative
25 council and on the board of control, and joint appendix 89

1 and 92 sets that out.

2 And finally, I would like to just indicate, we
3 haven't talked about the existing state of the law, but
4 this circuit, the Sixth Circuit decision is the only
5 decision that finds a comparable institution not to be a
6 State actor. This case is an outlier in that sense. The
7 law has been settled for over 30 years. Some of the
8 concerns that the respondent has I think have not been
9 manifested.

10 The way that the courts have dealt with the
11 issue of reviewing decisions of these associations is
12 through a proper level of deference on a matter of
13 substantive law, and so if the Court affirms below it will
14 be unsettling what has been settled law in every
15 jurisdiction that has heard this case for 30 years.

16 Thank you, Your Honor.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Blumstein. The case is submitted.

19 (Whereupon, at 12:04 p.m., the case in the
20 above-entitled matter was submitted.)

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