

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TENNESSEE SECONDARY SCHOOL :

4 ATHLETIC ASSOCIATION, :

5 Petitioner :

6 v. : No. 06-427

7 BRENTWOOD ACADEMY. :

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9 Washington, D.C.

10 Wednesday, April 18, 2007

11

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

15 APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:22 a.m.)

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

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN MAHONEY

ON BEHALF OF THE PETITIONER

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

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

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

1 private concerns.

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

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

7 And that is, we are told that at the time
8 this issue arose, the practice itself was all right, and
9 it was all right for one school to invite students from
10 another school to join the invitee school's practice.

11 And now I take it that it's no longer permissible, that
12 one school's, one school's practice, is reserved for its
13 own students and not -- others are not invited. But if
14 it was permissible under the association's rules to
15 invite students from other schools, then why is it
16 impermissible to talk it up? I mean, you can do it, but
17 you can't talk about it?

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

25 But instead the problem here was that it was

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: In Umbehr we said, the

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

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

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

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

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

1 association?

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

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

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

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

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

1 this Court could readily find that that was not a
2 reasonable choice because it would impact --

3 CHIEF JUSTICE ROBERTS: What about
4 criticizing officials?

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

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

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

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

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

21 JUSTICE KENNEDY: And how would you
22 commence?

23 MS. MAHONEY: Probably find that that not be
24 a reasonable restriction, that it's probably not germane
25 to the important educational goals of the association.

1 But it could -- I mean, I think that what we have here
2 is the recruiting rule has been applied to speech that's
3 a private concern that can be delivered in another way;
4 and the choice to join is entirely voluntary.

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

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

22 What is the interest? And would that
23 interest have supported a ban on letters to the already
24 enrolled eighth grade kids?

25 MS. MAHONEY: First, I think that this

1 letter, which was not sent to Brentwood's own eighth
2 grade middle school students, probably could have been,
3 because under the rule those students were not enrolled
4 at another school. And what is really restricted is
5 coach-initiated contact with students enrolled at
6 another school.

7 This letter was instead sent to student
8 whose were still enrolled at another school. And the
9 interest I would --

10 JUSTICE SOUTER: Okay, so they had signed
11 up to go to Brentwood. So where does the recruiting
12 come in?

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

22 In fact, one of the top basketball athletes
23 in the eighth grade in the city of Nashville in the 1997
24 was named Jack West Curry. He signed one of these
25 contracts. He did not ultimately come to Brentwood.

1 And yet he was exactly the kind of person that still
2 could have been subject to recruiting if during that
3 period --

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

7 MS. MAHONEY: No.

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

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

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

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

1 adults, that it puts too much emphasis on athletics,
2 that it also --

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

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

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

17 MS. MAHONEY: About anything? I think again
18 --

19 JUSTICE KENNEDY: About enrollment. About
20 enrollment.

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

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

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

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

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

24 MS. MAHONEY: Your Honor, if I could just --
25 one thing I do want to make clear about the

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

9 It used to be that the association required
10 approval, which was routinely granted. But in 2005 they
11 actually changed the rule. It's in the handbook at page
12 23 on their website.

13 JUSTICE GINSBURG: But then that's part of
14 the trophy, whatever it is when you win at the end of
15 the year.

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

20 CHIEF JUSTICE ROBERTS: Is there any other?

21 MS. MAHONEY: Yes, Your Honor. There is a
22 Christian Athletic League that has 26 private schools,
23 that also conducts State tournaments. There are also
24 State tournaments in other sports, including lacrosse,
25 swimming, that are not run by TSSAA. And there's

1 nothing to stop Brentwood, for instance, from trying
2 form its own league, which is what independent schools
3 have done in many other States. They also could have
4 regular season play with TSSAA member schools and have
5 invitationals. There's no bar on schools attending
6 those.

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

21 If I could save the remainder of my time.

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

24 Mr. Himmelfarb?

25 ORAL ARGUMENT OF DAN HIMMELFARB

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

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

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

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

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

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

25 As applied to TSSAA's recruiting rule, the

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

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

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

1 attend a different school after signing one. This is at
2 page 240 of the joint appendix and there are additional
3 citations to the record on page 6 of the reply brief.

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

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

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

21 JUSTICE STEVENS: But isn't the coach
22 recruiting just a subcategory of a broader --

23 MR. HIMMELFARB: No. If it is a brochure
24 sent out by the school generally and it doesn't target
25 specific students and it went out to schools generally,

1 and there was a prohibition on that type of thing, I
2 think that might very well be a reasonable restriction
3 on speech. As I say, I think this that's close --

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: What if the mailing

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

7 MR. HIMMELFARB: I think --

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

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

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

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

25 JUSTICE STEVENS: I'm not asking you about

1 the school for the rule. I'm trying to figure out
2 what's the scope of the First Amendment protection.

3 MR. HIMMELFARB: Right. I -- I -- I think
4 that if the, if the -- if the recruiting rule -- if
5 there were a recruiting rule that prohibited those types
6 --

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

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

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

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

23 JUSTICE STEVENS: -- justification for the
24 rule in this case and the justification for the rule
25 that would prohibit the general solicitation I

1 described.

2 MR. HIMMELFARB: I'm sorry?

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

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

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

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

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

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

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

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

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

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

23 Mr. Blumstein?

24 ORAL ARGUMENT OF JAMES B. BLUMSTEIN,

25 ON BEHALF OF RESPONDENT

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

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

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

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

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

19 MR. BLUMSTEIN: Yes.

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

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

24 JUSTICE KENNEDY: One year --

25 MR. BLUMSTEIN: And the second year did not

1 take effect, Justice Kennedy.

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

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

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

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

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

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

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

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

1 with the coach.

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

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

11 JUSTICE STEVENS: Is it or is it not?

12 MR. BLUMSTEIN: Yes.

13 JUSTICE STEVENS: It is.

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

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

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

1 beginning.

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

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

10 JUSTICE ALITO: Yes, both are governmental.

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

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

25 JUSTICE SCALIA: But your claim here is not

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

3 MR. BLUMSTEIN: Unconstitutionally.

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

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

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

11 MR. BLUMSTEIN: But I think perhaps --

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

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

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

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

4 MR. BLUMSTEIN: No, Your Honor.

5 CHIEF JUSTICE ROBERTS: Why not?

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

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

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

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

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

13 JUSTICE GINSBURG: Mr. Blumstein, you're
14 making that distinction. Is there -- if the association
15 says no school in this association can invite students
16 enrolled in other schools to its practice, that's okay?
17 Because that's conduct, right? If this is your
18 statement, there's nothing to recruit for, because we
19 don't allow it period.

20 MR. BLUMSTEIN: Yes, Justice Ginsburg.

21 JUSTICE GINSBURG: That would be okay.

22 MR. BLUMSTEIN: That's correct. We have no
23 problem with the revised rules that the association has
24 adopted that does not permit spring practice --
25 non-matriculated students to participate in spring

1 practice. That's a regulation of conduct and it doesn't
2 fall within speech. We think that was the right
3 solution, not punishing the school in what --

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

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

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

1 table and say now, look, this is going affect speech,
2 let's be careful here. They didn't do that. They just
3 promulgated a perfectly reasonable rule.

4 Wouldn't we uphold that?

5 MR. BLUMSTEIN: Well, Your Honor --

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

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

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

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

24 JUSTICE SCALIA: Well, I mean, you may
25 criticize them when they get it -- when it comes out

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

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

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

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

23 MR. BLUMSTEIN: Well, in addition, there is
24 an obligation under this Court's decision in the
25 Thompson case for the government to consider non-speech

1 alternatives, where to restrict -- and to achieve its
2 objectives by not regulating speech at all. In the
3 Thompson case --

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

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

16 What is your response to her response?

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

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

25 MR. BLUMSTEIN: Well, I think that once a

1 family has -- and the evidence in this case established
2 that all these families had made their educational
3 choice.

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

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

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

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

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

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

1 there a legitimate interest in preventing recruiting
2 within the 5 percent?

3 MR. BLUMSTEIN: But there's the whole cited
4 Question 3, Justice Souter.

5 JUSTICE SOUTER: Yeah, but would you answer
6 my question? Why isn't that enough?

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

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

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

1 initiated by the school or initiated by the student.

2 In joint appendix 181 --

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

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

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

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

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

20 MR. BLUMSTEIN: Yes.

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

1 roughly a fair line?

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

7 JUSTICE SOUTER: The activity being tagging
8 along to spring practice?

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

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

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

1 communication is.

2 We would characterize --

3 JUSTICE SCALIA: It was a letter from coach.

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

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

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

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

22 JUSTICE GINSBURG: Is it fair to say "your
23 coach"? The letter was signed by your coach, not just
24 coach.

25 MR. BLUMSTEIN: Well, these were incoming

1 students, Justice Ginsburg, and --

2 JUSTICE SCALIA: And did it say, by the way,
3 everybody got this letter? Did it say that at the
4 bottom?

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

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

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

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

25 MR. BLUMSTEIN: Yes. There was a procedure

1 in which there was an exchange of letters between the
2 association and the school, in which the association had
3 some investigation and then the school had an
4 opportunity to respond. Yes, Judge Kennedy.

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

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

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

22 But it turns out that they, at the trial,
23 that the association members, or the board of control,
24 admitted that they considered the Bart King allegations
25 to enhance the penalty. So it must have been something

1 beyond Jacques Curry and that the school was never
2 informed that the Bart King's involvement beyond Jacques
3 Curry had anything to do with the proceedings.

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

11 JUSTICE BREYER: What was the evidence?

12 MR. BLUMSTEIN: I'm sorry?

13 JUSTICE BREYER: What was the evidence?

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

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

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

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

25 MR. BLUMSTEIN: And --

1 JUSTICE BREYER: Did you or not?

2 MR. BLUMSTEIN: Yes.

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

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

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

11 MR. BLUMSTEIN: We hadn't seen, we hadn't
12 seen them before the hearing.

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

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

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

25 MR. BLUMSTEIN: Well, we did not know that

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

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

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

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

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

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

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

4 MR. BLUMSTEIN: No --

5 JUSTICE BREYER: Is that right.

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

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

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

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

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

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

25 JUSTICE BREYER: Who considered it?

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

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

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

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

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

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

18 MR. BLUMSTEIN: Yes, Your Honor.

19 JUSTICE BREYER: And have you served the
20 four years.

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

23 JUSTICE BREYER: So there is three more
24 years? So if in fact you are correct that they were
25 under a misapprehension on this matter, then the thing

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

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

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

12 MR. BLUMSTEIN: Yes.

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

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

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

1 that's what we're seeking in this case as well, Your
2 Honor.

3 JUSTICE BREYER: Thank you.

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

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

1 whether there was sovereign power or, as in the case of
2 Fox, it was not sovereign power at all.

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

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

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

18 REBUTTAL ARGUMENT OF MAUREEN MAHONEY

19 ON BEHALF OF THE PETITIONER

20 MS. MAHONEY: Thank you.

21 If I could respond to the due process
22 issues, this is still a very important claim because if
23 in fact the association has violated civil rights by
24 failing to give due process Brentwood would still be
25 entitled to an award of attorney's fees. And I think

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

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

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

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

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

1 advantage of it.

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

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

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

24 JUSTICE BREYER: Was there anything at the
25 trial that came out that the investigator when they were

1 in the private session said a fact about Bart King of
2 supreme importance that they didn't know about?

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

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

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

10 JUSTICE STEVENS: No, but one did.

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

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

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

25 And when they -- and the reason they didn't

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

6 Thank you, Your Honor.

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

9 The case is submitted.

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

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