No.

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Tennessee Secondary School Athletic Association is a voluntary association, composed primarily of public schools, which adopts rules governing athletic competition between its members. Brentwood Academy is a private school that voluntarily chose to join TSSAA and agreed to abide by its rules, but now claims a First Amendment right to continue competing while violating TSSAA's rule against the use of "undue influence" in recruiting students for athletic purposes. The Sixth Circuit agreed, reasoning that Brentwood's voluntary agreement is irrelevant to the constitutional analysis and declining to recognize any substantial state interest in fair and level athletic competition. The question presented in this case is:

Whether the Sixth Circuit correctly held, in conflict with decisions of this Court and other courts of appeals, that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed contractual penalties for violations of the recruiting rule that Brentwood agreed to follow?

LIST OF PARTIES

In the court of appeals, the plaintiff/appellee was Brentwood Academy, and the defendants/appellants were the Tennessee Secondary School Athletic Association and its Executive Director, Ronnie Carter, both in his official and personal capacities.

RULE 29.6 STATEMENT

Petitioner Tennessee Secondary School Athletic Association does not have a parent corporation, and no publicly held company owns 10% or more of Tennessee Secondary School Athletic Association's stock.

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The Sixth Circuit's earlier panel opinion is reported at 262 F.3d 543 (Pet. App. 1-24). The district court's opinion on remand is reported at 304 F. Supp. 2d 981 (Pet. App. 25-77). The Sixth Circuit's subsequent opinion is reported at 442 F.3d 410 (Pet. App. 78 -153).

JURISDICTION

The Sixth Circuit denied the Tennessee Secondary School Athletic Association's petition for rehearing and rehearing *en banc* on June 27, 2006 (Pet. App. 154-155). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides that "Congress shall make no law … abridging the freedom of speech." The Fourteenth Amendment to the Constitution provides that "No State shall … deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association's ("TSSAA") member schools have agreed that one of the rules for their high school athletic league should be a mutual agreement not to use "undue influence … to secure or to retain a student for athletic purposes." Pet. App. 162-63.[1] High school athletic associations in every other state have similar rules, because there is a broad consensus among educators that recruiting for athletics harms students and undermines the educational purposes of high school sports. The recruiting rule also plays an important role in maintaining a fair and level playing field. It may limit "speech" in a sense, but so does the rule that a coach too vigorously protesting a referee's call will be ejected. Respondent Brentwood Academy voluntarily chose to join TSSAA and promised to respect its rules, and then

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[1] "Pet. App." refers to the petitioner's appendix filed in this Court. "CAJA" refers to the joint appendix filed in the court of appeals.

committed several clear and intentional violations of the recruiting rule. After TSSAA imposed a sanction, Brentwood initiated a decade of constitutional litigation claiming that its violations should have been treated as a case of "no harm, no foul." It claims, in essence, to have a constitutional right to compete in TSSAA-sponsored tournaments without following the rules that set the terms of competition, and victory, for others.

The Sixth Circuit found a constitutional violation only by making several serious errors that conflict with decisions of this Court and other courts of appeals, and merit review.

Factual Background

Interscholastic athletic competition requires a common set of rules to establish, define, and coordinate competition. TSSAA is a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics. CAJA 119-120. TSSAA's members are predominantly public schools, *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"), but private schools that agree to abide by TSSAA's constitution and bylaws are also permitted to join. Not all schools in Tennessee subscribe to TSSAA's particular philosophy. Members have terminated their relationships with TSSAA to pursue different objectives, and many private schools in Tennessee join other athletic associations with different values and different rules. CAJA 868-71, 574.

TSSAA's authority over its members derives exclusively from each member's annual, voluntary decision to participate in TSSAA and comply with its bylaws by executing a membership contract. CAJA 871-72, 574. This Court has held that TSSAA is a "state actor" due to its "entwinement" with its public school members, *Brentwood I*, 531 U.S. at 298, but the Tennessee legislature has never delegated any legislative, judicial, or executive power to TSSAA, nor granted it any official authority. Neither the Tennessee State Board of Education nor the principals of

public schools—the sources of this Court's "entwinement" rationale—have any authority over Brentwood's athletic program except by virtue of Brentwood's voluntary membership contract with TSSAA.

Brentwood's Voluntary Participation in TSSAA

Respondent Brentwood Academy is a small private academy with a prominent athletic program. CAJA 118. Since joining TSSAA for the first time in 1972, Brentwood has won nine TSSAA state football championships, usually competing against much larger schools. CAJA 1154. Since the outset of this litigation, Brentwood has acknowledged that its relationship with TSSAA is contractual in nature. Brentwood's briefs to the district court invoked contract law and emphasized that "as a member of TSSAA, Brentwood Academy and other member schools have certain contract rights. Among those rights is the right to participate fully in the activities of the TSSAA unless there is some cause for a change in status." Brentwood Mem. at 60, No. 3:97-1249, Doc. No. 28 (M.D. Tenn. June 1, 1998).

Brentwood has likewise acknowledged that joining TSSAA is an entirely voluntary choice. CAJA 1406, 574. Brentwood Headmaster Emeritus Bill Brown testified:

> Q. And Brentwood Academy was not under any compulsion to join, it did so voluntarily, correct?
>
> A. Yes, sir.
>
> Q. All right. And when Brentwood Academy joined TSSAA, it agreed to abide by the rules and decisions of TSSAA, each year, right?
>
> A. Yes, sir.

CAJA 565. Current Headmaster Curt Masters agreed:

> Q. So you would agree with me that the decision of whether to join TSSAA or not join TSSAA each year is Brentwood Academy's decision to make, right?
>
> A. It is.
>
> *****
>
> Q. Now would you agree with me that if the public schools who predominate in TSSAA enact a set of

> by-laws or rules to serve the public school mission, if Brentwood Academy's mission and those by-laws conflict, Brentwood Academy is free not to join those public schools in that association?
>
> A. Yes.

CAJA 1406, 1410-11.

TSSAA's Recruiting Rule

TSSAA's bylaws contain a "recruiting rule" that prohibits "the use of undue influence … to secure or retain a student for athletic purposes …." Pet. App. 162-63. The bylaws contain several pages of guidelines that explain the rule's scope and application. *Id.* at 163-66. For example, the guidance warns that "a coach may not contact a student or his or her parents prior to his enrollment in the school," and cites as an example of prohibited conduct "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete ...." *Id.* at 163-64. The guidance also defines "enrolled" as having "attended 3 days of school." *Id.* at 163-64. High school athletic associations in nearly every other state all have similar recruiting prohibitions. [2]

At trial, TSSAA gave three reasons for the rule: (1) preventing the exploitation of children; (2) ensuring that athletics remain secondary to academics; and (3) fostering a level playing field among its participating schools. TSSAA's evidence confirmed the importance of all three objectives. The NCAA first began permitting sports recruiting in 1956, and witnessed a pattern of abuses as well as a growing chasm between academics and athletics. CAJA 1665, 1339. At trial, four nationally renowned experts confirmed that schools must guard against this sort of exploitation of children. CAJA 1732, 1750, 1564, 1658, 1338. Brentwood's own expert acknowledged that preventing exploitation of children was a compelling interest. CAJA 1205.

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[2] The public internet sites of the state athletic associations are compiled at http://www.nfhs.org/custom/member_associations/states.aspx

The rule also helps preserve the primacy of academics over athletics. CAJA 1564, 657, 706. Otherwise the ills that have befallen the system of elite athletics at Division I colleges will filter to the high school level. CAJA 1569, 1604, 1609, 1661, 1338, 1351. Even Brentwood Headmaster Emeritus Bill Brown conceded that athletic recruiting is contrary to the purposes of high school sports and education, and should be prohibited. CAJA 607, 614.

TSSAA's recruiting rule also helps ensure fair and balanced athletic competition. Many different types of schools have come together to compete through TSSAA, and the entire enterprise depends on the ability to establish a reasonably level playing field. The evidence demonstrated that TSSAA's recruiting rule is essential to achieving that goal. CAJA 1728, 1564, 1571, 1306, 1311, 1324, 1086, 1102. Brentwood Headmaster Emeritus Bill Brown acknowledged that the recruiting rule protects a level of fairness in athletic competition that otherwise could not exist. CAJA 605, 615. According to Brown, without rules to prevent athletic recruiting, non-public schools that are not restrained by geographic attendance zones or dependent on limited tax revenues would have unfair competitive advantages over public schools. CAJA 615. The recruiting rule is therefore necessary to enable public schools and non-public schools to compete fairly within the same organization. Both the perception and reality of fairness and competitive balance are essential to the educational goals of high school athletics. As TSSAA expert witness Jack Roberts testified:

> If you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. All who participate want a fair chance to succeed …. The team doesn't want to be humiliated week after week by teams that are much more loaded in talent and powerful. … There won't be as many youngsters coming out for the team. When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people.

CAJA 1571-72.

Brentwood's Violation of the Recruiting Rule

In 1997, TSSAA received allegations about recruiting misconduct by individuals associated with Brentwood. CAJA 1025, 1437. Between May 30 and July 29, 1997, TSSAA Executive Director Ronnie Carter exchanged a series of letters and phone calls with Brentwood head football coach Carlton Flatt and Headmaster Brown about Brentwood's violations of TSSAA bylaws, and Carter and one of his assistants met personally with both Flatt and Brown. CAJA 1839, 1842, 1851, 1861, 1868, 618. On July 15, 1997, Brentwood provided TSSAA a copy of a letter Coach Flatt had sent to a dozen eighth-grade boys enrolled at other middle schools inviting them to attend spring football practice at Brentwood. Brentwood acknowledged that Coach Flatt had followed up those letters with personal telephone calls to the home of each boy. CAJA 1872, 1131. The boys had indicated an intention to attend Brentwood the next fall, but were not yet "enrolled" at Brentwood as defined in the bylaws. Every year some students change their minds before matriculating. CAJA 561-63, 582-84, 591.

The proof at trial was overwhelming that the invitation to spring practice was a recruiting endeavor that would tend to unduly influence the boys who received it. CAJA 1741, 1576, 1673, 1345, 1064. With the letter's references to "Your Coach" and "your new team," Coach Flatt effectively treated twelve boys as his own players, even though they were not yet Brentwood students. Flatt's implication that it would be in the child's best interest to attend spring practice sent the message that playing in the future depended on attendance at Brentwood's spring practice, even though the students were then enrolled at other schools. CAJA 1577, 1347. Such suggestions tend to have great effect because of the influence that coaches have on young student athletes. CAJA 1166, 1741. Coach Flatt himself acknowledged the coercive effect his letters had on the boys to whom they were sent. CAJA 1171-72.

Brentwood also provided TSSAA with information about Coach Flatt's provision of free tickets to a middle

school football coach that were in turn used by two prominent middle school athletes to gain free admission to a Brentwood football game, as well as information about violations of the TSSAA limit on off-season practice. CAJA 1138, 1851, 1150. Brentwood also responded to TSSAA requests for information about alleged Brentwood booster Bart King's contacts with potential Brentwood recruits. CAJA 1840, 1843, 1853-54, 1863, 1871, 1873-74.

TSSAA's investigation and adjudication complied with the procedures established in its constitution and bylaws and agreed upon by all members. The constitution provides that a school charged with violating TSSAA regulations "shall be notified of such charges," and "if a hearing is desired by the school involved … [p]rovisions will then be made for such hearing." Pet. App. 156. Moreover, the constitution ensures that "a member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing … [which] shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control." *Id.* at 157. Finally, "any decision of the Executive Director may be appealed to the Board of Control." *Id.*

On July 29, 1997, Executive Director Carter made an initial determination that Brentwood had violated the recruiting rule and the TSSAA limitation on off-season practice. That determination was based on all of the incidents discussed by the parties, including the activities of Mr. King. CAJA 1844. With the aid of counsel, and in accordance with TSSAA's bylaws, Brentwood then appealed to Carter and an advisory panel of three TSSAA Board of Control members. At this August 13, 1997 appeal, Brentwood presented sworn statements from witnesses and made a lengthy presentation that addressed each violation. CAJA 1152, 621, 1477-78, 2508, 2707. Following that hearing, Carter modified his initial decision. CAJA 1848.

Brentwood then pursued a *de novo* appeal under TSSAA bylaws to the entire TSSAA Board of Control on August 23, 1997. Again represented by counsel, Brentwood made a

lengthy presentation that included live testimony of witnesses and sworn statements addressing each violation. CAJA 2707, 3084. Brentwood's attorney presented an affidavit from Bart King and a sworn statement from a student, Jacques Curry, about Bart King. CAJA 2812-14, 2967-71, 1482-83. Brentwood's attorney also brought Mr. King in person to the hearing, but did not call him to testify. CAJA 1477, 1479. Brentwood's attorney acknowledged having had ample opportunity to prepare for the hearing, and testified that he was not prevented from presenting anything he wished to present. CAJA 1477-85.

After hearing Brentwood's arguments, the Board of Control issued a new and final decision. The Board of Control found that Brentwood: (1) violated the Recruiting Rule as a result of Coach Flatt's letters and calls; (2) violated the Recruiting Rule by giving free tickets to a Brentwood football game; and (3) violated the Practice Rule in boys' basketball. CAJA 1830. Each finding was based upon information that Brentwood supplied to TSSAA. The Board of Control placed Brentwood's athletic program on probation for four years, excluded the boys' basketball and football teams from TSSAA tournament playoffs for two years, and assessed a $3,000 "fine." (TSSAA bylaws do not provide a mechanism to compel payment. CAJA 867.)

Brentwood felt the punishment was too severe, and filed this lawsuit, alleging that the recruiting rule violated its First Amendment rights and that TSSAA's enforcement of the rule violated both substantive and procedural due process.

Proceedings Below

On July 29, 1998, the district court granted partial summary judgment to Brentwood. The district court held that the recruiting rule was unconstitutionally vague and was a content-based restriction on speech that failed strict scrutiny. *Brentwood Acad. v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The Sixth Circuit reversed, ruling that TSSAA did not act under color of state law. *Brentwood*

Acad. v. TSSAA, 180 F.3d 758 (6th Cir. 1999). This Court granted certiorari and reversed, concluding in a 5-4 decision that TSSAA was a state actor because of its "entwinement" with the State Board of Education and public schools. *Brentwood I*, 531 U.S. 288.

On remand to the Sixth Circuit, TSSAA argued that because of the contractual relationship between Brentwood and TSSAA, the *Pickering-Connick-Umbehr* line of cases, which governs retaliation against state employees or contractors because of speech, provided the appropriate analytical framework here. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996). Under that standard, TSSAA insisted that Brentwood's speech was not on a matter of public concern, and that application of the recruiting rule to Brentwood was reasonable in light of the rule's legitimate objectives.

The Sixth Circuit disagreed. It held that the voluntary and contractual nature of the relationship between Brentwood and TSSAA was relevant only to waiver—and that Brentwood had not knowingly and specifically waived its right to file suit for a perceived violation of its First Amendment rights. Pet. App. 7-8. The court briefly considered the potential relevance of *Umbehr* and *Pickering*, but held that the recruiting rule should instead be analyzed as a "time, place, and manner" restriction on speech subject to intermediate scrutiny. It reasoned that because TSSAA must prove that its recruiting rule serves important governmental interests, *Pickering*'s requirement that the speech must be on a "matter of public concern" was satisfied by definition. *Id.* at 9. It then remanded for trial under intermediate scrutiny. *Id.* at 14-15, 21-23.

The district court conducted a ten-day trial, and entered judgment in Brentwood's favor on January 13, 2003. The court acknowledged TSSAA's important interests in preventing exploitation of children and keeping athletics secondary to academics, but held that TSSAA's interest in promoting a level playing field was not as important, Pet.

App. 48-49, and that enforcement of the recruiting rule against Brentwood's particular actions was not narrowly tailored. *Id.* at 49-55. The court also ruled that TSSAA violated Brentwood's due process rights. *Id.* at 65-71.

On appeal, a divided panel of the Sixth Circuit affirmed in all relevant aspects. Pet. App. 107, 119-20. The panel majority held that the "applicability of the First Amendment … does not vary depending on … whether the relationship between the government and the speaker is voluntary or contractual," *id.* at 94, and that the deferential analysis applied to the termination of public employees or contractors in cases like *Pickering* and *Umbehr* is limited to the particular types of contracts involved in those cases, *id.* at 91-93. It also treated this Court's distinction between "sovereign power" and "contractual power" in *Umbehr* as "dicta." *Id.* at 92-93. The panel held that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest …." *Id.* at 100. It agreed that "TSSAA had substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes," *id.*, but held that "the TSSAA's use of its discretion to punish Brentwood for the letters and calls was not a narrowly tailored way to keep athletics subordinated to academics at Brentwood or ensure that the student athletes being contacted were not being exploited." *Id.* at 102. In addition, despite the evidence that Brentwood was fully aware of the issues involving Bart King and had received all the process it was due under its membership contract with TSSAA, the panel found a procedural due process violation because one member of TSSAA's Board testified that he considered the King matters in deciding on the penalty. *Id.* at 116-20.

Judge Rogers dissented, explaining that "[d]issatisfaction with application of game rules does not become a First Amendment violation merely because the rule involves speech." *Id.* at 132. Judge Rogers would have held that "Brentwood in this case gave up its right to

engage in certain types of speech," and noted that that waiver would have been respected in the Third, Fourth, and Ninth circuits. *Id.* at 134-36. He also explained that there was no "unconstitutional conditions" defect in Brentwood's agreement to abide by the recruiting rule, because that rule is reasonably related to the competitive athletic program overseen by TSSAA and because the "speech" in question—being purely a matter of private concern—clearly failed the *Pickering* test. *Id.* at 138-39. Judge Rogers also noted that the majority erred by second-guessing whether Brentwood's specific violation actually threatened the substantial state interests underlying that rule. "The anti-recruiting rules, like restrictions on an adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business." *Id.* at 144. Judge Rogers also disagreed with the majority's "remarkable" conclusion that competitive equity is not a substantial state interest: "it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." *Id.* n.2. Finally, Judge Rogers explained that the district court and panel clearly erred by concluding that Brentwood's procedural due process rights were violated. *Id.* at 147-48.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's analysis is flawed in at least three respects, each of which conflicts with this Court's precedents and the law of other circuits, and merits review.

First, the Sixth Circuit wrongly held that TSSAA's voluntary recruiting rule should be analyzed just like any "time, place, and manner" restriction on speech imposed involuntarily on members of the general public. It held that the "applicability of the First Amendment … does not vary depending on … whether the relationship between the government and the speaker is voluntary or contractual."

Pet. App. 94. That is plainly incorrect. In *Snepp v. United States*, 444 U.S. 507 (1980), this Court enforced a CIA agent's voluntary agreement to submit any proposed writings to the agency for pre-publication review—a rule that if imposed on the general public would be a nakedly unconstitutional prior restraint. And in *Rust v. Sullivan*, 500 U.S. 173 (1991), and similar cases, this Court has held that the government may impose explicit conditions on the speech of voluntary participants in government programs, simply as a product of its right to control the limits and purposes of the program. Brentwood knew of this rule and voluntarily agreed to play by it, and the rule restricts Brentwood's "speech" only in the narrow context of its actual participation in the competitive athletic program it chose to join. That should be the end of the matter.

Even if Brentwood's specific voluntary agreement to abide by this rule were disregarded, this Court has held that when a state actor simply terminates its *contractual* relationship with a citizen because of that citizen's speech, First Amendment review is substantially more deferential than when the state exercises sovereign authority to punish speech with civil or criminal penalties. An employee or contractor who suffers termination or another contractual penalty because of speech has a First Amendment claim only if he spoke "as a citizen," "upon matters of public concern," and his interest in speaking is not outweighed by the government's interest in protecting the purposes and quality of its programs. *See*, *e.g.*, *Umbehr*, 518 U.S. at 676; *Pickering*, 391 U.S. at 568. Several circuits have correctly held that when a voluntary association qualifies as a state actor, internal membership decisions raise constitutional concerns only if they violate the *Pickering* test. Brentwood cannot possibly succeed under that standard. The "speech" for which it was sanctioned here was delivered entirely in its capacity as a participant in the program administered by TSSAA, related solely to matters of private concern, and is not justified by any interest of Brentwood's sufficient to outweigh the undeniable need of TSSAA's member schools

to establish and enforce consistent rules for competition.

Second, even under its misguided "time, place, and manner" analysis, the Sixth Circuit improperly discounted the importance of TSSAA's interests. It held that TSSAA did not submit sufficient "evidence" to prove that promoting competitive equity is a "substantial" state interest. That holding is plainly wrong and in direct conflict with decisions of almost every other circuit and the highest courts of several states—all of which have recognized, without the need for evidentiary proof, that both the perception and reality of competitive equity are essential to the goals of interscholastic athletics. More broadly, the Sixth Circuit accepted two of TSSAA's substantial state interests for the recruiting rule but held that the rule should not have been enforced here because, in the court's substituted judgment, Brentwood's unambiguous violation was harmless. Second-guessing such judgment calls is not the business of a federal court. This Court has never required a government entity to prove that enforcement of a generally reasonable "time, place, and manner" restriction was justified by the particular facts of the case. And particularly in the athletic context, a referee or athletic association has a substantial interest in enforcing the agreed rules of a competitive endeavor *simply because they are the rules*. Referees sometimes look the other way when they believe that enforcement would not serve the rule's purposes, but no one has a constitutional right to such forbearance.

Third, the Sixth Circuit applied due process precedents developed in very different contexts to hold that the hearing TSSAA provided Brentwood was insufficient. That is incorrect and conflicts with the decisions of this Court and other circuits. The process Brentwood received was fully consistent with this Court's due process cases—and in any event was precisely the process it agreed to.

Finally, the Sixth Circuit's confusion illustrates why this Court's earlier decision in this case warrants reconsideration. *Brentwood I* created a new "entwinement" test for state action that lower courts and commentators

have repeatedly characterized as unworkable. It also involves the courts in the internal affairs of voluntary associations that do not threaten constitutional values.

On a practical level, there is no question that Tennessee has the right to decide how its own public schools will compete without any constitutional scrutiny. The real issue in this case is whether TSSAA (and its counterparts in all 49 other states and the District of Columbia) can continue to offer *private* schools like Brentwood the opportunity to participate in joint athletic tournaments on the condition that they agree to play by those same rules. Athletic associations like TSSAA are voluntary organizations funded by modest dues and ticket sales at high school tournament games. They do not have the resources for constitutional litigation or any incentive to risk it. This case alone—concerning a limited sanction for a clear recruiting violation—has dragged out for very nearly a decade. If allowed to stand, the Sixth Circuit's analysis will inevitably lead to the exclusion of private schools from associations like TSSAA. That will serve no one's interests.

I. THE SIXTH CIRCUIT'S FIRST AMENDMENT ANALYSIS IS WRONG AS A MATTER OF LAW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Sixth Circuit's Decision Fundamentally Misconceives First Amendment Doctrine

The Sixth Circuit treated TSSAA's recruiting rule just like a coercive "time, place, and manner" regulation of speech imposed by the State on the general public and subject to intermediate scrutiny, and held that the "applicability of the First Amendment … does not vary depending on … whether the relationship between the government and the speaker is voluntary or contractual." Pet. App. 94. That is incorrect. Conditions attached to voluntary government programs are always reviewed with substantially more deference than coercive speech restrictions imposed on the general public.

TSSAA's enforcement of its recruiting rule was not an exercise of sovereign power. TSSAA has no power at all over Brentwood other than the power that Brentwood has voluntarily given it by contract. Brentwood is subject to TSSAA's recruiting rule only because it voluntarily agreed to that rule when it chose to join TSSAA, and because it wants to continue competing in TSSAA's tournaments in the future. Private schools have plenty of other leagues and outlets for competition, in Tennessee and nationwide. Many Tennessee private schools do not belong to TSSAA. As this Court explained in *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988), abandoning its membership in the NCAA may have been a blow to UNLV's particular aspirations for athletic glory, "[b]ut that UNLV's options were unpalatable does not mean that they were nonexistent."[3] *Id.* at 198, n.19. TSSAA is simply offering a discretionary benefit to Brentwood on the condition that Brentwood agree to abide by the basic rules that define, make possible, and preserve the very benefit being offered. This Court recognized in *NCAA v. Bd. of Regents*, that an athletic league "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition." 468 U.S. 85, 101-02 (1984). The "integrity" of such rules "cannot be preserved except by mutual agreement." *Id.* at 102.[4]

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[3] *See also Grabow v. Montana High Sch. Ass'n*, 312 Mont. 92, 98-99 (2002) ("While the consequences may weigh on a district's decision to withdraw from the MHSA, the district still remains free to do so."); *Robinson v. Kansas State High Sch. Activities Ass'n*, 260 Kan. 136, 149 (1996) ("The fact that all member schools must agree to obey the rules governing interscholastic competition, whether or not they individually agree with those rules, likewise does not establish involuntariness.").

[4] *See also Grabow*, 312 Mont. at 98 ("Competitive interscholastic athletics requires rules for competition."); *Robinson*, 260 Kan. at 149 ("The nature of interscholastic competition demands that there be a set of rules all competing schools are willing to abide by. … [A] school wanting to compete in sports or other activities with other schools will agree to abide by the rules they all agree on -- whether each school may like or dislike a particular rule.").

That feature takes this case entirely outside of the "time, place, and manner" precedents relied on by the Sixth Circuit. First, the government is free to establish up-front conditions on participation in voluntary government programs, so long as the conditions are reasonable and germane to the purposes of the program. *See Grove City Coll. v. Bell*, 465 U.S. 555 (1984). In *Snepp*, for example, this Court rejected a First Amendment challenge to a pre-publication screening condition contained in a government employment contract. This Court did not analyze the condition as a "time, place, and manner" restriction; rather, it appropriately viewed the rule as a simple and reasonable condition of employment, voluntarily accepted at the outset. And in cases like *Rust*, this Court has held that the government may require that voluntary participants in government programs abide by reasonable restrictions on their speech within the contours of that program. *Rust*, 500 U.S. at 193. Individual participants do not have the right to change the basic character of a voluntary government program by participating in that program in a manner inconsistent with its purposes. Reasonable restrictions on speech *within the program* are unproblematic, so long as they are not intended to suppress particular ideas and do not "effectively prohibit[] the recipient from engaging in the protected conduct [or speech] outside the scope of the … program." *Id.* at 196. Like the counselors in *Rust*, Brentwood is free to say anything that it likes on the subjects of high school sports, recruiting, or TSSAA in a wide variety of contexts. *See* Pet. App. 11-12 (Sixth Circuit listing the "numerous ways in which Brentwood can get its message about athletics out to prospective students"). But "speech" by which Brentwood recruits individual students for athletic purposes is not abstract social commentary—it is active participation in the competitive athletic program offered and overseen by TSSAA, just like a coach's on-the-field challenge to a referee's penalty call. TSSAA is entitled to insist that participation in its own program be conducted consistent with that program's rules and purposes. *Rust*,

500 U.S. at 193; *cf. Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995) (voluntary participants in school athletics "have reason to expect intrusions upon normal rights and privileges").

Second, this Court has repeatedly held that the government may discipline or terminate any voluntary contractual relationship because of speech that disrupts the legitimate goals of that relationship. In such circumstances, review "must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). "[S]ubstantial weight" is given to the government's decisions as employer "even though when the government is acting as sovereign [this Court's] review … is considerably less deferential." *Id.* at 673; *Umbehr*, 518 U.S. at 678 ("Deference is therefore due to the government's reasonable assessments of its interests *as contractor*.")

That principle applies across a broad spectrum of voluntary contractual relationships with the government. *Umbehr*, 518 U.S. at 680. The Sixth Circuit's observation that this "case does not involve the government as a party in a contractual relationship with an independent contractor" misunderstands this Court's broad holding in *Umbehr*. This particular contractual relationship may raise different issues than more typical government contracts cases, but—just as in *Umbehr*—there is no reason that the *Pickering* balancing test cannot accommodate such differences. *Id.* at 678. Brentwood is a party to a voluntary contract with the government, and is contending that it was punished within the confines of that contract for protected speech. It is *at most* entitled to the protection of the *Pickering* test.

To prevail under that test, a plaintiff must first prove that it spoke "as a citizen on a matter of public concern." If those threshold requirements are met, the court must balance the employee or contractor's interests, as a citizen, in speaking on matters of public concern against the government's interests in the programs it administers through its employees or contracts. *Pickering*, 391 U.S. at

568. Brentwood cannot possibly satisfy those standards. Brentwood was not speaking "as a citizen" in the relevant sense. This Court recently clarified that employees or contractors have *no* right to speak freely *while performing their job or contract functions*, and can be disciplined for such speech without First Amendment scrutiny. *Garcetti*, 126 S. Ct. at 1960. (That is, of course, a manifestation of the same principle animating *Rust* and its progeny: the government is entitled to define the purposes and limits of its own programs, and insist that participants abide by those limits within the confines of their participation). Recruiting eighth graders to play high school football also is not speech on any "matter of public concern." *See City of San Diego v. Roe*, 543 U.S. 77 (2004). The Sixth Circuit's holding that Brentwood's speech is automatically about a matter of public concern if the recruiting rule is supported by any substantial state interest confuses apples and oranges, and would write the "public concern" test out of the law entirely. Brentwood therefore fails the threshold conditions for protection under the *Pickering/Umbehr* test. Even if a balancing of interests were appropriate, TSSAA's substantial interests in this rule certainly outweigh Brentwood's interests in violating it.

Third, even if the Sixth Circuit's "time, place, and manner" lens were appropriate, its application of intermediate scrutiny was seriously flawed. The Sixth Circuit conceded that TSSAA's recruiting rule is generally justified by its substantial interests in protecting students and ensuring that athletics remain subordinate to academics. It held, however, that "there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school." Pet. App. 106. But TSSAA is entitled to enforce a constitutionally justified rule without regard to whether that particular violation actually threatened the reasons for the rule. This Court has always asked whether the rule itself is justified by substantial state interests—not whether

this particular plaintiff's violation was somehow harmless. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court squarely rejected the argument that Ohio must prove that enforcement furthered the purposes behind the rule, holding that the state is not required to prove actual injury and that "the absence of explicit proof or findings of harm or injury [is] immaterial." *Id.* at 468; *see also Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (validity of time, place, and manner regulation "need not be judged solely by reference to the demonstration at hand," and the government's interests in generally applying the regulation cannot be challenged by advocating for an exception); *Heffron v. Int'l Socy for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (same); *cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). "Similarly, TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rules it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rules to be valid." Pet. App. 144 (Rogers, J., dissenting). No athletic association (or government agency) could function if every time it attempted to enforce its rules it bore the burden of proving why the purposes of the rule supported that enforcement.

Put another way, the Sixth Circuit essentially held that TSSAA's recruiting rule is overbroad, and that a somewhat narrower prohibition (one that would not reach Brentwood's conduct in this case) would be more appropriate. That misconceives the inquiry. A "time, place, and manner" regulation is valid "so long as [it] promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). As this Court recently clarified in *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, it does not matter if the regulation is overbroad in some respects relative to the interests it is designed to serve. "The issue is not whether other means … might be adequate. That is a judgment for Congress, not the courts. It suffices that the

means chosen by Congress add to the effectiveness of military recruitment." 126 S. Ct. 1297, 1311 (2006) (citations omitted). And this Court's holding that TSSAA is a state actor because of its "entwinement" with the public schools also necessarily implies that TSSAA is entitled to the deference that this Court gives to educational judgments.[5]

This Court should grant review to untangle the serious misconceptions embedded in the Sixth Circuit's analysis. If this Court declines to grant review on the merits, however, petitioners respectfully suggest that this decision should be vacated and remanded in light of *Garcetti* and *FAIR*.

B. The Sixth Circuit's Holding Conflicts with Decisions of Other Circuits

The Sixth Circuit's decision is inconsistent with several lines of authority in the other courts of appeals.

First, consistent with this Court's decision in *Snepp* the Third, Fourth, Eighth, and Ninth Circuits have held that an explicit contractual commitment to limit one's own speech will be enforced. *See Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms. Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *Lake James Cmty. Volunteer Fire Dep't. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998); *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993); *cf. Metro E. Ctr. for Conditioning & Health v. Qwest Communs. Int'l*, 294 F.3d 924, 928 (7th Cir. 2002). Brentwood voluntarily agrees each

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[5] *See Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (deferring to government regulation of speech in the educational context); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 275 n.6 (Stevens, J., dissenting) ("A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make decisions concerning the content of those activities.") (quotation omitted); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" not the federal courts.); *Bd. of Educ. v. Pico*, 457 U.S. 853, 909-10 (1982) (Rehnquist, J., dissenting) ("[A]ctions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign").

year to abide by TSSAA's recruiting rule, and these circuits would hold Brentwood to its bargain. The Sixth Circuit held that any valid waiver of First Amendment rights must include a specific promise not to sue to challenge the speech restriction. Pet. App. 7-8. That requirement is not consistent with the cited cases (or with this Court's decision in *Snepp*). Brentwood may retain the right to file this lawsuit, but that does not mean its contract does not limit the substantive scope of its First Amendment claim.

Second, several circuits have recognized that the *Pickering/Umbehr* test applies to a broad spectrum of voluntary relationships with the government, in conflict with the Sixth Circuit's holding that it is limited to employees and contractors, narrowly conceived. Pet. App. 91. Those circuits would have rejected Brentwood's claim.

In the Second Circuit, *Pickering* was held to govern the expulsion of members from a voluntary 4-H club that was a "subordinate government agency" under state law. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 548 (2d Cir. 2001). If *Gorman* is distinguishable from this case, it is only because the plaintiffs there had a much stronger claim than Brentwood has here. They were expelled for speech that undermined the operations and objectives of the voluntary association, but unlike Brentwood they had not specifically promised in advance to refrain from that speech. *See also Rottmann v. Pa. Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922 (W.D. Pa. 2004) (applying *Pickering* in nearly identical circumstances to this case).

Other circuits have likewise applied *Pickering* beyond the employee or independent contractor context when the plaintiff was in a voluntary relationship with the government. The Seventh Circuit applied *Pickering* to expulsion of students from voluntary state-run ROTC programs. *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980). Courts have also applied *Pickering* to the termination of volunteers from state-run voluntary

associations such as fire departments,[6] to the termination of licensees who were granted a contractual privilege,[7] and to cases in which a state actor refused to employ a person or do business with a prospective contractor on speech-related grounds.[8] *See also Blackburn v. City of Marshall*, 42 F.3d 925, 932 (5th Cir. 1995) ("[a]lthough the *Pickering/Connick* test arose in the context of public employment, courts have not strictly cabined its application"). Judge Rogers correctly noted in dissent in this case that "[t]here is no reason to limit the *Connick* no-public-concern analysis strictly to government employee cases," Pet. App. 138 and at least eight circuits agree.

II. COMPETITIVE EQUITY IS A SUBSTANTIAL STATE INTEREST

The Sixth Circuit held that TSSAA failed to prove that it has any substantial interest in fostering a level playing field among its member schools because TSSAA supposedly "cite[d] to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest…." Pet App. 100. That ruling was essential to the outcome because the recruiting rule is obviously narrowly tailored to serve this interest. The panel did not suggest otherwise.

The panel's ruling is unprecedented and has far reaching implications. "[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." Paul C. Weiler, LEVELING

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[6] *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979); *Versarge v. Twp. of Clinton*, 984 F.2d 1359 (3d Cir. 1993); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000).

[7] *See Copsey v. Swearingen*, 36 F.3d 1336 (5th Cir. 1994); *Havekost v. United States Dep't of Navy*, 925 F.2d 316, 318 (9th Cir. 1991); *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir. 1989); *Caine v. Hardy*, 943 F.2d 1406, 1415-16 (5th Cir. 1991) (*en banc*).

[8] *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000); *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (*en banc*).

THE PLAYING FIELD 2 (2000). Whenever people play competitive sports, they invariably devise eligibility or talent-spreading rules to ensure that competition is fair and no one team has an overwhelming advantage. Children on a playground alternate picking players for teams. All major professional sports leagues have a draft and restrictions on free agency, and many have salary caps or revenue sharing. All of these rules have as their primary purpose a desire to create and maintain competitive balance. *See, e.g.*, *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) (purpose of NBA salary cap and draft restrictions is "spreading talent among the various teams"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) ("The NFL draft, like similar procedures in other professional sports, is designed to promote 'competitive balance.'").

Competitive equity and balance is similarly essential to the goals of high school athletics. TSSAA's constitution recognizes that "the primary objective of all secondary schools is to educate youth," and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." CAJA 132. All those goals are undermined if student athletes perceive that the deck is unfairly stacked against them or that competition is futile, and become dispirited or cease participation. *See* CAJA 1571-72.

Perhaps the Sixth Circuit was confused by the "state action" posture of this case, because competitive equity in high school sports is not usually a significant preoccupation of state governments. But competitive equity surely and self-evidently *is* one of the central and important goals of any athletic league—and if high school athletic associations are to be treated as state actors then competitive equity must be recognized as an important *governmental* interest as well. The Sixth Circuit's allusion to a perceived lack of "evidence" is a red herring. As the dissent properly recognized, "the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need

not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that TSSAA needed more evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." Pet. App. 144-45 n.2.

The Sixth Circuit's decision conflicts with several other circuits and the highest courts of several states, which have all recognized (without requiring any special evidence) that competitive equity is vital to interscholastic sports. The Eighth Circuit in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994), held that a rule enforcing an age limit "helps reduce competitive advantage flowing to teams using older athletes," which was "of immense importance in any interscholastic sports program." The Third Circuit in *Smith v. NCAA*, 139 F.3d 180, 185, 187 (3d Cir. 1998), recognized that the NCAA's eligibility rules "primarily seek to ensure fair competition … and allow for an even playing field." The Seventh Circuit upheld the NCAA's no-agent rules because they "preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992). None of these courts scoured the record for evidence that competitive equity is important. They accepted it as self-evidently important. *See also Chabert v. Louisiana High Sch. Athletic Ass'n*, 312 So. 2d 343, 346 (La. Ct. App. 1975) (finding that "illegal recruiting of promising young athletes is the gravamen of this recurring problem," and that "it is unarguable that any state has an interest in prohibiting such occurrences in its high schools"); *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21, 25 (Mich. 1991) (upholding eligibility rule because it was "designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes"); *Law v. NCAA*, 134 F.3d 1010, 1023-24 (10th Cir. 1998) ("We note that the NCAA must be able to ensure some competitive equity between member institutions in order to produce a

marketable product: a 'team must try to establish itself as a winner, but it must not win so often and so convincingly that the outcome will never be in doubt, or else there will be no marketable 'competition.'") (citation omitted); *NCAA v. Lasege*, 53 S.W.3d 77, 86 (Ky. 2001) (the NCAA "certainly has an interest in the proper application of [its] regulations to ensure competitive equity"); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 842, 844 (7th Cir. 1999) (recognizing "the public's interest in maintaining a level field of competition" and "competitive equality").

III. THE SIXTH CIRCUIT'S DUE PROCESS ANALYSIS IS FLAWED AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

TSSAA's constitution and bylaws contain not only a set of rules but also a process for enforcing them and for resolving appeals or disputes. Brentwood voluntarily agrees each year to abide by TSSAA's rules, including its grievance procedures. In this context, Brentwood is not entitled to any more "process" than it voluntarily contracted to receive. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (due process is satisfied by arbitration if the employee agreed to arbitrate); *First State Ins. Co. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001) ("It was the method chosen by the parties to receive notice and therefore cannot be deemed to offend due process."); *Dominium Austin Partners, L.L.C., v. Emerson*, 248 F.3d 720, 726 (8th Cir. 2001) ("Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.").

The Sixth Circuit did not even mention the contractual procedures to which the parties agreed, and its ruling that TSSAA somehow violated Brentwood's due process rights in the abstract conflicts squarely with the Seventh Circuit's decision in *Batagiannis v. W. Lafayette Sch. Corp.*, 454 F.3d 738 (7th Cir. 2006). In that case, a school superintendent argued that her due process rights were violated because the school board conducting her termination hearing had already pre-judged her, and the hearing was a sham. The

Seventh Circuit held that Batagiannis had no viable due process claim because she "received exactly what she had agreed to accept: a hearing by the school board. That's what ¶5.b of her contract specified; by signing, she waived any entitlement to a wholly neutral decision-maker." *Id.* at 741. Unquestionably, Brentwood's due process claim would be rejected under *Batagiannis* in the Seventh Circuit.

Of course in some contexts, such as the firing of a tenured public employee, there is a constitutional minimum floor of due process that parties cannot be required to waive. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). But even if the same is true for high school athletics, the Sixth Circuit failed to recognize that the constitutional floor is not the same in all contexts. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). There is no reason for the federal courts to become deeply enmeshed in second-guessing the contractually agreed procedures for resolving athletic disputes. Certainly a player being ejected from a game for unsportsmanlike conduct is entitled to no process at all. The Sixth Circuit imported a standard from the tenured public employee cases requiring an "explanation of the employer's evidence," *Loudermill*, 470 U.S. at 546, but there is no reason that anything more than the "essential requirements" of "notice and an opportunity to respond" should apply to an athletic association enforcing its internal operating rules. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (due to "institutional needs and objectives," prisoners need not be informed in advance of evidence).

Finally, the Sixth Circuit was simply wrong as a matter of fact and law in holding that TSSAA's procedures were constitutionally deficient. Under *any* standard, TSSAA's procedures far exceed what is constitutionally required. The district court wrongly credited a statement that TSSAA considered *ex parte* evidence of recruiting violations by Brentwood booster Bart King, which as the dissent explains is clear factual error. Pet App. 147-48. Regardless it is undisputed that Brentwood's notice of the alleged violations included notice that King's activities were at

issue. CAJA 1844-47, 1839-43, 1851-54, 1861-65. It is also undisputed that Brentwood received a full formal evidentiary hearing, where it was represented by counsel and to which it even brought Mr. King. Pet. App. 68. The Sixth Circuit's real holding is that Brentwood was somehow entitled to advance notice of which of the fully disclosed concerns might be regarded as important by the decisionmaker in deliberations. No court has ever endorsed a standard like that, and it is completely unworkable.[9]

IV. THIS COURT SHOULD RECONSIDER ITS STATE ACTION HOLDING

The Sixth Circuit's confusion demonstrates why this Court should reconsider its state action analysis in *Brentwood I*. In that opinion, this Court discarded the traditional inquiry into the particular state *action* in addition to the status of the *actor*. The Sixth Circuit therefore looked purely at TSSAA's overall "entwinement" with the state, and was unable to recognize, for example, that the specific conduct complained of here was not an exercise of sovereign power but simply implementation of a voluntary contract. Put another way, enforcement of the recruiting rule "entailed functions and obligations in no way dependent on state authority." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). *Brentwood I's* exclusive focus on the status of the actor has now produced the incongruous result that a voluntary association of public and private actors "entwined" with the state has even less ability to enforce rules that its own members have voluntarily adopted than the state itself would have to enforce speech restrictions against its employees or contractors under *Snepp*, *Rust*, and *Umbehr*. The Sixth Circuit also was unable to understand how competitive equity could be a substantial *governmental*

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[9] For the reasons set forth, both the First Amendment and Due Process issues warrant review. In addition, Brentwood would remain a "prevailing party" eligible for a large and entirely unjustifiable attorneys' fee award at TSSAA's expense unless both rulings are reversed.

interest, even though it is a central purpose of the athletic associations that this Court has now deemed state actors.

Brentwood I was a break from this Court's precedents. *See Brentwood I*, 531 U.S. at 306 (Thomas, J., dissenting); *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (looking to "the specific conduct of which the plaintiff complains"). Lower courts have been confused by *Brentwood I*'s new "entwinement" doctrine, describing it as "labyrinthine," "nebulous," "vague," and a "freewheeling *gestalt* analysis."[10] The Second Circuit has held, in effect, that a state action claim can never be frivolous after *Brentwood I*. *Tancredi*, 378 F.3d at 230. Lower courts are even confused about how many different state action tests there are. *See Wang v. Blue Cross Blue Shield Ass'n*, 55 F. App'x 802, 803 (9th Cir. 2003) ("seven approaches to the issue"); *Keeling v. Schaefer*, 181 F. Supp. 2d 1206 (D. Kan. 2001) (four tests); *Sabeta v. Baptist Hosp. of Miami, Inc.*, 410 F. Supp. 2d 1224 (S.D. Fla. 2005) (three tests). Commentators have also been deeply critical of the decision. *See, e.g.*, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 587 (2005) (characterizing "entwinement" as "so malleable that no outcome is excluded … artificial and incapable of principled application"); Alan R. Madry, Statewide School Athletic Associations and Constitutional Liability; Brentwood Academy v. Tennessee Secondary School Athletic Association, 12 MARQ. SPORTS L. REV. 365 (2001) ("incoherent," "ad hoc," and "rides against a strong contrary tide"); Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of*

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[10] *See, e.g.*, *Leshko v. Servis*, 423 F.3d 337, 338 (3d Cir. 2005) ("labyrinthine"); *Kirtley v. Rainey*, 326 F.3d 1088, 1094-95 (9th Cir. 2003) ("vague"); *Tancredi v. Metro. Life Ins.*, 378 F.3d 220, 230 (2d Cir. 2004) ("nebulous"); *Crissman v. Dover Downs Entmt.*, 289 F.3d 231, 233 (3d Cir. 2002) ("little is straightforward"); *Willis v. Town of Marshall*, 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) ("anything but clear and consistent"), *rev'd in part on other grounds*, 426 F.3d 251 (4th Cir. 2005); *Gross v. Fond Du Lac Cty. Agric. Soc'y, Inc.*, 2005 U.S. Dist. LEXIS 19537, at *23 (E.D. Wis. Sept. 6, 2005) ("freewheeling *gestalt* analysis").

Substantive Context, 26 CARDOZO L. REV. 99, 125 (2004) ("the Court appears to have gone astray").

When this Court reconsiders a recent decision that "itself *departed* from … prior cases – and did so quite recently," this Court does "not depart from the fabric of the law; [it] restore[s] it." *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 233-34 (1995) (op. of O'Connor, J.) (emphasis in original); *accord Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.) ("[*S*]*tare decisis* is … not a mechanical formula of adherence to the latest decision"); *Payne v. Tennessee*, 501 U.S. 808, 835 (1991) (Scalia, J., concurring). *Brentwood I* was "decided by the narrowest of margins, over [a] spirited dissent[] challenging the basic underpinnings of th[e] decision[]." *Id.* at 829. And it is a very new decision that has not engendered any meaningful reliance. In such circumstances neither *stare decisis* nor the law of the case doctrine precludes reconsideration. *See Agostini v. Felton*, 521 U.S. 203 (1997) (overruling earlier decision at later stage of the same litigation).

V. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

This case has broad significance to the interscholastic sports and educational community, including the fifty-one high school athletic associations composed primarily of public schools, 17,346 member schools, and over 10 million participating students across the country. The entire enterprise of interscholastic athletic competition depends on clear and enforceable rules, and sometimes those rules must restrict speech or expressive conduct, ranging from recruiting limitations to ejecting a coach or player for unsportsmanlike conduct. As shown by the legions of athletic association cases on the books, high school sports can arouse tremendous passions and frequent litigation. This case alone has stretched for nearly ten years, with three trips to this Court, and three published decisions of the Sixth Circuit. High school athletic associations like TSSAA typically receive no state funding, and finance their operations through modest membership dues and gate

receipts at tournament games. They do not have the means to engage in continuous constitutional litigation,[11] and their (often volunteer) leaders do not have the incentive to accept serious risks of personal liability for constitutional violations lurking behind every effort to enforce compliance with agreed upon rules. Indeed, in this very case, Brentwood sued TSSAA's executive director Ronnie Carter in his individual capacity, and Mr. Carter escaped crushing personal liability only because of the Sixth Circuit's qualified immunity ruling—which may not be available to the next defendant in his position because of this case.

The Sixth Circuit's decision in this case threatens to unleash a wide array of litigation over rules that limit speech in the context of athletic or other competition. If the lower courts manage to navigate this Court's precedents correctly, cases brought by disappointed *public* schools will eventually be dismissed on the ground that state entities have no constitutional rights, and cases brought by public school coaches or teachers will eventually be dismissed under *Garcetti*. But the Sixth Circuit's ruling in this case creates an entirely different set of rules for private schools. Voluntary athletic associations composed primarily of public schools frankly do not need private school participation to flourish, and have no reason to allow it if their presence simply invites enterprise-threatening constitutional lawsuits and if the rules of fair play cannot be enforced equally. The best that can be hoped for from the Sixth Circuit's decision is, therefore, an end to private school participation in organizations like TSSAA.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

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[11] Kevin P. Braig, *A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James*, 14 MARQ. SPORTS L. REV. 343, 364-65 (2004) (noting that "[p]rior to the Supreme Court's decision in *Brentwood Academy*, the members of the high school athletic associations … did not bear the economic cost of recruiting allegations").

Respectfully submitted,

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