No. 06-427

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

REPLY BRIEF OF PETITIONER

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Most of Brentwood's opposition is consumed by misleading and irrelevant factual diversions. On the law, the opposition makes clear why review is necessary. Brentwood freely concedes that its position, and that of the Sixth Circuit, is that there is *absolutely no difference* for First Amendment purposes between a voluntary athletic league enforcing its agreed-upon rules of competition, and the state enforcing speech restrictions against any non-consenting member of the public under its general police powers. Brentwood completely ignores this Court's cases, cited in the petition, establishing that participants in voluntary government programs frequently must accept some limits on their speech within the context of the program. Instead it cites a litany of irrelevant public forum cases, and unconstitutional conditions cases that support TSSAA's position. Brentwood also forthrightly agrees with the Sixth Circuit that a desire to promote competitive equity can never justify limits on the recruiting "speech" of participants in high school athletics. And it agrees with the Sixth Circuit that federal courts should second-guess the judgment of athletic associations about whether a generally justified rule should be enforced in particular circumstances.

As the briefs of amici make clear, the Sixth Circuit's reasoning here is inconsistent with the consensus judgment of educators all over the country that recruiting of students for athletic purposes undermines the educational goals of high school athletics. It conflicts with decisions of this Court and other courts of appeals, and merits review.

1. Brentwood attempts to manufacture a vehicle problem by mischaracterizing the record and course of proceedings. Its arguments are completely without merit.

First, TSSAA has not changed its position, and the Sixth Circuit certainly did not "accept[] TSSAA's analytical framework" by applying intermediate scrutiny. Opp. 5. TSSAA argued from the very beginning of this case that Brentwood's First Amendment claim must be rejected

because TSSAA is a voluntary association and its authority over Brentwood is purely contractual in nature. TSSAA's Sixth Circuit brief on the first appeal argued that Brentwood's First Amendment claim fails "[e]ven if TSSAA is a 'state actor'" because Brentwood's "relationship with TSSAA is a purely voluntary and contractual relationship." Br. of TSSAA at 36, No. 98-6113 (6th Cir. Dec. 10, 1998). TSSAA cited this Court's decisions in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996), and argued that Brentwood's speech was not on a matter of public concern, *id.* at 37-40, defending itself under "time, place, and manner" standards in its reply brief only as a backup argument. Reply Br. of TSSAA at 23-24 (6th Cir. Dec. 12, 1998). On remand from this Court, TSSAA defended itself under the framework imposed by the Sixth Circuit, but also again stressed the voluntary nature of the relationship, citing one of the cases now relied upon to illustrate the circuit split. Suppl. TSSAA Br. at 4-5, 12-13, (6th Cir. June 8, 2001), *citing Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998). TSSAA also again argued, citing *Pickering* and *Umbehr*, that Brentwood loses because its speech was not on a matter of public concern. *Id.* at 16-19. The Sixth Circuit wrongly held that TSSAA's voluntariness arguments were relevant only to the issue of waiver, and remanded for trial under intermediate scrutiny. Pet. App. 7-8[1]. On certiorari, TSSAA defended the Sixth Circuit's analysis against Brentwood's contention that *strict scrutiny* should apply, but argued that the case warrants "intermediate scrutiny *at most*" and again emphasized the voluntary nature of the relationships, citing, *inter alia*, *Rust v. Sullivan*, 500 U.S. 173 (1991). Br. in Opp. at 20-22, No. 01-1117 (emphasis added).

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[1] "Pet. App." refers to petitioner's appendix filed in this Court. "Pet." refers to the Petition for a Writ of Certiorari. "Opp." refers to Respondents' Brief in Opposition. "CAJA" refers to the Joint Appendix filed in the Court of Appeals. "Tr." Refers to the trial transcript.

And on the final appeal from which TSSAA now seeks review, the Sixth Circuit understood TSSAA's argument and did not suggest that it had been waived—merely that its own prior decision applying intermediate scrutiny was law of the case. Pet. App. 88-90.

Second, Brentwood suggests that TSSAA admitted in an interrogatory that its rule is not narrowly tailored. Opp. 6. The district court recognized both that this was an obvious typographic error, and that "the theories of the parties make it clear that TSSAA contends that the rule's narrowly tailored." Tr. 2738. The unattributed quotes at the bottom of Opp. 6 are from Brentwood's *own lawyer*, not the district court. Brentwood's gamesmanship was clearly rejected by the court, Tr. 2733-39, and it did not argue this point to the Sixth Circuit or even designate the response in the CAJA.

Third, Brentwood suggests that this case is somehow not ripe because it has other claims not yet addressed in the district court. Opp. 4. Those claims are irrelevant to the issues here—and are, to put it charitably, unpromising.[2]

Finally, Brentwood accuses TSSAA of "heavy-handed threats of retaliation," Opp. 1, because of its prediction that the Sixth Circuit's analysis may spell the end of public-private cooperation in athletic associations. That concern is echoed by the amicus briefs of every public school athletic association in the country, and is not a threat but simply an observation about the choices that those associations will face if this decision stands. Brentwood concedes by its silence that public schools have every right to organize and agree on whatever restrictions on recruiting "speech" they believe to be required by their educational and athletic goals. *See Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). The Sixth Circuit's decision means that if such associations permit private schools to join (and there is absolutely no reason they have to), then those private schools cannot credibly promise to follow the same rules of competition as

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[2] Brentwood's rational basis equal protection claim is a non-starter, and Brentwood has been unable even to articulate what its antitrust theory is.

everyone else—and the association will be exposed to enterprise-threatening constitutional litigation arising out of every internal dispute with those schools.

2. On the merits, Brentwood argues that "TSSAA's regulatory conduct vis-à-vis BA is subject to conventional First Amendment scrutiny of governmental regulatory conduct." Opp. 17. It echoes, in other words, the Sixth Circuit's holding 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. As the petition demonstrated, that is clearly inconsistent with numerous decisions of this Court and other courts of appeals recognizing that voluntary participants in government programs may be asked to accept some limits on their in-program speech, so long as those limits are consistent with the objectives of the program. Remarkably, Brentwood does not discuss or even cite *Pickering, Connick, Umbehr, Rust,* or *Snepp v. United States*, 444 U.S. 507 (1980), or any of the court of appeals cases cited in the petition. Instead it makes three basic arguments, all of which are unpersuasive.

First, Brentwood argues that intermediate scrutiny must apply here because this Court held that TSSAA's conduct is "regulatory." Opp. 17. That simply elides the central question of whether TSSAA is "regulating" through sovereign power or merely exercising contractual authority. This Court's holding that TSSAA is a state actor does not remotely end that inquiry. Public employers "regulate" their workplaces and are certainly state actors, yet this Court has held that the employment relationship justifies an entirely different First Amendment analysis than, for example, a city's "regulation" of a public park. This Court held that the speech restriction in *Umbehr* would have triggered strict scrutiny if imposed on the public under the state's "sovereign power," but was entitled to great deference when imposed pursuant to "contractual power." 518 U.S. at 678. The administrators of the program in *Rust* similarly "regulated" the speech of participants in a sense.

Brentwood never disputes that TSSAA has no power over it other than what Brentwood has voluntarily agreed to.

Second, Brentwood suggests that its decision to join TSSAA is coerced because there are no "viable regulatory alternatives to TSSAA." Opp. 4. But Brentwood admits that it "voluntarily submits to TSSAA's regulatory authority," Opp. 20, and the Sixth Circuit confirmed that "[t]he TSSAA is a voluntary association," Pet. App. 79, as did this Court, *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*") ("no school is forced to join"). The evidence showed that Tennessee schools arrange athletic competition without belonging to TSSAA. CAJA 879-883, 1100, 1304-05. Brentwood Headmaster Emeritus Bill Brown testified that he considered TSSAA membership to be entirely voluntary, that Brentwood could have chosen to compete independently as the Webb School in Bell Buckle does, and that he simply did not feel that the Tennessee Athletic Association of Christian Schools "would have been the place for our school really." CAJA 565, 574-75. TAACS appears to have 40 member schools in Tennessee. *See* http://www.tacs1.org/memberschools.php?state=TN. There can be no serious dispute that Brentwood has other options. Its real argument is that competing for statewide athletic glory requires membership in TSSAA, but this Court and others have always rejected arguments like that. Pet. 15.

Third, Brentwood argues that a host of this Court's cases establish that First Amendment analysis is not altered by a contractual relationship between the speaker and the government. Brentwood misses the point of those cases.

Brentwood argues that *Keller v. State Bar*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), demonstrate that compelled speech is analyzed the same "whether [the] compulsion derives from positive law (*Keller*) or contract (*Abood*)." Opp. 22. *Keller* and *Abood* are unconstitutional conditions cases, and actually apply an analysis similar to *Pickering*, *Umbehr*, and *Snepp*. *Abood* dealt with union dues that public employees were required to pay as a condition of employment, even though they were

not members of the union that represented them. This Court held that such dues can be spent on speech only if it is "germane" to the union's collective bargaining activities. *Keller* held that state bar fees required as a condition of practicing law could only be spent on speech "germane" to "the State's interest in regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. Neither case supports Brentwood's (and the Sixth Circuit's) position: that conditions attached to voluntary participation in government programs are exactly the same as laws imposed coercively on the public. The general public cannot be forced to support union activities *at all*, no matter how "germane" to the union's bargaining role. *Keller* and *Abood* hold that participants in voluntary government programs may be asked to accept limits or burdens on their speech rights that the government could never impose on the general public, so long as those burdens are "germane" to the program's legitimate purposes. That is TSSAA's point.

Brentwood also relies upon "public forum" cases. In *Southeastern Promotions, Ltd. v. Conrad*, for example, this Court applied intermediate scrutiny to a private theater owner because the theaters it controlled were "public facilities" deemed to be "public forums designed for and dedicated to expressive activities." 420 U.S. 546, 555 (1975). The basis for this Court's rulings in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), was also that the schools had created limited public forums to encourage expressive activity, and therefore could not discriminate among viewpoints in regulating those forums. Brentwood correctly notes that the relationship between a university and its students is contractual, but again misses the point that these are unconstitutional conditions cases. *Southworth* explicitly relies on *Keller* and *Abood*; it simply explains that, in the context of a public forum created within a university to promote free expression, the usual "germaneness" inquiry would be inappropriate. 529 U.S. at 230-32. When

restrictions on speech *are* consistent with the legitimate purposes of the contractual relationship—as in *Connick*, *Pickering*, *Umbehr*, *Garcetti*, *Rust*, and *Snepp*, which Brentwood entirely ignores—this Court routinely holds that such restrictions are entitled to very substantial deference.

The point is that context matters in First Amendment doctrine, and speech restrictions required as a condition of voluntary participation in government-sponsored programs are analyzed differently from restrictions imposed on non-consenting members of the general public. The fact that some contractual restrictions on voluntary participants in government programs are invalidated—as in the public forum cases Brentwood cites—does not remotely establish that the voluntary nature of the relationship is irrelevant.[3]

Brentwood also misunderstands the circuit split created by the Sixth Circuit's decision. It argues that the waiver cases cited in the petition are "case-specific" and that "no waiver exists here." Opp. 22-23. But Brentwood specifically agrees in writing to comply with TSSAA's recruiting rule. CAJA 1951-64. At least four circuits have enforced such up-front agreements to limit speech. Pet. 20. Brentwood suggests no way to distinguish those cases, and there is none. Brentwood then suggests that the other cases cited in the petition involved "non-regulatory conduct." Opp. 27. That is inconsistent with Brentwood's own expansive conception of what counts as "regulatory." The authority exercised by the state actor 4-H program over its members

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[3] Brentwood suggests that *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), supports its notion that voluntary interactions with the state are the same as coercive police power regulation. This Court held in *Bantam Books* that the conduct in question was "not voluntary" and that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68. It also wrongly suggests that the state exercised no "sovereign authority" in *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994), because Ibanez could have "perform[ed] accounting functions without a license." Opp. 19. By statute she could not, however, hold herself out as a CPA or attest to the reliability or correctness of financial statements. 512 U.S. at 139.

in *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545 (2d Cir. 2001), or by the ROTC program in *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980), or by the volunteer fire departments in the cases at Pet. 22 n.6, is not different from TSSAA's relationship to its members. Pet. 21-22. Eight circuits apply the *Pickering* test to such relationships, and only the Sixth Circuit applies intermediate scrutiny.

3. Brentwood argues that TSSAA's interest in competitive equity is "conjured up" or insincere, Opp. 10 n. 5, just after spinning out an absurd conspiracy theory that TSSAA sought to punish Brentwood *because it was winning too many games*. Opp. 7-9. Apparently it fails to appreciate the inconsistency. As anyone who has ever competed in athletics knows (and amici confirm), reasonably balanced competition is essential because a perception of futility will harm morale and participation. Pet. 23; Br. of Nat'l Fed. of State High School Assocs. at 5 ("[S]tudents who lose games consistently will lose the willingness to compete."). That is one reason why every public high school athletic association prohibits athletic recruiting. *Id.* at 2. It is also why they put schools in divisions (such as 1A–5A in football) so that schools of similar size compete against one another. *See* Br. of Michigan High School Athletic Ass'n, et al. at 6.

Brentwood forthrightly embraces the Sixth Circuit's holding that competitive equity is not a substantial state interest and could never justify limits on recruiting speech. Opp. 11 n.6. To our knowledge no court has *ever* endorsed that conclusion before. Courts have consistently recognized the importance of competitive equity at all levels. Pet. 22-25. Brentwood argues that a focus on competitive equity subordinates the interests of students to the interests of the association. Opp. 11 n.6. That might make sense for the NFL or NCAA, which have institutional economic interests in competitive equity apart from its consequences for the players. But TSSAA is a non-profit with no economic interests of its own. It tries to promote competitive balance because, and only because, it believes that is the best thing for students. The real dispute here is that TSSAA believes

that vigorous and reasonably balanced competition will promote participation, sportsmanship, and teamwork, and Brentwood believes it should be free to do whatever it wants to pursue as many championships as possible.

4. Brentwood also embraces the Sixth Circuit's mistaken focus on these narrow facts, and urges that it correctly concluded that this particular violation of the recruiting rule was so harmless that enforcement should have been waived. Second-guessing such judgments is not an appropriate role for federal courts. This Court has always asked whether a *rule* is supported by substantial state interests, not whether enforcement in a particular case satisfies heightened scrutiny. Pet. 19. Brentwood argues for an exception on the ground that TSSAA's recruiting rule is "ad hoc" and "case-specific." Opp. 26. But the prohibition on "undue influence" is accompanied by several pages of guidance and examples, including one covering Brentwood's precise conduct. Only Brentwood could find guidance prohibiting "initial contact" with "a prospective student/athlete enrolled in any member school," Pet. App. 164, to be "ad hoc" as applied to Brentwood's initial contact of prospective athletes at other member schools. And many time, place, and manner regulations upheld by this Court required case-specific application. Pet. 19. This Court rejected "least restrictive means" analysis in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and again in *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.* ("*FAIR*") 126 S. Ct. 1297 (2006), which means that rules may be applied in debatable circumstances. No athletic league could function if participants can litigate whether the rules should have been overlooked in their case.

5. On the due process issue, Brentwood does not dispute that it received notice of the allegations, an evidentiary hearing with counsel where it submitted affidavits and questioned witnesses, and an appeal to the full board. That is the process Brentwood voluntarily contracted to receive, and is sufficient under *any* standard. It contends, and the Sixth Circuit held, that due process was violated because the decisionmakers discussed matters that Brentwood had

notice of but did not expect to be important. But no litigant has a right to anticipate and respond to everything that is discussed in the jury room. The same voluntary agreement that constrains Brentwood's First Amendment claim answers its due process claim. This issue merits review if this Court reviews the First Amendment issues, if only because Brentwood may remain eligible for a large and entirely unjustified fee award unless it is reversed.

6. Brentwood argues that nothing has happened since *Brentwood I* to justify reconsideration. But as this case and the cases and commentary cited at Pet. 27-29 show, it has become clear that the *Brentwood I* standard is unworkable, and that treating voluntary athletic associations as state actors opens a Pandora's box. The Sixth Circuit's tortured analysis and absurd conclusions here illustrate that high school sports and constitutional law are a bad combination.

7. Brentwood argues that a GVR in light of *Garcetti* is unnecessary because it dealt with employees, "not restraints on speech involving government as regulator." Opp. 23 n.12. But if TSSAA "regulates" its members, the public employer in *Garcetti* also "regulated" its workforce. The sources and nature of the power exercised in both situations are similar. Brentwood remarkably tries to dismiss *FAIR* by arguing that it held that military recruiting is conduct, not speech. *Id.* That is yet another reason for remand. *FAIR* also clearly rejected the kind of "least restrictive alternative" analysis applied by the Sixth Circuit here. And the fact that *FAIR* was decided ten days before this decision does not make a remand inappropriate. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("recent developments that we have reason to believe the court below did not fully consider").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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