No. 06-427

In The

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL

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SUMMARY OF ARGUMENT

When private parties who agree to contractual conditions in return for a discretionary government benefit later challenge those conditions under the First Amendment, this Court has applied a deferential standard of review to the government's actions. Two lines of cases have established this general proposition. First, the government can restrict the speech of government employees and independent contractors when that speech involves only matters of private concern and the restriction relates to the government's interest in effectively carrying out its goals. Second, the government can impose a speech-restrictive condition on the recipients of government subsidies as long as the condition furthers the government's legitimate purpose in offering the subsidy and does not lead the recipient to violate an independent constitutional provision.

Because the relationship between the Tennessee Secondary School Athletic Association (TSSAA) and Brentwood Academy (Brentwood) fits squarely within this Court's First Amendment contract jurisprudence, this Court should uphold TSSAA's enforcement of the recruiting rule as reasonable. In this case, TSSAA offered Brentwood the discretionary benefit of participating in its athletic league in exchange for compliance with the terms of its membership

A. The Relationship Between TSSAA And Brentwood In This Case Is Like The Relationship Between A Government And Its Employees Or Contractors.

The government may impose speech-related restrictions on employees or contractors that it may not impose on the public at large when those restrictions contribute to effective government operations. *Waters v. Churchill*

The relationship between TSSAA and Brentwood fits easily within the purview of the *Umbehr* test.[4] Private schools that compete throughout the school year with public schools in an athletic league that is itself a state actor have a relationship with the government that is at least as close as a contractor's. TSSAA has determined that anti-recruiting rules are crucial to preserving the fundamentally educational mission of high school sports. It should be given the latitude extended to other governmental agencies in deciding what contractual restrictions it may impose to advance its legitimate interests. This is especially so because the speech at issue – letters to eighth-graders about spring football practices – does not involve a matter of public concern. *See* Part II, *infra*.

B. The Relationship Between TSSAA And Brentwood In This Case Is Also Like The Relationship Between A Government And A Recipient Of Conditional Funding.

Just as the government may impose speech-related conditions on employees or contractors, so too the government may impose speech-related conditions on funding recipients that it may not impose on the public at large when those conditions contribute to achieving the purposes for which the subsidy is being provided. The government can, for example, "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program [illegible]

funding has long applied to private schools: "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not

The recruiting rule satisfies the *Dole* criteria for judging the constitutionality of a condition on government funding. Interscholastic athletics contributes in a number of important ways to the education of secondary school students. Restrictions on athletic recruitment of the kind imposed by TSSAA satisfy the germaneness requirement of *Dole* because they are important to ensuring that athletics does not eclipse academics, that athletics teaches students appropriate and meaningful life lessons, and that athletic participation is physically safe. *See* Part III, *infra*.

The contract between TSSAA and Brentwood also satisfies the other *Dole* criteria. Participation in TSSAA is unambiguously conditioned on compliance with its recruiting rule, making the conditional nature of the subsidy clear in the contractual agreement. *See Grove City Coll.*, 465 U.S. at 575. The precise contours of the condition need not themselves be , 1/g 7]006 Tc -c2.145 0 Tdee

relationships into overlapping and ill-defined categories, not presumed exhaustive, including regulatory, funding, subsidy, independent contractor, government speech, and employment. Pet. App. 92a-95a. This level of detail is not only unnecessary but also conceptually misleading. At one point, for example, it leads the Sixth Circuit to conclude that TSSAA's imposition of the recruiting rule is analogous to a unilateral zoning ordinance because this Court described TSSAA's contractual enforcement of its recruiting rule as *regulating* recruitment in its 2001 decision. *Id.* 14a. But many

enforcing contractual terms that limit Brentwood's recruiting speech as long as those terms are directly related to Brentwood's participation in the league TSSAA is operating and the terms serve some legitimate purpose.

A. Speech By A Contracting Party That Does Not Touch A Matter Of Public Concern Is Entitled To Only Minimal Constitutional Protection

When private parties make First Amendment claims against the government's enforcement of a contractual limitation on their speech, they must make "an initial showing" that their speech touches on "a matter of public concern." *Umbehr*, 518 U.S. at 685. Conversely, if the speech does not touch on a matter of public concern, then the contracting party should have "no First Amendment cause of action" based on the government's "reaction to the speech." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (citing *Connick*, 461 U.S. at 147); *see Umbehr*, 518 U.S. at 685.

Providing less protection in cases involving speech that is of only private concern reflects a well-established principle of First Amendment jurisprudence. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion) ("We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection. . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.") (citing *Connick*, 461 U.S. at 145; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Particularly when imposed contractually rather than unilaterally, governmental limits on speech of purely private concern deserve substantial deference.

B. Letters To Eighth Graders About The Place And Time Of Spring Football Practice Do Not Constitute Speech On A Matter Of Public Concern

The "speech" that triggered TSSAA's imposition of sanctions on Brentwood consisted of recruiting letters to eighth graders telling them where and when spring football practice would occur and urging them to attend. *See* Pet. App. 34a-35a. These letters, like many of the communications between schools and potential or actual students, contain no speech on a matter of public concern.

This Court's decisions have established that speech on a matter of public concern must be of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Such speech includes criticisms or reports of governmental action or policy and speech related to other such subjects where "free and open debate is vital to informed decision-making by the electorate."[7] *Id.* at 145 (citing *Pickering*, 391 U.S. at 571-

[7] The protection of public debate and criticism is central to the public concern analysis. Thus, courts have provided First Amendment protection to parties that contract with the government when their criticism has provided information relevant to public debate. For example, a high school teacher's public criticism of the Board of Education's funding allocations between athletic and academic expenses, *Pickering*, 391 U.S. at 571-72, a teacher's criticism of school policy in testimony in front of the state legislature, *Perry v. Sinderman*, 408 U.S. 593 (1972), and a teacher's informing a radio station about a memo from the school principal announcing a new teacher dress code (where the dress code was allegedly prompted by a belief by administrators that faculty dress was tied to public support of bond issues), *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), were each held to be speech that touched on matters of public concern.

The matter of public concern analysis also protects contracting parties' ability to participate in public debate and criticism even where that criticism, although related to public matters, is unrelated

72). The test is sensitive to both context and content: whether the "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." *Id.* at 147-48. As this Court recently explained, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

Connick and *City of San Diego* show why Brentwood's recruiting letters are not a matter of public concern. The content of the letters – the place and timing of a private school's football practice – are matters internal to the football team, relevant to the coaching staff, players, and players' parents, but no one else. The letters do not contain criticism of TSSAA's policies (which would be a matter of public concern, since such speech would pertain to the functioning of a state-run athletic association and invite political debate). Nor is the content of the letters a subject that has news interest of value and concern to the public.

The Sixth Circuit's ruling to the contrary rests on a serious misunderstanding. That court paradoxically concluded that because TSSAA might have to show that the speech *restriction* imposed by TSSAA-Brentwood contract "embodies substantial governmental interests,"[8] any *speech*

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to the contracting government entity. For example, *Rankin v. McPherson* found the political criticism implicit in a statement wishing for the success of future assassination attempts on President Reagan to be speech on a matter of public concern because the statement was made during a discussion of government policies. 483 U.S. 378, 386-87 (1987).

[8] This is itself a mistaken proposition. The government interest need not be so weighty as to be "substantial" – as opposed to simply "legitimate" – if a court applies the sort of balancing test used in government contracting and conditional spending cases. *See* Part I, *supra*.

restricted by the contract "will by definition implicate 'a matter of public concern.'" Pet. App. 9a.[9]

That analysis cannot be the law. Put simply, what the Sixth Circuit was asserting is that whenever TSSAA has a substantial government interest in regulating speech, the speech it is regulating is necessarily a matter of public concern. This leads to the perverse result that the government's ability to restrict speech declines as its legitimate interest in regulating the speech increases. The Sixth's Circuit's reasoning flatly contravenes this Court's decision in *City of San Diego v. Roe*, 543 U.S. 77 (2004). There, this Court recognized that a city police department had a substantial, public interest in limiting the injury to the department's reputation caused by an employee's selling videos on eBay of himself stripping off a police uniform and masturbating. *See id.* at 77. However, the video itself clearly did not speak to a "matter of public concern," and so did not merit First Amendment protection under *Connick* and *Pickering*.

The Sixth Circuit's analysis here rested on a linguistic confusion similar to errors that this Court has noticed and rejected elsewhere. In a case challenging legislative malapportionment, for example, this Court pointed out that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an

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[9] The 2006 decision adopted the earlier decision's analysis on TSSAA's contract-based arguments wholesale. *See* Pet. App. 89a-90a (explaining that TSSAA's First Amendment arguments were inconsistent with the law of the case).

To be sure, the 2006 decision provided additional reasons for

teamwork, discipline, and integrity. It is therefore imperative that educators have the flexibility to structure rules of play to attract as many students as possible to high school sports and to protect them once they decide to play.

To safeguard the essentially educational – rather than athletic – purpose of high school, courts have recognized that schools can condition students' participation in interscholastic sports on carrying a full courseload, passing a minimum number of classes, and satisfying mandatory attendance policies.[11] They have also recognized that athletic leagues should be permitted to impose regulations, on member schools as well as students, designed to encourage students to choose the school they attend based primarily on its academic offerings rather than its sports program. Every state athletic association in the country has some version of an anti-transfer rule that bars students who switch schools from participating in interscholastic competition for a designated period.[12] These

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[11] *See, e.g.*, *Moreland v. W. Pa. Interscholastic Athletic League*, 572 F.2d 121 (3d Cir. 1978) (barring students with excessive absences); *Angstadt ex rel. Angstadt v. Midd-West Sch. Dist.*, 286 F. Supp. 2d 436 (M.D. Pa. 2003) (barring students who fail to meet academic requirements); *Stone v. Kan. State High Sch. Activities Ass'n*, 761 P.2d 1255 (Kan. Ct. App. 1988) (barring students who fail courses from regaining eligibility to participate in interscholastic sports by completing coursework after the end of the semester).

[12] *See e.g.*, Cal. Interscholastic Federation, 2006-2007 Constitution and Bylaws, art. XX, § 214 (barring, for one year, students who transfer to another school from varsity competition in a sport they have played in the past year), *available at* http://www.cifstate.org (last visited Feb. 19, 2007); Mich. High School Athletic Ass'n, Your High School Eligibility: Guide for Student-Athletes (barring students who transfer for athletic reasons from interscholastic competition for two semesters), *available at* http://www.mhsaa.com/resources/eligibility.pdf (last visited Feb. 19, 2007); N.J. State Interscholastic Athletic Ass'n, 2005-2006 Constitution, Bylaws, and Rules, and Regulations, art. V, § 4.K(2)

rules seek to shield impressionable young people and sometimes unsophisticated parents from the invidious suggestion that athletics, not academics, should be a student's highest priority. Such rules fit hand-in-glove with other restrictions on recruitment, and they have consistently been upheld against constitutional challenges.[13]

Courts have also consistently upheld other rules designed to ensure a level playing field because such rules promote student safety and broad participation in interscholastic athletics. For example, consider eligibility rules prescribing age cut-offs for participation in high school sports.[14] It would be not only demoralizing but dangerous for thirteen-year-old freshmen to compete against twenty-year-old seniors. For the

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(barring varsity athletes who transfer to another school from interscholastic competition for at least 30 days), *available at* http://www.njsiaa.org/references/0506eligibilrules.pdf (last visited Feb. 19, 2007).

[13] *See, e.g.*, *In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (upholding transfer rule challenged by private school athletic league, noting that "federal courts have uniformly upheld comparable rules governing transfers against challenges based on both the due process and equal protection clauses," and collecting cases); *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980) (upholding transfer rule challenged by students of parochial school and their parents); *Denis J. O'Connell High Sch. v. Va. High Sch. League* 581 F.2d 81, 87 (4th Cir. 1978) (upholding exclusion of parochial high school from state athletic league because participation of schools lacking attendance zones would make enforcement of transfer rule impossible); *Robbins v. Ind. High Sch. Athletic Ass'n*, 941 F. Supp. 786 (S.D. Ind. 1996); *Ind. High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222 (Ind. 1998); *Chabert v. La. High Sch. Athletic Ass'n*, 312 So.2d 343 (La. Ct. App. 1975).

[14] *See, e.g.*, *Baisden v. W. Va. Secondary Sch. Activities Comm'n*, 568 S.E.2d 32 (W. Va. 2002) (recognizing that age eligibility rules serve important safety goals that trump even a claim under state disability law by an overage student).

same reason, courts have upheld rules requiring schools to compete only against other schools of a similar

persuade students to learn if they are already convinced that hard work will never pay off. And if uncontrolled recruiting signals to students that winning is more important than participating and participating is only for the preternaturally talented, then the shy, the clumsy, and the self-doubting will stay away from sports. Unless educators can enforce the rules that maintain "competitive equity," including anti-recruiting rules, they will lose the ability to influence a large number of students on the field – some of whom they may already have difficulty reaching in the classroom.

IV. Educational Authorities Such As TSSAA Are Entitled To Particular Deference In Enforcing Rules That Lie Within Their Educational Mission.

In *Brentwood I*, this Court held that TSSAA was a state actor because public school officials "overwhelmingly perform all but the purely ministerial acts by which the Association . . . functions" and because the State Board of Education authorizes TSSAA to administer high school athletics in its stead. 531 U.S. at 300, 301. Petitioners are asking this Court to overturn its holding of *Brentwood I*. NSBA takes no position on that question. But as long as TSSAA and other public-private interscholastic athletic leagues are considered state actors because of their entwinement with state educati

necessary to determine how best to pursue substantial educational interests.

The principle of local control over educational decisions is ingrained in our nation's history. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Local control of education "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)). Thus local control is both "vital to continued public

sponsored by schools. Athletic

CONCLUSION

For the foregoing reasons as well as those in petitioner's brief, the judgment should be reversed.

Respectfully submitted,

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