No. 06-427

In The

Supreme Court of the United States

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

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Its mission is to foster excellence and equity in public education through school board leadership. NSBA achieves that mission by representing the school board perspective before federal courts and government agencies.

NSBA represents 95,000 local school board members, virtually all of whom are elected. These local officials govern 14,890 local school districts serving the nation's more than 47 million public school students.

NSBA has participated as an amicus curiae in numerous cases before this Court that implicate the ability of school boards to carry out their responsibilities, including cases involving First Amendment speech issues raised by students, employees, and outside parties, such as *Morse v. Frederick*, No. 06-278 (*cert. granted* Dec. 1, 2006); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

This case implicates the ability of NSBA's members to determine the role that interscholastic sports will play within their schools, as well as their ability to structure their relationships with the many students, parents, and outside parties with whom they come into contact while carrying out their responsibilities.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amicus* states that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *amicus* and its counsel made any monetary contribution to the preparation or submission of the brief.

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 agreement, which included the challenged recruiting rule.

The recruiting rule itself is a reasonable contractual term, directly related to a school's participation in an interscholastic athletic league. Restrictions on athletic recruiting of adolescent students can contribute materially to a number of important educational values. They emphasize the priority of academics over athletics. By helping to maintain competitive balance among schools, they encourage broader participation, thereby maximizing the pedagogical benefits of athletics. And they keep scholastic athletics safe for participants. By contrast, any countervailing First Amendment interests are minimal at best: the speech in this case involved matters of

only private concern – namely, the opportunity for twelve eighth grade students to participate in spring football practice.

In striking down the recruiting rule, the Sixth Circuit committed three key errors. First, the court of appeals improperly characterized the recruiting rule as a regulatory ordinance, rather than a contractual term, and applied the far more searching First Amendment test applicable to unilateral government regulation, rather than the more properly deferential test that applies when the government acts as a contracting party. Second, the court of appeals failed to recognize TSSAA's significant education-related interests in ensuring competitive equity. Finally, the court of appeals improperly elevated the speech at issue to a matter of public concern by confusing that inquiry with the entirely distinct inquiry into whether the government's *restriction* of speech serves a public purpose.

The standard deference accorded to government action in contractual cases is reinforced here because TSSAA was acting in its educational capacity. When this Court labeled TSSAA a state actor, it did so because of extensive entwinement with both public schools and the Tennessee State Board of Education. *Brentwood v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 299-302 (2001) ("*Brentwood I*"). If such entwinement is enough to make TSSAA a state actor, then TSSAA, like the public bodies with which it is entwined, should be treated as an educator.

This Court has long recognized that educational decisions are "[b]y and large . . . committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (internal quotations omitted). This recognition reflects important principles of federalism, the specialized competence of educational policymakers, and institutional limitations of the federal courts to effectively implement educational policy. All of these factors point to deference to TSSAA's judgment here.

ARGUMENT

I. When The Government Contracts With Private Parties, First Amendment Challenges To Contractual Terms, Such As TSSAA's Recruiting Rule, Should Be Analyzed Under The Deferential Standard Used In This Court's Government Employee And Conditional Spending Cases.

Governments can interact with citizens in two distinct ways: they may unilaterally regulate as a function of their sovereignty or they may bilaterally contract with consenting private parties. While the Constitution of course applies to exercises of both regulatory and contractual powers, constitutional claims are assessed differently in each context. In the latter, contractual, context, this Court has applied a decisively more deferential standard of review to First Amendment challenges. The court of appeals failed to apply the correct legal standard, and thus its judgment should be reversed.

This case concerns a voluntary contract between a state actor (TSSAA) and a private party (Brentwood Academy), renewed annually, in which TSSAA agrees to include Brentwood in its interscholastic athletic league in return for which Brentwood pays dues, Pet. App. 160a, and consents to abide by various rules promulgated by TSSAA, including its limitation on athletic recruitment. *Id.* 159a-66a. In this sense, TSSAA resembles government agencies that pay outside parties who agree to conform their conduct to the government's terms. The terms of TSSAA's contract with Brentwood should thus be analyzed under the deferential standard that this Court has applied in conditional funding and government employee/contractor cases. Instead, the Sixth Circuit incorrectly treated TSSAA's "recruiting rule" as an exercise of sovereign power.

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*, 511 U.S. 661, 675 (1994). Under the government employee and contractor cases, if speech involves "matters only of personal interest" – for example, the sort of work-related matters that arise at any worksite, private or public – the government's response raises no First Amendment concerns "absent the most unusual circumstances." *Connick v. Myers*, 461 U.S. 138, 147 (1983).[2] This Court has applied this test not only to government employees, as in *Connick*, but to independent contractors as well. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996).[3] It has reasoned that "[i]ndependent contractors appear to us to lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government." *Id.* at 680.

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[2] By contrast, if an employee's speech involves a matter of public concern, then the government may take action based on that speech only if it prevails in "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[3] "[I]n this case, as in government employment cases, the Board exercised contractual power, and its interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated. Deference is therefore due to the government's reasonable assessments of its interests *as contractor*." *Umbehr*, 518 U.S. at 678.

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." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987).[5] This kind of selective or conditional

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[4] *See Rottmann v. Pa. Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922 (W.D. Pa. 2004) (applying *Pickering* and holding that recruiting restriction imposed by interscholastic athletic league did not violate First Amendment rights of a coach at parochial member school).

[5] *Dole* sets out four restrictions on the federal spending power. First, the spending "must be in pursuit of 'the general welfare.'"

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 obligated to accept." *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (upholding federal funding of higher education conditioned on adherence to the nondiscrimination provisions of Title IX, which can of course preclude certain speech-related or associational activity).

In this case, TSSAA wishes to provide a benefit – membership in an interscholastic athletic league, and in some cases revenue from TSSAA's tournaments – to schools that agree to certain conditions in how they run their athletic programs, including limits on athletic recruitment. The restriction on athletic recruiting is a reasonable method of deterring an activity – aggressive recruiting – that TSSAA does not believe to be in the public interest. Brentwood is not obligated to accept this benefit and its attendant conditions; the school conceded at trial that its participation in TSSAA is voluntary. *See* Pet. Cert. at 3. This concession is reinforced by the fact that many Tennessee private schools have left TSSAA or joined other athletic leagues to pursue goals incompatible with TSSAA's. *See id.* at 2.

Dole, 483 U.S. at 207. Second, any conditions imposed on a recipient must be "unambiguou[s]." *Id.* Third, any conditions must be "german[e]" – that is, related to the activity being subsidized. *Id.* at 208. Finally, "other constitutional provisions may provide an independent bar" to a particular condition. *Id.*

To be sure, this case involves state-imposed conditions rather than federal ones. While there might be a few exceptional instances where a state's power to subsidize is more limited than the federal power – if, for example, the subsidy trenches on foreign policy interests or implicates the dormant commerce clause – none of those concerns are implicated in this case. Otherwise, states surely have a power to condition their spending that is at least coterminous with the federal spending power recognized by *Grove City College v. Bell*, 465 U.S. 555 (1984) since state-imposed conditions raise no Tenth Amendment-based concerns.

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 described. *See Waters*, 511 U.S. at 673 (speech restrictions on public employees are permissible even when the standard of prohibited speech is "almost certainly too vague when applied to the public at large"); *Connick*, 461 U.S. at 153 (supporting a state employee's termination for insubordination even though she "did not violate announced office policy"). The point of this requirement – that the recipients of the government's subsidy be "cognizant of the consequences of their participation," *Dole*, 483 U.S. at 207 – was surely met here: TSSAA expressly says in Section 21 of its publicly available bylaws that membership in its league is conditioned on recruitment restrictions. Pet. App. 162a-63a. Nor does TSSAA's recruiting rule require that Brentwood itself do anything that would violate the Constitution. *See Dole*, 483 U.S. at 210-11 (explaining that the "independent constitutional bar" limitation refers to conditions that would lead the recipient "to engage in activities that would themselves be unconstitutional" such as inflicting cruel and unusual punishment).

That the conditional benefit offered by TSSAA consists largely of the right to participate in its league, rather than of a

more direct financial subsidy, makes no difference to the analysis. A contract that provides consideration in the form of government funds (as in *Rust*, *Dole*, and *Grove City College*) and a contract that provides consideration of some other kind, such as membership in an athletic league, are functionally identical. The only important characteristic, present in both kinds of contracts, is that the government, in order to further a state interest related to the contract, provide the contracting party with something that it could otherwise withhold. This Court recognized in *Grove City College* that "[t]he economic effect of direct and indirect assistance often is indistinguishable," 465 U.S. at 565, as indeed is the case here. For example, TSSAA might work around a court-imposed distinction between conditioned funds and conditioned membership in the league by attaching a nominal monetary subsidy to its recruitment conditions. The subsidy could be offered outright or implicitly in TSSAA's decision to fund certain incidental costs of running the league. Surely there is nothing to be gained by requiring such empty legalistic maneuvers. Just as with the state action doctrine itself, "if formalism were the sine qua non" of what constitutes a subsidy, "the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling." *Brentwood I*, 531 U.S. at 302.

C. The Distinction Between Sovereign State Action And Contractual State Action Works Better Than The Sixth Circuit's Taxonomy.

The clean distinction between sovereign state action and contractual state action makes much more sense than the Sixth Circuit's haphazard taxonomy of government-citizen relationships. Categorizing state power as either contractual or sovereign suffices for this case as it did for this Court in *Umbehr*, 518 U.S. at 678, since that distinction neatly addresses the question whether the party on the receiving end of the government's attention agreed to be there. The Sixth Circuit, on the other hand, carves the wide range of possible

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 contractual terms, including terms in contracts between private parties, "regulate" the behavior of the parties, and this does not convert them into governmental "regulation"; the Sixth Circuit confuses the two contexts in which the word is used. Later, it also concludes that the contractual nature of the relationship is irrelevant because the state offers membership in the league as consideration instead of the model of money-for-services found in most independent contractor relationships such as highway construction. Adopting such an unsystematic categorization of government relationships with private parties will only encourage further confusion among lower courts.

The court of appeals in this case improperly blurred the line between the government's more constitutionally constrained sovereign power to restrict speech and its greater contractual flexibility by citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Pet. App. 95a. Those cases held that when the government erects a public forum and then enters into contracts with parties who want to use the forum, it may not exclude participants based on the content or viewpoint of their speech. But the public forum cases are entirely inapposite. TSSAA is neither a traditional public forum defined "by long tradition . . . devoted to assembly and debate," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), nor a designated forum, created when the government "designate[s]

a place not traditionally open to assembly and debate as a public forum," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Instead, TSSAA is an athletic league designated by the State of Tennessee to facilitate statewide interscholastic sports and not to enable some general form of expression.

In contrast to the Sixth Circuit, other courts have adopted the position we advocate here, finding the distinction between contractual and sovereign powers both workable and preferable. Thus, these courts have enforced private parties' relinquishment of constitutional rights in contracts with the government, as long as the contract was entered into voluntarily and is in the public interest.[6]

II. When A Contracting Party's Speech Involves Only Matters Of Private Concern Directly Related To Its Contractual Undertaking, A State Actor's Right To Enforce Contractual Restrictions Is Particularly Strong.

Brentwood's recruiting letters involve a matter of private concern that is governed by the terms of its contract with TSSAA. Consequently, TSSAA has wide latitude in

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[6] *See Lake James Community Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998) (enforcing a volunteer fire department's waiver, as part of its service contract with a county, of its First Amendment right to object to a change in the boundaries of its fire protection district); *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993) (enforcing a firefighter union's acceptance, as part of its collective bargaining agreement with a city, of a corresponding salary deduction if it exercised its First Amendment right to successfully lobby the state legislature to mandate increased pay or benefits); *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987) (enforcing firm's consent to customer arbitration and waiver of its Article III right to independent federal adjudication as part of its membership agreement with the Chicago Board of Trade).

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 applying intermediate scrutiny. *See id.* 94a-95a. However, the attempts to analogize the facts of this case to application of a municipal ordinance or access to a public forum are unavailing. *See* Part I, *supra*. Furthermore, these newly identified reasons do not redeem the erroneous "matter of public concern" analysis of the Sixth Circuit's 2001 opinion.

objection 'is little more than a play upon words.'" *Baker v. Carr*, 369 U.S. 186, 209 (1962) (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)). So too here: the mere fact that the government has a "public" interest in regulating certain speech does not mean that the speech itself is on a matter of "public" concern.

Connick itself rules out placing the label "matter of public concern" on a matter of at most limited general interest. There, an assistant district attorney who was unhappy with a transfer distributed a questionnaire to co-workers that asked questions "concerning office transfer policy, office morale, the need for a grievance committee . . . and whether employees felt pressured to work in political campaigns." *Connick*, 461 U.S. at 141. Of these questions, this Court deemed only the last to touch a matter of public concern because of the implications the question had for limiting public employees' ability to voice dissent. *See id.* at 149. The other survey questions were treated as merely reflecting the plaintiff's dissatisfaction with her own transfer. *Id.* at 148. More generally, the Court noted that "[t]o presume all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case." *Id.* at 149. That conclusion applies even more strongly to the speech here, which does not even resemble criticism of the government: to presume that all matters that transpire under a contractual agreement are of public concern plants a constitutional case in every contract term and thereby makes such contracting impracticable.

III. The Strong Governmental Interest In Ensuring Student Safety And Preserving The Educational Value Of Interscholastic Sports Justifies The Imposition Of Bargained-For Restrictions On Participants' Speech.

Every high school sports association in the country with public school members considers it important to promote a

"level playing field."[10] Yet the Sixth Circuit refused to recognize the government's substantial interest in preventing the emergence of gross disparities in talent among teams. The court's error can be traced to its treatment of competitive equity as an end in itself. Pet. App. 100a ("There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place."). But competitive equity is not the ultimate government objective; rather, it is an essential means of advancing the three major educational goals of high school sports.

First, as a definitional matter, interscholastic sports involve *schools*. Thus, educators may conclude that the entire complex of rules governing interscholastic athletics should emphasize the primacy of academic concerns over the pursuit of athletic glory. Second, competition between mismatched teams poses an increased risk of physical injuries to students. Third, rules that avert lopsided match-ups and humiliating defeats ultimately encourage more students to play sports. As this Court has recognized, "[i]nterscholastic athletics obviously play an integral part in . . . public education," *Brentwood I*, 531 U.S. at 299, and it does so precisely because sports are a powerful tool for imparting the values of

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[10] *See, e.g.*, Brief for Mich. High School Athletic Ass'n et al. as Amici Curiae in Support of Petition for Writ of Certiorari, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, No. 06-427 (Nov. 29, 2006) ("The MHSAA's primary purpose . . . is . . . to promote a level playing field") (quoting Mich. High School Athletic Ass'n Handbook); Minn. State High School League, http://www.mshsl.org/mshsl/aboutmshsl.asp?page=1 (last visited Feb. 19, 2007) ("The League exists to provide competitive, equitable and uniform opportunities for high school students."); Or. School Activities Ass'n, 2006-2007 Handbook, Mission Statement ("The OSAA will work to . . . provide equitable participation opportunities"), *available at* http://www.osaa.org/publications (last visited Feb. 19, 2007); National Federation of State High School Ass'ns, Mission Statement, http://www.nfhs.org/web/2006/09/mission_statement.aspx (last visited Feb. 19, 2007).

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 size. If large schools, whose student populations give them a better chance of fielding teams comprised entirely of tall, strong, and developed players, were pitted against small schools, the number of mismatches would rise.

Restrictions on recruiting itself further the same important interests served by these other rules – a major reason why they are actively enforced by high school athletic associations.[15] Anti-recruiting rules seek to prevent students from subordinating their academic welfare to their athletic commitments. Like transfer rules, rules that ban or limit contact between coaches and students enrolled elsewhere are simply another method of discouraging students from choosing the school with the winningest football team, rather than the school that will best prepare a student for higher

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[15] *See, e.g.*, Tania Ganguli, *FHSAA Crackdown Continues; A 2nd Girls Basketball Power Is Hammered for Violating Association Rules*, Orlando Sentinel, Jan. 31, 2007 at C9 (Florida High School Athletic Association stripped private school of playoff eligibility for two years and imposed a $5000 fine after three players transferred to the school when it hired the coach from their prior school); Dan McCarney & Burt Henry, *League Drops Cornerstone Christian High School*, San Antonio Express-News, Sept. 14, 2006 at 5B (Texas Association of Private and Parochial Schools expelled a member school for improperly recruiting basketball players with offers of room and board after previously recruiting five players from Mexico, including a future National Basketball Association forward); Christine Willmsen & Michael Ko, *Chief Sealth Stripped of State Titles*, Seattle Times, July 26, 2006 at A1 (Washington Interscholastic Activities Association stripped public high school of two state championships after finding that the coach of the girls' basketball team had lured three students to the school with promises of starting positions and college scholarships and provided fake lease agreements to their parents so that they could enroll without moving from the suburbs).

education or the work force.[16] It would be perverse if officials could forbid students from participating after an improper transfer, but could not penalize the schools encouraging those very transfers. At the very least, organizations such as TSSAA are entitled to deference in determining that significant educational interests justify limits on recruiting speech.

Recruiting restrictions can also reduce the risk of injury. By preventing any one school from amassing a disproportionately large number of big, fast, and skillful athletes, recruiting restrictions reduce the number of mismatched games between mismatched bodies.

Finally, consider the dispiriting effect if schools that recruit across local, state, and even national borders consistently defeat other league participants who are limited to enrolling students from a local neighborhood (as is often the case with public schools). Students at the public schools whose teams consistently lose may become less likely to participate in sports.[17] While part of the value of sports is the rough lesson that sometimes hard work does not translate into a victory on the scoreboard, it is not one that educators can

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[16] *See Denis J. O'Connell High Sch.*, 581 F.2d at 86 (observing that the purposes of transfer rules and anti-recruiting rules are "basically the same[:] to deter those who would pressure a student to transfer and to deter the student from succumbing to such pressures by preventing him from becoming immediately eligible to compete at his new school").

[17] *Cf. Burrows v. Ohio High Sch. Athletic Ass'n*, 891 F.2d 122, 124 (6th Cir. 1989) (upholding rule designed to "prevent unfair development of 'power squads,'" or teams that practice together year-round, by barring participation in interscholastic athletics by students who play for independent sports teams); *Alerding v. Ohio High Sch. Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985) (upholding rule limiting participation in interscholastic athletics to state residents to prevent private schools located near state border from gaining an unfair advantage by recruiting out-of-state students).

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 educational authorities, courts should treat them as educators as well. And as an educator, TSSAA is entitled to the great deference that federal courts traditionally allow state and local school authorities in setting education policies and priorities, a deference not accorded it by the court of appeals.

A. Under *Brentwood I*, TSSAA And Similar Bodies In Which Public Schools Participate Are Education Policymakers.

TSSAA fulfills two complementary roles. As this Court found earlier, TSSAA implements the goals of public schools with regard to high school sports, *see Brentwood I*, 531 U.S.

at 291, 299-300, and it acts in lieu of the Tennessee State Board of Education in administering interscholastic competition, *id.* at 291, 300-02. In both roles, TSSAA acts as an educator and an education policymaker. Furthermore, TSSAA oversees secondary school athletics, an activity this Court has recognized as an "integral part" of education. See *id.* at 299. Thus, TSSAA should be treated as an educator.

In coordinating interscholastic athletics, TSSAA operates well within the traditional realm of educators. This Court has previously recognized that the scope of public education is broader than what is taught in the classroom. Indeed, education includes many school-sponsored but non-curricular activities that "members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). This Court reasoned that "[t]hese activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting," because they are "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* As we have already explained, the high schools of Tennessee – and indeed, high schools across the country – find competitive sports useful as a means to teach students important skills; TSSAA, in overseeing high school athletics, acts as an educator setting policy for the students of Tennessee.

B. As An Educator, TSSAA Deserves Deference In Its Administration Of Interscholastic Athletics

This Court has long recognized that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (internal quotations omitted). When deferring to state and local authorities in the realm of education, this Court has relied on two parallel lines of reasoning. First, principles of federalism favor local control of education. Second, unlike courts, educators have the professional qualifications

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 support of the schools" and is "of overriding importance from an educational standpoint as well." *Rodriguez*, 411 U.S. at 49 (internal quotations omitted).

This Court has also recognized that educators, not courts, have the competence to best determine educational policies and priorities. States and school officials possess "comprehensive authority" when they move to "prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969). Permitting federal court challenges to this school authority would "compel[] the teachers, parents, and elected school officials to surrender control of the American public school system" to those who would sue in federal court, a result this Court has expressly disclaimed. *Bethel Sch. Dist. No. 3 v. Fraser*, 478 U.S. 675, 686 (1986) (citation omitted).

Public education acts as "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (citations omitted). This can be true for a wide variety of extracurricular activities

sponsored by schools. Athletic events, artistic performances, and service learning can facilitate cooperation among students from diverse backgrounds and bring together the larger community as well.

These admirable goals would be undermined if this Court were to affirm the court of appeals' approach. That court's willingness to assess for itself the importance of goals such as competitive balance is likely to produce a proliferation of lawsuits challenging the decisions of educational authorities. As this Court has recognized in its qualified immunity jurisprudence, there is a real danger that excessive litigation could "deter [officials'] willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Butz v. Economou*, 438 U.S. 478, 497 (1978) (internal quotations omitted). It is for this reason that this Court, in *New Jersey v. T.L.O.*, crafted a reasonableness standard requiring that school officials simply exercise "common sense" before searching a student for drug paraphernalia so as to avoid "unduly burden[ing] the efforts of school authorities to maintain order in their schools." 469 U.S. 325, 342-43 (1985). Such deference to educational judgment ensures that educators and not litigants maintain control of public education.

Further, this Court has consistently held that federal courts are ill-suited to intervene in the day-to-day operations of public schools. For example, in *Hazelwood* this Court held that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts." 484 U.S. at 267 (internal quotation marks omitted); *see also Fraser*, 478 U.S. at 683. These cases reflect this Court's consistent recognition that educational judgments properly rest with educational authorities.

If this Court were to turn its back on these longstanding principles to adopt the Sixth Circuit's reasoning, the consequences for public education would be severe. First,

public leagues like TSSAA might choose to exclude private schools altogether rather than face repeated First Amendment challenges to their policies – a result that could harm both public and private school students who would no longer compete against as diverse a group of other schools. Second, parents and students could try to extend the Sixth Circuit's reasoning by bringing constitutional challenges to a range of other school policies and decisions. For instance, students could challenge intra-school rules limiting participation in athletics, other extracurricular activities, or even curricular activities as violating their rights to free association or free expression. If Brentwood can challenge the terms of its voluntary contract with TSSAA, students and parents are likely to assert that the non-contractual relationship between citizens and school authorities provides even less legal protection for educational decisions.

If the Sixth Circuit's fact-sensitive intermediate scrutiny is applied in such contexts, then litigation against educational authorities will be even more protracted than it already is. The litigation will be costly even if the school boards ultimately prevail. Fear of such litigation will paralyze school authorities and hamper their ability to educate the nation's children efficiently and effectively. Moreover, because challenges to school rules will satisfy the requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), plaintiffs may very well obtain damages (as well as injunctive relief) even in cases where school districts acted reasonably only to be second-guessed by federal courts. This Court's jurisprudence has long recognized that educators should receive special deference in their policy decisions precisely to avoid the second-guessing and gridlock in public education that adoption of the Sixth Circuit's rule would create. Under that tradition, TSSAA's recruiting rule is entitled to deference here.

CONCLUSION

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

Respectfully submitted,

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