No. 07-107

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Petitioners,

v.

TIMOTHY M. COHANE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE* THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS AND THE TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Federation of State High School Associations ("NFHS") and the Tennessee Secondary School Athletic Association ("TSSAA") submit this brief as *Amici Curiae* in support of the Petitioner National Collegiate Athletic Association ("NCAA").[1] Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. About ninety percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks arising from their participation in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The objectives of the NFHS include the protection of interscholastic athletics and the development of solutions to problems related to interscholastic athletics at the high school level.

The TSSAA is a voluntary association of public and independent secondary schools in the State of Tennessee and is a member of the NFHS. The TSSAA is a private corporate entity. The TSSAA establishes and enforces bylaws under which interscholastic athletic competition

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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, *Amici* states that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *Amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

among its member schools is conducted. This Court has previously held that the TSSAA is a "state actor" for purposes of 42 U.S.C. § 1983 because of the entwinement of public school officials in the organization. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) ("*Brentwood I*").

Based on the purposes underlying the NFHS, its objectives, and its nationwide membership, the NFHS has a strong interest in the extent to which its member associations may be held liable on constitutional claims under 42 U.S.C. § 1983. The NFHS has an equally strong interest in the extent to which private entities or citizens may be deterred from entering into relationships or transactions with its member associations for fear of assuming § 1983 liability under an expansive "joint participation" theory of state action.

Although the TSSAA has been held to be a "state actor" when enforcing its bylaws, "[c]areful adherence to the 'state action' requirement" is necessary to preserve to the TSSAA and similar associations the freedom to conduct operations free from inappropriate constitutional restriction. *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 936 (1982). The TSSAA has a strong interest in the extent to which the "joint participation" theory of state action may be used, in conjunction with the treatment of the TSSAA as a "state actor," to subject private vendors, private service providers, and advertisers or sponsors of the TSSAA, as well as independent school members of the TSSAA, to § 1983 liability. Consequently, both the NFHS and the TSSAA have an interest in this Court's intervention to prevent the Second Circuit's expansive application of the "joint participation" theory of state action.

SUMMARY OF ARGUMENT

The Respondent Cohane claims that the NCAA's report of its investigation and SUNY Buffalo's ratification of the findings in that report defamed him and destroyed his ability to pursue his chosen occupation. Cohane identifies the NCAA's report as the instrument that caused an alleged deprivation of his liberty interest without due process in violation of his rights under the Fourteenth Amendment. The Second Circuit allowed Cohane to proceed with his action against the NCAA, relying on *Brentwood I* to hold that Cohane may be able to prove a set of facts showing that the NCAA was a willful participant in joint activity with the State.

The Fourteenth Amendment erects no shield against private conduct. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). Constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. *Id.*, at 1004. Consequently, "state action" may be found if, and only if, there is such a close nexus between the State and the challenged action that the seemingly private action fairly may be treated as that of the State itself. *Brentwood I*, 531 U.S. at 295; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). The required close nexus between the State and the challenged action is necessary to insure both that an area of individual freedom is preserved by limiting the reach of federal law and that responsibility is not imposed upon the State for conduct the State does not control. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

Similarly, the under-color-of-law requirement of § 1983 excludes merely private conduct. *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). The purpose of § 1983 is to allow enforcement of the Fourteenth Amendment against those who carry a badge of authority of the State and represent the State in some

capacity. *Hafer v. Melo*, 502 U.S. 21, 28 (1991). A person acts under color of law for purposes of § 1983 only when exercising power possessed by virtue of State law and made possible only because the person is clothed with the authority of State law. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981).

With its expansive application of the "joint participation" theory, the Second Circuit has invited a broad application of *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 936 (1982), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), despite this Court's efforts prior to *Brentwood I* to limit application of that theory to the particular facts of *Lugar* and *Burton*. *See, e.g., Sullivan, supra*, 526 U.S. at 57-58.[2] The Second Circuit's rationale effectively dispenses with the "under color of law" requirement for the private actor's § 1983 liability in a "joint participation" case, rendering the private actor liable for constitutional violations where the only allegations of "state action" relate to the acts of the government co-defendant. The Second Circuit's version of "joint participation" does not require any finding that the private actor be exercising power that is possessed by virtue of State law and made possible only because the person is clothed with the authority of State law. *Polk County v. Dodson, supra.*

Because the "joint participation" theory extends the reach of Fourteenth Amendment restrictions to otherwise private persons who were intended to remain beyond the reach of those constitutional requirements, the theory cannot be expansively applied as the Second Circuit did here. The

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[2] There were no dissents from the portion of *Sullivan* holding that the private insurers did not engage in state action. Justices Breyer and Souter joined that part of the majority opinion. *Id.*, at 62. Justice Ginsburg did not disagree, but simply concluded that resolution of the issue was not necessary because there was no underlying constitutional violation in any event. *Id.* And while Justice Stevens dissented in part, he did so only as to the claims against the state defendants. *Id.*, at 64-65.

theory must be limited to those circumstances where there is a showing of an active, knowing and willful conspiracy between the private actor and the state actor to commit the act on which the constitutional claim is based.[3] A more expansive application of the "joint participation" theory will not only lead to more confusing results like the one below, but will also impair the activities of state high school associations and their member schools, both public and private, by subjecting an array of private entities to the risk of liability under § 1983 simply because they have entered into relationships with those associations or schools.

ARGUMENT

A. The Second Circuit's "joint participation" analysis wrongly focused on the actions of the University and not on whether there was any active, knowing and willful conspiratorial act on the part of the NCAA that implicated Cohane's Fourteenth Amendment rights.

"Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." *Blum*, *supra*, 457

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[3] Restricting the liability of private actors under the "joint participation" theory to true conspiracies between the private actor and the State may provide justification for the result in *Burton*. *Lugar*, on the other hand, was wrongly decided and is fundamentally at odds with the limiting effect that the requirements of "state action" and action "under color of law" are intended to have upon liability under the Fourteenth Amendment and § 1983, respectively. Unfortunately, *Lugar* has led to a decision like that of the Second Circuit here. The result of this sort of extension of *Lugar* to other settings, in the case of private entities that have some relationship with the State, is a virtually standard-less measure of whether the action of the private entity was "under color of state law" – leaving lower courts to apply constitutional restrictions to and uphold § 1983 claims against those private entities based on what really amounts to no more than a trial judge's "gut feeling."

U.S. at 1003. As the Second Circuit describes it, Cohane's complaint alleges any number of improprieties *on the part of SUNY Buffalo.* Cohane claims that the University forced his resignation in an effort to placate the NCAA. Cohane alleges that the University actively participated in the NCAA's hearing. Cohane alleges that the University intimidated witnesses and suborned perjury. The Second Circuit concluded that these allegations of University improprieties distinguished the case from *Tarkanian.*

The critical question before the Second Circuit was whether the NCAA acted under color of state law. Even accepting that the University's acts constitute "state action" for Fourteenth Amendment liability, missing from the Second Circuit's analysis is any suggestion of "action under color of law" by the NCAA. There is no suggestion, in the Second Circuit's analysis of the complaint, that the NCAA exercised power possessed by virtue of state law and made possible only because it was clothed with the authority of state law. *West v. Atkins*, 487 U.S. 42, 49 (1988); *Polk County v. Dodson, supra.* There is no suggestion by the Second Circuit that the NCAA jointly participated in, acquiesced in, or even had knowledge of the alleged improprieties committed by the University.[4] For a private actor to be liable under § 1983 for actions of the State, the private actor must be a "willful" participant in joint activity with the State. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).[5]

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[4] Under *Blum*, the State's involvement in the NCAA's private conduct may be sufficient to subject the State itself to liability if it arises to the level of State compulsion. But subjecting the State to liability for constitutional claims because of State action is far different than subjecting a private entity to § 1983 liability because of the State's actions when that private entity does not depend upon the "color of law" for its own actions.

[5] "Willful" participation by private actors in true "joint" activity with the State that produces the constitutional violation is a necessary component for finding action under color of state law, lest the private

B. An expansive reading of the "joint participation" theory will impair the ability of the NFHS's member associations, including the TSSAA, to enter into agreements with private entities or individuals because of the risk of constitutional exposure assumed by those entities and individuals.

After *Lugar*, this Court held that qualified immunity is not available as a defense to a private entity sued under § 1983. *Richardson v. McKnight*, 521 U.S. 399 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992). The "joint participation" theory of state action thus produces the anomalous result that a private person or entity may have even greater exposure for constitutional violations than its joint State participant in the challenged activity.[6]

Because this Court held in *Brentwood I* that the TSSAA is a "state actor" under an entwinement rationale, an expansive application of the "joint participation" theory means that private entities or individuals who contract with or act in coordination with the TSSAA may also be subject to § 1983 liability.[7]

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actors "face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937.

[6] Under the Second Circuit's version of "joint participation," the TSSAA could be liable for constitutional torts under § 1983 not only in its enforcement of bylaws under *Brentwood I*, but also in its routine employment decisions, its contracts with advertisers and vendors, its registration of game officials, its provision of benefits like catastrophic insurance to student-athletes, and every other act it takes – since it may be said that the State by virtue of the presence of public school principals on the TSSAA's governing body participates in every aspect of TSSAA's operations.

[7] Even if those private entities or individuals ultimately escape liability on the merits, the ability of a claim under the "joint participation" theory to so easily survive a motion to dismiss means that

For example, the TSSAA adopts "rules of the game" in basketball for its member schools to follow. The TSSAA also has a registration process for game officials in basketball, and the TSSAA requires that member schools use registered officials for their basketball games.[8] The officials are obtained by the schools through arrangements with regional officials' associations, private organizations that work with schools and other sports leagues to coordinate the assignment of officials for games. Under the Second Circuit's application of the "joint participation" theory, an official who officiates a basketball game at a TSSAA tournament, or even one who officiates a regular season game between two TSSAA member schools, may be subject to § 1983 liability for any occurrence at the game in which the official might be involved. The officials' association that assigned that official to the game may also be subject to such a claim.[9]

The same sort of result would follow in the case of a private security company providing security guards for a TSSAA-sponsored event. A security guard removing an

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those entities or individuals still face the deterrent effect that comes with the time and expense of prospective litigation.

[8] Game officials register with the TSSAA and receive some training from the TSSAA, but they are not employees of the TSSAA. They are independent contractors.

[9] This example highlights the practical difficulties not only with the "joint participation" theory under which the private actor could be sued but also with the threshold "entwinement" theory under which the TSSAA could be sued for constitutional violations. Under those theories, a coach who is removed from a basketball game for something said in an argument with a game official could assert First Amendment claims against both TSSAA and the official. While the result in *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 127 S. Ct. 2489 (2007) ("*Brentwood II*"), may eventually lead to dismissal of the First Amendment claims after a trial or on summary judgment, the "entwinement" and "joint participation" theories would still be enough to enable the plaintiff to survive a motion to dismiss and subject the defendants to the cost of defending the claim on the merits.

unruly spectator or searching the purse of a spectator at an athletic event sponsored by an NFHS member association like the TSSAA would subject the TSSAA to potential constitutional liability based on the "entwinement" doctrine of *Brentwood I* and would subject himself and his employer to potential constitutional liability as "joint participants" with TSSAA.

Officials and security guards are not the only private entities or individuals that may be subject to constitutional scrutiny under the limitless "joint participation" theory. Hypothetically, suppose that an NFHS member association like the TSSAA schedules its state basketball tournament games in such a way that the boys' games are held at more desirable times than the girls' games. Under the Sixth Circuit's decision in *Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *cert denied*, 127 S. Ct. 1912 (2007), such scheduling could support a Fourteenth Amendment equal protection claim against the TSSAA under § 1983. Under an expansive application of the "joint participation" theory that does not require an active, knowing and willful conspiracy, advertising sponsors of the TSSAA state basketball tournament – whose sponsorship revenues might well be enhanced by the actions of the TSSAA – could also be subjected to Fourteenth Amendment claims under § 1983 as "joint participants" in the TSSAA's discriminatory conduct.[10]

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[10] This example is even more troublesome than those involving game officials or security guards, *supra*, because the particular action alleged to have caused the constitutional deprivation in the sponsorship example would be the action of the state actor TSSAA, not that of the private entity. Cohane's claim falls somewhere between these two examples – although he claims that the decision of the private entity the NCAA is what ultimately caused the deprivation of his liberty, the alleged misconduct that he points out is all misconduct committed by the state actor the University.

There are many other contractual relationships that organizations like the TSSAA use to assist in providing various services to their member schools and the students and families associated with those schools. The TSSAA contracts with a private company to post and sell photographs from TSSAA events. The TSSAA contracts with private individuals to assist in various aspects of its Student Services Program. The TSSAA contracts with a private insurance carrier to provide catastrophic insurance coverage for student-athletes. The TSSAA contracts with the NFHS to obtain rule books for the various sports. If the TSSAA is a "state actor" for all purposes, then in all of these activities, the private individuals or entities that contract with the TSSAA are at risk of liability as "joint participants" with the TSSAA under § 1983.[11]

Like the TSSAA, most of the NFHS member associations are made up predominantly of public schools. *Brentwood I*, 531 U.S. at 299. Only a small portion of the revenues of these associations comes from member school dues. *Id.* Critical to the ability of the member schools to maintain robust athletic programs is their ability to provide

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[11] The purpose of the requirements of "state action" under the Fourteenth Amendment and action "under color of law" under § 1983 is "to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004 (emphasis in original); *see also*, *Tarkanian*, 488 U.S. at 199 ("In the final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.'" (quoting *Lugar*, 457 U.S. at 937)). In each of the examples above, however, a private entity would be treated as jointly participating in state action based on a contract with another private entity, resulting in the imposition of Fourteenth Amendment liability upon actors a step further removed from the State. These combined effects of the "entwinement" theory in *Brentwood I* and the "joint participation" theory in *Lugar* as applied by the Second Circuit here illustrate an expansive constitutional reach that all but disregards the limits that the "state action" and "under color of state law" requirements are intended to preserve.

adequate financial support for those programs, not only through ticket sales but also through things like advertising revenues and through controlling costs. With a variety of avenues for spending their advertising or sponsorship dollars, private businesses will be less likely to spend those dollars on high school athletics (or other public school-related activities) if doing so may subject them to § 1983 liability as "joint participants" in the activities of the public schools and their associations. If a liberal "joint participation" standard leaves even routine contracting parties exposed to § 1983 liability because of the "state actor" status of an association like the TSSAA, the additional costs associated with that exposure will be passed on to the association in that contract. If service providers like officials and security companies, or even the NFHS itself, must confront or insure against constitutional liability for their conduct, the cost to associations like the TSSAA for obtaining those services will undoubtedly rise.[12]

[12] The difficulties inherent in the "joint participation" theory are not, of course, limited to those private organizations that deal with state high school athletic associations like the TSSAA. For example, The Southern Association of Colleges and Schools (SACS) is an organization that is aimed at the improvement of schools, both public and private, through an accreditation process based on satisfaction of a variety of standards. *See, www.sacscasi.org/region/standards/index.html.* Many of the member schools of the TSSAA, both public and private, are accredited by SACS or by other similar accrediting organizations. Under the Second Circuit's liberal application of the "joint participation" theory, a constitutional claim based on an act taken by a public school in an effort to comply with SACS accreditation standards could subject SACS to § 1983 liability as a "joint participant" in the public school's act.

C. Expansive application of the "joint participation" theory may result in the imposition of constitutional liability upon private schools.

The TSSAA bylaws include a provision requiring that the host school of an athletic contest be responsible for providing sufficient security and insuring orderly conduct on the part of all spectators. This bylaw, adopted and enforced by TSSAA as a "state actor" under *Brentwood I*, applies with equal force to both the public and private member schools of the TSSAA. Compliance with this bylaw will expose even a private school member of the TSSAA to § 1983 liability if the Second Circuit's liberal "joint participation" theory is upheld.

If Brentwood Academy, a private school member of TSSAA, requires a spectator to leave the gymnasium at an interscholastic basketball game because of something that spectator is yelling at an official or at players, then Brentwood Academy is arguably enforcing the TSSAA bylaw requiring the school to insure the orderly conduct of spectators. Under the "joint participation" theory as espoused by the Second Circuit, this act by Brentwood Academy officials taken in the enforcement of a TSSAA bylaw could subject Brentwood Academy to liability under § 1983 for the ejected spectator's First Amendment free speech claim. This is just one example of many where a private school that has joined the TSSAA may be subject to liability on constitutional claims for actions taken in accordance with TSSAA bylaws, simply because the TSSAA is a "state actor" under *Brentwood I*. Similar applications of the "joint participation" theory could lead to a due process claim against a private school that discharges a coach because of the coach's violations of TSSAA bylaws, or an equal protection claim against a private school that declines to award financial aid to a female or African-American

student in order to maintain its classification status within the TSSAA.[13]

This sort of exposure to liability under § 1983 will serve as a strong disincentive to private schools. Adding this substantial disadvantage to membership in associations like the TSSAA may lead those private schools to search for other alternatives, including the formation of separate private school associations, where the private schools would not be faced with the possible costs of defending or insuring against constitutional claims under § 1983. Since other NFHS member associations are likely to be treated as "state actors" under the entwinement rationale of *Brentwood I*, this disincentive and the consequences of it would not be unique to Tennessee. The separation of public and private schools for their athletic competition (and other interscholastic activities like band, chorus, forensics, and debate) would ultimately harm the schools and the families and children they serve in both the public and private sectors.

The "joint participation" theory should be restricted to cases involving true conspiracies between the State and a private entity to deprive a plaintiff of a constitutionally protected right, so that a private actor in such a case is held to act "under color of state law" only where the actor engages in an active, knowing and willful joint undertaking with the State to cause the deprivation.

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[13] TSSAA has two classifications that are relevant to this example, "Division I" for schools that do not provide financial aid to student-athletes, and "Division II" for schools that provide need-based financial aid to student-athletes. A school in Division I may provide need-based financial aid to a student, and some private Division I schools provide such aid, but a recipient of such aid is not eligible to participate in interscholastic athletics at a Division I school.

CONCLUSION

The NFHS and the TSSAA as *Amici Curiae* respectfully submit that the Second Circuit's decision should be reversed.

Respectfully submitted,

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