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

REPLY BRIEF OF PETITIONERS

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The brief in opposition reads as if the defendant here were SUNY-Buffalo—arguing that the only relevant question is whether the NCAA's private conduct may be "fairly attributed" to the state. Like the Second Circuit, and the respondents in *American Manufacturers Mutual Insurance Co. v. Sullivan*, Cohane suggests that "we need not concern ourselves with the 'identity of the defendant,'" 526 U.S. 40, 50 (1999) (citation omitted), or "the target of the remedy sought," Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1689 n.10 (2d ed. 1988). Whether the state may fairly be blamed for a private decision, however, is "obviously different from those cases in which the defendant is a private party." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). Cohane nevertheless fails to address—indeed, seems to embrace—the Second Circuit's misconception that *the University's* willful participation in the NCAA's private activity could subject *the NCAA* to constitutional liability.

As the *amicus* briefs make clear, that holding would subject to constitutional challenge the most mundane day-to-day actions of private and public entities. Am. Council on Educ. Br. at 8–12; Nat'l Fed'n of State High Schs. Ass'ns, et al. Br. at 7–13. It conflicts with decisions of this Court and other circuits, and condones an intolerable invasion into the sphere of private freedom that the state-action doctrine is designed to protect.

1. The petition explained that this Court and several justices have criticized the "joint participation" test of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Pet. 11–12. And in *Sullivan*, this Court held that although *Lugar* "contains general language about 'joint participation' as a test for state action … its language must not be torn from the context out of which it arose." 526 U.S. at 58.

Cohane concedes that *Sullivan* limited "*Lugar*'s relatively low bar for finding joint action," but argues that it is still "possible" for "joint action" to be found where there is

"improper cooperation" between the state and a private party. Opp. at 16–17 n.6. Cohane's position appears to be that so long as a plaintiff inserts the word "improper" before describing any parallel or cooperative conduct of private and governmental parties, a constitutional claim is alleged. *E.g.*, Opp. at 12, 13, 14, 17, 18, 19, 20 (invoking the word "improper" eleven times). As the petition explained, however, the only continuing validity of the "joint participation" test outside of the facts of *Burton* and *Lugar* is cases involving allegations that a private party conspired with a state actor to commit an *official act* that is obviously unlawful and directly harms the plaintiff. In *Adickes v. S.H. Kress & Co.*, it was an agreement for the officer to arrest a white teacher because she was attempting to eat with her black students. 398 U.S. 144, 172 (1970). In *Dennis v. Sparks*, it was allegations "that *an official act of the defendant judge* was the product of a *corrupt conspiracy* involving bribery of the judge." 449 U.S. 24, 28 (1980) (emphasis added); *see also Tarpley v. Keistler*, 188 F.3d 788, 792 n.2 (7th Cir. 1999) (noting that in *Adickes* and *Dennis* "the state actor's actions unquestionably caused the injury"). In each case, the private party was liable because it conspired with state actors to wield state power to do something genuinely corrupt and obviously unlawful.[1]

2. Cohane's principal theory, like the Second Circuit's, is that conspiracy allegations are unnecessary because the NCAA somehow becomes a state actor if "the University

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[1] Cohane accuses Petitioners of "a chronological sleight of hand," Opp. at 16 n.6, because *Lugar* came after *Adickes* and *Dennis*. The point is that *Lugar*'s expansion of *Adickes* and *Dennis* was promptly limited to pre-judgment attachment cases by *Lugar* itself (and later more forcefully by *Sullivan*) leaving the theory of *Adickes* and *Dennis* as the governing—and only—"joint participation" test for state action.

Cohane also looks to *West v. Atkins*, 487 U.S. 42, 51 (1988), for support. Opp. at 16. But this Court has made clear that in *West* "the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action." *Sullivan*, 526 U.S. at 55 (describing *West*).

willfully participated in joint activity with the NCAA," Pet. App. 5a, or if the university engaged in any "improper cooperation" with the NCAA. Cohane's absurd suggestion that the NCAA's liability as a state actor turns on whether *the University* cooperates points directly at the fundamental problem with the Second Circuit's analysis. A private party's liability cannot depend on what the state chooses to do. That would "intolerably broaden … the notion of state action under the Fourteenth Amendment," *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.10 (1978).

Cohane essentially argues the case for holding SUNY liable by framing the issue as whether it is fair to attribute the NCAA's conduct *to the University*.[2] But when a private party is sued for damages under §1983, it is not enough to find "state action" in the fact pattern; it must also be fair to "attribute" the use of state authority to the private defendant—such that it became a "state actor" or (put differently) acted "under color of law." Cohane's argument that "the complaint alleges sufficient facts to show that SUNY jointly participated in the NCAA's actions," Opp. at 18, says nothing about whether the NCAA wielded state power or whether "governmental authority … dominate[d] [the] activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

3. Perhaps realizing that his (and the Second Circuit's) principal argument simply cannot be right, as a backup Cohane tries to make this case sound more like *Dennis* and

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[2] *E.g.*, Opp. at 10 ("Whether a 'private actor operates as a willful participant in joint activity with the State or its agents' is one of 'a host of facts that can bear on the fairness of … an attribution' of a private party's 'seemingly private behavior' to the state.") (citation omitted); *id.* at 4 ("It is well-settled that the statute's provisions extend to private act[ion] when th[ose] actions are 'fairly attributable' to the state."); *id.* at 7 (a "'host of facts … bear on the fairness of … [such] an attribution'") (citation omitted); *id.* at 18 ("This case *is* 'the traditional state-action case' in which the relevant state action inquiry is 'whether [SUNY] participated to a critical extent in the NCAA's activities.'").

Adickes, by occasionally describing the NCAA's alleged conduct as "collusion" with the University. These are word games. The complaint alleges only parallel independent conduct and cooperation by the University with the NCAA's private investigation, but no meeting of the minds on any unlawful objective or means. *E.g.*, Pet. App. 30a (alleging that both participated in presenting the case against him). Every allegation cited by the Court of Appeals as demonstrating "collusion" was an allegation about what *the university* alone did, Pet. App. 4a–5a ("In particular, the complaint alleges that *the University* forced Cohane's resignation …, actively participated in the case against Cohane …, intimidated student-witnesses … by threatening to wrongfully withhold their degrees, suborned perjury …, and adopted the Report and its findings ….") (emphasis added), and begs the question whether the NCAA could have done anything differently to keep its own conduct—"improper" or not—from being transformed from a state law tort into conduct regulated by the Constitution. And Cohane's allegation that SUNY officials were "under the control of the NCAA," Pet. App. 30a, (or as he rephrases it in the opposition without any record citation—worked "at the NCAA's behest," Opp. at 5), when "SUNY officials threatened to withhold the students' degrees unless they complied with NCAA investigators," Opp. at 2, is just a conclusory assertion. Cohane never alleged that this "control" was anything more than SUNY's desire to comply with its membership obligations. This Court has already held that "even if we assume that a private monopolist can impose its will on a state agency …, it does not follow that such a private party is therefore acting under color of state law." *NCAA v. Tarkanian*, 488 U.S. 179, 198–99 (1988).

There is no genuine allegation that NCAA conspired to receive or itself used any state power. The basic allegations against the NCAA—that it "took steps to coerce, taint, and manipulate evidence," suborned perjury, or "disseminated a report based on the tainted and false evidence"—are only claims that the NCAA committed state law torts in the

course of investigating the allegations, interviewing witnesses, and presenting or considering evidence. Opp. at 13–14. These are not constitutional claims.

Cohane's suggestion that a conspiracy to abuse official power might be *inferred* from the University's cooperation is inconsistent with the settled law underlying *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). This issue arises frequently in antitrust cases, and the rule is that a secret conspiracy may not be inferred from evidence that is also consistent with independent parallel activity.[3] Surely the rule should be no less stringent when evaluating "joint participation" state action allegations.

That suggested inference is also flatly inconsistent with *Tarkanian*. Cohane argues that his "complaint differs materially from Tarkanian's allegations," Opp. at 5, because the NCAA and UNLV acted like "adversaries," while Cohane alleges a cooperative relationship. But UNLV assisted NCAA investigators "to locate and obtain information from persons with pertinent information," Brief for Pet'r, at 12, *Tarkanian*, 488 U.S. 179 (No. 87–1061), and Tarkanian pointed to the NCAA's letter to UNLV's president asking for his "cooperation and assistance to the end that complete information related to this matter may be developed," Br. for the Resp't at 11, *Tarkanian*, 488 U.S. 179 (No. 87-1061) ("Tarkanian Br."). Like Cohane, Tarkanian also emphasized UNLV's cooperation during the investigation and hearing,[4] and argued that the NCAA

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[3] *See Twombly*, 127 S. Ct. at 1966 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Baby Food Antitrust Litig.)*, 166 F.3d 112, 122 (3d Cir. 1999) ("[N]o conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."); 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* §§1410b, 1414, 1417b, 1417g, 1433a, 1434a, 1434c2 (2d ed. 2003).

[4] *Compare* Tarkanian Br. at 15–16 ("[T]he 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort which … is designed to place the responsibility for

could not have completed its work without UNLV's help. This Court's point in *Tarkanian* was that UNLV and the NCAA were in an inherently adversarial *posture*, which precluded any fair characterization of their parallel or "joint" activity as a conspiracy to violate Tarkanian's rights. The same is true here. SUNY was sanctioned in this investigation. Cohane's suggestion that his allegations are unique and that permitting them to go forward would not result in more lawsuits against the NCAA is entirely hollow. These allegations are just like Tarkanian's and other cases cited in the petition, Pet. 5 n.1, specifically, *Harrick v. Bd. of Regents of University of Georgia*, No. 04-0541, slip. op. (N.D. Ga. Apr. 15, 2004), and the NCAA is often sued by players or coaches alleging "cooperation" by a university.[5]

4. Cohane is able to argue that the circuits are not in conflict only because his peculiar view of the law allows him to disregard the crucial distinction between cases satisfying the requirements of *Dennis* and *Adickes* (a conspiracy to abuse official power) and cases like this one involving far less rigorous versions of the "joint participation" test. The conflict is not over *Dennis*-type claims, but rather over the application of *Burton* and *Lugar* beyond their unique facts.

Cohane argues, for example, that despite the fact that at least the Fourth, Fifth, and Sixth Circuits have explicitly

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determining the facts on the shoulders of both the institution and the enforcement staff in an effort to assist the Committee on Infractions in arriving at appropriate judgments.") *with* Opp. at 2 ("officials from both the NCAA and SUNY Buffalo participated in presenting the case against respondent at a January 2000 hearing of the Mid American Conference"); *id.* at 3 ("On February 9, 2001, respondent appeared at the hearing conducted by the [NCAA] Committee on Infractions. Both NCAA and SUNY officials participated in the hearing.").

[5] The district court did not hold that the NCAA is categorically exempt from §1983 liability. It held that it was "not persuaded by Plaintiff's argument that SUNY's cooperation … with the NCAA transformed its otherwise private conduct into state action," Pet. App. 16a, and that "[u]nder the circumstances, it cannot be said that SUNY Buffalo's alleged complicity in this investigation somehow transforms the NCAA's well-established private conduct into state action," *id. at* 17a. In other words, it rejected Cohane's weak attempts to distinguish *Tarkanian*.

limited *Lugar*'s joint participation theory to pre-judgment attachment cases (as this Court instructed), Pet. 16–18, those and other courts have still permitted §1983 liability against private parties "under the joint participation theory outside the prejudgment attachment context." Opp. at 21–24. But Cohane is only saying that the courts that have limited *Burton* and *Lugar* have not limited *Dennis* and *Adickes*. Cohane simply cites cases permitting *Dennis* allegations to go forward,[6] or cases that cite *Burton* or *Lugar* when rehashing the history of this Court's jurisprudence,[7] or cases that are totally inapposite.[8] None of the cases cited in his footnotes 8–11 support Cohane's position, and several endorse the NCAA's argument.[9]

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[6] *See Abbott v. Latshaw*, 164 F.3d 141, 147–48 (3d Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999) (allegations satisfy *Dennis* where private party conspired with and paid police officer to repossess a car for her); *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 385–88 (5th Cir. 1985) (jointly planned scheme to illegally enter property under the authority of the police, disassemble oil pipelines to insert microchips to track the flow of oil); *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 905–06 (6th Cir. 2004) (allegations that police conspired with company officers to threaten and intimidate striking workers with police authority); *Revis v. Meldrum*, 489 F.3d 273, 290–91 (6th Cir. 2007) (acknowledging that a conspiracy to abuse official power states a claim and citing *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002), cited in the petition (at 22–23) as establishing the correct standard).

[7] *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005),

[8] *See Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 7–8 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999).

[9] *See Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000) (conspiracy with police to have a child declared by officials a ward of the state; acknowledging that there could be no liability if all the parties did was act independently); *Thurman v. Village of Homewood*, 446 F.3d 682, 687 (7th Cir. 2006) (*Dennis* case acknowledging that a private party does not act under color of law when it does something that a private citizen is entitled to do without state assistance, regardless of state official's contributing conduct in the fact pattern); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277–79 (11th Cir. 2003) (private party was acting as a surrogate for the state and therefore with state authority); *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584,

Cohane incorrectly suggests that the Fourth Circuit's decision in *DeBauche v. Trani*, 191 F.3d 499, 507–08 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000), was limited by *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir.), *cert. denied*, 534 U.S. 952 (2001). Opp. at 24. After a long discussion of this Court's state action jurisprudence, *Mentavlos* just stated that "[a]lthough not directly pertinent to the state action inquiry here, state action has also been found in circumstances where a private actor operates as a 'willful participant in joint activity with the State or its agents.'" 249 F.3d at 311 (quoting *Lugar*, 457 U.S. at 941). It in no way intimated that, contrary to *DeBauche*, a private actors' conduct could be converted into state action merely by some contributing conduct by a state actor, nor did it conduct any joint participation inquiry. This case would still have been dismissed under *DeBauche* in the Fourth Circuit.

5. Cohane has no response to the obvious force of Justice Powell's dissent in *Lugar*, and essentially concedes that at least in the state coercion cases a finding that a private party's conduct is fairly attributable to the state may not warrant a conclusion that it was a state actor or acted "under color of law." Opp. 27–28. He also concedes that the circuits are split on that issue, but wrongly suggests that the "conflict is irrelevant" because the theory of state action here was joint participation not state coercion. Opp. at 28 n.15.[10] But the same basic insight applies; holding a private

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596 (10th Cir. 1999) (board composed of state officials and therefore entwined with the state); *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 967 (1992) (commenting that where a private party receives overt and significant state participation, such that it is effectively granted state authority, it is acting under color of law); *Berger v. Hanlon*, 129 F.3d 505, 514–15 (9th Cir. 1997), *cert. denied*, 525 U.S. 961 (1998) (reasoning that "the joint action test … is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party," and finding "not only a verbal agreement, but a written contractual commitment" allowing media to enter private land "under the government's cloak of authority.")

[10] In a case decided after the petition was filed, a concurring Sixth Circuit judge found that a private corporation that registers and

party liable requires some real inquiry into whether the conduct found to be state action is genuinely attributable to the private party. This case would resolve the conflict over the coercion cases while clarifying the broader underlying confusion that conflict stems from.[11]

6. This Court's denial of review in *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir.), *cert. denied*, 76 U.S.L.W. 3168 (U.S. Oct. 9, 2007), is irrelevant. The private party was given complete control over the city's police force in order to enforce private speech restrictions. *Id.* at 595.[12]

7. Cohane suggests that review is inappropriate because this case was resolved on a motion to dismiss. This Court

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maintains records of thoroughbred horses, "did not act 'under color of' law for purposes of §1983" when it denied the plaintiff the use of his preferred name, despite finding that "[w]ith respect to Defendant K[entucky] H[orse] R[acing] A[uthority]," the state entity that denied plaintiff the ability to race his horse unless properly registered, "I conclude that state action is present." *Redmond v. The Jockey Club*, No. 05-6607, 2007 WL 2250978, at *7 (6th Cir. Aug. 2, 2007) (Clay, J., concurring).

[11] Cohane wrongly suggests that the NCAA waived the argument that it did not act under color of law. The NCAA argued below that the state's conduct could not convert its private conduct into state action and that it did not act under color of law, Mem. of Law in Supp. of Motion To Dismiss, at 8 (W.D.N.Y. Oct. 1, 2004) ("MTD"), and that Cohane's reliance on *Lugar* was misplaced, Reply Mem. in Further Supp. of MTD, at 4 (W.D.N.Y. Jan. 21, 2005). The same arguments were made on appeal. *E.g.* Br. of Defs.-Appellees, at 6–7 (2d Cir. May 26, 2006) ("Mere cooperation with a public institution is insufficient to convert private decisions into state action."). That is just another way of saying that even if the state's conduct qualifies as "state action," that does not mean that the NCAA's conduct was "under color of law." And, the "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); *see also* Robert L. Stern et al., *Supreme Court Practice* § 6.25, at 421 (8th ed. 2002).

[12] Cohane also repeatedly cites *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001), but never seriously argues that the "entwinement" theory would apply here. A finding of entwinement regarding the specific conduct at issue effectively means that the private party is an alter ego for the state and acts with state authority; thus, it would always be a proper defendant.

resolved many of the seminal state action cases in the same posture, including ones Cohane relies upon. *E.g.*, *Sullivan*, 526 U.S. 40; *Lugar*, 457 U.S. 922; *Polk County v. Dodson*, 454 U.S. 312 (1981); *Dennis*, 449 U.S. 24; *Flagg Bros.*, 436 U.S. 149. State action must be resolved at this stage to ensure that private parties are not lightly forced to run the gauntlet of §1983 litigation. The unpublished nature of the decision also has little significance. Citation to unpublished opinions is permitted under the Federal Rules, and the Second Circuit's use of a summary order "does not mean that the court considers itself free to rule differently in similar cases," 2d Cir. R. 32.1 cmt. Nor is this the first time the Second Circuit has ignored this Court's attempts to limit *Lugar*. *See Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1146 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

8. A GVR in light of *Twombly* is insufficient. It would do nothing to correct the legal standard that governs state action determinations in this and future cases. If this Court nevertheless declines review of the state action issue, a GVR is certainly warranted. The Second Circuit twice invoked the "no set of facts" standard this Court rejected in *Twombly*, and interpreted it to permit a complaint to go forward whenever discovery might uncover some facts to support the claim (under the court's own flawed conception of the governing legal standard). Cohane's notion that a GVR would serve no purpose because the district court will apply *Twombly* in any event is plainly incorrect. The purpose of a GVR *in every case* is to alert the lower courts to the need to apply new precedent. There is no reason to assume the district court would entertain reconsideration of the NCAA's Rule 12(b)(6) motion in contravention of the Second Circuit's mandate if this Court has refused to GVR in light of *Twombly*. Without this Court's intervention the case will proceed forward through discovery. It may later be dismissed *on summary judgment*, but that defeats the whole purpose of the *Twombly* rule.

CONCLUSION

The petition for certiorari should be granted.

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