No. 21AP1525

In the Supreme Court of Wisconsin

HAYDEN HALTER and SHAWN HALTER,

PLAINTIFFS-APPELLANTS-RESPONDENTS,

v.

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION,

DEFENDANT-RESPONDENT-PETITIONER.

NON-PARTY BRIEF OF JOHN GARD, DAVID GOSA, ERIC JOHANSKI, MARK LIEN, CARRIE AND PAUL MILLER, AND AMY ROBINSON IN SUPPORT OF PLAINTIFFS-APPELLANTS-RESPONDENTS

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INTRODUCTION

High school sports have become entwined with the American educational model. They are a way in which society encourages excellence and bestows public honor. In some parts of this nation, a state championship is practically a knighthood. More importantly, the State uses high school sports to teach universal values, including dedication and teamwork. *See generally Barnhorst v. Mo. State High Sch. Activities Ass'n*, 504 F. Supp. 449, 457 (W.D. Mo. 1980) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973)) ("It is beyond cavil that education is a traditional function of the [S]tate and 'perhaps the most important function of state and local government.' Extracurricular activities are an important component of an education in today's modern society.").

While high school sports play an integral role in the model—and, indeed, in the culture—they have not always exemplified the principles this nation holds dear. The Titans are remembered because they showed how sports could unify a racially segregated people. *See generally* Rember the Titans (Walt Disney Pictures & Jerry Bruckheimer Films 2000) (portraying a story, based on actual events, of an attempt to integrate a public high school's football team in 1971). Similarly, Congress enacted Title IX for a reason—to ensure that girls, too, can benefit from participating in sports. 20 U.S.C. § 1681 (prohibiting sex discrimination in extracurricular activities).

Against this backdrop, this action is unsurprisingly significant to Wisconsinites, including roughly 90,000 student-athletes, their parents, and public school officials. *WIAA Partnerships*, WIAA (last visited Oct. 3, 2024), https://www.wiaawi.org/About-WIAA/WIAA-Partnerships. For

context, in early 2019, Hayden Halter, a sophomore, became a wrestling state champion. *Halter v. WIAA*, 2024 WI App 12, ¶¶1–2, 411 Wis. 2d 191, 4 N.W.3d 573. The Wisconsin Interscholastic Athletic Association (WIAA) has fought to revoke his title for years. It asks this Court to undo Mr. Halter's victory, thereby giving the WIAA one of its own.

How or why Mr. Halter invoked the WIAA's wrath is bordering on immaterial: The WIAA says it should win because it is not subject to a rulebook. More technically, it says it is not a state actor—i.e., the federal and state constitutions do not bind it. Free speech? Optional. Due process? Discretionary. Equal protection? Maybe. Under the WIAA's theory, it could even bring back segregated sports without a constitutional problem. But for Title IX, it could also eliminate girls-only teams.

The WIAA's position is absurd.

The WIAA has, with the help of the State, substantially monopolized high school sports. In the words of the court of appeals, "Wisconsin public high schools have outsourced athletic programming and competitions" to the WIAA. *Id.*, ¶16. Every public high school in the State belongs to the WIAA, accounting for approximately 80 percent of WIAA members. *Id.* The WIAA is so entwined with the State that the Wisconsin Statutes presuppose its existence and acknowledge its unique role in high school sports—even though the legislature never voted to create the WIAA. *E.g.*, Wis. Stat. § 118.293(2) ("In consultation with the . . . [WIAA], the department shall develop guidelines and other information for the purpose of educating athletic coaches and pupil

athletes and their parents or guardians about the nature and risk of concussion and head injury in youth athletic activities.").

The WIAA, like similar associations across the nation, not only consists primarily of public schools but purports to bind student-athletes, parents, and even public school officials, declaring in its constitution: "The Board of Control [of the WIAA] shall have general control over all activity and persons involved with the official school teams in any sport sponsored by [the WIAA]." WIAA Const. art. VI, § 2(A), https://www.wiaawi.org/Portals/0/PDF/Publications/2022-23handbook.pdf. *See generally* Diane Heckman, *Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics*, 5 Va. Sports & Ent. L.J. 1, 7–9 (2005) ("Such rules may govern compliance with academic requirements, physical ability[] and appearance, age and length of athletic eligibility, sex and marital status, use of tobacco, alcohol or drugs, recruiting, transfers to other member schools, competing only in certain athletic association-approved athletic events, amateurism, and entry by schools into athletic associations.").

For these reasons, the WIAA is a state actor—or at least, this Court should treat it as such.

STATEMENT OF INTEREST

Parents naturally want the best for their children and are tragically affected by the WIAA's often arbitrary and capacious conduct. *See, e.g.*, Corrinne Hess, *WIAA Reconsidering After Banning Student Athlete from Track Competition*, Wis. Pub. Radio (May 16, 2024) ("The association . . . ruled last week that senior Josh Onwunili was ineligible because his parents live in Ghana, Africa."),

https://www.wpr.org/news/wiaa-reconsidering-after-banning-student-athlete-from-track-competition.

This brief is filed on behalf of parents of student-athletes, including some enrolled in public schools, who are required to obey the WIAA if they wish to compete. These student-athletes have constitutional rights. *See, e.g.*, *Duffley v. N.H. Interscholastic Athletic Ass'n*, 446 A.2d 462, 463 (N.H. 1982) ("[I]t can hardly be argued that high school students wishing to participate in interscholastic athletics shed all of their constitutional rights at the entranceway to the New Hampshire Interscholastic Athletic Association."). As advocates and guardians, these parents seek to safeguard those rights—not to mention their own—by ensuring the WIAA is not legally entitled to do whatever it wants. This brief is also filed on behalf of a coach who similarly must obey the WIAA if he wishes to field a team.

STATEMENT OF THE ISSUE

Is the WIAA bound by the federal and state constitutions, given that it has the apparent power to bind the public, including student-athletes, parents, and even public school officials?

ARGUMENT

Yes. Courts across this nation have treated similar associations as state actors for decades. This Court should follow the overwhelming trend. From the point of view of a student-athlete, parent, or public school official, the WIAA unquestionably exercises state power, affecting their day-to-day lives. A contrary conclusion ignores reality. *A.H. ex rel. Holzmueller v. Ill. High Sch. Ass'n*, 263 F. Supp. 3d 705, 719–20 (N.D. Ill. 2017) ("Any student from a public high school who competes in the hopes of making it to 'state' would understand that the IHSA and its

tournaments are deeply interwoven with the public schools and their athletics programs."), *aff'd*, 881 F.3d 587 (7th Cir. 2018).

I. Nearly every court to have considered whether an interscholastic athletic association is a state actor has answered in the affirmative.

Nearly every court to have considered this issue has held that an interscholastic athletic association is—or at least should be treated as—a state actor. *E.g.*, Doyice J. Cotton & John T. Wolohan, Law for Recreation and Sports Managers 436 (3d ed. 2003) ("Historically, most courts have found . . . interscholastic athletic associations to be state actors."). Indeed, the Eastern District of Wisconsin held that the WIAA was a state actor in the 1970s. *Leffel v. WIAA*, 444 F. Supp. 1117, 1119 (E.D. Wis. 1978).

As explained in one article, "[t]hese decision . . . [are] based on the combined circumstances of extensive state involvement in these organizations and extensive 'delegation' to these organizations of significant power to control the athletic activities of state institutions." William G. Buss, *Due Process in the Enforcement of Amateur Sports Rules*, *in* Law & Amateur Sports 1,5 (Ronald J. Waicukauski ed., 1982); *see also* John J. Miller & Kristi L. Schoepfer, Legal Aspects of Sports 222 (2d ed. 2017) ("Based on the significant case law precedent, . . . [interscholastic] athletic associations are generally considered state actors when they pass regulations regarding a student-athlete's participation in sports.").

The Sixth Circuit was, at one time, a notable exception. Josiah N. Drew, Note, *The Sixth Circuit Dropped the Ball: An Analysis of* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n *in Light of the Supreme Court's Recent Trends in State Action*

Jurisprudence, 2001 BYU L. Rev. 1313, 1314 ("Recently, the Sixth Circuit held that Tennessee's Secondary Athletic Association . . . , which traditionally makes all of the rules and guidelines that govern high school athletics for that state, is *not* a state actor. This is groundbreaking. Every federal circuit court and every state's highest court that has ever entertained the issue of whether state high school athletic associations are state actors had nodded in the affirmative."); *see also* Joseph P. Trevino, Comment, *The WIAA as a State Actor: A Decade Later,* Brentwood Academy's *Potential Effect on Wisconsin Interscholastic Sports*, 2011 Marq. Sports L. Rev. 287, 287 (indicating the Sixth Circuit was an outlier because "courts nationwide [had] found high school athletic associations to be state actors").

In 1999, the Sixth Circuit held that an interscholastic athletic association was not a state actor; however, the United States Supreme Court reversed that decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001).

The United States Supreme Court explained that a nominally private actor can be a state actor under various tests:

- when the private actor is exercising "coercive power" on behalf of the State;
- when the private actor receives "significant encouragement, either overt or covert" from the State;
- when the private actor has been "delegated a public function;"
- when the private actor operates as a "willful participant in joint activity with the State or its agents;"
- when the private actor is "controlled" by the State; and
- when the private actor is "entwined" with State "control," "policies," or "management."

Id. at 296 (collecting decisions). Notably, these tests often emphasize similar facts. *See id.* at 295–96.

The United States Supreme Court applied the last of these tests, holding that a Tennessee interscholastic athletic association should be treated as a state actor. *Id.* at 302. The State did not fund the association or pay its employees, although they could join the Tennessee public retirement system. *Id.* at 291–92. Its revenue was derived primarily from ticket sales and dues paid by member schools. *Id.* at 291. Even still, the Court emphasized other facts; among them, most association members were public schools, and the governing body was, "at the time in question," made up entirely of public school officials. *Id.* at 298–300.

The most important fact, however, was that the Tennessee association set rules that bound the public:

> Interscholastic athletics obviously play an integral part in the public education of Tennessee, where nearly every public high school spends money on competitions among schools. Since a pickup system . . . would not do, these public teams need some mechanism to produce rules and regulate competition. The mechanism is an organization overwhelmingly composed of public school officials who select representatives . . . , who in turn adopt and enforce the rules that make the system work. Thus, by giving these jobs to the [a]ssociation, the 290 public schools in Tennessee belonging to it can sensibly be seen as exercising their own authority to meet their own responsibilities.

Id. at 299.

Since *Brentwood*, courts applying it have reached the same conclusion about other interscholastic athletic associations, even with different facts. Miller & Schoepfer, Legal Aspects of Sports, 221 ("Although the . . . [United States Supreme Court] acknowledged [in *Brentwood*] that whether a state [interscholastic] athletic association is

a state actor is a case specific, fact bound inquiry, the overwhelming majority of cases that have considered this issue have reached the same conclusion."); *see, e.g.*, *A.H.*, 263 F. Supp. 3d at 719–20 (holding an Illinois association is a state actor even though public school officials had a less "formal role" in its day-to-day operations than such officials had in the Tennessee association); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504, 511–12 (6th Cir. 2004) (holding a Michigan association is a state actor even though association employee eligibility to join a public retirement system was being phased out), *vacated and remanded on other grounds*, 544 U.S. 1012 (2005), *aff'd*, 459 F.3d 676 (6th 2006).

Commentators have severely criticized courts that have not followed the overwhelming trend. Patrick McCormick, Comment, *Disregarding* Brentwood: *State Courts Ignoring the Supreme Court's Decision on State Action*, 33 Marq. Sports L. Rev. 819, 819 (2023) (explaining "[t]he overall trend" has been "to hold that . . . [interscholastic athletic associations] are state actor[s]," and arguing courts that have rebuked this trend ignored or misapplied *Brentwood*).

In fact, since *Brentwood*, the WIAA has tried to avoid having any court rule on whether it is a state actor, apparently as a litigation strategy. In *WIAA v. Gannett Co.*, the WIAA stipulated that it was a state actor, and while the Seventh Circuit did not address the issue directly, it indicated it agreed with the parties. 658 F.3d 614, 616 (7th Cir. 2011) ("The parties have stipulated that [the] WIAA is a state actor. . . . We note that in other cases where courts had to decide if similar organizations were state actors, the answer has been yes."); *see also*

Trevino, *The WIAA as a State Actor*, at 301 (discussing a 2008 circuit court decision from which the WIAA apparently did not appeal, in which the court concluded it is a state actor). As one commentator wrote in 2023: "It seems that the . . . [WIAA] believes that it will one day become a state actor, and . . . [it is] not taking a position to fight that determination. If . . . [it] were to attempt to fight that designation, . . . [it] would most likely fail." McCormick, *Disregarding* Brentwood, at 833.

Indeed, the WIAA seemingly employed this strategy in this very action. As the court of appeals explained, "[the] WIAA's status as a state actor was not originally an issue in this case: As it did in . . . *Gannett* . . . , [the] WIAA chose not to challenge the . . . assertion that it is a state actor . . . ." *Halter*, 411 Wis. 2d 191, ¶12. The court, however, exercised its discretion, ordered supplemental briefing, and held that the WIAA is a state actor, following the overwhelming trend. *Id.* Likely, had the court assumed without deciding that the WIAA is a state actor, this action would not even be before this Court.

II. This Court should hold that the WIAA is a state actor, emphasizing that it has the apparent power to bind the public.

This Court should follow the overwhelming trend and help ensure that student-athletes are treated justly by concluding that the WIAA is a state actor. Perhaps public school officials can form such an association for bureaucratic convenience, but that association becomes entwined with the State. *Robbins ex rel. Robbins v. Ind. High Sch. Athletic Ass'n*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) (holding an Indiana association is a state actor because such associations are "entirely dependent upon the absolute cooperation and support" of the State for their "existence").

This Court should emphasize that the WIAA exercises state power. Only with this power can these associations accomplish their mission. As the United States Supreme Court once said, "[i]t is . . . axiomatic that a state may not induce, encourage[,] or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (quoting *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)). In the words of the Eastern District of Wisconsin, "[a] program of interscholastic sports, *after having been provided*, must be administered without violation of the Fourteenth Amendment . . . ." *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1110 n.3 (E.D. Wis. 2001) (quoting *Robins*, 941 F. Supp. at 791).

At most, a nominally "private entity," like the WIAA, may bind the public—i.e., "wield government power"—only if it has such authority, and even then, it must be subject to the same constitutional restraints as the government would be if it wielded that power directly. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 423 (5th Cir. 2024).

The WIAA has the apparent power to order student-athletes, parents, and even public school officials to do various things, thereby making it a state actor (or at least making such treatment appropriate). Decades ago, the attorney general explained:

> When the [public] school authorities by proper action take the necessary steps which result in the school becoming a member of the WIAA, the effect is to make the rules and regulations of that association those of the school. Hence, so far as the individual pupil is concerned, the rules of the association are rules of the school authorities and he [or she] must comply with them to compete.

38 Wis. Att'y Gen. Op. 82, 87–88 (1949). From the standpoint of the student-athlete or parent, a decision to suspend the student-athlete is no different whether it is made directly by a public school official or by the WIAA. The WIAA suspension decision is every bit as binding.

At bottom, when public schools form (or help form) a nominally private association and then let that association bind the public, the association is a state actor. That is precisely what the WIAA is, and student-athletes and their parents deserve to have their rights protected.

Indeed, as many parents and their children have experienced, the WIAA is a state actor. The WIAA has tremendous power—much more so than many government agencies. It can control the daily lives of student-athletes and parents. Student-athletes must either forgo participation in an integral part of the American educational model or obey the WIAA. Any ruling that the WIAA is not a state actor ignores the lived experiences of those who have been put to this choice.

CONCLUSION

This Court should follow the overwhelming trend and hold that the WIAA is a state actor, especially given the WIAA's apparent power.

Dated: October 4, 2024.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) and § (Rule) 809.81(4). The length of this brief is 2,964 words as calculated by Microsoft Word.

Dated this 4th Day of October, 2024.

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