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STATE OF WISCONSIN

SUPREME COURT
Case No. 2021AP001525

HAYDEN HALTER AND SHAWN HALTER,

Plaintiffs-Appellants,

v.

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION,

Defendant-Respondent-Petitioner,

PETITION FOR REVIEW

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PETITION FOR REVIEW

The Wisconsin Interscholastic Athletic Association ("WIAA"), the Respondent below, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to WIS. STAT. § 808.10 and WIS. STAT. § 809.62 to review the decision and order of the Court of Appeals, District II, in *Hayden Halter and Shawn Halter v. Wis. Interscholastic Athletic Ass'n*, Case No. 2021AP001525, filed on February 28, 2024, which reversed and remanded the decision and order of the Circuit Court for Racine County, the Honorable Eugene A. Gasiorkiewicz presiding.

I. ISSUES PRESENTED FOR REVIEW

1. Is the WIAA a state actor?

Court of Appeals Answer: Yes. The court of appeals held that the WIAA is a state actor for purposes of this appeal under the United States Supreme Court's holding in *Brentwood Acad. v. Tenn. Secondary Schs. Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 294, 148 L. Ed. 2d 807 (2001).

2. Are the Halters entitled to judicial review of the WIAA's decision to suspend Hayden Halter from the 2019 varsity wrestling regional event and to deny him an internal appeal to the body's Board of Control?

Court of Appeals Answer: Yes. The court of appeals held that limited judicial interference with the WIAA's interpretation and application of its own rules is appropriate under the circumstances of this case. The court of appeals held that Hayden Halter has a legally protectable right to have WIAA eligibility and appeal rules applied to him in a fair, reasonable, and nonarbitrary manner.

3. Are the Halters entitled to certiorari relief?

Court of Appeals Answer: Yes. The court of appeals held that the WIAA applied its suspension and appeal rules in an arbitrary, oppressive, or unreasonable manner and as an exercise of its will not its judgment.

4. Are the Halters entitled to declaratory relief reinstating Hayden Halter's 2019 state title and points?

Court of Appeals Answer: Yes. The court of appeals held that the Halters were entitled to a declaratory judgment reinstating Hayden Halter's 2019 state title and points because he has a legally protectable right to have WIAA eligibility and appeal rules applied in a fair, reasonable, and nonarbitrary manner.

5. Are the Halters entitled to a permanent injunction?

Court of Appeals Answer: Yes. The court of appeals held that the circuit court erroneously exercised its discretion by failing to recognize that the WIAA is a state actor and that Hayden Halter has an expectation that WIAA will apply its rules and regulations in accord with their terms and in a manner that is not arbitrary, oppressive, or unreasonable and is an exercise of its judgment rather than will. The court of appeals held that Hayden Halter would be irreparably harmed absent a permanent injunction reinstating his 2019 state title, wins, points, and accompanying records and benefits.

II. BRIEF STATEMENT OF CRITERIA FOR REVIEW

Review should be granted because a decision by the supreme court will help develop and clarify the appropriate bounds of judicial intervention in cases concerning a voluntary high school athletic association's interpretation and application of its own, member chosen rules to non-member student athletes.

Review should also be granted because the court of appeals' holding is in conflict with controlling precedent of the supreme court which prohibits purely advisory opinions. Specifically, the court of appeals ruled that the WIAA is a state actor when there was not an actual controversy on that issue in this case. Further, state action was not an element of the claims the court of appeals ultimately decided.

Review should also be granted because the case presents novel questions, the resolution of which will have statewide impact. These questions include whether the WIAA is a state actor and whether its rules and regulations give rise

to legally protectible rights in non-member student athletes who participate at over 500 member schools. These questions are not factual; rather, they present legal questions of the type that are likely to recur unless resolved by the supreme court.

Finally, review should also be granted because the court of appeals' decision is in conflict with controlling precedent of the Wisconsin Supreme Court, which affords WIAA a presumption of correctness and validity in decisions subject to certiorari review.

III. STATEMENT OF FACTS AND OF THE CASE

-Nature of the Case-

At its present stage, the nature of this case has been reduced to several issues, including the state actor status of the WIAA; the appropriate bounds of judicial intervention in the WIAA's interpretation and application of its rules to student-athletes; the legally protectible rights, if any, that WIAA rules afford student athletes; and whether the Halters presented sufficient evidence below to overcome the presumption that the WIAA correctly applied its rules to Hayden Halter.

This case has its origin in a February 2, 2019 Southern Lakes Conference wrestling meet. At this meet, Hayden Halter, a sophomore wrestler for Waterford High School, received two unsportsmanlike conduct violations – one for swearing at an official and a second for taunting an opposing crowd. Per WIAA Rules, the consequence of Halter's ejection would be his suspension from the "next competitive event." Relying on the history of the rule, published guidance, and past practice, WIAA deemed Halter's next competitive event to be varsity regionals set for the following Saturday, February 9, 2019.

Halter took the position that his suspension was served when he was registered for and sat out of a lower-level, junior varsity event – the Badger Invitational – on February 5, 2019. The WIAA refused to acknowledge the Badger Invitational as satisfying Halter's suspension. Halter disputed the correctness of the calls leading to his ejection and the WIAA's refusal to

acknowledge the intervening junior varsity event as satisfying the suspension resulting from his ejection. Halter requested and was denied an appeal to the WIAA's governing body – the Board of Control.

-Procedural History of the Case and Dispositions Below-

On February 7, 2019, the Halters commenced a civil action against the WIAA in Racine County Circuit Court. The Halters' Complaint alleged that WIAA was a state actor subject to certiorari review. The Complaint further alleged that WIAA's actions violated Hayden Halter's procedural due process rights under the Wisconsin State Constitution.

On February 8, 2019 (the day prior to the varsity regional event), Halter secured a temporary restraining order from the Racine County Circuit Court, Judge Michael Piontek presiding, permitting him to wrestle in the varsity regional event and subsequent WIAA State Tournament series. Judge Piontek subsequently denied dispositive motions on both sides. Following Judge Piontek's retirement, the matter was tried to Judge Eugene Gasiorkiewicz on May 18 and 19, 2021.

At trial, the Halters contested the correctness of the officials' calls that led to Hayden Halter's disqualification and subsequent suspension, the WIAA's interpretation and application of the next competitive event to the varsity regionals, and WIAA's refusal to permit an appeal to the WIAA Board of Control.

The WIAA did not contest the assertion that it was a state actor for purposes of this case only. Rather, WIAA argued that the Halters had failed to overcome the presumption of correctness to warrant certiorari relief from the officials' judgment calls and the WIAA's interpretation and application of the next competitive event rule. WIAA further argued that Hayden Halter could not state a constitutional claim because the law does not recognize participation in interscholastic athletics as a constitutionally protected property interest.

On June 2, 2021, Judge Gasiorkiewicz issued an oral ruling denying all relief requested by the Halters, rendering judgment in favor of the WIAA in all respects, and dismissing the matter. Judgment was entered on June 4, 2021.

On September 2, 2021, the Halters initiated an appeal to the Wisconsin Court of Appeals, District II. In their appeal, the Halters abandoned any dispute concerning the correctness of the officials' calls. Instead, the Halters focused only on the WIAA's interpretation and application of the next competitive event rule and refusal to allow Halters an internal appeal to the WIAA Board of Control.

Following the completion of briefing, the court of appeals requested further briefing on several issues, including:

> Is WIAA a state actor? Please provide a clear answer based upon the facts and law as to why or why not.

However, because the WIAA's state actor status was not contested in the circuit court, there was limited opportunity to develop a record on the factors that have been established by the United States Supreme Court for analyzing one's state actor character. Some evidence of state actor status came into the record if at all peripherally. Nonetheless, WIAA endeavored to answer the court of appeals while staying within the confines of the record below.

On February 28, 2024, the court of appeals issued its decision and order with Judge Neubauer dissenting. The court of appeals reversed the circuit court and remanded the case with directions to enter an injunction consistent with its opinion.

Statement of Facts

WIAA rules and their application in this case.

On Saturday, February 2, 2019, Hayden Halter, a Waterford Union High School sophomore, was wrestling a Union Grove High School student in the 120-pound final at the Southern Lakes Conference wrestling tournament. R. #79, at 1. At the conclusion of the match, Halter received two separate unsportsmanlike conduct penalties for swearing and taunting. R. #140, at 220-21. R. #116, at 9;

#140, at 222; and #141, at 25, 45, 52, and 54. These two penalties resulted in his ejection. *Id.* and R. #83, at 1 and #140, at 229.

Per Winter Season Regulations, an ejection results in suspension from the next competitive event. R. #85, at 1 and #141, at 89. In Halter's case, the next competitive event would be the varsity regionals. R. #141, at 93. Failure to compete at regionals would mean that Halter was out of the State Tournament series altogether. Ap., at 87-92[1]; R. #87, at 2-3; #140, at 209; and #141, at 98-100. The consequence of Halter's ejection as a result of the calls, however, is governed by the WIAA rules. R #99.

The WIAA is governed by a constitution, bylaws, rules of eligibility and season regulations. R. #113, at 4. Halter's ejection gave rise to the following WIAA Rule, which is part of the Winter Season Regulations for wrestling:

> A student, disqualified from a contest for flagrant or unsportsmanlike conduct, is suspended from interscholastic competition for no less than the next competitive event (but not less than one complete game or meet).

Ap., at 86; R. #113, at 20. The rule was adopted by the WIAA membership in 1995. Ap., at 87-92; R. #87, at 1-3 and R. #141, at 98-99. At issue in this case is the meaning of the term "next competitive event." Ap., at 86; R. #113, at 20.

The varsity regionals were the start of the WIAA tournament series. *See* R. #141, at 108-09. Therefore, if Halter's next competitive event was the varsity regional event, he would not compete in the remainder of the WIAA State Tournaments. *See id.* From the evidence admitted at trial, this scenario was envisioned by the members when the rule was originally adopted. Ap., at 87-92; R. #87, at 1-3. Meeting minutes from 1995 revealed the following inquiries:

> Question: "[I]n wrestling, if during tournament competition a wrestler was disqualified would he be able to advance?"
>
> Answer: "[I]n tournaments if a wrestler was disqualified for unsportsmanlike conduct he could not advance."

[1] Citations to "Ap." are in reference to the Appendix filed with this Petition.

> Question: "[I]f an unsportsmanlike disqualification took place in an individual sport in the final regular season contest, would it mean that the athlete was then out of tournament competition?"
>
> Answer: "Yes."

Id. at Ap., at 88-89; R. #87, at 2-3.

At the time of Halter's ejection, and long before the ejection, the WIAA had published guidance on the application of the "next competitive event" with several examples. R-Ap., at 28; R. #86 and R. #141, at 91. One such example provides:

> **Question:** A player was ejected from a varsity football game, on Saturday, for unsportsmanlike conduct. There is a junior varsity game scheduled for next Thursday, with the next varsity game being next Saturday. When does this athlete serve his suspension?
>
> **Answer:** This suspension must be served at the next varsity contest, which is next Saturday. A suspension received at a higher level cannot be satisfied by missing a lower-level contest.

Ap., at 93; R. #86.

Another example highlighted during trial testimony provides:

> **Question:** A player is ejected, for unsportsmanlike conduct, from a J.V. football game, on Thursday night. There is a varsity game scheduled for Saturday, with the next J.V. game being scheduled for next Thursday night. When does this player serve his suspension?
>
> **Answer:** The suspension must be served by missing the appropriate game. If the athlete was slated to play in the varsity game on Saturday, he serves his suspension by missing that game. If he normally would not play in that game, he must miss the junior varsity game on the following Thursday night.

Id.

The guidance specifically notes that the examples are not all inclusive and goes on to note: "If an athletic director has questions, relative to a specific interpretation, he/she should call the WIAA Office." *Id.*

WIAA Deputy Director Wade Labecki testified that the rule has consistently been applied so that the athlete serves the suspension with a contest

he or she would have otherwise participated in. R. #141, at 97, 100. As Labecki explained, a student-athlete "can't substitute a level that [] [he or she] is not a regular person on." R. #141, at 97. When questioned on the intent behind the rule, Labecki explained:

> The rule was brought by the membership a couple decades ago and it's to go ahead and provide a consequence for the athlete, so the athlete cannot pick and choose what level you're disqualified at. The athlete's behavior causes the ejection and where that behavior is most appropriate is where the consequence is going to be.
>
> So a varsity wrestler is not going to suffer a consequence for his behavior if he sits out a JV match that he normally would not sit out of. The next match that he would have a consequence for his behavior would be at the same level that he normally is at which is the varsity level, where they are slated at. So when they're slated to be at that level, that's where you go ahead and apply that consequence.

R. #141, at 97-98.

During his testimony, Labecki gave examples of recent applications of the rule:

1. A soccer player was not permitted to sit out a football game as a kicker to avoid missing the next soccer game.
2. A football player disqualified from a JV game was instructed to sit out a varsity game if that is where the majority of his playing time occurred.
3. A varsity wrestler was not permitted to use a JV match to serve a code of conduct violation in order to compete at regionals.

R. #88, at 4 and R. #141, 100-01.

In Hayden Halter's case, he was exclusively a varsity wrestler – having never wrestled a single junior varsity match at any point prior to his suspension. R. #140, at 36. Dr. Labecki confirmed this as part of his review of the suspension. R. #141, at 111-12. Nonetheless, Waterford attempted to satisfy the suspension by registering Halter for the Badger Invitational - a junior varsity meet that was scheduled several days prior to the varsity regional event. R. #141, at 95.

Specifically, the Monday following the Southern Lakes Conference meet, Waterford's Athletic Director, Jill Stobber, contacted Mr. Labecki and asked if Halter could attend the Badger JV meet. *See id.* Labecki explained that this would not satisfy the suspension because it was not at the appropriate level. *See id.*

Labecki testified that he did his diligence in confirming that the Badger Invitational was not an appropriate event to satisfy Halter's suspension. R. #141, at 93-94. As Labecki explained:

> First, he was a varsity wrestler and he was suspended from a varsity Conference meet so logically the next Conference meet is the Regional and that's where he should have sat out because of his level. In addition to that I inquired with the school both Waterford and his previous school to see if there was the potential that he would have or he was a JV wrestler in fact and we did not get any indication of that.
>
> In addition to that I reviewed all the reports as you've seen from the officials to see exactly what they had done when they had applied two unsportsmanlike calls which states for disqualification. So I solicited advice or I solicited some comments from Mr. Schlitz to see where the general belief would be for this rule amongst membership to confirm that this is a common interpretation, that it's being applied correctly, that the wrestler was not a JV wrestler and that this is the way or the direction that the membership and the board of control has interpreted that rule, so we applied it that way.

Id.

Jeremy Schlitz, referred to by Labecki, was serving at the time as the President of the Wisconsin Athletic Directors Association ("WADA"). R. #141, at 157. Schlitz testified at trial that his understanding of the rule is that a varsity athlete disqualified from a varsity event must serve the suspension at the varsity level. R. #141, at 76-77. He further testified that in his belief, this understanding was shared by the WADA membership. *Id.*

This understanding was also shared by Waterford's superintendent, Lucas Francois. R. #140 at 207. Francois was a former WIAA Board of Control member and former President of the Wisconsin Wrestling Coaches Association.

R. #140, at 206. He was called as a witness by the Halters at trial. R. #140, at 184. However, when cross-examined, Francois admitted that he understood the "next competitive event" to be "the event that the student athlete would regularly participate in. . . ." R. #140, at 207. Moreover, Francois admitted on re-direct that sitting out a game and doing homework is no consequence at all. R. #140, at 213-14.

Prior to the Southern Lakes Conference meet, Waterford's Athletic Director and wrestling coach were warned that a student's ejection from his or her last event before regionals would result in disqualification from the varsity regionals. R. #113, at 28. In particular, Labecki's written reminder stated:

> ***Important Note to Coaches!***
> Keep in mind, any wrestler who is ejected from competition in their last event before regionals (typically conference tournaments), for any reason, *will be ineligible for regional competition the following week*.

Id. (emphasis in original).

On cross-examination at trial, Halter's coach had to admit that the only reason he entered Hayden into the Badger Invitational was because of his suspension and that it had nothing to do with him preparing for regionals. R. #140, at 127.

Labecki testified that the issue for Hayden, however, was not whether he was technically eligible for the Badger Invitational, but whether it was the appropriate event to satisfy his suspension resulting from the disqualification. R. #141, at 165-66. Halter's eligibility for the event does not answer the question. *See id.* Rather, as the examples from published guidance discussed above reflect, the suspension is served by missing the appropriate event. Ap. 93; R. #86. If the student-athlete would not normally participate in the event, it does not satisfy the suspension. *See id.*

In this case, Halter himself admitted that the Southern Lakes Conference meet was his last event before varsity regionals the following Saturday. R. #140,

at 38. Halter admitted at trial that he had never wrestled a junior varsity match in his high school career. R. #140, at 36. He further admitted that prior to his suspension he had no plans to wrestle in the junior varsity Badger Invitational prior to regionals. *See* R. #140, at 37-39. In fact, at trial, Halter testified that going into the Southern Lakes Conference meet, there was no conceivable reason that he would have wrestled in the JV match. *See id.*

Deputy Director Labecki's decision to apply Halter's suspension to the varsity regionals was affirmed by the Executive Director Dave Anderson. *See* R. #110. Per WIAA rules, the decision of the Executive Director is final and may not be appealed to the Board of Control. R. #113, at 19. In particular, while found in the Rules of Eligibility, the disqualification rule at issue was also deliberately placed in the season regulations. R. #126, at 3 and R. #85. The rules provide that the Executive Director's decisions concerning season regulations may not be appealed to the Board of Control. R. #113, at 19. In particular, the WIAA Appeal Process under "Application/Status" provides:

> **B. Application/Status**
> The WIAA Appeals Procedures do not apply to the Executive Director's rulings, interpretations or decisions relating to sports regulations. . . .

Id.

As Mr. Labecki explained during his testimony, it was placed in the season regulations so the Executive Director's decision would be final, and for good reason. R. #141, at 135-36, 177. Labecki testified that in 2019 winter sports alone, there were 65 ejections. *See id.* Labecki explained that if the application of the suspension to each of those ejections was contested, it simply would not be feasible to convene the Board of Control to address all of them, especially because some need to be decided on short notice. *See id.* For this reason, Labecki explained that making the rule a season regulation allows disputes to be promptly resolved at the Executive Director level so there is finality. *See id.* Labecki confirmed that in his 12-year tenure, he could recall not a single instance in which

the Board of Control entertained a dispute over the interpretation of the next competitive event. R. #141, at 16.

At the 2019 WIAA Annual Meeting, an editorial change to the disqualification rule was proposed and adopted by the membership. R. #123, at 20. The revision clarifies that the suspension must be served at the same level the ejection occurred at. *See id.* As Labecki explained during his testimony, editorial changes do not change the rule. *See* R. #141, at 153-55, 174-75 and R. #123, at 15. Rather, an editorial change is a clarification. *See id.* After Labecki was provided the complete document on re-direct, Labecki directed the court to the following statement from the 2018-19 Annual Meeting Packet regarding editorial changes:

> Editorial changes are attempts to clarify existing rules *without making any change in the interpretation of the rule*. In some instances, the change may be merely a word(s) or the addition or deletion of a sentence, while in other cases the change may reflect Board of Control interpretation of membership wishes.

R. 123, at 15 (emphasis added); R. #141, at 174-75.

Under the protection of a temporary restraining order, Hayden Halter went on to successfully complete regional, sectional and state competition, ultimately winning the individual Division I WIAA State Wrestling Tournament for his weight class on February 23, 2019. R. #31, at 1.

The legal action continued despite Halter's victory. Per WIAA Rules of Eligibility, failure to succeed on the merits at trial gives rise to the prospect of penalties. R. #92, at 1. Specifically, the rules state:

> If a school declared disqualified or a student declared ineligible is permitted to participate in interscholastic competition, because of a court restraining order and/or injunction against the school or WIAA, and if such restraining order and/or injunction subsequently is voluntarily vacated, stayed, reversed, or finally determined by the courts not to justify injunctive relief, one or more of the penalties outlined in Article I, Section 5-A-1) and 2) may be taken in the interest of restitution and fairness to other member schools.

Id. For individual sports, such as individual wrestling, those penalties include:

A. Elimination of all matches, places, points, and scores; and

B. Return of awards.

R. #92, at 1-2.

State Action

The Wisconsin Interscholastic Athletic Association ("WIAA") is a voluntary unincorporated association comprised of public *and* non-public schools. R #113, at 3-4. Specifically, membership is open to public high schools, state supported institutional schools, non-public schools and charter schools. R. #123, at 8. The precise breakdown in membership between these specific types of educational institutions is not in the record; however, there were 511 member high schools in 2018-2019. R. #123, at 6. At the time of trial, Deputy Director Labecki testified that approximately one in five members were nonpublic schools. R. #141, at 140.

There is no evidence in the record that the WIAA is funded by the State of Wisconsin. The record evidence, rather, shows that WIAA revenues come from tournaments, official registrations, royalties, and other miscellaneous sources, including advertising by private, for-profit entities. R. #123, at 21; R. #141, at 173. While it did at one time, the WIAA does not collect dues directly from its member schools. R. #113, at 13; R. #123 at 21.

The WIAA is governed by a Board of Control. R. #123, at 6. The Board of Control is comprised of 11 members, including a non-public school representative. *Id.* The Department of Public Instruction ("DPI") does not have a representative or representatives on the Board of Control. *Id.* Rather, DPI merely provides a liaison to the Board of Control. *Id.*

There is no evidence in the record that the WIAA is staffed by the State of Wisconsin. Rather, the Board of Control employs an Executive Director and approves assistants to the director and other employees. R. #113, at 14. There is no evidence in the record that WIAA employees receive or are eligible to receive state benefits.

There is no evidence in the record that the State of Wisconsin recognizes the WIAA as a regulatory body of state high school athletics. Nor is there evidence in the record that WIAA rules are approved or subject to oversight by the State of Wisconsin. To the contrary, there have been failed legislative efforts in recent years to indirectly regulate the WIAA by directly prohibiting school districts from joining any "interscholastic athletic association" under certain circumstances. One such effort was 2015 Assembly Bill 873, which sought to prohibit school districts from joining any voluntary athletic association that did not follow open meeting and public records laws. The bill failed to pass both chambers.

Another effort appeared as part of the 2015-17 Biennial Budget (2015 Wisconsin Act 55). As part of the Act, the Legislature required a school board to permit homeschooled pupils residing within its district to participate in interscholastic athletics at the school. The Act further prohibited a school district from being a member of "an athletic association" unless the association required member schools to comply with the Act. Governor Walker vetoed the latter provision, observing in his veto message that state statutes should not dictate a private association's rules.

Most recently, 2021 Assembly Bill 383 sought to restrict school districts from joining any "interscholastic athletic association" that implemented a transfer eligibility restriction in transfers premised on academic programming. In vetoing the legislation, Governor Evers' message objected to the Legislature inserting itself into a private, member-driven organization's decision-making process.

IV. ARGUMENT

1. Is the WIAA a state actor?

As an initial matter, by granting review, the Wisconsin Supreme Court will have the opportunity to consider the propriety of the court of appeals deciding the issue of state action in the first instance. Here, as it has done before, the WIAA chose not to challenge the assertion that it was a state actor for purposes of the

case only. *See* R. #28, at 2, n. 1. In *Wis. Interscholastic Ath. Ass'n v. Gannett Co.*, the court noted that the issue of state action would not be addressed because the parties stipulated that the WIAA is a state actor. 716 F. Supp. 2d 773, at n. 6 (W.D. Wis. 2010). This stipulation was confirmed on appeal. *See* 658 F.3d at 616. The court then proceeded to address the First Amendment claims at issue. *See id.* Here, similar to *Gannett Co.*, there was not an actual controversy on the issue of state action.

Therefore, by ruling on the issue of the WIAA as a state actor, the court of appeals issued a purely advisory opinion. It is well established that "[c]ourts act only to determine actual controversies-not to announce principles of law or to render purely advisory opinions." *State v. Robertson*, 2003 WI App 84, ¶32, 263 Wis. 2d 349, 369, 661 N.W.2d 105, 114 (citing *State ex rel. Ellenburg v. Gagnon*, 76 Wis. 2d 532, 535, 251 N.W.2d 773 (1977)).

The court of appeals, in essence, also issued an advisory opinion by ruling on state action when it is not an element of the claims the court of appeals proceeded to decide. State action is an element of a Fourteenth Amendment claim under the United States Constitution generally arising in Section 1983 litigation, which has an identical "under color of state law" requirement. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) and *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). *See also Woodall v. AES Corp.*, IP 02-575-C B/S, 2002 U.S. Dist. LEXIS 12415, at *5 n.2 (S.D. Ind. Jul. 5, 2002):

> The language of "state action" derives from Section 1 of the Fourteenth Amendment which provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Here, the Halters did not bring a Fourteenth Amendment claim. They did, however, assert a violation of procedural due process under the Wisconsin

Constitution. Assuming a consistent interpretation of the Fourteenth Amendment and due process under the Wisconsin Constitution, state action is an element of Halters' state constitutional claim. *See Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶ 12, n. 6, 296 Wis. 2d 337, 723 N.W.2d 131. However, the court of appeals never ruled on this claim. Rather, its discussion delved into the propriety of subjecting certain WIAA decisions to judicial review before proceeding to conduct certiorari review. State action is not an element of certiorari review. To be sure, certiorari review has been applied to private entities in certain circumstances. *See, e.g., State ex rel. Curtis v. Litscher*, 2002 WI App 172, 256 Wis. 2d 787, 650 N.W.2d 43. Rather, the question on certiorari review is whether the decision has been rendered by a municipality, administrative agency, or other quasi-judicial tribunal. *State ex rel. City of Waukesha v. City of Waukesha Bd. of Rev.*, 2021 WI 89, ¶ 18, 399 Wis. 2d 696, 967 N.W.2d 460. Therefore, in ruling on an element of a claim that the court of appeals did not decide, the court of appeals essentially issued an advisory opinion.

If state action is an element of certiorari review, the supreme court should also consider review for the compelling reason that the WIAA was handicapped in litigating the question directly for the first time on appeal. A complete record relevant to the issue was not developed below on either side in light of the WIAA not contesting the assertion that it was a state actor in this case.

If at issue, the state action question is a novel one, the resolution of which will have statewide impact. First, as argued to the court of appeals, before the WIAA can be deemed a state actor, the court must determine what the standard is for state action in this case. The Plaintiffs only raised state law claims, including a procedural due process claim under the Wisconsin Constitution. Therefore, it is an unsettled question of law as to whether the United States Supreme Court's *Brentwood* framework applies.

In addressing a free speech argument under the Wisconsin Constitution and "state action" as the phrase is employed in federal law, this court previously stated:

> Our discussion of Defendants' "state action" argument should not be taken to mean that this court is adopting or approving such a "state action" concept in deciding cases dealing with the Wisconsin Constitution, Article I, sec. 3.

State v. Horn, 139 Wis. 2d 473, 484 n.6, 407 N.W.2d 854 (1987). In accepting this Petition, the Wisconsin Supreme Court has an opportunity to clarify what the appropriate state action test is when solely state law claims are raised.

Even if the *Brentwood* test applies, it is a novel question whether the WIAA is a state actor merely because of the public-private composition of its membership. The court of appeals' opinion failed to address the other *Brentwood* factors relevant to the question of "pervasive" entwinement between the WIAA and the state. There was either no evidence in the record to support such a finding or the evidence that was available failed to establish any connection between the bodies. This included the presence of a non-public school representative on the Board of Control, the lack of voting representation on the Board of Control for the Department of Public Instruction, no state employees, no access to state benefits, no dues paid by member schools, private-for profit revenue sources, no government oversight of or control over member rules, and no "wink and nod" relationship between the Association and the State as the case was in *Brentwood*. In fact, the WIAA identified several instances in which efforts by the Legislature to insert itself into WIAA affairs have failed on both sides of the isle.

Resolution of the novel state actor question will have statewide impact. The WIAA membership comprises over 500 high schools in the State of Wisconsin that are home to thousands of student athletes. The WIAA is regularly the subject of litigation. If the WIAA is a state actor, its decisions will be the subject of state constitutional claims and Section 1983 claims. Its representatives will undoubtedly spend more time involved in protracted litigation that will extend

beyond the dispositive motion phase into evidentiary hearings to consider the propriety of the process afforded and the reasonableness of each decision. Further, pre-deprivation hearings in every contested suspension case will surely exacerbate the time demands on the Board of Control, which is comprised of school administrators.

Alternatively, state actor status will leave open the question of Section 893.80 immunity for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. If viewed as a state actor, the WIAA may be a government contractor – contracted by public schools throughout the State of Wisconsin for the purpose of administering an interscholastic athletic program. If applicable, Section 893.80 immunity could have statewide impact by foreclosing, limiting, or delaying a number of state law claims that would otherwise be available if commenced against a private entity. *See, e.g. Estate of Lyons v. CAN Ins. Co.*, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996).

2. Are the Halters entitled to judicial review of the WIAA's decision to suspend Hayden Halter from the 2019 varsity wrestling regional event and to deny him an internal appeal to the body's Board of Control?

Defining the proper boundaries of judicial involvement in the internal affairs of a voluntary association has developed a healthy body of case law. However, as applied to a high school athletic association's interpretation and application of its own rules to non-member student athletes, the issue is a novel one where, as here, judicial intervention is requested by a non-member of the association. Accepting this appeal affords the Wisconsin Supreme Court an opportunity to clarify and develop the law of judicial intervention as it specifically pertains to student athletes and voluntary interscholastic athletic associations.

As Judge Stademueller correctly observed in *Isabell A.*, WIAA rules govern "schools but cannot reasonably be viewed as creating enforceable rights for student athletes." *Isabella A. v. Arrowhead Union High Sch. Dist.*, 323 F. Supp. 3d 1052, 1060 (E.D. Wis. 2018). That does not keep Halters' case out of court, but it

should keep Halters out of court. The proper party to request intervention by the judiciary is the party with enforceable rights. In this case that would have been Halters' school, which has a contract with the WIAA created by its constitution, bylaws and rules. *See Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n.*, 210 Wis. 2d 365, 377-78, 563 N.W.2d 585 (Ct. App. 1997). As Judge Stadtmueller noted in *Isabella A.*, "the WIAA rule governs schools but cannot reasonably be viewed as creating enforceable rights for student athletes." 323 F. Supp. 3d at 1060.

By accepting this appeal, the Wisconsin Supreme Court can develop and clarify the law of judicial intervention in the affairs of voluntary associations and whether intervention should extend to cases by non-member complainants. The court can then make its own determination whether a non-member student athlete has any rights by virtue of the rules alone or whether those rights need to be litigated by his or her member school by virtue of its contractual membership in the association.

By accepting this appeal, the Wisconsin Supreme Court also has the opportunity to clarify the proper depth of judicial intervention when invoked by the proper party. By the time this case reached the court of appeals, the Halters had restricted their requested review to whether the WIAA was reasonable in applying Hayden Halter's suspension to the varsity regional event and in denying him an appeal of its decision to the Board of Control. However, where is the end point? Would the judgment calls of officials also be open to judicial scrutiny? What in the court of appeals' analysis keeps the merits of amateur status violations, recruiting violations, code of conduct violations, transfer appeals, and a myriad of other contested matters out of court? Nothing without further direction if all a student athlete must claim is a legally protectible right to reasonable rules, reasonably applied.

As Judge Stadtmueller observed in *Isabella A.*, the WIAA rules give rise to nothing more than "procedural entitlements" and are "hardly viable sources of law

for purposes of formulating a student's substantive rights. . . ." *Id.* at 1060. If that is correct, then this court has an opportunity to clarify that judicial intervention into the voluntary association's factual analysis in applying its own rules, as opposed to whether procedures were available and afforded, goes too far. That was the case here when the Court of Appeals reassessed the WIAA's determination of the next competitive event.

3. Are the Halters entitled to certiorari relief?

The court of appeals' decision to grant certiorari relief to the Halters is in conflict with controlling opinions of the Wisconsin Supreme Court that afford the WIAA a presumption of correctness and validity and restrict review to whether the facts set forth in the record reasonably justified the decision.

On certiorari review, "[t]he test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal." *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment*, 131 Wis. 2d 101, 120, 388 N.W.2d 593, 600 (1986). Further, the decision below is afforded a presumption of correctness and validity. *See Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 71, 382 Wis. 2d 1, 913 N.W.2d 131.

Here, while the circuit court took additional evidence at trial without objection from either side, the court of appeals incorrectly concluded that there was not a record at the administrative level. The "record" was admitted into evidence at trial as Exhibit 516. *See* R. #113. As argued by the WIAA and held by the circuit court, the next competitive event rule is found within the Winter Season Regulations. Consequently, there is no right of appeal to the Board of Control for the director's rulings on Season Regulations. Therefore, the Executive Director's office is the tribunal below.

Here, Deputy Director Labecki itemized the facts considered in arriving at the conclusion that Hayden Halter's suspension was to be properly served at the varsity regionals as opposed to the intervening junior varsity event. The record shows that Labecki:

(1) Considered his notice titled "Important Reminders for Wrestling Coaches" sent prior to the Southern Lakes Conference Meet, reminding coaches that wrestlers ejected from competition in their last event before regionals would be ineligible for regional competition the following week.

(2) Investigated and confirmed Halter's competitive history prior to the ejection, which was exclusively varsity.

(3) Considered previously published WIAA guidance on the interpretation and application of the next competitive event.

(4) Considered past practice in applying the next competitive event rule, including an identical situation from the same week.

(5) Confirmed his understanding and application of the next competitive event rule with the President of the Wisconsin Athletic Directors Association.

In short, this was not an arbitrary decision, unsupported by facts of record. Further, there was simply no evidence presented at trial to overcome the presumption of correctness and validity. There was merely argument by the Halters over the clarity of the WIAA's published guidance. Yet, the intent of the rule was further confirmed by facts that supplemented the record at trial, including:

(1) Admissions on cross-examination by Waterford's Superintendent (a former WIAA Board of Control member and Halter's own witness) that the rule was intended to provide a consequence and that sitting out a JV match to do homework, as Hayden Halter did, was no consequence at all.

(2) An admission by Halter on cross-examination that he had no intent of wrestling in the JV match but for the ejection.

(3) Minutes from the 1995 adoption of the rule by the membership clarifying Labecki's application of the rule to varsity regionals.

To hold that the WIAA arbitrarily chose to apply the suspension to varsity regionals; exercised its will rather than its judgment in doing so; and reached a decision not justified by the facts is simply not supported in the record. In so

holding, contrary to controlling precedent, the court of appeals appears to have ignored the presumption of correctness and validity and shifted the burden to the WIAA from the outset.

4. Are the Halters entitled to declaratory and injunctive relief?

For the reasons discussed above, the Wisconsin Supreme Court should accept review because the Halters' entitlement to declaratory and injunctive relief is premised on novel questions concerning the WIAA's state actor status and the propriety of judicial intervention in the affairs of a voluntary interscholastic athletic association's application of its member adopted rules to a non-member student athlete.

V. CONCLUSION

The Wisconsin Supreme Court should grant review because (1) a decision will help develop and clarify the appropriate bounds of judicial intervention in cases concerning a voluntary high school athletic association's interpretation and application of its own, member chosen rules to non-member student athletes, (2) the court of appeals issued an improper advisory opinion that the WIAA is a state actor, (3) whether the WIAA is a state actor raises novel questions with statewide impact that are likely to recur, and (4) the court of appeals decision granting certiorari relief is contrary to binding supreme court precedent that affords the WIAA's decision below a presumption of correctness and validity.

Respectfully submitted this 22nd day of March, 2024.

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VI. CERTIFICATION OF FORM AND LENGTH

I hereby certify that this Petition conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and 809.62(4) for a Petition for Review produced with a proportional serif font. The length of this Petition is 7,209 words.

Dated this 22nd day of March, 2024.

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