

No. 10-2627

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wisconsin Interscholastic Athletic Association and
American-HiFi, Inc.,

Plaintiffs/Appellees,

v.

Gannett Co., Inc., and
Wisconsin Newspapers Associations, Inc.,

Defendants/Appellants.

Appeal from the U.S. District Court
For the Western District of Wisconsin, Case No. 09-CV-0155
The Honorable William M. Conley, Presiding

Brief of Amicus Curiae National Federation of State High School Associations in Support
of Appellee and Affirmance

William E. Quirk MO #24704
Anthony W. Bonuchi MO #57838
POLSINELLI SHUGHART PC
120 West 12th Street, Suite 1700
Kansas City, Missouri 64105
(816) 421-3355; FAX (816) 374-0509

*Attorneys for Amicus Curiae National Federation
of State High School Associations*

DISCLOSURE STATEMENT

The National Federation of State High School Associations (“NFHS”) is a not-for-profit organization that is neither publicly traded nor owned by any publicly traded company. In addition to this brief, the NFHS filed a amicus curiae brief in the District Court in this case. In both instances the NFHS has been represented by William E. Quirk (wquirk@polsinelli.com) and Anthony W. Bonuchi (abonuchi@polsinelli.com) of Polsinelli Shughart PC, 120 W. 12th St., Kansas City, MO 64105. (816) 421-3355.

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Interest of Amicus Curiae¹

THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS (“NFHS”) IS THE NATIONAL SERVICE AND ADMINISTRATIVE ORGANIZATION OF HIGH SCHOOL ATHLETICS. 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. APPROXIMATELY 90 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 THROUGH THEIR PARTICIPATION IN INTERSCHOLASTIC ATHLETICS AND ACTIVITIES. IT STRIVES TO PROMOTE PARTICIPATION AND SPORTSMANSHIP IN ATHLETICS, TO DEVELOP GOOD CITIZENS THROUGH THAT PARTICIPATION, AND TO ENRICH THE EDUCATIONAL EXPERIENCE OF STUDENTS. THE NFHS ALSO SEEKS TO PROTECT THE ROLE THAT INTERSCHOLASTIC ATHLETICS PLAYS IN EDUCATION AND TO DEVELOP SOLUTIONS TO PROBLEMS RELATED TO HIGH SCHOOL ATHLETICS.

THE NFHS HAS A SUBSTANTIAL INTEREST IN HELPING ITS MEMBER ASSOCIATIONS PROMOTE THEMSELVES AND THE ACTIVITIES THEY SPONSOR. TO THAT END, THE NFHS SUPPORTS ITS MEMBER ASSOCIATIONS’ RIGHT TO ENTER INTO EXCLUSIVE AGREEMENTS WITH MEDIA COMPANIES TO PRODUCE, LICENSE, AND TRANSMIT

¹ All parties have consented to the filing of this brief.

ASSOCIATION-ORGANIZED EVENTS ON RADIO, TELEVISION, AND THE INTERNET. THESE AGREEMENTS NOT ONLY HELP PROMOTE THE VALUE OF INTERSCHOLASTIC ATHLETICS, BUT THEY ALSO CREATE REVENUE ESSENTIAL TO THE FUNDING OF ASSOCIATION-SPONSORED STATE CHAMPIONSHIPS IN ALL SPORTS. IF INDIVIDUAL STATE ASSOCIATIONS WERE NOT ALLOWED TO ENTER INTO AND ENFORCE THESE EXCLUSIVE AGREEMENTS, THEIR ABILITY TO PROMOTE THE BENEFITS OF INTERSCHOLASTIC ACTIVITIES WOULD BE SIGNIFICANTLY DIMINISHED.

ARGUMENT

THIS APPEAL ASKS WHETHER APPELLEE WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION (“WIAA”) SHOULD BE ALLOWED TO SELL EXCLUSIVE LICENSES TO TRANSMIT SPORTING EVENTS IT ORGANIZES AND SPONSORS. APPELLANTS, WISCONSIN NEWSPAPER ASSOCIATION (“NEWSPAPERS”) AND THE MEDIA CONGLOMERATE GANNETT CO., INC. (“GANNETT”) (COLLECTIVELY “APPELLANTS”), ARGUE THAT THE FIRST AMENDMENT AFFORDS THEM UNLIMITED ACCESS TO SPORTING EVENTS SPONSORED BY STATE ASSOCIATIONS LIKE THE WIAA, AND SPECIFICALLY ALLOWS THEM TO TRANSMIT THE COMPETITIONS LIVE OVER THE AIR OR THE INTERNET.

CONTRARY TO APPELLANTS’ ARGUMENT, THEIR FIRST AMENDMENT RIGHTS ARE NOT ABSOLUTE. COURTS IN FACT HAVE REPEATEDLY UPHELD GOVERNMENTAL ACTION IN APPROPRIATE CIRCUMSTANCES, DESPITE ITS INCIDENTAL EFFECT ON A PARTY’S FIRST AMENDMENT RIGHTS. *SEE, E.G., KTSP-TAFT TELEVISION & RADIO CO. V. ARIZ. STATE LOTTERY COMM’N*, 646 F.SUPP. 300, 307-08 (D. ARIZ. 1986). IN DETERMINING THE CONSTITUTIONALITY OF GOVERNMENTAL CONDUCT, COURTS WILL CONSIDER WHERE THE CONDUCT OCCURS AND THE CAPACITY IN WHICH THE GOVERNMENT IS ACTING. *ID.* AT A MINIMUM, COURTS WILL BALANCE THE CONSTITUTIONAL RIGHTS AT ISSUE AGAINST THE GOVERNMENT’S INTERESTS IN THE CHALLENGED CONDUCT. *ID.* THE NFHS WILL LEAVE IT TO THE PARTIES TO ADDRESS THE CONSTITUTIONAL NUANCES. THIS BRIEF WILL INSTEAD FOCUS LARGELY ON THE INTERESTS AT STAKE, AND WILL EXPLAIN WHY THE WIAA, LIKE SIMILAR STATE

ASSOCIATIONS THROUGHOUT THE COUNTRY, NEEDS TO BE ABLE TO ENTER INTO AND ENFORCE EXCLUSIVE LICENSING AGREEMENTS.

I. STATE ASSOCIATIONS ENTER INTO EXCLUSIVE LICENSING AGREEMENTS TO PROVIDE GREATER OPPORTUNITIES FOR STUDENTS TO BENEFIT FROM PARTICIPATING IN INTERSCHOLASTIC ACTIVITIES.

APPELLANTS AND THEIR AMICI TRY TO IMPUGN THE WIAA FOR ITS SUPPOSED “PROFIT MOTIVE” IN ENTERING INTO EXCLUSIVE LICENSING CONTRACTS. IT IS UNDOUBTEDLY CORRECT THAT THE WIAA SEEKS TO RAISE REVENUE USING ITS LICENSE AGREEMENT. BUT, APPELLANTS’ CHARACTERIZATION MISSES THE BROADER POINT OF THESE AGREEMENTS, WHICH IS NOT TO SIMPLY “PROFIT,” BUT TO RAISE THE FUNDS NECESSARY TO PROMOTE INTERSCHOLASTIC ATHLETICS. AT BOTTOM, EXCLUSIVE LICENSING CONTRACTS ALLOW ASSOCIATIONS TO RAISE REVENUE, THE ULTIMATE PURPOSE OF WHICH IS TO SUPPORT THE NOT-FOR-PROFIT ASSOCIATIONS’ EDUCATIONAL MISSION.

STUDIES AND RESEARCH DONE AROUND THE COUNTRY ALL HIGHLIGHT THE IMPORTANCE OF INTERSCHOLASTIC ATHLETICS TO EDUCATION. HIGH SCHOOL SPORTS UNQUESTIONABLY CONTRIBUTE VALUABLE LESSONS ABOUT TEAMWORK, SPORTSMANSHIP, WORK ETHIC, AND WINNING AND LOSING, ALL OF WHICH ENHANCE THE ACADEMIC CURRICULUM. BEYOND THESE INTUITIVE BENEFITS, HOWEVER, THERE IS EVIDENCE THAT PARTICIPATION IN EXTRACURRICULAR ACTIVITIES HAS A DIRECT AND POSITIVE EFFECT ON PARTICIPANTS’ LIVES AND FUTURE SUCCESS. CONSIDER THE FOLLOWING STATISTICS ASSEMBLED BY THE NFHS IN A 2004 REPORT:

- **THE UNITED STATES DEPARTMENT OF EDUCATION FOUND IN 2002 THAT YOUNG ADULTS WHO DO NOT PARTICIPATE IN EXTRACURRICULAR ACTIVITIES ARE 49% MORE LIKELY TO USE DRUGS AND 37% MORE LIKELY TO BECOME TEEN PARENTS THAN THOSE WHO DO. U.S. DEPT. OF EDUCATION, *NO CHILD LEFT BEHIND: THE FACTS ABOUT 21ST CENTURY LEARNING*, 2002.**
- **A MINNESOTA STATE HIGH SCHOOL LEAGUE STUDY SHOWED THAT THE AVERAGE GPA OF STUDENT-ATHLETES WAS 2.84, COMPARED TO 2.68 FOR OTHER STUDENTS, AND THAT STUDENT-ATHLETES MISSED ONLY 7.4 DAYS OF SCHOOL EACH YEAR COMPARED TO 8.8 DAYS FOR NON-ATHLETES.**
- **A NORTH CAROLINA STUDY REVEALED EVEN STARKER DIFFERENCES, FINDING THAT THE AVERAGE GPA FOR ATHLETES WAS 2.98 VERSUS A GPA OF 2.17 FOR NON-ATHLETES. THAT SAME SURVEY SHOWED THAT THE DROPOUT RATE FOR ATHLETES WAS A MERE .6% COMPARED TO A SOBERING 10.32% FOR NON-ATHLETES.**
- **A STUDY PUBLISHED IN THE AUGUST 2007 ISSUE OF *MEDICINE & SCIENCE IN SPORTS & EXERCISE* FOUND THAT STUDENTS WHO PARTICIPATED IN VIGOROUS SPORTS LIKE SOCCER AND FOOTBALL DID APPROXIMATELY 10% BETTER IN MATH, SCIENCE, ENGLISH, AND SOCIAL STUDIES CLASSES.**
- **A 2006 RESEARCH PROJECT PUBLISHED BY THE CENTER FOR INFORMATION & RESEARCH ON CIVIC LEARNING & ENGAGEMENT FOUND THAT 18-25**

YEAR-OLDS WHO PARTICIPATE IN SPORTS DURING HIGH SCHOOL ARE MORE LIKELY TO VOLUNTEER, VOTE, FEEL COMFORTABLE SPEAKING IN PUBLIC, AND WATCH AND FOLLOW THE NEWS.

THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, *THE CASE FOR HIGH SCHOOL ACTIVITIES*, AVAILABLE AT [HTTP://WWW.NFHS.ORG/WORKAREA/DOWNLOADASSET.ASPX?ID=3263](http://www.nfhs.org/workarea/downloadasset.aspx?id=3263) (LAST VISITED, NOV. 10, 2010).

THOUGH HE MAY NOT HAVE KNOWN THE STATISTICS, JUSTICE BRYON WHITE—A CELEBRATED FOOTBALL PLAYER IN HIS OWN RIGHT—CERTAINLY UNDERSTOOD THE IMPORTANCE OF EXTRACURRICULAR ACTIVITIES LIKE SPORTS:

SPORTS AND OTHER FORMS OF VIGOROUS PHYSICAL ACTIVITY PROVIDE EDUCATIONAL EXPERIENCE WHICH CANNOT BE DUPLICATED IN THE CLASSROOM. THEY ARE AN UNCOMPROMISING LABORATORY IN WHICH WE MUST THINK AND ACT QUICKLY AND EFFICIENTLY UNDER PRESSURE . . . SPORTS RESEMBLE LIFE IN CAPSULE FORM AND THE PARTICIPANT QUICKLY LEARNS THAT HIS PERFORMANCE DEPENDS UPON THE DEVELOPMENT OF STRENGTH, STAMINA, SELF-DISCIPLINE AND A SURE AND STEADY JUDGMENT.

JOHN M. BARRON, BRADLEY T. EWING, GLEN R. WADDELL, *THE EFFECTS OF HIGH SCHOOL ATHLETIC PARTICIPATION ON EDUCATION AND LABOR MARKET OUTCOMES*, REVIEW OF ECONOMICS AND STATISTICS, AUGUST 2000, AT 409. UNDOUBTEDLY, INTERSCHOLASTIC ATHLETICS ARE AN IMPORTANT COMPONENT OF HIGH SCHOOL STUDENTS' EDUCATIONS NATIONWIDE. AND, AS WILL BE SEEN, LICENSING AGREEMENTS SUPPORT THIS PUBLIC INTEREST BY INCREASING OPPORTUNITIES FOR STUDENTS TO PARTICIPATE IN, AND BENEFIT FROM, INTERSCHOLASTIC ACTIVITIES.

VI. A STATE HIGH SCHOOL ATHLETIC ASSOCIATION'S ABILITY TO SELL EXCLUSIVE LICENSING RIGHTS TO ITS CHAMPIONSHIP EVENTS IS VITAL TO ITS ABILITY TO ORGANIZE AND PROMOTE A BROAD RANGE OF INTERSCHOLASTIC ACTIVITIES.

THE REVENUE GENERATED BY LICENSING AGREEMENTS HELPS MAKE IT POSSIBLE FOR STATE HIGH SCHOOL ACTIVITIES ASSOCIATIONS TO ORGANIZE AND PRODUCE STATE-WIDE COMPETITIONS, NOT JUST IN POPULAR SPORTS, BUT ACROSS A WIDE RANGE OF ACTIVITIES.

STATE-WIDE ASSOCIATIONS GENERALLY ORGANIZE POSTSEASON TOURNAMENTS AND CHAMPIONSHIPS, AND THE EXCLUSIVE LICENSING CONTRACTS NOW AT ISSUE APPLY ONLY TO THOSE EVENTS. SOME SPORTS ARE OF COURSE MORE POPULAR THAN OTHERS, AND THEIR TOURNAMENTS ARE SELF-SUSTAINING. BUT THE CHAMPIONSHIP CONTESTS AND TOURNAMENTS IN MOST SPORTS LOSE MONEY AND THUS DEplete THE ASSOCIATIONS' RESOURCES. BECAUSE ORGANIZATIONS LIKE THE WIAA ARE NOT-FOR-PROFIT, THE REVENUE THEY RAISE IN CONNECTION WITH THE MOST POPULAR EVENTS IS CRITICAL TO THEIR ABILITY TO SURVIVE AND TO ORGANIZE EVENTS FOR YOUNG PEOPLE WHO PARTICIPATE IN LESS POPULAR SPORTS.

INCREASINGLY, ASSOCIATIONS LIKE THE WIAA ARE TRYING TO MAXIMIZE REVENUE TO SUPPORT THEIR MISSION BY USING EMERGING TECHNOLOGY IN CONNECTION WITH HIGH SCHOOL BASKETBALL TOURNAMENTS, FOOTBALL CHAMPIONSHIPS AND OTHER POPULAR STATE-WIDE SPORTING EVENTS. HERE, THE WIAA HAS ENTERED INTO MULTIPLE AGREEMENTS GRANTING EXCLUSIVE PRODUCTION AND LICENSING RIGHTS TO VARIOUS MEDIA COMPANIES. IT GRANTED

WHEN WE WERE YOUNG PRODUCTIONS (“WWWY”) “THE EXCLUSIVE RIGHT TO PRODUCE, SELL AND DISTRIBUTE ALL WIAA TOURNAMENT SERIES AND CHAMPIONSHIP EVENTS FOR ALL WIAA SPORTS WITH THE EXCEPTION OF EXISTING CONTRACTS AS OF THE DATE OF THIS CONTRACT.” EXHIBIT A TO FIRST AMENDED COMPLAINT, DOC. #7. SIMILARLY, THE WIAA HAS EXCLUSIVE CONTRACTS WITH FOX SPORTS NET NORTH, LLC TO TELECAST STATE FOOTBALL CHAMPIONSHIP GAMES, AND WITH TWO OTHER LOCAL TELEVISION COMPANIES (“QUINCY”) TO TRANSMIT THE STATE BOYS AND GIRLS HOCKEY AND BASKETBALL CHAMPIONSHIP GAMES. AFFIDAVIT OF JAMES L. HOYT, DOC.# 56 ¶ 20. THESE AGREEMENTS PROVIDE THE MEDIA COMPANIES THE EXCLUSIVE RIGHT TO DISSEMINATE THEIR PRODUCTIONS OF THE EVENT OVER THE AIR AND THE INTERNET.

IN HIS AFFIDAVIT, DR. JAMES L. HOYT STATES THAT IN 2008, THE WIAA RECEIVED \$75,000 FROM QUINCY FOR THE RIGHTS TO THE STATE HOCKEY AND BASKETBALL TOURNAMENTS FOR BOYS AND GIRLS, \$20,000 FROM FOX FOR THE FOOTBALL STATE FINALS, AND \$60,000 FROM WWWY FOR ALL OF THE OTHER EVENTS. HOYT AFFIDAVIT, DOC.# 56 ¶ 39. THE WIAA ALSO RECEIVED \$80,000 FROM A SPONSORSHIP PARTNER. *Id.* AT ¶ 41. THESE FUNDS ARE ESSENTIAL TO THE WIAA’S GOALS OF PROMOTING AND FOSTERING INTEREST AND PARTICIPATION IN INTERSCHOLASTIC ATHLETICS.

ALL STUDENT-ATHLETES SHOULD HAVE THE SAME OPPORTUNITY TO PARTICIPATE IN STATE-WIDE, END-OF-THE-SEASON COMPETITIONS, EVEN IF THEIR TALENTS OR INTERESTS LIE OUTSIDE THE MOST POPULAR, SELF-SUSTAINING SPORTS. THE WIAA

AND ITS SISTER ASSOCIATIONS ACROSS THE COUNTRY ENSURE THAT THESE OPPORTUNITIES ARE AVAILABLE BY, AMONG OTHER THINGS, OBTAINING CORPORATE SPONSORS FOR THEIR TOURNAMENTS AND SELLING EXCLUSIVE LICENSING RIGHTS TO THIRD PARTIES.

HERE, WITHOUT LICENSING REVENUE, THE WIAA WOULD BE HARD-PRESSED TO AFFORD CHAMPIONSHIP EVENTS FOR ALL ACTIVITIES. IN 2008, LESS THAN HALF OF THE WIAA-ORGANIZED TOURNAMENTS PAID FOR THEMSELVES. BASEBALL LOST AROUND \$109,000, SOFTBALL LOST ABOUT \$121,000, AND TRACK LOST NEARLY \$200,000. EXHIBIT A TO AFFIDAVIT OF DOUGLAS CHICKERING, DOC. #53. SPORTS LIKE SWIMMING (-\$45,495), TENNIS (-\$56,234), GYMNASTICS (-\$31,153), CROSS COUNTRY (-\$78,346), AND GOLF (-\$51,755) WERE ALL IN THE RED AS WELL. *Id.* ALL TOLD, THESE NINE SPORTS ACCOUNTED FOR APPROXIMATELY \$692,983 OF THE EXPENDITURES IN THE WIAA'S 2008 BUDGET. *Id.*

ON THE OTHER HAND, THE MORE POPULAR SPORTS—BASKETBALL, WRESTLING, FOOTBALL, HOCKEY, AND SOCCER—GENERATED \$2,546,874 IN REVENUE. OF THAT AMOUNT, \$235,000 APPEARS TO HAVE COME DIRECTLY FROM THE LICENSING CONTRACTS. HOYT AFFIDAVIT, ¶¶ 39-41. WHILE TOURNAMENTS ARE NOT THE WIAA'S ONLY SOURCES OF REVENUE AND EXPENSES, THEY MAKE UP A SIGNIFICANT PORTION THE WIAA'S BUDGET. EVEN THOUGH, VIEWED AS A WHOLE, THE TOURNAMENTS WERE PROFITABLE, THE WIAA ITSELF STILL LOST \$34,779 IN 2008. THUS EVERY SOURCE OF REVENUE IS ESSENTIAL TO THE WIAA'S SURVIVAL AND TO ITS

ABILITY TO FULFILL ITS MISSION OF ORGANIZING AND PROMOTING HIGH SCHOOL ATHLETICS.

THE WIAA'S EXPERIENCE MIRRORS THAT OF OTHER STATE ASSOCIATIONS THROUGHOUT THE COUNTRY. EXHIBIT A, ¶ 4, DOC. #67. ALTHOUGH THESE ASSOCIATIONS STRIVE TO ORGANIZE AND PROMOTE CHAMPIONSHIP CONTESTS IN ALL SPORTS AND ACTIVITIES, THE REALITY IS THAT SOME ACTIVITIES ARE FAR MORE POPULAR THAN OTHERS. *Id.* ¶ 5. WITHOUT THE ABILITY TO USE REVENUE FROM POPULAR SPORTS TO SUBSIDIZE LESS-POPULAR ONES, HIGH SCHOOL SPORTS AS A WHOLE, AND AMERICAN SECONDARY EDUCATION, WILL SUFFER. *Id.* ¶¶ 4-8.

NOT ONLY DO THE CHALLENGED LICENSING AGREEMENTS MAKE IT POSSIBLE FOR STATE ASSOCIATIONS LIKE THE WIAA TO ORGANIZE STATE-WIDE EVENTS IN ALL SPORTS, THEY ALSO INCREASE THE PUBLIC'S ACCESS TO THESE EVENTS, THEREBY HIGHLIGHTING AND PROMOTING THE VALUABLE ROLE ATHLETIC COMPETITION PLAYS IN THE LIVES OF HIGH SCHOOL STUDENTS. FOR EXAMPLE, AS DR. HOYT EXPLAINS, THE WWVY WAS WILLING TO TRANSMIT ALL WIAA EVENTS OVER THE INTERNET. HOYT AFFIDAVIT, ¶ 20. BUT NEITHER THE WWVY, NOR ANY OTHER MEDIA OUTLET, WOULD INVEST THE RESOURCES NECESSARY TO PRODUCE THIS INTERNET CONTENT IF THEY WERE NOT GRANTED THE EXCLUSIVE LICENSING RIGHTS. *Id.* AT ¶¶ 45-48. IN FACT, IN 2004-2005, BEFORE THE WWVY CONTRACT WAS EXECUTED, NO WIAA EVENTS WERE AVAILABLE ON THE INTERNET. IN 2008-2009, AFTER THE WWVY CONTRACT WAS EXECUTED, 82 LIVE CONTESTS COULD BE SEEN THROUGH INTERNET

STREAMING. *Id.* THIS, TOO, IS CONSISTENT WITH THE EXPERIENCE OF STATE HIGH SCHOOL ASSOCIATIONS THROUGHOUT THE COUNTRY. EX. A, ¶¶ 4, 8, DOC. #67.

ALLOWING THE WIAA AND SIMILAR STATE ASSOCIATIONS TO USE EXCLUSIVE LICENSING AGREEMENTS TO CONTROL VIDEO STREAMING NOT ONLY HELPS THEM MAINTAIN AND PROMOTE COMPETITIONS IN LESS-POPULAR ACTIVITIES, BUT IT SERVES A NUMBER OF OTHER IMPORTANT GOALS. AMONG THESE ARE:

- **AVOIDING COMMERCIAL EXPLOITATION OF STUDENT-ATHLETES;**
- **AVOIDING ANY ASSOCIATION BETWEEN HIGH-SCHOOL SPORTS AND UNVETTED INTERNET STREAMERS, WHO MAY CREATE AN INFERIOR PRODUCT;**
- **AVOIDING CONFUSION AS TO THE SOURCE OF INTERNET-STREAMED GAMES;**
- **REDUCING ADMINISTRATIVE AND ORGANIZATIONAL COSTS FOR SCHOOLS AND ATHLETIC ASSOCIATIONS THAT WOULD OTHERWISE NEED TO NEGOTIATE WITH MULTIPLE INTERNET STREAMERS;**
- **GIVING INTERNET STREAMERS A FINANCIAL INTEREST IN INVESTING IN THEIR ENTERPRISE AND DOING A MORE PROFESSIONAL JOB; AND**
- **AVOID OVERCROWDING AND CONFLICTS BETWEEN INTERNET STREAMERS VYING FOR LIMITED PHYSICAL SPACE AND RESOURCES IN WHICH TO RECORD AND STREAM GAMES—WHICH MIGHT OTHERWISE THREATEN THE PHYSICAL SAFETY OF SPECTATORS AND STUDENT-ATHLETES, DISRUPT THE FLOW OF GAMES, AND LEAD TO STREAMING FROM LESS-THAN-DESIRABLE VANTAGE POINTS.**

GRANTING APPELLANTS THE UNRESTRICTED ACCESS THEY NOW DEMAND WOULD THREATEN EVERY ONE OF THESE GOALS. FROM THE PERSPECTIVE OF THE AMERICAN HIGH SCHOOL COMMUNITY, THIS CASE CONCERNS NOT JUST VIDEO STREAMING, BUT ALSO THE ABILITY OF EDUCATIONAL INSTITUTIONS TO PROTECT THEIR STUDENTS. THE WIAA’S EXCLUSIVE LICENSING AGREEMENTS FOSTER THIS LATTER, PARAMOUNT GOAL, AND THE COURT SHOULD BALANCE THOSE IMPORTANT INTERESTS AGAINST ANY CLAIMED CONSTITUTIONAL VIOLATION.

VII. THE WIAA'S EXCLUSIVE CONTRACTS DO NOT RESTRICT APPELLANTS' ABILITY TO REPORT ON WIAA EVENTS.

ANY RESTRICTION THE EXCLUSIVE LICENSING AGREEMENTS AT ISSUE MAY PLACE ON APPELLANTS' ABILITY TO TRANSMIT THE HIGH SCHOOL ATHLETIC EVENTS LIVE IS INCONSEQUENTIAL, ESPECIALLY WHEN WEIGHED AGAINST THE IMPORTANT INTERESTS JUST DESCRIBED. THE NEWSPAPERS AND GANNETT SPECIFICALLY COMPLAIN THAT THE WIAA'S EXCLUSIVE LICENSING AGREEMENTS RESTRICT THEIR ABILITY TO "REPORT" ON WIAA-SPONSORED EVENTS. ESSENTIALLY, THEY ARGUE THAT BECAUSE THESE CONTRACTS FORCE THEM TO OBTAIN LICENSES TO STREAM VIDEO OF THE EVENTS OVER THE INTERNET, THE FREEDOM OF THE PRESS IS SOMEHOW HINDERED. BUT THE WIAA'S CONTRACTS DO NO SUCH THING.

TO BEGIN WITH, THE EXCLUSIVE LICENSING AGREEMENTS DO NOT IN ANY WAY PREVENT THE APPELLANTS FROM "REPORTING" ON WIAA-SPONSORED EVENTS. THEY ONLY LIMIT THE UNLICENSED TRANSMISSION OF MORE THAN TWO MINUTES OF A GAME AT A TIME. REPORTERS AND JOURNALISTS ARE FREE TO SHOW CLIPS OF THE GAME, WRITE STORIES, INTERVIEW COACHES AND PLAYERS, SUMMARIZE AND DISSEMINATE STATISTICS, AND PERFORM ALL THE OTHER TASKS THAT TRUE REPORTING ENTAILS. THE SAME IS TRUE OF PHOTOGRAPHS TAKEN AT THE GAMES. APPELLANTS ARE FREE TO PUBLISH OR OTHERWISE DISSEMINATE THE PHOTOS THEY TAKE AS PART OF THEIR COVERAGE SO LONG AS THEY REFRAIN FROM SEPARATELY SELLING THE PICTURES.

THE ONLY LIMITATIONS APPELLANTS FACE ARISE WHEN THEY ATTEMPT TO GO BEYOND THEIR TRADITIONAL PROVINCE OF REPORTING. IF MEDIA COMPANIES LIKE APPELLANTS NOW WISH NOT JUST TO REPORT ON, BUT ACTUALLY TO TRANSMIT HIGH-SCHOOL EVENTS OVER THE AIRWAVES OR THE INTERNET, THEY ADMITTEDLY MUST OBTAIN A LICENSE FROM WWVY. BUT THESE ARE HARDLY RESTRICTIONS ON APPELLANTS' TRADITIONAL FREE PRESS ROLES. THERE IS A CLEAR DISTINCTION BETWEEN "REPORTING" ON AN EVENT AND TRANSMITTING IT IN FULL OVER THE INTERNET. *SEE RICE V. KEMPKER*, 374 F.3D 675, 679 (8TH CIR. 2004) (HOLDING THAT RESTRICTIONS ON FILMING EVENTS DO NOT VIOLATE FIRST AMENDMENT); *POST-NEWSWEEK STATIONS-CONNECTICUT, INC. V. TRAVELERS INS. CO.*, 510 F.SUPP. 81, 84 (D. CONN. 1981) (EXPLAINING THAT THERE IS NO SPECIAL ACCESS FOR THE PRESS TO SPORTING EVENTS).

THERE IS NOTHING NEW OR OFFENSIVE ABOUT EXCLUSIVE LICENSING CONTRACTS IN THIS CONTEXT. *SEE, E.G., HOME BOX OFFICE, INC. V. F.C.C.*, 587 F.2D 1248, 1253 (D.C. CIR. 1978) (UPHOLDING FEDERAL COMMUNICATIONS COMMISSION RULE ALLOWING EXCLUSIVE LICENSING CONTRACTS IN TELEVISION); *KTSP-TAFT*, 646 F.SUPP. AT 307-08 (UPHOLDING EXCLUSIVE CONTRACT TO BROADCAST STATE LOTTERY AS NOT VIOLATING FIRST AMENDMENT). "CONTRACTS CONFERRING THE EXCLUSIVE RIGHT TO BROADCAST SPORTING EVENTS AND ARTISTIC OR THEATRICAL PERFORMANCES ARE COMMONPLACE." *Id.* WHILE ENTERTAINMENT CAN BE "NEWS," WHEN THAT ENTERTAINMENT "IS THE EXPOSITION OF AN ATHLETIC EXERCISE . . . IT IS ON THE PERIPHERY OF PROTECTED SPEECH (FOR PURPOSES OF A BALANCING OF

CONFLICTING INTERESTS).” *POST NEWSEEK*, 510 F.SUPP. AT 81 (FINDING THAT CITY’S CONDITIONING ACCESS TO ICE-SKATING CHAMPIONSHIPS ON AGREEMENT TO INDEMNIFY IT FOR ANY DAMAGES ARISING OUT OF THE UNAUTHORIZED TRANSMISSION OF THE EVENT DID NOT VIOLATE FIRST AMENDMENT).

CONCLUSION

CONTRACTS LIKE THE WIAA’S EXCLUSIVE RIGHTS AGREEMENTS ARE VALID AND DO NOT OFFEND THE FREEDOM OF THE PRESS. THE MINIMAL INTRUSION ON APPELLANTS’ ABILITY ALSO TO PROFIT FROM LIVE TRANSMISSIONS OF THE EVENTS IS INSIGNIFICANT WHEN COMPARED TO THE CRUCIAL ROLE THESE LICENSING AGREEMENTS PLAY IN PROMOTING AND PROTECTING HIGH SCHOOL ATHLETICS. IF STATE ASSOCIATIONS LIKE THE WIAA ARE TO EFFECTIVELY PROMOTE INTERSCHOLASTIC ATHLETICS FOR ALL SPORTS AND ALL STUDENT-ATHLETES, THEY AS A PRACTICAL MATTER MUST BE ALLOWED TO RAISE REVENUE BY ENTERING INTO EXCLUSIVE CONTRACTS LIKE THOSE AT ISSUE HERE. THESE SAME CONTRACTS HAVE IMPORTANT ADDITIONAL BENEFITS BOTH IN EXPANDING PUBLIC ACCESS TO POST-SEASON CONTESTS AND PROTECTING STUDENT-ATHLETES AND THEIR SCHOOLS FROM EXPLOITATION AND OTHER ADVERSE INFLUENCES. THE NFHS URGES THIS COURT TO AFFIRM THE DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT IN THE WIAA’S FAVOR.

DATED: NOVEMBER 12, 2010

RESPECTFULLY SUBMITTED,

WILLIAM E. QUIRK **MO #24740**

WQUIRK@POLSINELLI.COM

ANTHONY W. BONUCHI **MO #57838**

ABONUCHI@POLSINELLI.COM

POLSINELLI SHUGHART PC
TWELVE WYANDOTTE PLAZA
120 W. 12TH STREET, SUITE 1700
KANSAS CITY, MO 64105
(816) 421-3355
(816) 374-0509 FAX

*ATTORNEYS FOR AMICUS CURIAE NATIONAL
FEDERATION OF STATE HIGH SCHOOL
ASSOCIATIONS*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT THIS BRIEF COMPLIES WITH THE TYPE-VOLUME LIMITATIONS SET FORTH IN FED. R. APP. P. 32(A)(7)(B) AND 29(D). THIS BRIEF CONTAINS 3,557 WORDS. I FURTHER CERTIFY THAT THIS BRIEF COMPLIES WITH THE TYPEFACE AND TYPE STYLE REQUIREMENTS OF FED. R. OF APP. P. 32(A)(5)-(6) AND SEVENTH CIRCUIT RULE 32(A)-(B). THIS BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING MICROSOFT WORD 2003 IN 13-POINT BOOK ANTIQUA.

I FURTHER CERTIFY THAT AN ELECTRONIC VERSION OF THIS BRIEF HAS BEEN PROVIDED ON A DISC TO THIS COURT UNDER CIRCUIT RULE 31(E), AND THAT THE DISC IS VIRUS FREE.

DATED: NOVEMBER 12, 2010

**ATTORNEYS FOR AMICUS CURIAE NATIONAL
FEDERATION OF STATE HIGH SCHOOL
ASSOCIATIONS**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON NOVEMBER 12, 2010, A COPY OF THE FOREGOING

WAS SERVED VIA U.S. MAIL AND ELECTRONICALLY VIA EMAIL TO:

PERKINS COIE, LLP

JOHN S. SKILTON

JSKILTON@PERKINSCOIE.COM

DAVID L. ANSTAETT

DANSTAETT@PERKINDCOIE.COM

JEFF J. BOWEN

JBOWEN@PERKINSCOIE.COM

AUTUMN N. NERO

ANERO@PERKINSCOIE.COM

1 EAST MAIN STREET, SUITE 201

MADISON, WI 53703

TELEPHONE: (608) 663-7460

FACSIMILE: (608) 663-7499

ANDERSON, O'BRIEN, BERTZ, SKERENE & GOLLA

GERALD O'BRIEN

GMO@ANDLAW.COM

1257 MAIN STREET

P.O. Box 228

STEVENS POINT, WI 54481-0228

TELEPHONE: (715)344-0890

FACSIMILE: (715)344-1012

***ATTORNEYS FOR THE PLAINTIFFS' WISCONSIN INTERSCHOLASTIC
ATHLETIC ASSOCIATION AND AMERICAN-HiFi, INC.***

MAWICKE & GOISMAN S.C.

JENNIFER S. WALTHER

JWALTHER@DMGR.COM

1509 NORTH PROSPECT AVENUE

MILWAUKEE, WI 53202

TEL: (414) 224-0600

FAX: (414) 224-9359

ATTORNEY FOR THE PLAINTIFFS

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION

GODFREY & KAHN, S.C.

ROBERT J. DREPS

RDREPS@GKLAW.COM

MONICA SANTA MARIA

MSANTAMARIA@GKLAW.COM

ONE EAST MAIN STREET, SUITE 500

PO Box 2719

MADISON WI 53701

608-284-2606

FAX: 608-257-0609

ATTORNEYS FOR DEFENDANT

GANNETT Co., INC.

ATTORNEYS FOR AMICUS CURIAE NATIONAL
FEDERATION OF STATE HIGH SCHOOL
ASSOCIATIONS