Wisconsin Interscholastic, et al v. Gannett Company, Incorporated, et al Doc. 14

No. 10-2627

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
Newspaper Association,

Defendants-Appellants.

Appeal from a Judgment and Order of the United States
District Court for the Western District of Wisconsin
Case No. 09-CV-155-WMC
Hon. William M. Conley, Presiding

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The full names of the parties represented as Plaintiffs-Appellees are Wisconsin Interscholastic Athletic Association and American-HiFi, Inc.

The names of all law firms whose partners or associates have appeared for these parties in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this Court are: Perkins Coie LLP, Mawicke & Goisman, S.C. and Anderson, O'Brien, Bertz, Skrenes, & Golla.

Neither Wisconsin Interscholastic Athletic Association nor American-HiFi, Inc. has parent corporations.

No publicly held company owns 10% or more of American-HiFi, Inc.'s stock. The Wisconsin Interscholastic Athletic Association is an unincorporated and nonprofit organization.

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The Wisconsin Interscholastic Athletic Association has no parent corporations.

The Wisconsin Interscholastic Athletic Association is an unincorporated and nonprofit organization.

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JURISDICTIONAL STATEMENT

The jurisdictional summary in the appellants' brief is complete and correct.

STATEMENT OF ISSUES

1. Does First Amendment public forum law require WIAA to allow reporters to Internet transmit entire WIAA games free of charge despite WIAA's exclusive contract with its business partner?

District Court answered: No.

2. Do WIAA's media policies provide unconstitutional discretion to grant or deny Internet transmission permits when numerous alternative means of communication and reporting remain, when there has been no indication or history of content-based review, and when in practice no request to stream has ever been denied?

District Court answered: No.

3. Is the licensing fee charged by WIAA to Internet stream entire games an unconstitutional tax on the media when WIAA permits other means of reporting on that game and when WIAA uses that revenue to defray the costs of the service and to offset the costs of its tournaments?

District Court answered: No

STATEMENT OF THE CASE

As the district court stated, this case turns on whether the Wisconsin Interscholastic Athletic Association ("WIAA") violated the First Amendment rights of Appellants Gannett Co., Inc., and Wisconsin Newspaper Association, Inc., (collectively, "Gannett") by entering into an exclusive license with American-HiFi, Inc. d/b/a When We Were Young Productions ("WWWY") to stream WIAA-sponsored tournament events over the Internet. After careful consideration, the district court correctly answered "no." The opening district court summary provides a succinct statement of the case before this Court:

> Ultimately, this is a case about commerce, not the right to a free press. The exclusive license [WWWY] purchased from WIAA does not violate the First . . . Amendment because it poses no threat to the rights and values embodied in [that] constitutional provision[]. The events sponsored by the WIAA are not public forums; the principal reason WIAA granted an exclusive license to stream its games over the internet is not to promote discourse, but to create and grow an additional source of revenue. WIAA has made a business decision that it will be more lucrative to give one company the rights to broadcast its tournament games, a decision that does not stifle speech or discriminate on the basis of viewpoint. Moreover, the public does not lose meaningful access to these games under [WIAA's] agreement because other media companies are permitted to stream any tournament game [WWWY] declines to produce. Even with respect to those games for which [WWWY] holds exclusive rights, [Gannett] remains free to (1) publish stories on the games, (2) express opinions about them and (3) offer limited live coverage. While WIAA has limited defendants' ability to use its tournament events to generate advertising dollars on other companies' websites, the Constitution does not require the government to assist private entities in making a profit.

(Appellants' Short Appendix at 2-3 (hereafter "AA")).

In other words, this case is not about suppression of the press. The dispute has nothing to do with free speech or the right to report or gather news or with any

control of the content of that news. Rather, this case is about whether a private business has the right to record and transmit, for free, in their entirety and for a profit, events organized and sponsored by WIAA.

STATEMENT OF FACTS

WIAA is a voluntary, unincorporated and nonprofit organization located in Stevens Point, Wisconsin. (AA3-4; Plaintiffs-Appellees' Supplemental Appendix ("SA") 2.) WIAA is comprised of public and private high and middle schools. (AA4;SA169-70.)

The overall purpose of WIAA is threefold:

> To organize, develop, direct, and control an interscholastic athletic program which will promote the ideals of its membership and opportunities for member schools' participation.
>
> To emphasize interscholastic athletics as a partner with other school activities in the total educational process, and formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship.
>
> To promote uniformity of standards in interscholastic athletic competition, and prevent exploitation by special interest groups of the school program and the individual's ability.

(AA4;SA60.) Members of WIAA include 506 public and private high schools and 117 junior high and middle schools. (AA4.) WIAA sponsors events for multiple sports including baseball, softball, basketball, football, golf, hockey, gymnastics, soccer, and tennis, among others. (AA4.)

WWWY is a video production company in Waunakee, Wisconsin. (AA4;SA2-3,244.). Tim Eichorst, the majority shareholder, founded WWWY to produce and distribute high school athletic events. (SA244-45.)

Appellant Gannett Co., Inc., publishes newspapers throughout the United States, including 10 daily and 19 nondaily Wisconsin newspapers. (AA4;SA14.) Appellant Wisconsin Newspaper Association, Inc., is a Wisconsin newspaper group that reports on high school athletics, including WIAA events. (AA4.)

I. WIAA's Media Policies

WIAA acknowledges the responsibilities of legitimate news-gathering media in reporting from WIAA tournaments. (SA75.) In order to assist members of the media in providing coverage to their communities, WIAA publishes annually a Media Policies Reference Guide containing policies in effect for all levels of State Tournament Series competition (i.e., regional, sectional, and state finals) ("WIAA tournaments" or "WIAA events"). (*Id*.)

WIAA issues media credentials to television stations; radio stations; daily and weekly newspapers, including photographers; legitimate sport-specific publications; and news-gathering websites meeting certain criteria. (SA77,90.) WIAA has not denied any legitimate media entry to a tournament or media facilities, or media credentials. (SA177,159-60.)

WIAA prohibits non-editorial, commercial, or unauthorized use of complete transmissions or Internet streams of actual events without WIAA consent. (SA75.) WIAA prohibits live or delayed television or Internet streaming of WIAA events exceeding two minutes without WIAA permission. (SA65,72.) Those who wish to exceed two minutes must obtain permission. (SA90.)

When available, WIAA provides space and technology to make reporting more convenient for credentialed media. (SA283-84.) Under WIAA policies,

newspapers have virtually complete access to WIAA events at no charge in order to fully describe, explain, and analyze newsworthy events. (AA3,41;SA296-97.) Newspapers are able to report on the details and outcomes of the games, including sidebars, statistics, and other information, and can freely photograph events and interview participants. (AA3,41;SA295,283-84.) Reporters are generally permitted to film game action, record statistics and other information via audio, and publish and produce stories. (AA3,41;SA295.)

II. WIAA's State Athletic Tournaments

The overwhelming majority of WIAA's budget derives from post-season tournament revenues, events WIAA organizes, sponsors, and administers. (AA13;SA170,211-12.) In the fiscal year ending July 31, 2008, tournaments brought in $6,202,963, comprising 86% of WIAA's total operating revenue. (AA13;SA170,183.) Remaining WIAA revenue for that year came from membership dues (.5%); sports fees (5.5%); officials dues (5%); and miscellaneous revenue such as subscriptions and rule book orders (3%). (AA13-14;SA170,183.) All of WIAA's revenue supports operation and administration of WIAA programs, including all tournaments. (AA14;SA170.)

Some of WIAA's sports generate a profit; others generate a loss. (AA14;SA170-71,184-85.) Revenues from profitable sports offset deficits in other sports. (AA14;SA170-71,184-85.) In the fiscal year ending July 31, 2008, WIAA generated positive net revenues in only six sports, with basketball and football accounting for 60.9% of WIAA's tournament revenue. (SA170,180-85.) For eight

sports, expenses exceeded revenues, requiring WIAA to subsidize those sports with tournament revenue. (*Id.*)

WIAA hosts and administers 25 State Tournaments, including boys and girls sports, and individual and team competitions. (AA4-5;SA176.) WIAA leases 16 facilities for terms of 3 to 5 years. (AA5;SA176.) Each of the leased facilities is designed for a specific tournament, and many venues are privately owned. (SA176-77.) WIAA uses the venues solely for competitions and for the duration of those competitions. (AA5;SA176.) It does not otherwise manage or operate the venues. (AA5;SA176.) The public may enter any event upon payment of a fee. (AA5;SA177.)

III. WIAA's Exclusive Contract with When WWWY

WIAA has had an exclusive contract with Fox Sport Network Wisconsin ("Fox") to transmit the seven state football finals since 2001. (SA171.) WIAA receives $20,000 annually. (SA171.)[1] WIAA has had an exclusive video transmission contract with Quincy Newspapers, Inc. ("QNI") for boys basketball since 1968, and for girls basketball and hockey since the 1980s. (AA5;SA171.) In 2004, QNI negotiated a reduced annual payment ($140,000 to $40,000), causing WIAA to seek new revenue sources. (AA5;SA171-2,202-12.)

At the same time, WIAA sought broader distribution and increased exposure for underexposed sports, e.g., volleyball and wrestling. (SA172,12-13.) Few high school sports were televised and WIAA was unaware of any Internet streaming of

[1] This amount reflects the yearly payment through the 2009-10 school year.

games. (AA5;SA172,212.) WIAA inquired whether existing contractual partners would broadcast these events. They declined. (AA5;SA173,212-13)

In 2005, Tim Eichorst made a formal proposal to WIAA to deliver broadcast quality production and distribution of WIAA events via the Internet. (AA5;SA245-46,260-72,173-74,213.) Before that, no media or production company expressed interest in transmitting WIAA events via the Internet, and there were no media inquiries regarding transmission of underexposed sports. (AA5;SA213.) Eichorst invested millions of dollars in developing WWWY as a high quality production company at no cost to WIAA. (SA252.)

In May 2005, WWWY and WIAA entered into a ten-year Production Rights and Distribution Agreement ("the Agreement"). (AA5;SA247,274-76,174.) The Agreement gives WWWY exclusive rights to produce, sell, and distribute, including through Internet streaming, all WIAA tournament and championship events for all WIAA sports, subject to existing contracts. (AA5-6;SA247,274-76,174,213.) The Agreement provides for production goals of 100% of state tournaments, 50% of sectional events, and 25% of regional events. (AA6;SA248,274.) WWWY later contracted with Fox to distribute WWWY-produced WIAA events. (AA6;SA251.) Fox required WWWY to provide it with exclusive content for distribution. (AA6;SA251.)

WWWY paid $60,000 to WIAA in 2008 for these rights (AA7;SA174,213,249.) and received $80,000 from a sponsorship partner, a portion of which came from WWWY program advertising. (AA7;SA215.) WIAA keeps revenue from partners for internal operations and does not transfer any to the State of Wisconsin or to any

state agency. (AA7;SA174-75.) Revenue from WWWY allows WIAA to expand program opportunities and transmission of events for all WIAA-recognized sports, including WIAA-subsidized sports, and allows WIAA to keep ticket prices affordable. (SA174-75,178.)

IV. Affiliate Production Partners

The Agreement grants WWWY rights to authorize affiliate production partners to produce WIAA events. (SA248,274.) Through this system, WWWY monitors production and distribution for WIAA, ensuring compliance with media policies and quality control. (SA216,248-49.)

Anyone may Internet stream (i.e., transmit) a WIAA event that WWWY has declined upon payment of $250 for one camera, or $1,500 for multiple cameras. (AA12;SA217,318,253.) WIAA based this fee on a number of factors, including fees charged by other state athletic associations; resources devoted to the production at the event site; transmission medium (whether Internet or TV); and likely extent of distribution. (AA12-13;SA253,217.)

WWWY has never rejected a request to produce an event not already produced by WWWY; WWWY and has never charged anything other than the WIAA-determined fee. (AA12,48;SA252,217.)

V. WWWY's Valuable Services for WIAA

As part of the Agreement, WWWY provides no cost video production resources to WIAA and operates and manages WIAA's "wiaa.tv" web portal. (AA7;SA214-18,249-51.) WWWY films, edits, and makes available on wiaa.tv WIAA's Annual Meeting, sports meetings, and award ceremonies. (AA7;SA214-

18,49-51.) WWWY produces an annual video highlight compilation of all WIAA tournaments. (AA7;SA214-18,249-51.) At championship tournaments, WWWY provides feed to the video board of both live games and video recaps from other WIAA state championship tournaments that WWWY has produced. (AA8;SA214-18,49-51.) WWWY also creates public service announcements for WIAA. (AA8;SA214-18,249-51.) The value of these services totals $508,806 annually. (AA7;SA253.)

The wiaa.tv web portal contains all WWWY-produced live and archived videos of WIAA events, and all WWWY-produced live and archived videos for meetings and ceremonies. (AA7;SA218.) Although no WIAA events were offered on the Internet in 2004-05, in 2008-09 the wiaa.tv web portal transmitted 82 live events and 175 in archived form or on DVD. (AA8;SA213,311-12.) WIAA has control over the content placed on wiaa.tv to ensure it supports and is consistent with WIAA's mission and purpose. (AA7;SA218-19,247-48.)

VI. Similar Media Policies

WIAA's contract reflects standard practice for athletic programs of public educational institutions, which often grant exclusive transmission rights in order to increase the value of those rights, thereby increasing revenue. (SA284-89,293.) For example, the University of Wisconsin—Madison entered an exclusive broadcasting agreement with Learfield Communications that includes Internet streaming of University of Wisconsin games, substantially increasing the University's revenue. (SA286-88,118-21,138.) This revenue increase is consistent with the experiences of

other educational institutions: Learfield alone has rights agreements with over fifty organizations. (SA288-89,140.)

SUMMARY OF ARGUMENT

The district court properly rejected Gannett's claim that the First Amendment grants newspapers unfettered rights to transmit WIAA games over the Internet despite WIAA's exclusive contract with WWWY. Gannett argues that WIAA created a public forum for Internet streaming and thus may impose only limited restrictions on participants in that forum. In order to prevail on this claim, Gannett bears the burden of demonstrating that WIAA *intended* to create such a forum. As the district court found, the record conclusively demonstrates the opposite intention. Although WIAA provides ample opportunity for media representatives to *report* on tournament games, WIAA never intended to create a public forum for the streaming of complete games. Instead, WIAA intentionally restricted game transmission to an exclusive contract partner as part of a business decision to raise revenue and expand coverage of sports with smaller followings. Moreover, the purpose of this enterprise—limited, orderly transmission of events—is incompatible with the expressive purposes associated with a public forum. WIAA's legitimate commercial interests in raising revenue and managing successful tournaments underscore that WIAA acts in a proprietary, rather than a governmental or regulatory, capacity when organizing tournament events and providing for their transmission. As the district court noted, WIAA's proprietary

interests provide further evidence that WIAA created only a nonpublic forum for Internet streaming of tournament games.

Since this occurs within a *nonpublic* forum, WIAA need only show that its policies are reasonable in light of the purpose of the forum. As the district court concluded, an exclusive contract with WWWY has provided some $60,000 in revenue as well as a host of other benefits, including advertising revenue, expanded coverage of more sports, protection from association of WIAA events with advertising inappropriate for high school students, and various valuable production services for WIAA meetings and awards presentations. At the same time, organizations remain free to report on all WIAA events using a wide variety of means and communication channels, and need only pay a modest fee if they wish to Internet stream a game. WIAA's media policies easily satisfy the reasonableness criteria. In fact, even assuming WIAA had created a public forum, which it has not, this same easy access to reporting methods and ready availability of streaming constitute reasonable and constitutionally sound time, place and manner restrictions.

Gannett also argues that WIAA's media policies provide officials with "unfettered discretion" over the granting of streaming permits because they state that permissions granted and fees required "will be at the sole discretion of the WIAA." As the district court concluded, however, the "unfettered discretion" cases are inapposite because there is virtually no risk of censorship or viewpoint discrimination. Gannett remains free to access any game and report on it without

any permit whatsoever, and Gannett failed to identify any plausible reason why viewpoint would be considered in the decision to stream a high school sporting event. Furthermore, the district court found that WIAA has adopted a uniform practice of granting every application to stream for which WWWY is not already producing the game. Because courts incorporate established practice into the analysis of discretion, this uniform practice obviates any concerns that might otherwise be raised by a policy leaving some discretion to administrators.

Finally, Gannett argues that the $250 fee charged to media companies wishing to stream an event constitutes an unconstitutional tax on the media. In light of the alternative avenues of communication open to Gannett, the cases striking down blanket levies on the only forms of expression available cannot apply here. Moreover, numerous courts have explicitly upheld reasonable licensing fees imposed by governmental actors to defray the costs of administering a particular program or to raise dedicated revenue when the government is acting in a commercial capacity. As the district court found, both of those situations apply here; WIAA's modest fees are both reasonable and justified.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Sweat v. Peabody Coal Co.*, 94 F.3d 301, 304 (7th Cir. 1996). The Court looks to whether the pleadings, discovery and affidavits on file show that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)). In determining

whether a genuine issue of material fact exists, the Court considers facts in the light most favorable to the nonmoving party. *Tolentino v. Friedman*, 46 F.3d 645, 649 (7th Cir. 1995). At the same time, the non-moving party must demonstrate the presence of a genuine factual issue for trial. The nonmovant fails in this task "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party . . . ." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If no genuine issue of material fact exists, the sole question is whether the moving party is entitled to judgment as a matter of law. *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1014-15 (7th Cir. 1996).

ARGUMENT

I. The District Court Correctly Held that WIAA's Transmission Policies Pass Muster Under First Amendment Forum Analysis.

The district court's forum analysis reduces to the straightforward conclusion that because WIAA did not intend to create a "forum" for Internet transmission, and because WIAA's transmission policy is reasonable and not viewpoint discriminatory, WIAA's transmission policies are constitutional. Stripped of its hyperbole, Gannett's challenge to this opinion boils down to the tenuous proposition that because WIAA allows the media access to its events, the Constitution demands that Gannett be allowed to transmit the entirety of any tournament game free of charge on the Internet. As found by the district court, this contention is meritless. WIAA did not create a "public forum" merely by allowing media to report on its events. Rather, whether Gannett has a First Amendment right to transmit WIAA events depends on (1) whether WIAA intended to create a forum for expressive activity and (2)

whether the activities Gannett seeks to engage in (here, complete transmission of games) are consistent with WIAA's purpose in organizing events. Both factors weigh in WIAA's favor. Accordingly, WIAA's reasonable and nondiscriminatory policies pass muster.

A. Courts Recognize Three Categories of Speech Fora, Warranting Differing Levels of Scrutiny.

As Gannett concedes, the First Amendment does not ensure "access to all who wish to exercise their [speech rights] on every type of Government property. . . ." *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788, 799-800 (1985). Rather, courts employ "forum" analysis to determine "whether a potential speaker has a right to use public property for expressive purposes." *Air Line Pilots Ass'n, Int'l v. Chicago*, 45 F.3d 1144, 1151 (7th Cir. 1995). Under this framework, the degree to which WIAA may regulate expression varies depending on the nature of the forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-45 (1983).

There are three basic categories of fora requiring different degrees of scrutiny. *Perry,* 460 U.S. at 44-46; *see also Ill. Dunesland Pres. Soc'y v. Ill. Dept. of Natural Res.*, 584 F.3d 719, 723 (7th Cir. 2009). First "traditional" public fora are those places traditionally "held in trust" for the use of the public for expressive activities—streets, sidewalks, and parks. *Perry*, 460 U.S. at 45-46; *Ill. Dunesland*, 584 F.3d at 723. Second "designated" public fora, are property the Government has opened to the expressive activity, generally for "specified forms of private expressive activity: plays, in the case of theater, rather than political speeches." *Ill. Dunesland*,

584 F.3d at 723. Third, the Court has recognized "nonpublic" fora, i.e., public property that "is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. While such facilities "sometimes are used for private expressive activities," they are not "primarily intended for such use." *Ill. Dunesland*, 584 F.3d at 723.

In both traditional and designated fora, the government may impose content-neutral time, place, and manner restrictions that are narrowly tailored to serve a significant government interest and leave open sufficient alternative channels for communication. *Perry*, 460 U.S. at 45. In nonpublic fora, by contrast, the government may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because the officials oppose the speaker's view." *Id.* at 46.[2]

B. The District Court Correctly Held that WIAA Did Not Create a Forum for Internet Transmission.

Gannett bears the burden to demonstrate WIAA-sponsored events are public fora. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies."). Gannett, however, has failed to marshal evidence to prove its case.

[2] Courts at times recognize a fourth category, called variously a "limited public forum" or "limited designated public forum," *Gilles v. Blancard*, 477 F.3d 466,473-74 (7th Cir.2007), in which the government creates a channel for a specific or limited type of expression where one did not previously exist. *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 382 (4th Cir. 2006) (citation omitted).

Indeed, Gannett has not proven any First Amendment violation under forum analysis. Rather, as the district court held, WIAA is the proprietor of its events, a fact that weighs strongly in favor of finding that no public forum exists. Gannett's brief does nothing to undermine the district court's conclusion. Indeed, to demonstrate its entitlement to "strict scrutiny," Gannett relies on (1) the general accessibility of WIAA events and (2) media policies concerning news gathering and media credentials. App. Br. at 35. Neither issue changes the forum analysis. Rather, as addressed below, a proper forum analysis considers (1) the intent of the government and (2) the nature of the property at issue. Gannett ignores these factors, both of which weigh in WIAA's favor.

1. WIAA's Transmission Policies Are Commercial in Nature and Therefore *Not* Public Fora.

In its capacity as tournament organizer, WIAA is no different than a professional sports league and is thus entitled to make similar distinctions in the scope of activities permitted at its events. As the district court concluded, this case is not about taxpayer-funded events; WIAA acts in its proprietary capacity in administering its own tournament events. Courts have uniformly permitted state actors to compete with private companies on nearly equal footing when engaged in a commercial venture. "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Int'l Soc'y for Krishna Consciousness, Inc. v.*

Lee, 505 U.S. 672, 678 (1992).[3] As recognized by the district court, WIAA has the right to generate revenue through transmission of its sporting events. (AA22.) Indeed, these funds are necessary to support WIAA and its tournaments. (AA22;SA370-73,74-76,254.)

Gannett fails to marshal any support for its attack on the district court. Rather, Gannett posits that WIAA does not function in a proprietary capacity because "contrary to the district court's view" the "principal purpose of all interscholastic athletics, including tournaments, is educational, or they would not justify the large expenditure of public funds for equipment, coaches and facilities, much less the time they take from academics." App. Br. at 32 (emphasis added). Gannett misstates the record.[4] This case does not involve regular season, taxpayer-

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[3] *See also, e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality) ("The City is engaged in commerce . . . The advertising space . . . is part of a commercial venture."); *Ridley v. Mass. Bay Trap. Auth.*, 390 F.3d 65, 79 (1st Cir. 2004) ("a lower level of scrutiny usually applies when the government acts as a proprietor"); *Gannett Satellite Info. Network Inc. v. Metro. Trans. Auth.*, 745 F.2d 767, 774 (2d Cir. 1984); *KTSP-Taft Television & Radio Co. v. Ariz. State Lottery Comm'n,* 646 F. Supp. 300, 309 (D. Ariz. 1986); *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 85 (D. Conn. 1981); *Foto USA, Inc. v. Bd. of Regents of the Univ. Sys. of Fla.*, 141 F.3d 1032 (11th Cir. 1981); *Am. Yearbook Co. v. Askew*, 339 F. Supp. 719, 722 (M.D. Fla.), *aff'd,* 409 U.S. 904 (1972); *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1544 (D.R.I. 1986) (upholding ban on cameras at public concerts), *aff'd*, 815 F.2d 692 (1st Cir. 1987); *Atlanta Journal & Constitution v. Atlanta Dep't of Aviation*, 322 F.3d 1298, 1309 (11th Cir. 2003); *Okla. Sports Props. v. Indep. Sch. Dist. #11 of Tulsa County*, 957 P.2d 137, 139 (Okla. Ct. App. 1998); *Sw. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230 (Tex. Ct. App. 1947); *Colo. High Sch. Activities Ass'n v. Uncompahgre Broad. Co.*, 300 P.2d 968, 970 (Colo. 1956); *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1986); *HippoPress, LLC v. SMG*, 150 N.H. 304, 313-14, 837 A.2d 347, 356-57 (2003).

[4] Gannett's brief misstates multiple facts. Gannett asserts, for example, that the tournaments at issue in this case are "funded by taxpayers" (App. Br. at 10, 22) or "paid for by the public" (App. Br. at 22) and that the tournaments are held on "public property" (App. Br. at 16-17, 27) in "public buildings" (App. Br. at 53) or in "public venues." App. Br. at 31. It is undisputed that WIAA pays for these tournaments with funds that are primarily derived from ticket sales, not tax dollars; only half of a percent of WIAA's revenues are

funded sports at a local high school gym. Rather, the challenged policies apply to state tournament events. As the district court found, rather than taking "large public expenditures," WIAA is a "self-sustaining organization." (AA23;SA170,183-85,211-12.) State tournament events are *funded entirely by WIAA* through tournament revenues, which derive from ticket sales and licensing revenue, not tax dollars. (AA23;SA170,211-12.)

After painstaking review of the record submitted by both parties in this matter, the district court concluded that the clear purpose of these events was not to foster debate or even educate but "to make money." (AA23.) The public must pay to enter the event and the media must pay extra to engage in certain activities, including transmission. (AA22;SA177,285,296.) The district court found that the WIAA needs these revenues in order to sustain its programs. (AA23;SA170-75,178,211-15,288-91.) Gannett has come forward with no evidence to challenge the district court's conclusion.

Moreover, Gannett misapprehends the law. To act in a proprietary capacity, WIAA need not have purely commercial motives. As the district court noted in rejecting Gannett's similar argument below, Gannett "cite[s] no authority for [its]

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derived from the membership dues that come from the member schools' budgets. (AA13-14;SA181-85.) Moreover, WIAA does not own, control or manage any of the venues, but rather leases venues for a limited period for the specific tournament. (AA4-5;SA176-77.) Many of the facilities are leased from private entities. (AA4-5;SA176-77.)

Because other mischaracterizations are largely irrelevant to the issues before this Court, WIAA will not discuss them further. Similarly, although Gannett relies upon inadmissible evidence, *see, e.g.*, App. Br. at 10 (citing to the inadmissible opinion of the Board of Directors of the Wisconsin Association of PEG Access Channels), such references have little bearing upon the legal issues before this Court.

view that an entity with broader purposes . . . can only operate in a public forum for First Amendment purposes." (AA25 (citing *Gannett,* 745 F.2d at 775).) A state actor engaged in one area may act in a proprietary capacity even where its purposes are not solely directed at commerce. *See Lee*, 505 US at 682-83; *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294, 315 (S.D.N.Y. 2000) ("when the government places limits on expression in nonpublic spaces while acting in a 'proprietary capacity' for the purposes of raising revenue or managing internal operations, a reduced standard of First Amendment scrutiny is demanded"). This remains true even when, like WIAA, state actors make commercial decisions within an educational or an athletics context. *See Foto USA, Inc. v. Bd. of Regents of the Univ. Sys. of Fla.*, 141 F.3d 1032, 1037 (11th Cir. 1998) ("the state in its proprietary capacity may contract to allow exclusive commercial access to one graduation photographer without offending the equal protection clause."); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 966 (9th Cir. 1999) ("[W]here the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality."); *Okla. Sports Props.*, 957 P.2d at 139 ("Rather, we are presented with the independent school district, acting in a *proprietary*, not *governmental*, matter, over which the constitution does not proscribe different treatment of the various news media." (citation omitted)). Here, although WIAA also aims to enhance educational experiences of Wisconsin's youth through athletics, WIAA must also generate funds

to produce and sustain tournaments. (AA22;SA170-75,178,211-14,288-91.) WIAA's exclusive contract and the associated rights fees are largely directed at this objective. (AA22;SA170-75,178,211-14,288-91.)

Gannett fails to identify a single case in which an exclusive transmission contract violated the First Amendment. Indeed, ignoring the bulk of the district court's analysis (and WIAA-cited precedent), Gannett distinguishes only two of the many cases relied on *KTSP-Taft* and *Post Newsweek*. First, with respect to *KTSP*, Gannett argues that the contract was not exclusive. Not so. While numerous stations could bid on the challenged rights, only one bidder (a joint bid from two channels) became "the exclusive broadcasters of the pick game throughout its existence." 646 F. Supp. at 305. Although the bid specifications did not mandate exclusivity, only one contract was awarded annually, and the court found "de facto exclusive status." *Id.* at 306 n.2.

Second, with regard to *Post Newsweek*, Gannett questions its relevance because the challenged exclusive contract was between the broadcaster and a private skating organization. While the *Post Newsweek* court acknowledged the origin of the exclusive broadcasting agreement, 510 F. Supp. at 83, this did not affect the outcome. Instead, the court focused on three factors: (1) the city acted in a proprietary capacity in operating the facility; (2) the restriction was relatively minor, given event access and alternative reporting avenues; and (3) the restriction was not arbitrary in light of the possibility that wider television broadcast could diminish the commercial value. *Id.* at 85-86. None of these factors depended upon

the source of the exclusive contract—in fact, the contract executed by the director of the facility acknowledged the exclusive broadcasting rights. *Id.* at 85 n.5.

Gannett's remaining quibbles with the district court's proprietary interest analysis are equally unpersuasive. Generally, Gannett complains that the district court "sacrificed" its speech rights to WIAA's commercial interests. Equating transmission of a high school football game with political discourse, Gannett contends that the district court "ignored" its "intention" to follow newspapers' local teams through tournaments with streaming coverage and express a unique "local" viewpoint. App. Br. at 22-23. Of course, there is no evidence or logical reason why a "local" viewpoint would be considered in any permit decision. Moreover, this argument turns forum law on its head. The First Amendment does not assure "access to all who wish to exercise their [speech rights] on every type of Government property . . . ." *Cornelius*, 473 U.S. at 799-800. The district court could not "sacrifice" Gannett's right because WIAA is engaged in a commercial venture, acting as a proprietor. Gannett simply does not have the right to wholesale transmission of WIAA events. Gannett's rhetoric ignores the fact that, like any media organization, Gannett is not meaningfully denied any right to gather, report, or editorialize on "news" related to any event.

2. Media Access to WIAA Events Does Not Create a Public Forum Because WIAA Must Intend to Designate a Public Forum.

Gannett also points to its access to WIAA events in order to claim that WIAA has created a public forum, but this argument is equally unpersuasive. WIAA does not dispute that it permits the public (including the media) entry to WIAA events,

the public upon payment of an admission fee, and the media upon obtaining credentials without a fee. This is not enough to establish a forum. "Not all public places are public forums." *Int'l Soc. for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 159 (3d Cir. 1982) ("[A] place owned or controlled by the government does not become a public forum simply because members of the public are freely permitted to visit it.") (citing *Greer v. Spock*, 424 U.S. 828, 837 (1976)). "Such a principle of constitutional law has never existed, and does not exist now." *Greer*, 424 U.S. at 836.

Nor did WIAA create a public forum merely by issuing policies governing media conduct during its tournament events. *Cornelius*, 473 U.S. at 805 ("[S]elective access, unsupported by evidence of a *purposeful designation* for public use, does not create a public forum.") (emphasis added). Rather, to create a public forum, Gannett must show that WIAA made the decision intentionally to open the nontraditional forum of a sports arena for public discourse. *Id.*[5]

The undisputed record demonstrates that WIAA had no such intention. As the district court found, and as Gannett has not challenged, "[t]here is no genuine dispute that WIAA never intended to open up its events for Internet streaming by the general public or the media." (AA29.) Indeed, before 2005 (when WIAA contracted for streaming), there was no WIAA tournament streaming. (AA13,29;SA345,172,214.) Only WWWY and WIAA were interested in producing

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[5] *See, e.g.*, *N.J. Sports*, 691 F.2d at 161 (New Jersey's Meadowlands sporting complex was a non-forum); *Hubbard*, 797 F.2d at 555; *HippoPress*, 150 N.H. at 313-14, 837 A.2d at 356-57; *Hone v. Cortland City Sch. Dist.*, 985 F. Supp. 262, 271 (N.D.N.Y. 1997); *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986).

events. (AA10,29;SA213,348.) After 2005, WIAA permitted streaming only by way of its streaming policies, designed to increase revenues by controlling when parties may stream a game and the amount they must pay. (AA23) Rather than demonstrating intent to open streaming as a forum, WIAA's policies evince intent to control this medium strictly to achieve WIAA's financial goals. Courts have acknowledged that an actor's intent to profit from a venture is antithetical to intent to create a public forum. *Lee*, 505 U.S. at 682. This is because, unlike public fora, commercial endeavors rarely if ever are intended to "promot[e] the free exchange of ideas." *Id.*[6]

As the district court noted, physical realities further corroborate WIAA's intention to limit access: "WIAA could not have intended to create unlimited media access for streaming tournament games because it would be impossible to do so." (AA30.) As the district found, recording and transmitting a game requires significant space. (AA30;SA316-17,378-79,295,43.) Some WIAA venues are simply unable to accommodate more than one broadcaster, let alone every media

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[6] Gannett challenges the district courts analysis based on *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), in which this Court found a public advertising forum on city transit. *Planned Parenthood* is inapposite, as in that case the city had no policy limiting use of advertising space, and had thus opened its doors to a wide range of expression, allowing all advertising "as a matter of course." *Id.* at 1233*; see also Entertainment Software Ass'n v. Chicago Transmit Authority*, 696 F. Supp. 2d 934, 943 (N.D. Ill. 2010) (holding Chicago's policies continue to evidence intent to allow all manner of speech). In contrast, as in *Lehman*, 418 U.S. 298, WIAA has a strictly enforced streaming policy.

representative wishing to transmit over the Internet. (AA30;SA316-17.)[7] This too weighs strongly in favor of finding an intent to limit the forum.

3. The Nature of WIAA Tournament Venues Is Incompatible with Uncontrolled Internet Transmission.

In determining WIAA's intent, the Court must also consider the nature of the property itself: "[t]he primary factor in determining whether property owned or controlled by the government is a public forum" is "how the locale is used." *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 547 (2d Cir. 2002) (quotation omitted). The "nature of the property" at issue aids the court in determining whether the actor intended to open a forum. *Cornelius*, 473 U.S. at 802-03; *see also Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991) ("Both *Hazelwood* and *Cornelius* instruct that we also examine the nature of the government property . . . .") (analyzing overall nature of a school in holding that publications and athletic programs were nonpublic fora). While it is true that "channels for public communication—or alternative fora—may well exist *within* the greater piece of government property," the nonpublic status of the overall facility must also be considered. *Air Line*, 45 F.3d at 1151-52 (nonpublic status of an airport is relevant to the forum status of alternative channels within airport); *Cornelius*, 473 U.S. at 801. In this case, the nature of the property provides further evidence that WIAA did not intend to create a public forum.

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[7] Gannett tries to avoid fact by noting that all credential media are invited to videotape the entire game in order to generate two minutes of highlights. This argument ignores the WIAA's video transmission priority criteria, which establish an order of preference when "demand for transmissions exceeds available accommodations." (SA32.)

Most obviously, the locale here is an athletic facility dedicated to non-expressive activity. WIAA holds events in private facilities rented for that purpose alone—the events are not held in "public property," as Gannett asserts. (SA340-41,176-77.) And it is undisputed that these facilities are rented primarily for sporting events, selected based on suitability for that purpose. (SA340-41,176-77.) These facilities include sports fields, arenas, and venues of purely athletic character, such as swimming pools, golf courses, and tennis courts. (SA341,176-77.) When WIAA leases these facilities, it does so for competitions only. (SA340,176-77.) WIAA does not own, control, or manage any of the venues. (SA176.) Quite simply, WIAA venues are not places of public assembly intended for the exchange of ideas, but designed for the non-expressive activity of athletic competitions.[8] Numerous courts have held that facilities of like character are not public fora because, as stated by the Third Circuit, they "are the kind of public places . . . so clearly dedicated to recreational use that talk of their use as a public forum would in general be totally unpersuasive." *N.J. Sports*, 691 F.2d at 161 (quotation omitted).[9] Thus, the purpose of WIAA tournaments is not the free exchange of ideas, but sporting events. They have little if any expressive content.

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[8] Sports are not afforded significant First Amendment protection. *See Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So. 2d 496, 501 (Fla. Ct. App. 2003) (citing *Sunset Amusement Co. v. Bd. of Police Comm'rs*, 496 P.2d 840, 845-46 (Cal. 1972); *see also Murdock v. City of Jacksonville*, 361 F. Supp. 1083, 1096 (M.D. Fla. 1973); *Justice v. NCAA*, 577 F. Supp. 356, 374 (D. Ariz. 1983); *Post Newsweek*, 510 F. Supp. at 86.

[9] *See also Hubbard*, 797 F.2d at 555; *HippoPress*, 837 A.2d at 356-57; *Hone*, 985 F. Supp. at 271; *Calash*, 788 F.2d 80.

Sports reporting is, at best, "on the periphery of protected speech," and it is certainly not akin to core political speech, as Gannett posits. *See Post Newsweek*, 510 F. Supp. at 86; *see also* AA28. Moreover, transmitting a game is distinct from reporting on those events and even more remote from core protected expression. That a particular venue may be used "in part" for reporting, as Gannett asserts, is insufficient to establish a public forum for all media activities. Neither a courtroom nor a prison is a public forum, yet both have policies in place to govern media activities therein, including videotaping policies. Similarly, reporters may be allowed access to a stadium during an athletic competition, and the stadium may have policies regulating these activities. But such policies do not transform a nonpublic forum into a public one.

In the end, Gannett "fails to demonstrate the 'clear intent to create a public forum,'" as required by the Supreme Court. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (quoting *Cornelius,* 473 U.S. at 802). There is no evidence that WIAA either by "policy or by practice," had an intent to open tournament games to "indiscriminate use," whether by the media or anyone else. *Id.* (quoting *Perry,* 460 U.S. at 46-47). Instead, the evidence demonstrates that WIAA has "reserve[d] the forum for its intended purpos[e]," i.e., as a sporting event. *Id.* (quoting *Perry*, 460 U.S. at 46). Therefore, because WIAA's policies are reasonable and viewpoint neutral they survive Gannett's First Amendment challenge.

4. The District Court Properly Considered the Forum to be Internet Streaming Rather Than Physical Media Space or a Broader Forum for Transmission and Communication.

Gannett also attempts to recast the forum at issue as a physical space for reporters, arguing that WIAA cannot restrict Gannett's activity within that space. App. Br. at 30-31 ("WIAA intentionally created a designated public forum by opening designated areas of its tournament venues to the media for coverage of the events . . . The forum at issue is the physical space set aside for credentialed media within tournament venues."). But it is undisputed Gannett has never been denied access to the "physical space"[10] it contends is a designated forum. AA13;SA177,160,342.) Indeed, no reporter has been denied entry, access to the media area, or credentials for any WIAA event. (AA13;SA177,160,342.)

Moreover, within that space, Gannett is free to attend and report on the games and to provide the public with any information it deems important. Gannett may report on the details and outcomes of the games, whether in regular print editions or on its websites. (AA13,41;SA177,160,342,283-84,296.) Gannett may rely on photographs of the events and interview coaches and athletes. (AA13,41;SA337-38,80-89,219,284-84,295-96.) Gannett may carry live audio streams of tournament games by paying an additional rights fee of $40-50 to WIAA. (SA376,283,296.) Gannett may likewise use two minutes of highlights or other action for reporting (and may exceed two minutes with WIAA's approval). (SA336-37,376-77,282-83,296,64,72,86,104-05.) Gannett may report live from tournament venues using

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[10] The availability and size of the press area varies. (SA316-17). At many smaller events, there is no such area. (SA316-17).

live game action as a backdrop for the report so long as there is no play-by-play commentary. (SA336-37,376-77,282-83,296,64,72,86,104-05.) Gannett is not even foreclosed from Internet streaming of games, as it may transmit unproduced games by simply paying the required fee. (SA337,377,105,283,296,318-19,217,321-22.) And Gannett can do all of this and more from any purported media space within an event.[11] (SA375-78,282-84,295-97.) Rather than being "denied" any access, Gannett has virtually complete access to the athletic events in order to perform its journalistic function, i.e., to fully describe, explain, and analyze newsworthy events. (SA374,296-97.)

a. Both Courts and Industry Recognize the Distinction Between Covering and Transmitting Events Wholesale.

Gannett does not actually seek "access" to a "physical space" because it already has access. Gannett seeks to film and transmit WIAA games without paying and without regard to whether WIAA's exclusive rights partner is already producing that event. Filming and transmission restrictions have been "universally" upheld by courts. *See, e.g.*, *Rice v. Kempker*, 374 F.3d 675, 679 (8th Cir. 2004) ("[C]ourts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access."). The right of access does not necessarily include the right to videotape. *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999) (no "essential nexus between the right of access and a right to videotape"); *see also Zacchini v. Scripps-*

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[11] Reporters are generally restricted to specific locations and to have limitations placed on the equipment they can use, for example, on the ability to originate a radio broadcast. (SA376,295) Such policies are necessary given the limited availability of space and the need to control the conduct of the game. (SA295)

Howard Broad. Co., 433 U.S. 562, 576 (1977) (no right to broadcast entertainment). Even this Court, while allowing reporters to "cover" hearings, has such a restriction on video transmission. *See* Circuit Rule 55. Nor does the press have a constitutional right of "special access" to sporting events. *See Post Newsweek*, 510 F. Supp. at 84 (collecting cases). And as addressed *infra* Part III, there is no prohibition on charging a transmission fee.

Indeed, there is nothing atypical about this WIAA transmission policy. (SA378,295.) Rather, there is a widely recognized distinction between *covering* a game, which any news organization can do, and *carrying* or *transmitting* a complete game, which is limited to the appropriate rights holder. (SA374,295.) A reporter with access to Wrigley Field cannot transmit a Chicago Cubs game without a rights agreement in place. What WIAA has restricted, and what Gannett challenges, is who can *transmit* the entire game, not who can *cover*, i.e., report on, a game.

Courts have regularly acknowledged this distinction. For example, the *KTSP-Taft* court, in which the media challenged contracts related to the carrying of the lottery drawing, recognized that "[a]ll stations have been offered immediate and simultaneous access to those winning results. What they have not been afforded is a right to broadcast in its entirety the drawing itself. The drawing has entertainment value and as such has certain offsetting value against asserted first amendment rights." *KTSP-Taft*, 646 F. Supp. at 310 (citing *Zacchini*, 433 U.S. at 576). Likewise, the court in *Post Newsweek*, 510 F. Supp. at 86, distinguished between "reporting" and broadcasting in holding that exclusive rights contracts related to the broadcast

of figure skating in a public arena did not violate the First Amendment rights of competing television stations. The court noted that although "the event will be reported by newspaper and radio media without any time or manner restriction, and the plaintiff, itself, may attend and report on the championships," the plaintiff was prohibited from broadcasting entire events, in part because, unlike "newspaper and radio media," "broadcasting would have an unusual impact on the entertainment value of this event." *Id.*

b. WIAA Did Not Create a Forum for Transmission of Events by Permitting Reporting on Events.

Gannett asks the Court to brush aside this undisputed distinction between transmitting and reporting because, unlike a professional sports league, WIAA is a state actor operating in a public forum. Even assuming a limited public forum for reporting has been created, which WIAA does not concede, Gannett cannot exceed the bounds of that forum. A limited reporting forum would involve a "channel for a specific or limited type of expression where one did not previously exist." *Child Evangelism*, 457 F.3d at 382. WIAA may reserve that "forum" solely for the purpose of coverage. As industry practice and precedent demonstrate, transmission of an entire game falls outside the scope of reporting. Indeed, WIAA's media policy is explicit as to this distinction: unlike reporting, in which any credentialed reporter may engage, streaming is only permitted with permission and payment of a rights fee. Rather than demonstrating creation of a forum for streaming, WIAA's media policies make clear that no streaming forum exists.

Internet streaming is not a method of reporting but a means of transmitting an entire event. This fundamental substantive distinction cannot be overcome by redefining the scope of the forum. Gannett has come forward with no authority showing that WIAA, after opening the door to reporting, must allow Gannett to transmit events wholesale. Quite the contrary, even assuming WIAA has created a limited forum, WIAA may reserve that forum for "certain groups or for the discussion of certain topics subject only to the limitation that its actions must be viewpoint neutral and reasonable." *Child Evangelism*, 457 F.3d at 382; *see also Ill. Dunesland*, 584 F.3d at 723 (may reserve for "specified forms of private expressive activity"). In fact, WIAA may even "draw permissible status-distinctions among different classes of speakers in order to preserve the purpose of the forum, even when the proposed uses by those inside the permitted class of speakers and those outside are quite similar"—even where a forum is "wonderfully suited" for the proposed speaker's purpose. *Gilles*, 477 F.3d at 470

Nor did WIAA expand this purported reporting forum to streaming by entering into a contract with WWWY: "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998); *Hubbard*, 797 F.2d at 556 (allowing "a small number of commercial advertisers access to a limited amount of advertising space on government property in order to generate revenue" does not create a public forum). WIAA has entered into a contract with WWWY, a production company operating as

an agent of WIAA. (AA37.) WWWY does not stream games for its own station or website, but rather for wiaa.tv or its distribution partners. (AA37.) And WWWY provides extensive production and Internet services in addition to production and transmission of events, services Gannett does not offer or want to provide. (AA37-38;SA357-59,361-62,214-15,217-18,247-51.) This is unsurprising, given that (as the district court found) Gannett and WWWY are not similarly situated. (AA36-37;SA297.) Rather, WWWY is akin to a third-party vendor offering services to WIAA. (AA38.)

C. WIAA's Transmission Restrictions Clear the Constitutional Hurdle for Restrictions in Nonpublic Fora.

Because WIAA has not created a streaming forum, its policy is reviewed for reasonableness. *Cornelius*, 473 U.S. at 809. Under this standard, WIAA may place reasonable restrictions on both subject matter and speaker identity so long as the policy is consistent with the forum's purpose and does not discriminate on the basis of viewpoint. *Id.* at 806-809.

As the district court held, "there can be little doubt that [WIAA's] exclusive license passes constitutional muster." (AA31.) Indeed, Gannett has failed to identify a single case in which an exclusive license agreement was found unconstitutional. Importantly, WIAA's policy of exclusive rights agreements serves the significant interest of raising necessary revenue.[12] (AA23,31;SA170-75,178,211-15,289-91,142-46.) WIAA tournaments generate 86% of its annual operating budget.

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[12] Courts have recognized the need to raise revenue as a valid government interest. *See, e.g.*, *Post Newsweek*, 510 F. Supp. at 86.

(AA13;SA170,181-85,338.) WIAA's broadcast contracts form an important part of this revenue, and as the value of these rights undisputedly rests primarily on exclusivity. (AA31;SA383,285-90,112-40.) If the Court permits Gannett to stream WIAA games, this revenue would all but disappear. (AA31;SA383,285-90,112-40.) *See also Zacchini*, 433 U.S. at 574-75 ("Much of its economic value lies in the right of exclusive control over the publicity given to his performance.") (quotation and citation omitted). Numerous courts have found this interest sufficient. (*See* AA33 (collecting cases).)

But WIAA's policies are justified with respect to non-financial interests as well. To be sure, WIAA depends on this funding, which is critical for otherwise under-funded sports that could not generate revenue on their own. (SA338-40,372,170-71,183-84,295,142-46.) These "subsidized" sports constitute the majority of WIAA events. In addition to funding these sports, however, the exclusive rights agreement increases exposure for them. (SA338-40,372,170-71,183-84,295,142-46.) Without WWWY's production under the contract, these events would be unavailable to the non-attending public—no other entity has expressed any interest in producing subsidized events. (SA339-40,361,363,372,384-85,292-93,212-13,178,248.) As such, the district court found it would be reasonable for WIAA to conclude that the contract has thus enhanced public access to WIAA events. (AA35;SA348,370-72,383-85,212-13,174-76,292-93,60.) Further, the policy allows WIAA to shield participant schoolchildren from inappropriate content. (SA41,43-44,47-50,315.)[13]

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[13] Gannett cursorily implies this policy constitutes viewpoint discrimination, or a risk thereof. App. Br. at 22. As argued in detail in WIAA's summary judgment papers, it does

Furthermore, without its exclusive policy, WIAA and WWWY would be unable to offer to the public the variety of content and services currently available, including services offered by WWWY in addition to streaming. (SA349-51,357-63,369-73,383-84,246-54,274-76,174-76,178,212-15,218,290-92,60.) The array of audio-visual support WWWY provides to WIAA as a part of the contract would disappear, at a cost of over $500,000. (SA357-63,369,373,213-214,217-19,246-47,249,252-54.)[14]

Given that the policy is compatible with the intent of the forum, it is constitutional, provided it does not discriminate based on viewpoint. As found by the district court, WIAA's policy is not "directed at limiting any particular idea from entering the marketplace." (AA38.) "Neither the purpose nor effect of WIAA's exclusive license with WWWY is to stifle speech." (AA39-40.) No information about or related to the games has been suppressed. (A40.) In fact, Gannett is even free upon payment of a fee to transmit all but a small subset of games: those already transmitted through WWWY. (A40.) WIAA's policies do not favor or disfavor any viewpoint, and despite its bald assertions to the contrary, Gannett has come forward with no evidence demonstrating or even suggesting bias or censorship. (AA40.)[15]

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not. Regardless, Gannett's challenge this policy below was properly disregarded by the Court because Gannett failed to raise the issue prior to summary judgment. (AA15-17.)

[14] This contractual obligation to provide valuable services, combined with the $80,000 sponsorship payment (SA215), disproves Gannett's claim that WWWY "owed WIAA nothing under their contract." App. Br. at 24.

[15] In fact, Gannett attempts to distinguish the WIAA's video policies from its radio policies by pointing to what they call the "viewpoint-neutral" policy for radio coverage entitled

Gannett speculates that WIAA policy, at some point in the future, will trigger censorship. Of course, Gannett has no evidence that the policy has ever been used in that manner, nor has Gannett identified any plausible "viewpoint" likely to form part of a permitting decision. In fact, as detailed *infra* Part II.A., in practice WIAA allows any party to stream games not offered on wiaa.tv for payment of a fee, and no party has been denied this opportunity for any reason. Regardless, as the district court found, WIAA policies simply cannot have the effect of excluding disfavored opinions. This is because supposedly disfavored opinions would have "substantial alternative channels" to convey any information or opinion regarding WIAA events. Thus, in the end, as district court found, rather than threatening expression, WIAA's "internet streaming policy does not prohibit [Gannett] from expressing a single thought, opinion or analysis about a game." (AA41.)

D. WIAA's Restrictions Further Constitute Reasonable Time, Place, and Manner Restrictions.

Finally, WIAA's streaming policy would be constitutional even if this Court determined that a public forum had been created. Gannett devotes but a single cursory paragraph to this issue (devoid of any factual support), asserting that the Court "should reject WIAA's argument that its policy is a constitutional time, place or manner restriction," because, according to Gannett, time, place and manner restrictions must be applied "evenhandedly to all." App. Br. at 35 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). The district

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"Audio Transmission Priority Criteria." App. Br. at 37. Gannett, however, ignores the fact that the WIAA's video transmission policies contain virtually identical language in its "Video Transmission Priority Criteria." (SA87,105.) Gannett has in effect admitted that WIAA's video policies are also "viewpoint-neutral."

court did not need to reach this issue, but should this Court decide to do so, Gannett's alternative (albeit, perfunctory) argument should be rejected.

Heffron, the sole case relied on by Gannett, does not support the proposition that by allowing WWWY to stream games under a contract, restrictions on other media organizations cannot constitute time, place, or manner restrictions. In *Heffron* the Court addressed whether the operators of a state fair could limit charitable organizations to specific areas of the grounds. *See Generally* 452 U.S. 640. Rather than creating a *per se* rule that all persons in a forum must be subject to identical restrictions, the Court relied on the "evenhanded" application of the policy as evidence of *content-neutrality*: "as the Supreme Court of Minnesota observed, the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds." *Id*. at 649. The case creates no rule that the presence of an exclusive contract partner invalidates restrictions placed on other participants.

To be sure, the Supreme Court has noted that "[w]hen speakers and subjects are similarly situated, the state may not pick and choose." *Perry*, 460 U.S. at 55. Again, however, this statement stands for the principle that the government may not deny *access* to a forum as a means of engaging in viewpoint discrimination—not that it cannot limit a particular activity within that forum, such as the live transmission of sporting events, to a business partner. Again, the crux of Gannett's grievance is not that it has been denied "access" to the forum (as in *Perry*), but that once admitted to the forum, it has been told it cannot transmit the entirety of

events via the Internet absent permission and payment of a rights fee. Moreover, as found by the district court, the production company WWWY is *not* "similarly situated" to newspapers. Rather, it is an agent or partner of WIAA in, *inter alia*, producing events for wiaa.tv. (AA37). WIAA policies thus have been "evenhandedly" applied to all similarly situated speakers: all must pay a rights fee—*as did WWWY*, which paid $60,000 in 2008.

As with reasonableness, WIAA's Internet streaming policy easily meets the constitutional criteria for an acceptable time, place, and manner restriction. First, the restrictions do not "burden substantially more speech than is necessary" to achieve a substantial government interest, and are therefore narrowly tailored. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Indeed, the media is free to engage in a large array of reporting activities. To the extent any activity is burdened, it is only the full transmission of a WIAA event, the very component that *must* be held exclusively to protect the economic value of the contract. (SA373,381-84,254,286-93,112,118-21,138,156,211-15.) Second, as established above, WIAA's policies leave more than sufficient alternative means of communicating information to the public regarding these tournament events. Moreover, *as with all WIAA media policies*, WIAA's policy on Internet streaming relates only to post-season events, and WIAA places no restrictions on the streaming of regular season events. (AA9;SA75,93.) Finally, as established above, the policies further numerous important WIAA interests, including, *inter alia*, raising revenue, subsidizing

underfunded sports, increasing access to otherwise untransmitted sports, protecting student athletes, and obtaining valuable production and Internet services.

II. The Theoretical "Discretion" Retained by WIAA to Grant or Deny a Streaming Permit Does Not Violate the First Amendment.

Gannett also argues that WIAA's Media Policies violate the First Amendment because they lack explicit written standards governing when WIAA or WWWY must grant permission to stream tournament games over the Internet. App. Br. at 36-45. As the District Court noted, however, WIAA's straightforward policies do not create an appreciable risk of censorship. First, the policies at issue only govern complete transmission of a high school sporting event, rather than reporting about that game or any other commentary. Gannett fails to explain how or why requiring a permit to stream the entire game would give rise to any risk of viewpoint discrimination, particularly given Gannett's conceded ability to attend any game and to report on any aspect of it. Second, in practice, WIAA has never denied a request to transmit a game not already produced by WWWY and has adopted a policy of granting a permit to every legitimate media organization that applies for a permit and agrees to abide by WIAA's media policies. The district court found this practice to be undisputed and noted the absence of any evidence (or even claim) that this policy was likely to change in the future. Furthermore, WIAA's media policies, taken as a whole, *do* provide ample guidance regarding the standards expected of permit applicants. WIAA simply reserves the right to deny a permit to media companies who have violated those standards, something it has never had to do.

A. WIAA's Media Policies Do Not Create a Substantial Risk of Censorship and Thus Cannot Involve Excessive Discretion.

As it did in the district court, Gannett points to a sentence from the 2009-10 WIAA Media Guide stating that "'[a]ll permissions granted, policies enforced and fees required will be at the sole discretion of the WIAA and the rights holder.'" App. Br. at 37. According to Gannett, the absence of explicit standards "precludes a finding of reasonableness or viewpoint neutrality," App. Br. at 36, under *City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750 (1988), regardless of whether WIAA's discretion has ever been abused or even applied. App. Br. at 36. Instead, Gannett argues, the "unbridled discretion" renders the policy facially invalid "because of the risk that that the applicant may self-censor his or her speech to please the licensor." App. Br. at 40 (quoting *Lakewood*, 486 at 757). As the district court noted, however, Gannett's argument ignores the nature of the discretion at issue here. WIAA's theoretical discretion over whether to grant permission to stream a game does not involve Gannett's right to access a public forum or the ability to speak therein. Rather, the discretion involves a decision by the exclusive rights holder as to whether it will produce and transmit the particular event itself or not—in other words, a purely internal business decision with limited implications for censorship of particular viewpoints. (AA49 (noting that "defendants fail to identify how 'viewpoint' would be relevant to a request to broadcast a game"); SA217,252-53,316,318-19.)

In its opening brief, Gannett cites only three cases regarding discretion, each of which involves significant discretion awarded to public officials over whether and

on what terms a potential speaker has access to a public forum. App. Br. at 37-43. In *Lakewood*, 486 U.S. at 769, the Court struck down a local ordinance granting the mayor complete discretion to allow or deny the placement of news racks on sidewalks and other public property or to set conditions on them. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Court invalidated an ordinance setting speaker fees for parades and demonstrations at a rate determined in the sole discretion of an administrator. Finally, in *MacDonald v. City of Chicago*, 243 F.3d 1021, 1032-33 (7th Cir. 2001), this Court *upheld* an ordinance governing approval of parades, noting that the approval process examined traffic implications and available police protection rather than the content of the proposed speech. In each case, the ordinance involved discretion over the access of a speaker to a traditional public forum. *See also U.S. v. Griefen*, 200 F.3d 1256 (9th Cir. 2000) (noting that these "permit cases dealt with venues generally open for expressive activity, but only with the prior permission of a government licensor, or a gatekeeper, whose discretion was unbridled and unfettered").

Here, by contrast, the discretion to grant or deny a permit to transmit an entire WIAA tournament event does not impede Gannett's access to the game or ability to report on that game. Media may attend any tournament event on the same terms as the general public and may also obtain credentials permitting access to designated media facilities and reserved areas. (SA73-90,91-110,296-97,333-35,338,374.) As with any other media, Gannett may report on any aspect of the tournament event through newspaper articles, Internet stories, television or radio

broadcasts, and many other means of communication. (SA13-37,282-84,294-96,374.) They may also take and use photographs, interview players and coaches, and use live tournament action as a backdrop for live action reports from the event. (SA104-105,283-4,295-96,375-77.) They may even use up to two minutes of live game action in any news broadcast without requesting or receiving a permit from WIAA or WWWY. (SA13-37,104-5,282-83,296,336-37,376-77.) Unlike the discretion cases cited by Gannett, any discretion exercised by WIAA or WWWY would not impede access to the forum for reporting on tournament events.

As a result, the specific First Amendment concerns raised in *Lakewood* and other discretion cases are not present here. In *Lakewood*, the Supreme Court noted that unbridled discretion could "intimidate[] parties into censoring their own speech" in order to receive a favorable permit decision, and it could permit the licensor to "discriminat[e] against disfavored speech" in the guise of exercising discretion. 486 U.S. at 758. Here, the access always available to Gannett and the numerous alternative avenues of communication at their disposal eliminate the risk that WIAA may somehow suppress Gannett's speech or cause self-censorship in the reporting of events. The *Lakewood* Court itself noted that the press could not simply "challenge as censorship every law involving discretion to which it is subject." 486 U.S. at 759. Rather, the law must pose "a real and substantial threat of the identified censorship risks." *Id*; *see also Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 66 (3d Cir. 1990). Here, those "real and substantial risks" are lacking because Gannett reporters remain free to speak on whatever topic they wish

in a wide variety of ways. And there is no record evidence—or any other evidence of which WIAA is aware—of any attempt to intimidate the media in any way, much less to create a slant on how it reports sporting events.

Furthermore, as the district court noted, a WIAA tournament event is not a public forum, but a nonpublic forum. (AA21-30.) As the Federal Circuit explained, "the unbridled discretion doctrine has been articulated as a limit on licensing regimes in public fora." *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002). Although unbridled discretion over access to nonpublic fora or limited public fora may also raise First Amendment concerns, courts only review standards conferring discretion in these fora "for reasonableness instead of some higher level of scrutiny." *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1199 n.11 (11th Cir. 1991). Courts also consider any discretion granted in light of the nature and function of the forum at issue. *Ridley v. Mass. Bay Transp. Auth.,* 390 F.3d 65, 94-95 (1st Cir. 2004) ("Excessive discretion and vagueness inquiries under the First Amendment are not static inquiries, impervious to context."). In *Griffin*, the Federal Circuit upheld a regulation limiting the display of different flags in a Veterans Administration cemetery despite the discretion granted to administrators:

> The nature and function of the national cemetery make the preservation of dignity and decorum a paramount concern, and the government may impose restraints on speech that are reasonable in that pursuit. Because the judgments necessary to ensure that cemeteries remain "sacred to the honor and memory of those interred or memorialized there" may defy objective description and may vary with individual circumstances, we conclude that the discretion vested in VA administrators by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries.

288 F.3d at 1325; *see also Ridley*, 390 F.3d at 95 ("Our view is that a grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is reasonable in light of the characteristic nature and function of that forum.") (quotation omitted).

Here, too, WIAA has created a nonpublic forum and specifically reserved Internet transmission of live tournament action for its exclusive broadcast partner. The forum depends upon the ability to grant exclusive streaming rights in order to raise the revenue needed to operate the tournament, to ensure the streaming of sports with a smaller public following, and to prevent association of high school athletes with inappropriate advertising. (SA108,169-71,174-76,178,213,217-19,247-48,317,362,370-73; Dkt. 90, Ex. D.) Without the ability to decide whether or not it wished to stream a game (and exclude others from creating an alternative broadcast), the contract would have limited economic value for WWWY, and WIAA would not be able to operate the forum. (SA60-64,169-179,211-15,254,288-93,372-73,382-84; Dkt.90, Ex.D.) Similarly, without the ability to subject those who wish to stream a game to WIAA's media policies on advertising, WIAA could not protect streamed images of its student athletes from association with inappropriate advertising. Thus to the extent WWWY and WIAA exercise discretion over whether another media company may stream an event over the Internet, that discretion is reasonable in light of the nature and function of WIAA tournaments.

Moreover, as the district court found, WIAA and WWWY have developed a uniformly applied practice surrounding the exercise of discretion, regardless of

whether the forum is construed as reporting on WIAA tournament games or the live Internet streaming of the games themselves. This established practice provides significant certainty to any potential applicant for Internet streaming rights. First, the discretionary decision turns solely on whether WWWY has decided to exercise its exclusive transmission rights awarded by the contract. (SA212-13,216-217,248-49,252-53,273-76,317-19,324-25,352-57.) If WWWY has decided not to produce an event, WWWY allows anyone else who applies to produce and distribute that event. (SA217,252-53,317-19,355.) WWWY has never rejected a request to produce a "declined" event. (SA217,249,252,355.) Second, WIAA and WWWY have established a strict fee structure based on the number of cameras used in producing a tournament event. (SA217,253,356.) WIAA and WWWY determined those fees based on the resources devoted to the production, the fees charged by other state athletic associations, and the likely distribution of the streamed event. (SA217,253,356.) The fees charged have not varied from event to event, and any private applicant approaching WIAA or WWWY receives the same fee schedule. (SA216-17,253,318-19,356.) In fact, WIAA provides consistent information about these practices and fee structures to anyone who inquires, further reducing the risk of "self-censorship" based on the mention of discretion in the written policy. (SA71-72,333.)[16] Gannett did not dispute this uniform practice in the district court, and

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[16] Gannett points to the invitation to contact WWWY for more information as evidence that the written policies do not contain the complete range of relevant policies and standards. App. Br. at 41. Neither the district court nor WIAA implied otherwise. Instead, the district court found that, in practice, applicants have always been granted permission to stream a game when WWWY has not chosen to produce the game itself. To the extent that WIAA or WWWY retained any further practical discretion to deny an application (something which

the record does not show any genuine issue of material fact on this point. (AA8-13;SA71-72,333.)

B. WIAA Established Practices for Interpreting Its Media Policies Form Part of the Discretion Analysis.

Rather than challenge the fact that WIAA in practice grants licenses to everyone who applies, Gannett argues on appeal that the district court should not have considered this practice because it has not been set down in written form. App. Br. at 40-45. As the district court noted, however, courts accept an agency's interpretation and practice of implementing its own regulation when reviewing for excessive discretion. *See, e.g.*, *Griffin*, 288 F.3d at 1326 ("Even unwritten speech policies may survive constitutional challenge if uniformly enforced."); *Stokes v. City of Madison*, 930 F.2d 1163, 1170 (7th Cir. 1991) ("Instead of examining only the ordinance's language, we also examine its administration and implementation."). Even the Supreme Court cases relied upon by Appellants recognize that an agency's consistent interpretation of its own ordinance should inform the discretion analysis. *See, e.g.*, *Forsyth County*, 505 U.S. at 131 (noting that it would "consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it" and concluding that the county had not established meaningful standards in practice); *Lakewood*, 486 U.S. at 770 n.11 (recognizing that the authoritative construction of a statute or an equivalent "well-

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has never happened), that discretion is based solely on the applicant's willingness to abide by the Media Policies, which are set forth in detail in written form. It is also ironic that Gannett points to WIAA's willingness to provide additional information about the nature of the discretion WIAA retains as evidence that WIAA has provided insufficient information about the nature of the discretion WIAA retains.

understood and uniformly applied practice" would inform the court's analysis but noting the absence of such practice in the case before it). Here, WIAA and its partners have established a clear pattern of approving any application for Internet streaming upon payment of a set fee whenever WWWY has not independently accepted the event.

Gannett implicitly acknowledges this case law but argues that "no court has ever relied on this principle to endorse an explicit claim of unbridled discretion over permissions, conditions, and fees to speak on public property, much less to report on government-sponsored events." App. Br. at 44-45. Here, of course, WIAA does not claim any discretion over permission "to speak" or "to report," and Gannett always remains free to engage in both activities using a variety of communication channels. Moreover, the Seventh Circuit has relied directly on an undisputed history of granting all permit requests in upholding an ordinance reserving discretion over permitting decisions.

In *Stokes*, the plaintiffs challenged an ordinance granting Madison city officials the discretion to deny speakers the use of sound amplification devices at certain times on the State Street Mall. 930 F.2d at 1168. The court determined that the speech at issue was "a protected form of expression" and that the ordinance had "the characteristics of a prior restraint." *Id.* at 1169. After examining the "administration and implementation," however, the court noted that "the Mall Coordinator and Staff Team have never denied a sound amplification or Street Use Permit with sound amplification rights to a party wanting to speak on the Mall." *Id.*

at 1170. As a result, the court upheld the ordinance, concluding that "the method of implementation has therefore obviated the potential harm of the prior restraint." *Id.* Similarly, in this case, WIAA's implementation of its policies obviates any potential harm to Gannett, even assuming such harm were theoretically possible. Furthermore, the criteria at issue in *Stokes* "appear[ed] to grant officials the authority to deny permits for content-related reasons," and the court noted that "[w]ere it not for the generous practice of the city authorities, [the ordinance] might not survive constitutional scrutiny." *Id.*

By contrast, the WIAA policy at issue contains no such content-based criteria and the district court concluded that Gannett had "failed to identify how 'viewpoint' would be relevant to a request to broadcast a game." (AA49.) Given that the Seventh Circuit has relied upon a history of granting all permit requests in order to uphold a grant of discretion more likely to trigger the content-based concerns raised in *Lakewood*, WIAA's history of granting all requests under its own content-free criteria should obviate any concerns over any discretion ceded under its policies.

Gannett also claims, without any citation to the record, that WIAA's license scheme "inhibits streaming coverage." App. Br. at 43. Gannett's sole "evidence" for this proposition is an unsupported statement that newspapers and some PEG channels "object to paying money," implying that they chose not to stream some games that they otherwise would have streamed. The question for an "unbridled discretion" challenge, however, is not whether someone would have conducted the activity in the absence of any need to obtain a license but whether excessive

discretion "posed a real and substantial threat of the identified censorship risks." *Lakewood*, 486 U.S. at 759. Gannett has cited no evidence that uncertainty surrounding approval impacted any decision to apply for a streaming permit, nor did Gannett present any before the district court. Moreover, the record shows that Gannett and other media companies expressed interest in streaming football and other popular games that would tend to receive coverage in any case, not the sports with a smaller public following that prompted WIAA to enter into its exclusive contract with WWWY. (SA172-73,212-13,345,364.) Coverage of a wider range of sports constitutes one of the primary benefits of that contract and highlights the basic reasonableness of granting WWWY discretion to produce and stream games.[17]

III. WIAA's Rights Fee Does Not Violate the First Amendment as an Unconstitutional Tax.

Gannett also argues that WIAA's licensing system amounts to an unconstitutional tax because media companies must pay a fee in order to stream a tournament game live over the Internet. Gannett misapprehends the law. Gannett claims that any fee imposed on the exercise of a constitutional right is always unconstitutional unless one of several narrow exceptions applies. App. Br. at 50-51. In fact, courts routinely uphold reasonable fees imposed on the media in connection with a state actor's commercial activities or to recoup administrative costs. Rather than "exceptions" to a "general rule," these are simply different situations, like here,

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[17] Gannett notes that only a relatively small proportion of the total regional, sectional, and state tournament events were streamed in 2008-09, implying that the contract has not accomplished its goal of expanding coverage. However, as the district court noted, *no* events were offered on the Internet prior to WIAA's contract with WWWY. With the contract in place, at least one game was streamed from each sport.

in which the risk of censorship is minimal and the state has important commercial interests.[18]

Gannett relies on cases that bear no relation to the facts at hand. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944) invalidated flat levies on door-to-door solicitation because the tax directly and substantially burdened the only relevant means of religious expression and therefore presented a high risk of censorship. *See also Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 387 (1990) (reviewing *Murdock* and *Follett* and concluding that "[s]ignificantly, we noted in both cases that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct"). Here, by contrast, the fee only impacts the wholesale transmission of an athletic event without imposing any burden on reporting.

Moreover, Gannett has no First Amendment right to stream an entire tournament game for free, and the modest fee requested by WIAA therefore does not burden any constitutional right. As described above, *supra* Section I.B.I. WIAA is acting as a proprietary actor in a nonpublic forum and may establish exclusive contracts for the transmission of the tournaments it has organized. Gannett

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[18] Gannett also misapprehends the basis for the district court decision. Gannett claims that the district court recognized a rule against imposing fees on the media but "apparently relied" on an "exception" for "a profit-conscious fee for retail space used to sell newspapers." App. Br. at 51. In reality, the district court correctly noted that license fees or taxes that do not present a danger of suppressing ideas, like the WIAA's, do not violate the constitution. (AA44.) Furthermore, the court recognized that fees charged by a state entity undertaking a commercial enterprise are permissible, even when those fees go beyond the government's administrative costs. (*Id.* at 44-6.) It was on these grounds that the district court found WIAA's fees constitutional. (*Id.)*

remains free to report on those tournament events without paying any fee, but Appellants cannot claim a constitutional right to appropriate the commercial benefit of the activity organized by WIAA.

Furthermore, like the exclusive contract itself, WIAA's licensing fees help defray the cost of organizing the tournament, including the cost of providing logistical support for the streaming. (AA14;SA170,180-85,211-12,253,338,370.) Courts have routinely upheld fees charged to the media in these proprietary contexts or when the fees defray the costs of organizing the activity at issue. In *Gannett Satellite Info. Network*, 745 F.2d at 774-75, Gannett challenged a licensing fee imposed by the MTA on newspaper racks placed in commuter rail stations. The court considered the *Murdock* line of cases and noted that "in those cases in which licensing fees were prohibited, however, the government was acting in a governmental capacity and was raising general revenue under the guise of defraying its administrative costs." In *Gannett*, by contrast, the government entity was "engaged in a commercial enterprise" where "the raising of revenue is a significant interest." *Id.* Given that any revenue raised by the fees was used for the operation of the railroad, rather than general revenues, the court upheld the fee. *See also Atlanta Journal & Constitution v. Atlanta Dep't of Aviation*, 322 F.3d 1298, 1308-10 (11th Cir. 2003) (rejecting application of *Murdock* and upholding a fee on airport newsracks because the fee was "an outgrowth of [the government's] role as a business proprietor rather than its ordinary role as a regulator"). Similarly, here, the licensing fees flow directly from WIAA's role as the proprietary organizer and

sponsor of the tournaments, and the licensing revenue applies directly to the cost of those tournaments without any contribution to the general state coffers.[19]

Even when acting in a governmental capacity, a state actor may charge fees to defray the costs of administration even if that fee impacts constitutionally protected activity. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (upholding a license fee on parade marchers); *NE Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109-10 (6th Cir. 1997) (upholding a licensing fee on peddlers); *Ctr. for Auto Safety v. Athey*, 37 F.3d 139, 145-46 (4th Cir. 1994) (upholding a license fee for charitable organizations). Here, WIAA uses its fees to cover the costs of administering the tournaments as well as the cost of accommodating the streaming itself. (AA14;SA170,253,338.) In response, Gannett asserts, without record support, that WIAA "did not even consider its costs of administering its media policies in setting the amount." App. Br. at 50. As the district court concluded, however, WIAA and WWWY "considered several factors in determining" the license fees, including the "resources at the venue" devoted to the particular type of production, the "cost to the host venue," and the "fees charged by other state athletic organizations." (AA12.) The district court concluded that WIAA's fees were both reasonable and justified, and Gannett provides no basis for challenging these factual findings.

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[19] Gannett attempts to distinguish this line of cases as limited to "vendors," whereas Internet streaming would not be sold to persons physically present at tournament events. App. Br. at 51. Nothing in those cases suggests that the location of the customer plays a role in the analysis, which focused on the government's role as proprietor.

Finally, Gannett argues that the differential fees charged to newspapers, radio broadcasts, and PEG channel broadcasts somehow invalidate the fee structure. App. Br. at 52. Gannett provides no basis in the record to argue that these different media transmissions require comparable administrative costs. Rather, the record demonstrates that the presence of multiple cameras or other equipment differentiates Internet streaming productions from, say, newspaper reporting. (AA12.) Moreover, the Supreme Court has held that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (upholding Arkansas sales tax exempting newspapers but not other media); *Id.* at 453. Here, the policy of charging fees to media members who wish to stream WIAA games live is not directed at suppressing particular ideas and poses no threat of viewpoint censorship. All media members have complete access to tournament events and may report on those events or any other topics using many different modes of communication. (AA41;SA63-4,71-2,75-90,98,100-06,108-09,215-16,219,282-97,333-38,374-78.)

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the district court's decision granting summary judgment and declaratory relief.

Respectfully Submitted,

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I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 32 and Circuit Rule 32:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12-point Century Schoolbook font.

Dated: November 5, 2010

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I hereby certify that the Brief supplied to the Court is in a non-scanned PDF format.

Dated: November 5, 2010

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CERTIFICATE OF SERVICE AND FILING BY MAIL

Wisconsin Interscholastic Athletic Association, et al. v.
Gannett Co., Inc., et al.
Appeal No. 10-2627

I, Karen R. Dempski, an employee with the law firm of Perkins Coie LLP, hereby certify that on November 5, 2010, I caused two hard copies of the following documents: PLAINTIFFS-APPELLEES' BRIEF and PLAINTIFFS-APPELLEES' SUPPLEMENTAL APPENDIX to be served by hand delivery on the following persons listed below and an electronic copy of the same brief to be served via email on the persons on the same day:

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