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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Defendants-Appellants' Reply Brief

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INTRODUCTION

Wisconsin Interscholastic Athletic Association ("WIAA") leaves no doubt about its legal position: it claims the same right as a "professional sports league" to ration and sell opportunities for Internet streaming coverage of the athletic tournaments it sponsors. Plaintiffs-Appellees' Br. ("Pls.' Br."), 17. It justifies this claim purely on fiscal grounds:

> WIAA's policies evince intent to control this medium strictly to achieve WIAA's financial goals.

Id. at 24. The only authority WIAA cites for this "right," however, involve *private* entertainers and athletic competitions, not government-sponsored, publicly-funded events for, primarily, public school children. This Court should find that the First Amendment does not permit discriminatory treatment of credentialed media at state high school tournaments.

WIAA nowhere even acknowledges the fundamental First Amendment principle that the "Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business ...." *United States v. Kokinda*, 497 U.S. 720, 725-26 (1990). WIAA is a state actor. It is not just like Major League Baseball, as it contends, and it cannot emulate that league's media practices, much as it would like, without violating the First Amendment.

WIAA opens tournament venues to credentialed media, including Internet websites, so they can provide "comprehensive coverage to their communities." (Dkt.26-3, at 1.) Having done so, WIAA may not "pick and choose" which media may

provide streaming coverage, except through explicit time, place and manner regulations applied evenhandedly where physical space may be limited. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 55 (1983).

WIAA challenges this principle by trying to define the forum at issue as Internet streaming, a medium it did not create, and contending that its expressed intent to control the medium to raise revenue is dispositive. Pls.' Br., 22-25. WIAA's public forum analysis, like the district court's, thus converts "what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) ("ISKCON"). WIAA is wrong.

WIAA's Internet streaming policies violate the First Amendment, moreover, even without regard to forum label. WIAA's argument that its commercial interests trump the newspapers' speech rights ignores the binding precedent of both the U.S. Supreme Court and this Court. WIAA's assertion of "sole discretion" over Internet streaming licenses is facially unconstitutional. It cannot be excused by WIAA's claim not to have abused that discretion. Nor does the First Amendment allow WIAA to charge a profit-conscious fee as it sells the right to stream coverage of its publicly-funded tournaments. For these reasons, the district court's opinion should be reversed.

FACTS

WIAA's brief incorrectly construes the undisputed facts in several material respects. WIAA first argues that "this case is not about taxpayer-funded events" to justify its position that, "[i]n its capacity as tournament organizer, WIAA is no different

than a professional sports league." Pls.' Br., 17. This comparison fails on many levels. Unlike the members of a professional sports league, which are private for-profit businesses, the overwhelming majority of WIAA's members are public schools. The overwhelming majority of the student athletes attend public high schools and are coached by public employees. Taxpayers provide the equipment and facilities nearly all students use to practice and compete to qualify for WIAA's tournaments. WIAA is a state actor, and its tournaments are government-sponsored events.

WIAA tries to distinguish regular season and tournament competition. *Id.* at 18-19. Conceding that the regular season is publicly funded, it contends tournaments somehow are not because they "are *funded entirely by WIAA* through tournament revenues, which derive from ticket sales and licensing revenue, not tax dollars." *Id*. at 19 (emphasis in original). The Supreme Court has recognized, however, that public high school tournament revenue in Tennessee is--in effect if not in name--public revenue:[1]

> The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own.

Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 299 (2001). The same is true in Wisconsin.

WIAA also disputes the newspapers' observation that the "principal purpose of all interscholastic athletics, including tournaments, is educational." Pls.' Br., 18. It prefers the district court's characterization that their clear purpose is "to make money."

[1] Ticket revenue comprises 86% of WIAA's overall budget. (Dkt.53, ¶5.)

Id. at 19. This contradicts WIAA's own public position and statement of purpose, which emphasizes the role of interscholastic athletics "in the total educational process," Dkt.34-5, at 14, not to mention common sense.

> Interscholastic athletics obviously play an integral part in the public education of Tennessee, where nearly every public high school spends money on competitions among schools.

Brentwood Academy, 531 U.S. at 299. Again, this is equally true in Wisconsin and, contrary to WIAA's view, this educational purpose does not change when the student athletes advance from regular to post-season competition.

Finally, WIAA grossly exaggerates the value of the ancillary audio-visual services WWWY provides it under their contract. The value of these services is not "over $500,000," Pls.' Br., 35, because that estimate includes *all* of WWWY's tournament production costs, both "in the field" and "post-field." (Dkt.55, ¶40.) The record does not specify the portion of WWWY's overall production costs attributable to the ancillary services provided to WIAA.

ARGUMENT

WIAA has abandoned its argument, adopted by the district court, that the newspapers' First Amendment rights are somehow diminished because newspapers may, someday, sell advertising with their streaming coverage of tournament events. *See* Defendants-Appellants' Brief ("Defs.' Br."), 21. WIAA still claims entitlement to some undefined relaxation of First Amendment standards, however, because this case concerns media coverage of "sporting events," which it says "have little if any expressive content." Pls.' Br., 26, 26 n.8. WIAA misses the point--both of the First Amendment's sweep and the case law WIAA cites.

It is irrelevant, for example, that a wrestling promoter cannot claim First Amendment protection because "a boxing match does not constitute either pure or symbolic speech." *Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So. 2d 496, 501 (Fla. Dist. Ct. App. 2003). The speakers whose rights are at issue here are journalists, not athletes or sports promoters. WIAA cannot seriously contend that streaming coverage of tournament events, with audio description and commentary, lacks "sufficient communicative elements to bring the First Amendment into play." *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

WIAA did find a district opinion that claims "the exposition of an athletic exercise ... is on the periphery of protected speech ..., as opposed, for example, to political speech, which is at the core of first amendment protection." *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981); *see* Pls.' Br., 27. That political speech is at the First Amendment's core is not in doubt. But to

implicitly equate sports coverage to nude dancing ignores both law and reality. The Connecticut district court cited no authority for this proposition and overlooked contrary Supreme Court precedent. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (the "guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."). Moreover, this case does concern "comment upon public affairs," *id.*, since WIAA's tournaments mostly involve public schools.

WIAA errs again in arguing the newspapers "bear[] the burden to demonstrate WIAA-sponsored events are public fora." Pls.' Br., 16. It relies on *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984), a symbolic speech case concerning two tent cities erected in Washington, D.C., parks in which the plaintiff had the initial burden "to demonstrate that the First Amendment even applies." *Id.* This case does not involve symbolic speech, and nobody disputed in *Clark* that parks are traditional public fora. There should be no dispute here, moreover, that the newspapers have satisfied their burden to prove the First Amendment applies or that, as a result, WIAA bears the burden of justifying its Internet streaming policies. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

I. WIAA'S STREAMING POLICIES VIOLATE THE FIRST AMENDMENT.

WIAA has uncovered no authority to support its essential position that the First Amendment allows a state actor to control coverage of publicly-sponsored and financed events through exclusive licensing agreements. WIAA claims its agreements pose

"virtually no risk of censorship or viewpoint discrimination," Pls.' Br., 12, but ignores its own candid admission that it uses them to gain "control over the *message* that [is] associated with [its] voluntary athletic association." (Dkt.53, ¶35 (emphasis added).) No court has endorsed anything like WIAA's position or purpose because they are plainly unconstitutional.

To advance its cause, WIAA suggests that tournament venues operate like a "courtroom"--a nonpublic forum with "policies in place to govern media activities ...," Pls.' Br., 27, including "a restriction on video transmission." *Id*. at 30. Putting aside the question of judicial independence, the analogy is incomplete. The question is not the ability of government, including the judicial branch, to establish policies but whether or not those policies are fairly and uniformly applied. It may or may not be wise for the federal courts to permit live or videotaped coverage of proceedings, but no one would suggest that the judiciary could sell exclusive licenses for that coverage, simply because it "needs" revenue. *Id*. at 19. Yet that is precisely the power WIAA has assumed for itself.

WIAA's brief, like the district court's opinion, casts this controversy in appropriately stark if mercenary terms. "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." Pls.' Br., 3-4. It is simply about money--not discriminatory treatment, not government licensing and message control, and certainly not public education and student athletics--just "commerce." If that is true, this Court need spend little time on the case. That facile characterization, however, ignores the stipulation at the heart of the dispute: WIAA is

the state. Much as it covets, explicitly, the status and revenue of professional sports, it sponsors high school athletic events involving thousands of public school student athletes and the public employees who coach them in public facilities, whether owned or leased.

A. WIAA Intentionally Created A Designated Public Forum For Media Coverage Of Tournament Events.

WIAA created a textbook example of a designated public forum by inviting all "legitimate news gathering media representatives" to attend its tournaments and "provide[] comprehensive coverage to their communities." (Dkt.26-3 at 1.) By this invitation, WIAA designated the media areas of tournament venues as "place[s] ... for use by certain speakers ... for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). Thus, WIAA's own Media Guide explicitly states its intention to create a designated public forum.

WIAA ignores the distinction between a forum created for certain speakers and certain subjects and one designated generally for public use by repeatedly emphasizing that it has not designated tournament venues as "places of public assembly intended for the exchange of ideas." Pls.' Br., 26; *see also id.* at 19, 23, 27. WIAA's assertion is irrelevant here, of course, and serves only to highlight the lack of any authority for WIAA's argument that the First Amendment allows a state actor to open government events to credentialed media while using exclusivity agreements to control their "message" and raise revenue.

The Supreme Court has recognized that a state actor's use of public "property as a commercial enterprise" may be inconsistent with an intent to create a designated public forum. *Cornelius,* at 804; Pls.' Br., 17-22. But high school athletic tournaments are not commercial enterprises, and the Supreme Court draws this inference only "[i]n cases where the principal function of the property would be disrupted by [the] expressive activity" at issue. *Cornelius*, at 804. Far from being disruptive, WIAA solicits media coverage to inform local communities of public high school activities.

WIAA dissembles on the purpose of its tournaments, urging first that their "clear purpose" is "to make money" and, later, acknowledging that their purpose is "sporting events." Pls.' Br., 19, 26. The record is clear, however, that the "principal function of the property" where WIAA's tournaments are held is, indeed, to host sporting events as an integral part of public education. *See Cornelius*, at 804. The law also is clear that, having opened tournament venues for "comprehensive coverage" by credentialed media--expressive activity perfectly compatible with their principal purpose--WIAA may not "pick and choose" among credentialed media to generate revenue. *Perry*, 460 U.S. at 55.

1. WIAA incorrectly defines the forum.

WIAA denies the forum at issue is properly defined "as a physical space for reporters," arguing that newspapers have "never been denied access to" tournaments. Pls.' Br., 28. WIAA misses the point--credentialed media have physical access to tournament venues but WIAA strictly controls the expressive activities allowed in that space. This is precisely the situation the Supreme Court addressed in *Kokinda* and *ISKCON*. In each case, the public already had access to the property at issue, but the

government restricted the expressive activity it allowed there. The Court nonetheless identified the public space itself as the relevant forum--a postal sidewalk in *Kokinda* and an airport terminal in *ISKCON*. It did not define the forum as the narrow expressive activity the government had restricted. WIAA simply ignores the point, and cites only the district court's opinion for its position that Internet streaming is the forum at issue. Pls.' Br., 28-29.

WIAA also ignores the newspapers' argument that defining each "particular means of communication" as a separate forum makes the analysis "a self-fulfilling progression." It would entitle WIAA to designate an exclusive business partner for each medium--television, radio, print--as a means to raise revenue. *See* Defs.' Br., 28-29.

Internet streaming is not the relevant forum in this case because it is not a government-created communications medium. Unlike the teacher mailboxes in *Perry*, the charity drive in *Cornelius*, or the scoreboard advertising space in *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552 (8th Cir. 1986), Internet streaming is not a government-created "means of communication" subject to WIAA's control. *Cornelius*, 473 U.S. at 801. WIAA may have no present intention to grant a newspaper publisher exclusivity at tournament events, but WIAA cannot (and does not) deny that its constitutional analysis would permit just that.

WIAA's forum analysis would allow it to adopt Major League Baseball's media policies, applying them to each reporting method, even though WIAA is a state actor whose tournaments feature public school athletes equipped, trained and coached with

public money who compete on public property.[2] WIAA's analysis is fundamentally flawed: the First Amendment does not allow the government "a free hand in deciding whom to admit to its property and on what terms," even in a "nonpublic forum," simply to further its commercial interests. *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998) ("*Navy Pier*"). The constitutional right of free speech cannot be rationed and sold.

2. WIAA's intent to control streaming coverage is not dispositive.

WIAA's narrow focus on its own intent to strictly control media coverage from tournament venues miscomprehends the law. Forum analysis would be pointless if the government's demonstrated "intent" to restrict speech on public property were all that mattered. *Cornelius*, 473 U.S. at 805. The First Amendment instead requires that courts consider "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id.* at 802.

The goal of forum analysis is to determine "whether the manner of expression [at issue] is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Streaming coverage is perfectly compatible with the conduct of WIAA's tournaments, since it has authorized WWWY to transmit nearly all of them. This is not a case "where the principal function of the property would be disrupted by" streaming. *Cornelius*, 473 U.S.

[2] Even private venues leased by WIAA must be considered "public property" for forum analysis purposes during the lease term. *See* Pls.' Br., 26 (distinguishing private, leased facilities from "public property").

at 804. WIAA's intent to strictly control media coverage of and the message from tournament events is revealing, but it "is not dispositive. " *Id.* at 805.

The "selective access" cases WIAA replies upon are easily distinguished. Pls.' Br., 32. The Supreme Court upheld a policy of selective access for electoral candidates in *Ark. Educ. Television Comm'n v. Forbes*, ("AETC"), because opening debates to "all ballot-qualified candidates" would "actually undermine [their] educational value and quality." 523 U.S. 666, 681 (1998) (citation omitted). Allowing credentialed media equal access to stream WIAA tournament coverage, by contrast, would not interfere with their educational value or quality but, rather, enhance them.

Similarly, this Court upheld selective speaker access in *Gilles v. Blanchard*, 477 F.3d 466, 474 (7th Cir. 2007), because the university's speak-by-invitation policy "assure[d] nondiscrimination, and a reasonable diversity of viewpoints" on its library lawn. WIAA's exclusive rights contract with WWWY does just the opposite--it gives WWWY the unilateral power to exclude newspapers, like *The Post-Crescent*, that would bring a local perspective to their streaming coverage, and by exclusion enables WIAA to "control" the message associated with its own tournaments.

The very "nature of the property" at issue also strongly supports the newspapers' position. *Cornelius*, 473 U.S. at 802. WIAA's tournaments are held at publicly-owned or leased facilities for mostly public school athletes. WIAA itself describes its tournaments as "events for the entire state to embrace and witness the quality of educational experiences provided by school systems throughout our state." (Dkt.79-3 at 3.) Opening tournaments to streaming coverage by any interested media

would enhance this objective and further the First Amendment's purpose to encourage the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

3. There is no recognized distinction between entire-event coverage and news reporting for state actors or government events.

WIAA relies upon the "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." Pls.' Br., 30 (emphasis in original). Again, WIAA turns to professional sports for authority--drawing an analogy to Wrigley Field and the Chicago Cubs--but it has found no legal authority holding the First Amendment allows a state actor to impose this distinction at government events.

WIAA cites three cases for its position but none applies here. One case, *KTSP-Taft Television & Radio Co. v. Arizona State Lottery Comm'n*, 646 F. Supp. 300 (D. Ariz. 1986), did not involve an exclusive contract. The state apparently recognized the constitutional requirement of equal access and offered all stations willing to televise every weekly lottery drawing the right to do so. *Id*. at 306. The plaintiff wanted to televise only those drawings it chose, *id*., but the court held the First Amendment does not require that. It did not address whether a state actor could sell the exclusive right to cover government events to one media company.

Another case, *Post Newsweek,* held that the enforcement of a private promoter's exclusive television contract at a private skating competition held in a public arena did not violate the First Amendment. 510 F. Supp. at 83. WIAA claims the promoter's

private status somehow "did not affect the outcome," Pls.' Br., 21, but the case says nothing relevant concerning a state actor's constitutional authority to sell the right to cover public school athletic competitions at public venues, regardless of length.

Finally, WIAA relies on *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), in which the Supreme Court weighed the news media's First Amendment rights against the common law property rights of a private, professional entertainer. Pls.' Br., 34. The Court did not address whether the First Amendment permits the government to raise money by controlling the length and methods of reporting government events. It does not. Indeed, that the "human cannonball's" performance occurred at a county fair was not even mentioned in the Supreme Court's legal analysis, and the case says nothing whatsoever about governmental authority to restrict speech at and about government events.

B. WIAA's Streaming Policies Cannot Be Justified As Time, Place And Manner Restrictions.

WIAA's attempt to justify its streaming policies as time, place and manner restrictions warrants little discussion. Pls.' Br., 36-39. That WIAA found no authority for its position is not surprising because exclusivity is fundamentally inconsistent with the First Amendment.

> If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.

AETC, 523 U.S. at 677. Time, place and manner restrictions can be justified under a lower standard only because they must apply equally to all speakers. *E.g., Ward v. Rock*

Against Racism, 491 U.S. 781, 787 (1989) (upholding regulation of sound amplification restriction "for all performances at the bandshell" in Central Park to remedy a problem caused annually by one concert promoter).

The Supreme Court applied this principle in *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), which upheld a rule forbidding the sale or distribution of literature at the Minnesota State Fair except from a licensed booth. The Court reversed the Minnesota Supreme Court, which had concluded that allowing an exception for one religious group would cause minimal disruption.

> [T]he inquiry must involve not only [the plaintiffs], but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to [plaintiffs]. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

Id. at 654. Time, place and manner restrictions must be "applie[d] evenhandedly to all," the Court held, to ensure the restriction is not based on viewpoint. *Id*. at 649. WIAA's exclusive-rights streaming policy simply does not qualify.

The "sole discretion" WIAA claims over Internet streaming policies also disqualifies them as time, place and manner restrictions. Again, *Heffron* is instructive.

> Nor does Rule 6.05 suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation

> because such discretion has the potential for becoming a means of suppressing a particular point of view.

Id. at 649. Because WIAA's streaming policies plainly have that *potential*--indeed, message control is a declared purpose--they are unconstitutional regardless of forum label.

II. WIAA'S STREAMING POLICIES ARE UNCONSTITUTIONAL REGARDLESS OF FORUM LABEL.

WIAA's explicit policy asserting "sole discretion" over "[a]ll permissions granted, policies enforced and fees required," Dkt.26-3 at 17, for Internet streaming is facially unconstitutional because of the inherent risk of viewpoint discrimination. The Constitution does not require proof that the discretion has been abused to invalidate this naked assertion of unconstitutional power. WIAA *has* abused the power, moreover, by granting WWWY exclusivity and first choice to produce most tournament events.

This fundamental First Amendment principle also invalidates WIAA's license scheme for events WWWY declines to produce, without regard to forum label. Even in a nonpublic forum, after all, the First Amendment abhors viewpoint discrimination. *See Perry*, 460 U.S. at 49. WIAA's license scheme is plainly unreasonable, moreover, because the record shows WWWY's contract right to profit from the work of licensees actually deters the increased tournament coverage WIAA claims their contract promotes. (Dkt.78-1, ¶7.) Indeed, there is no evidence WIAA has received any revenue at all from licensing streaming coverage. *See infra*, at 25 n.6. WIAA's "established practice" of granting the few license requests WWWY receives does not outweigh these factors.

A. Unbridled Discretion In A Speech Licensing System Is Unconstitutional In Any Forum.

WIAA's license scheme for declined events is a system of prior restraint. It is unconstitutional because it lacks the "narrow, objective, and definite standards to guide the licensing authority" that the First Amendment demands of any license or permit system that limits free expression. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). Anything less is unconstitutional. *See MacDonald v. City of Chicago*, 243 F.3d 1021, 1026 (7th Cir. 2001) ("It is well established that where a statute or ordinance vests the government with virtually unlimited authority to grant or deny a permit, that law violates the First Amendment's guarantee of free speech.").

WIAA incorrectly suggests the First Amendment's abhorrence for unbridled discretion is muted in a nonpublic forum. Pls.' Br., 43-44. WIAA relies on cases from other circuits while ignoring this Court's careful and thorough exploration of the subject in *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), and *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566 (7th Cir. 2002), both of which applied the First Amendment 's prohibition of unbridled discretion regardless of forum label.

The district court had ruled in *DeBoer* that a village hall was a nonpublic forum. This Court found it unnecessary to decide that issue because the First Amendment's requirement of viewpoint neutrality and its corresponding prohibition of unbridled discretion apply "regardless of forum status." 267 F.3d at 566-67. It affirmed the district court's ruling that the permit system for using the hall "was facially unconstitutional

because it vested the Village Clerk with unbridled discretion in violation of the Free Speech Clause." *Id*. at 572. So it is here.

Forum analysis was considered only "by close analogy" in *Southworth* because the case involved the university's mandatory student fee system, which the court considered a nonphysical forum of money. 307 F.3d at 580, *quoting Bd. of Regents v. Southworth,* 529 U.S. 217, 229 (2000). But it is nonetheless instructive here.

Like the newspapers, the students argued "the mandatory fee system fails to satisfy the *constitutional mandate of viewpoint neutrality* because it grants the student government *unbridled discretion*." 307 F.3d at 574 (emphasis in original). Like WIAA, the university argued "that the only constitutional requirement for the mandatory fee system is that it actually operate in a viewpoint-neutral manner." *Id*. This Court rejected the university's position, holding "that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement," which applies anytime the government restricts expressive activity. *Id*. at 579.

Consistent with *DeBoer* and *Southworth*, the prohibition against unbridled discretion must be applied in this case without regard to forum label. Just as the requirement of viewpoint neutrality applies even in a nonpublic forum, so does the prohibition against unbridled discretion. Neither First Amendment principle is diluted in a nonpublic forum.

B. WIAA's Streaming Policies Are Facially Unconstitutional.

This case may require the Court to reconcile the Supreme Court's authorization of facial challenges to schemes that grant licensors unbridled discretion, "even if the

discretion and power are never actually abused," with the theoretical possibility that evidence of "well-established practice" can compensate for the absence of explicit limits on a licensor's discretion. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 770 (1988). Unlike other aspects of this dispute, both parties find some support in the case law on this issue. Yet, the Supreme Court has *never* acted on the theoretical possibility it held out in *Lakewood* and this Court has done so just once, over decades of decisions. *See Stokes v. Madison*, 930 F.2d 1163 (7th Cir. 1991). Whatever its force, the exception should not be applied here.

No party has uncovered a case that involved an assertion of unbridled discretion as blatant as the streaming license provision in WIAA's Media Guide. Only the City of Lakewood's newsrack ordinance came close--it required that the mayor merely state reasons for denying a newsrack permit and allowed her to condition a grant on any "terms and conditions deemed necessary and reasonable." 486 U.S. at 753-54. The Court found that permit scheme unconstitutional on its face, without requiring any evidence of abuse, for reasons that resonate in this case.

WIAA misreads the Supreme Court's admonition that the news media cannot "challenge as censorship every law involving discretion to which it is subject." Pls.' Br., 42, *quoting Lakewood*, 486 U.S. at 759. The Court was distinguishing general laws, like those requiring a building permit, which pose no "real and substantial threat of the identified censorship risks" when applied to the media, from permit requirements, like Lakewood's newsrack ordinance and WIAA's streaming license scheme, that apply specifically to speech. *Lakewood*, 486 U.S. at 759.

The "risk" that a potential licensee will mute its coverage to please the licensor is no less real under WIAA's license scheme, moreover, than it was under the newsrack ordinance in *Lakewood*. The publisher in *Lakewood* also had "numerous alternative avenues of communication at [its] disposal," besides newsrack distribution of its product. Pls.' Br., 42. The Supreme Court nonetheless invalidated the newsrack ordinance, on its face, even though the licensor's discretionary power had never been abused. *Lakewood*, 486 U.S. at 772. Indeed, it is far less "difficult to visualize" a risk of self-censorship under WIAA's licensing scheme than it was in *Lakewood*, *id*. at 757, since WIAA's Media Guide threatens licensees with revocation or future denial for inappropriate comment or commentary, Dkt.26-3 at 12, ¶3, and WIAA concedes its license scheme is intended, in part, to control its image and message, Dkt.53, ¶35.

WIAA has no good reason for its failure to publish what it claims are its "established practices." Why must those interested in streaming call WWWY to find out the price and conditions for a license, when radio broadcasters need only consult the Media Guide? Streamers should not have to take it on faith that WWWY "provides consistent information about practices and fee structures." Pls.' Br., 45. The First Amendment requires written standards to sustain a system for licensing speech.

The Media Guide's video priority criteria[3] include no rule for allocating space to or among streaming license applicants, creating an unconstitutional risk of viewpoint

[3] The newspapers inadvertently misstated the record at pages 37-38 of their initial brief, incorrectly stating that WIAA's Media Guide includes Audio Transmission Priority Criteria but not Video Transmission Priority Criteria. Actually, it has both. (Dkt.26-3 at 13-14.) The newspapers should have said WIAA's video transmission priority criteria include no rule for

discrimination that is "effectively unreviewable." *Lakewood*, 486 U.S. at 759. Any reviewing court would have to rely on WIAA's "post hoc rationalizations" in the event of a conflict between website operators over limited space, *id*. at 758-59, because WIAA has left space allocation for streaming coverage to the "sole discretion" default rule. This deficiency is among the principal reasons unbridled discretion is deemed facially unconstitutional in any license scheme. *Id.*

WIAA's policy of unbridled discretion also enables WWWY, like the mayor in *Lakewood*, to add any additional license conditions it chooses. The newspapers have emphasized throughout this case that WWWY requires anyone seeking a license to produce a declined event to surrender to WWWY their right to sell their own work product. *E.g.*, Defs.' Br. at 43; (*see also* Dkt.46-2 at 2; Dkt.78-3 at 1.) WIAA nowhere claims it authorized this condition. Indeed, WIAA has yet to even acknowledge that WWWY imposes this additional condition, falsely claiming, instead, that it allows newspapers "*upon payment of a fee* to transmit all but a small subset of games." Pls.' Br., 35 (emphasis added).

WWWY's ability to add additional license conditions is, by itself, sufficient to find WIAA's streaming policies facially invalid. *Lakewood*, 486 U.S. at 772. Indeed, WWWY's additional condition must be treated as part of WIAA's "established practice," even though it was not authorized or acknowledged by WIAA. This

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allocating limited space at declined events to or among those seeking a streaming license from WWWY.

additional condition demonstrates that the Media Guide's "sole discretion" provision for streaming licenses means precisely that.

This case does not present a choice, as WIAA suggests,[4] between uncontrolled Internet streaming of tournaments events and WIAA's exercise of unbridled discretion over streaming licenses. Pls.' Br., 44. WIAA's Media Guide at least attempts to comply with the First Amendment's requirement for "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 150-51. But the undisputed facts demonstrate that WIAA's streaming license scheme falls far short of that constitutional requirement.

C. WIAA's Streaming Policies Fail Even Nonpublic Forum Standards.

WIAA did not respond to the newspapers' argument, based on Justice O'Connor's controlling opinion in *ISKCON* and this Court's ruling in *Navy Pier*, that commercial interests alone cannot justify speech restrictions, even in a nonpublic forum. Defs.' Br., 45-49. WIAA's forum analysis instead assumes that its proprietary capacity and need for revenue will carry the day if the media areas of tournament venues are deemed nonpublic fora. Yet, the same arguments were held insufficient in *ISKCON* and *Navy Pier* because, as here, the speech activities at issue were not incompatible with the public property's principal purpose. Once again, WIAA's silence is telling.

[4] The newspapers have never disputed WIAA's right to require media credentials for access to tournament press areas nor their obligation to comply with WIAA's "media policies on advertising," Pls.' Br., 44, and the other time, place and manner restrictions WIAA applies equally to all credentialed media.

Commercial interests were held insufficient to justify a prohibition on leafleting in *ISKCON*, 505 U.S. at 689-93 (O'Connor, J., concurring) and *Navy Pier*, 150 F.3d at 702-03, even though the public property at issue in each was a nonpublic forum. WIAA ignores the point, even though its exclusive-rights policies serve no governmental interest besides raising revenue.

WIAA's speech-licensing revenue is not devoted to "subsidizing underfunded sports," as it contends. Pls.' Br., 38-39. Rather, its revenue from all sources is combined to "support[] operation and administration of WIAA programs, including all tournaments." *Id.* at 6.

WIAA's interest in "obtaining valuable production and Internet services" from WWWY simply restates its revenue interest. *Id.* at 39. WWWY presumably would agree to pay more for exclusivity if its contract did not require services--although certainly not $500,000 more--and WIAA could then purchase the services in the marketplace. WIAA's argument incorrectly assumes, moreover, that its contractual commitment to violate the First Amendment by granting exclusivity is valid consideration for services.

Exclusivity does not serve WIAA's interest in "protecting student athletes" from association with advertising for adult products. Pls.' Br., 39. That interest applies to all credentialed media, including radio and print where WIAA has no exclusive partner, and is protected by the threat to "deny future credentials to any media organization or individual not adhering to WIAA policies." (Dkt.26-3 at 1.)

Nor does exclusivity necessarily further WIAA's interest in "increasing access to otherwise untransmitted sports." Pls.' Br., 39. First, most of WIAA's exclusive-rights

contracts cover state finals in the most popular sports. *See id*. at 7. Second, WWWY's contract does not obligate it to transmit *any* tournament events; it merely sets goals. (Dkt.26-5.)

Any increase in coverage attributable to WWWY's contract must be deemed insignificant, moreover, given that WWWY produced by itself or through licensees only 134 of the 3,585 tournament events its contract covered in 2008-2009. (Dkt.54, ¶8.) One reason for this poor showing compared to the contract's coverage goals is WWWY's right to profit from the work of those it licenses.

WIAA denies that its partnership with WWWY inhibits coverage of declined events by deliberately misrepresenting the newspapers' argument. Pls.' Br., 48. The newspapers did not claim inhibition because they "and some PEG channels object to paying money'" for a license. *Id*., *quoting* Defs.' Br., 43. Quite the contrary, the newspapers emphasized that the undisputed facts show inhibition because they and "some PEG channels that would otherwise participate object to paying money *or surrendering their work product to WWWY*." Defs.' Br., 43 (emphasis added).

The record *does* show that the association representing Wisconsin PEG Channels refused to endorse WWWY's proposed affiliate agreement "because it asked that publicly-funded PEG facilities use their resources for a private company's private gain." (Dkt.78, ¶7.) The record also shows newspapers object to surrendering their work product to WWWY to obtain a streaming license. (*See* Dkt.39, ¶13.)

That leaves only WIAA's commercial interest, which no court has found sufficient, by itself, to justify restricting speech at and about government-sponsored

events. WIAA has actually undermined its legitimate interest in increasing coverage of tournament events by granting a for-profit company exclusivity and control over licensing declined events.[5] Those policies fail nonpublic forum standards, apart from WIAA's reservation and WWWY's exercise of unbridled discretion, because they are not even reasonable.

III. WIAA'S STREAMING LICENSE FEES VIOLATE THE FIRST AMENDMENT.

A government actor may not exact a "flat license tax, the payment of which is a condition of the exercise of ... constitutional privileges." *Murdock v. Pennsylvania,* 319 U.S. 105, 112 (1943). WIAA's streaming fees fit precisely the Supreme Court's definition of a prohibited license tax:

> [T]he license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned.

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 387 (1990).

WIAA urges that its licensing fees--for streaming, $250 or $1,500 depending on the number of cameras involved--are constitutional because they "help defray the cost of organizing the tournament, including the cost of providing logistical support for the streaming." Pls.' Br., 51. In fact, streaming fees are paid to WWWY, not WIAA.

Accepting WIAA's statement as true for argument's sake, it confirms streaming fees are *not* "imposed as a regulatory measure to defray the expenses of policing the

[5] Ironically, there is no evidence that WWWY has ever shared any streaming license revenue with WIAA. The payment they negotiated after WIAA commenced this action is calculated as a percentage of WWWY's cable television distribution revenue. (Dkt.77-2 at 7.)

activities in question." *Jimmy Swaggart Ministries*, 493 U.S. at 387. Whatever the actual "cost of providing logistical support for the streaming" may be, Pls.' Br., 51, WIAA's streaming fees are clearly intended for profit rather than to defray the expenses of policing streaming. Consider that WWWY charges a $50 *annual* fee to PEG channels to defray the cost of "making all necessary arrangements with the local school to get the television station set up for production," compared with at least $250 to stream a single event. (Dkt.55, ¶26.) Similarly, WIAA charges $20-$50 per regional or sectional event to entities interested in producing various types of audio or live text transmissions. (Dkt.26-3 at 17.) This large disparity could not possibly be justified by differences in WIAA's cost of "policing" these different coverage methods, confirming that is *not* the basis on which the fees were determined.

WIAA does assert it considered some costs that it or a host institution might incur from accommodating streaming, including that a "multi-camera production ... requires more resources at the venue itself [for example] to provide power for the production truck which is much different than for an individual cameraperson" when setting the streaming fees. (Dkt.54, ¶16.) It is not even remotely possible, however, that streaming costs WIAA or a host institution $1250 more in electrical power (or other expenses) if multiple cameras are used rather than one. In short, WIAA has failed to support with record evidence the connection it asserts between the amount of its streaming fees and the constitutionally permitted purpose of charging to defray the cost of accommodating streaming coverage and administering its media policies. WIAA's prohibitively high license tax is not without consequence. It

functions as a prior restraint and prevents or limits the First Amendment activities of entities that cannot afford the fee. (*See* Dkt.39, ¶17.)

What the record actually shows is that WIAA determined the streaming fee primarily by reference to market factors, in violation of the First Amendment. It considered the fees charged by competing state athletic associations, whether a transmission will be live or tape-delayed, and whether a "production lends itself to a wide internet distribution platform that people are able to see world-wide." (Dkt.54, ¶16.) WIAA's unsupported estimate of a production's commercial value, however, is not indicative of its costs to administer the activity.

The record clearly supports an inference that WIAA and host institutions incur only minimal costs to accommodate Internet streaming of tournament events. For *The Post-Crescent's* unauthorized productions in 2008, for example, the newspaper provided all the necessary equipment, including its own wireless Internet connection and needed at most to rely on the host institution's power supply. (*See* Dkt.36, ¶24.)

WIAA's streaming fees were already in place in October 2008, long before it conceded state actor status and the consequent applicability of the First Amendment. WIAA's implicit claim, that it *reasonably* considered the costs of accommodating streamers, is contradicted by the record evidence that such accommodation imposes minimal costs. Instead, the record supports the inference that, believing itself a private actor with minimal restrictions, it devised a market-based fee scheme analogous to those in place for professional sports leagues. That is unconstitutional.

CONCLUSION

The Constitution requires equal access and coverage opportunities for credentialed media at WIAA's tournaments. The district court should be reversed and directed to enter judgment declaring WIAA's exclusive licensing policies and profit-conscious fees for Internet streaming violate the First Amendment.

Dated this 19th day of November, 2010.

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RULE 32 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 32 and Circuit Rule 32 for a brief produced with proportionally spaced type-face. This brief was produced in Microsoft Word 2003 format, and its length as set forth by the word processing system used to prepare the brief is 6,998 words including headings, footnotes and quotations, but excluding the Table of Contents, Table of Authorities and any certificates of counsel.

Dated: November 19, 2010

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CERTIFICATION PURSUANT TO CIRCUIT RULE 31(e)

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

Dated: November 19, 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, Matthew P. Veldran, a paralegal employed with the law firm of Godfrey & Kahn, S.C., hereby certify under penalties of perjury that on November 19, 2010, I caused two hard copies of the following document: DEFENDANTS-APPELLANTS' REPLY BRIEF 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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