No. 10-2627

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN INTERSCHOLATIC ATHLETIC ASSOCIATION
and AMERICAN HI-FI, INC.,
Plaintiffs-Appellees,

vs.

GANNETT CO., INC. and WISCONSIN NEWSPAPER ASSOCIATION,
Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Wisconsin,
Case No. 09-cv-155-wmc
The Honorable William M. Conley, Judge Presiding

BRIEF OF *AMICI CURIAE* NEWS MEDIA REPRESENTATIVES IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

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DISCLOSURE STATEMENT

Appellate Court No. 10-2627

Short Caption: Wisconsin Interscholastic Athletic Association and American Hi-Fi Inc. v. Gannett Co., Inc. and Wisconsin Newspaper Association

The full name of every party that the attorney represents in the case:

- The American Society of News Editors;
- Chicago Tribune Company;
- The E.W. Scripps Company;
- GateHouse Media, Inc.
- Hearst Corporation;
- Illinois Press Association;
- The Journal Broadcast Group;
- The Journal Sentinel, Inc.;
- Lee Enterprises, Incorporated;
- The McClatchy Company;
- The National Press Photographers Association;
- Newspaper Association of America;
- Online News Association;
- Sun-Times Media, LLC; and
- The Washington Post.

The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

SNR Denton US LLP

If the party or amicus is a corporation:

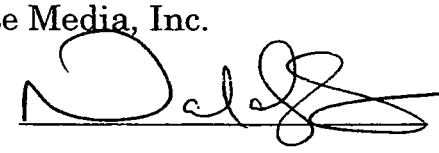
(i) Identify all its parent corporations, if any; and

- The American Society of News Editors does not have a parent company.
- Chicago Tribune Company's parent company is Tribune Company.
- The E.W. Scripps Company does not have a parent company.
- GateHouse Media, Inc. does not have a parent company.
- Hearst Corporation does not have a parent company.
- Illinois Press Association does not have a parent company.
- Journal Broadcast Group's parent company is Journal Communications, Inc.

- The Journal Sentinel, Inc.'s parent company is Journal Communications, Inc.
- Lee Enterprises, Incorporated does not have a parent company.
- The McClatchy Company does not have a parent company.
- The National Press Photographers Association does not have a parent company.
- Newspaper Association of America does not have a parent company.
- Online News Association does not have a parent company.
- Sun-Times Media, LLC's parent company is Sun Times Media Holdings, LLC.
- The Washington Post's parent company is The Washington Post Company.

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

- Bestinver Gestion, a Spanish company, owns more than 10% of the stock in The McClatchy Company.
- Berkshire Hathaway Inc. owns more than 10% of the Class B stock of The Washington Post Company.
- Fortress Investment Group LLC owns more than 10% of the stock in GateHouse Media, Inc.

Attorney's Signature:  Date: 10/12/10

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CONCISE STATEMENT OF INTEREST

All parties herein have consented to the filing of this brief *amicus curiae,* submitted on behalf of the following news media representatives:

- With some 500 members, **The American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily and online newspapers and academic leaders throughout the Americas. Founded in 1922, ASNE is active in a number of areas with priorities on improving freedom of information, diversity, readership and credibility of newspapers. This brief was authorized by Kevin M. Goldberg, Legal Counsel to the ASNE.

- **Chicago Tribune Company** publishes the *Chicago Tribune*, with distribution on the Internet and in print, and is the largest metropolitan daily and Sunday newspaper in Illinois and one of the largest in the United States. From its founding, the *Chicago Tribune* has been dedicated to the preservation and advancement of First Amendment freedom of the press. This brief was authorized by Karen Flax, its Assistant General Counsel.

- **The E.W. Scripps Company** is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio of locally focused media properties consists of: 10 TV stations; daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Howard News Service. This brief was authorized by David M. Giles, its Deputy General Counsel.

- **GateHouse Media, Inc.** is a provider of local content and advertising in small and midsize markets. Our core products include: approximately *87 daily newspapers* with total paid circulation of approximately 728,000; approximately *261 weekly newspapers* (published up to three times per week) with total paid circulation of approximately 564,000 and total free circulation of approximately 752,000. The submission of this brief was

authorized by Polly Grunfeld Sack, its Senior Vice President, General Counsel and Secretary.

- **The Hearst Corporation** is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications, and owns and operated numerous television broadcast stations. Hearst also owns a leading features syndicate, has interests in several cable television networks, and produces news and current affairs programming for television and the Internet. This brief was authorized by Jonathan R. Donnellan, its Senior Counsel.

- **The Illinois Press Association** ("IPA") is the largest state press organization in the United States. Founded in 1865, the IPA's members include nearly all of the more than 600-plus newspapers in Illinois. Throughout its history, the IPA has been dedicated to promoting and protecting the First Amendment interests of newspapers and citizens. The submission of this brief was authorized by Dennis DeRossett, its Executive Director.

- **Journal Broadcast Corporation** owns and operates 33 radio stations and 13 television stations in 12 states and operates an additional television station under a local marketing agreement. In Wisconsin, Journal Broadcast Corporation owns and operates WTMJ-TV, WGBA-TV, WACY-TV, WTMJ-AM and WLWK-FM. This brief was authorized by Jennifer L. Peterson, its Media Counsel and Deputy General Counsel.

- **The Journal Sentinel, Inc.** publishes the Milwaukee Journal Sentinel, a daily newspaper circulated throughout the greater Milwaukee area, and produces one of the most popular destinations for Milwaukee Internet users - JSOnline.com. This brief was authorized by Jennifer L. Peterson, its Media Counsel and Deputy General Counsel.

- **Lee Enterprises, Incorporated** is a publisher of local news, information and advertising in primarily midsize markets. Lee publishes over 50 newspapers, including *The Southern Illinoisan*

in Carbondale, IL, the *Wisconsin State Journal* and *The Capital Times* in Madison, WI, and the *St. Louis Post Dispatch.* This brief was authorized by Karen J. Guest, its Vice President-Law and Chief Legal Officer.

- **The McClatchy Company** owns 30 daily newspapers in 29 U.S. markets, including *The Kansas City Star, The Sacramento Bee, The Miami Herald, The Star-Telegram* of Fort Worth, *The Charlotte Observer*, and about 45 non-daily papers. In each of its daily markets, McClatchy operates the leading local website, offering readers information, comprehensive news, advertising, e-commerce and other services. This brief was authorized by Karole Morgan-Prager, its General Counsel.

- **The National Press Photographers Association** ("NPPA") is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses serving the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to photojournalism. This brief was authorized by Mickey H. Osterreicher, its General Counsel.

- **The Newspaper Association of America** ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of nondaily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of its members to provide the public with news and information on matters of public concern. This brief was authorized by René P. Milam, its Vice President and General Counsel.

- **The Online News Association** ("ONA") is the premier U.S.-based organization of online journalists. ONA's members include reporters, news writers, editors, producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media, as well as academics. ONA is dedicated to advancing the interests of online journalists and the public, generally, by encouraging editorial integrity, editorial independence, journalistic excellence, freedom of expression and freedom of access. This brief was authorized by Christine Montgomery, ONA's President.

- **Sun-Times Media, LLC** is the publisher of the *Chicago Sun-Times* newspaper, one the largest daily newspapers in the United States, as well as many other daily, weekly and semi-weekly newspapers in northern Illinois and Indiana, including *The SouthtownStar*, *The Beacon News*, *The Courier News*, the *Naperville News*, and the *Post Tribune* (in Indiana). This brief was authorized by Jim McDonough, its Chief Administrative Officer and General Counsel.

- **The Washington Post** is a leading newspaper and website with an estimated daily print circulation of over 615,000 and Sunday print circulation of over 845,000. The newspaper's website averaged more than 250 million page views per month and had an average of 23.9 million unique visitors per month during 2009, as measured by The Washington Post. This brief was authorized by Eric N. Lieberman, its Vice President/Counsel.

The interest of these *amici* springs from their concerns regarding government placing restrictions on the press's ability to report and circulate information about matters of public interest. *Amici* seek to explain the broader implications of the district court's decision, not only with respect to the specific policies and restrictions at issue, but for the practice of journalism generally.

INTRODUCTION

The high school sporting events sponsored by the Wisconsin Interscholastic Athletic Association ("WIAA") are unquestionably the focus of intense public interest, and have not just a "traditional" but an ancient lineage as a forum for public expression and assembly. In Imperial Rome, the state sponsored gladiatorial contests at the Coliseum. High school and college athletes are our modern gladiators, whose contests the state still sponsors and promotes.[1] The district court's suggestion that these events have "little expressive content," or that reporting on them is somehow entitled to lesser First Amendment protection (Dkt. 117 ("Op.") 26-27), is not just wrong but grievously wrong; "[w]hat is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948).

And while the WIAA and the State of Wisconsin may not be Caesars seeking to distract the people with "Bread and Circuses," they are unquestionably attempting to control how they, and their sponsored athletic contests, are viewed by the public. The WIAA is not a professional league or private sports licensing organization; it is *de facto* an arm of the

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[1] *See* H.G. Bissinger, *Friday Night Lights* 7, 11, 274 (DaCapo Press 1990) (describing Friday night high school football games: "It's like gladiators"; "the solemn ritual that was attached to almost everything, made them seem like boys going off to fight a war for the benefit of someone else, unwitting sacrifices to a strange and powerful god"; "It was like imperial Rome, like the Christians and the lions, violent, visceral, exciting, crazy"). The Grafton (Wis.) High School Gladiators are among many high school teams bearing that moniker.

government, and must comply with the First Amendment's requirements. Just as no one would suggest that the government could handpick who will report on city council meetings, or reserve to itself unlimited discretion to bar certain reporting of those meetings deemed "inappropriate," it cannot impose such restraints on reporting on state-sponsored sporting events. That the WIAA and its chosen licensees have *not yet* exercised their discretion to foreclose certain viewpoints (Op. 39-40) is of no moment; the very fact they *could* do so is the danger against which the First Amendment was designed to protect.

As for the public forum analysis which needlessly occupied most of the district court's decision, the district court and WIAA placed heavy, and misplaced, reliance on the fact that the WIAA is attempting to make money off of these games. (*E.g.*, Op. 1, 2, 22.) The state's profit motive does not insulate it from the obligations of the First Amendment. The WIAA has created a chokehold on information about the games it is sponsoring and promoting, by handpicking a mouthpiece that will present events as it likes, and placing limits on all others who would seek to report on the games, such limits to be exercised in its sole, unfettered discretion. That arrangement is patently unconstitutional.

Regardless of whether a "public forum" exists here—and it does—the government cannot play favorites with the flow of information about

activities conducted under its aegis. This is fundamental. The First Amendment guarantees a right to gather and disseminate the news, via the Internet no less than other means. The restrictions and licensing requirements the WIAA has imposed on journalists who cover tournament events flies in the face of long-standing Supreme Court precedent establishing the media's right of equal access to report the news, free of government control over content or methods.

Simply put, this is a clear-cut case of the government placing restrictions on the press's ability to report and circulate information about its activities and matters of manifest public interest. Under the Constitution, those restrictions cannot stand.

BACKGROUND

The WIAA, which organizes and regulates interscholastic high school athletics in Wisconsin, commenced this action, seeking a broad declaration of its "ownership rights in any transmission, Internet stream, photo, image, film, videotape, audiotape, writing, drawing or other depiction or description of any 'tournament event,'" after the defendants challenged the preferential treatment the WIAA affords its "exclusive" media partners, such as When We Were Young Productions ("WWWY"), a private media company to which the WIAA has granted exclusive Internet streaming rights for most tournament events.

The WIAA's 2009-10 Media Policies Reference Guide ("Media Guide") provides:

> The WIAA reserves the right to grant, issue, revoke and deny credentials to any media or Internet site organizations based on the interpretation and intent of these policies determined by the WIAA. In cases deemed unique by the Association, these policies may be amended. The WIAA and its exclusive rights partners retain the rights to all commercial use of video, audio, or textual play-by-play transmitted at a WIAA Tournament Series event. Furthermore, the WIAA owns the rights to transmit, upload, stream or display content live during WIAA events and reserves the right to grant exclusive and nonexclusive rights or not to grant those rights on an event-by-event basis. (Dkt. 26-3 at 12.)
>
> The WIAA also asserts the right to revoke or deny media credentials to anyone whose speech about tournament events the WIAA deems "inappropriate or incompatible with the educational integrity of the tournament or host institution..." (*Id.*)

Through these policies, the WIAA has established a classic system of prior restraints by requiring that media companies purchase a license to report by audio, video or text transmissions on newsworthy, government-sponsored events that are open generally to the public.

ARGUMENT

The WIAA is a state actor and the tournaments it sponsors are public events, staged on public property that is opened generally to the public and the media, and paid for with public funds. It cannot adopt the model of a

private, professional sports business. In particular, it cannot control speech about tournament events by granting exclusive rights and unbridled discretion to favored media companies, to censor that speech by threatening to revoke or deny future requests for the credentials it requires of the media to report on those events, and to raise revenue by charging rights fees for the opportunity to report from tournament venues using specified methods and technologies.

Amici submit that the district court's decision below missed the forest for the trees. It focused on a highly technical (and we submit, incorrect) analysis of whether a "public forum" exists in this case, while neglecting (or directly flouting) the fundamental First Amendment principles that apply to news-gathering and news dissemination, regardless of what category of forum is at issue.

I. THE FIRST AMENDMENT'S PROTECTIONS ARE NOT CONFINED TO "POLITICAL" SPEECH, AND FULLY EXTEND TO NEWS GATHERING AND INTERNET REPORTING ON PUBLIC HIGH SCHOOL SPORTING EVENTS.

The First Amendment protects the gathering, reporting and circulation of the news of the day, and "bar[s] government from interfering in any way with a free press." *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974). "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). "The

press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). News reporting on an athletic event—sponsored by the government at taxpayer expense—is protected by the First Amendment, no matter what technology or form of expression a journalist uses.

A particularly disturbing aspect of the district court's decision below is its comment that the challenged policies of the WIAA "pose[] no threat to the rights and values embodied in" the First Amendment (Op. 2), and that "the nature of the speech at issue" was "relevant" to this conclusion: "[s]ome events, such as political events, by their very nature foster free discourse regardless of the intent of the event's sponsor," while "a typical sporting event—even one played for a state championship—has little expressive content for purposes of the First Amendment." (*Id.* at 26-27; *see also id.* at 39 (relying on "the generally nonpolitical, nonideological nature of the speech at issue").)

Contrary to what the district court suggests, First Amendment rights "are not confined to 'political expression or comment upon public affairs'"; the public's legitimate interest embraces "sports and sports figures, whose 'public interest' character is amply demonstrated by the elaborate sports

section in every daily newspaper published in this nation and by the numerous periodicals, such as that involved here, exclusively devoted to sports." *Time, Inc. v. Johnston*, 448 F.2d 378, 382-83 (4th Cir. 1971) (citing *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970)). "The line between . . . informing and . . . entertaining is too elusive. . . . What is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948); *see also Citizens United v. F.E.C.*, 130 S.Ct. 876, 917 (2010) (that speech is "neither high art nor a fair discussion on how to set the Nation's course" is "not for the Government" to say).

High school athletic contests are popular, uniquely public events because they involve the entire community—the taxpayers who pay for public school teams, coaches, equipment and facilities as an integral part of public education, the student athletes who compete to be state champions, and the spectators who support the teams and provide the principal funding for the events. "Public school systems, their athletic programs, and those who run them are consistent subjects of intense public interest and substantial publicity." *Basarich v. Rodeghero*, 321 N.E.2d 739, 742 (Ill. App. Ct. 3d Dist. 1974).

As Pulitzer Prize-winning journalist H.G. Bissinger observes in his chronicle of high school football in Odessa, Texas, "in the county library, . . . the 235-page history that had been written about Permian [High School]

football was more detailed than any of the histories about the town itself." H.G. Bissinger, *Friday Night Lights*, 24 (DaCapo Press 1990). Permian football was as much "a part of the town" and its inhabitants' lives "as religion, as politics, as making money, as raising children . . . . Football stood at the very core of what the town was about . . . . It had nothing to do with entertainment and everything to do with how people felt about themselves." (*Id.* at 237.) "'There is nothing to replace [high school football]. It's an integral part of what made the community strong. You take it away and it's almost like you strip the identity of the people.'" (*Id.* at 43.)[2]

Equally important, the First Amendment protects *all* methods and means of disseminating reports on public high school sports. It "protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era," *Clement v. California Dept. of Corrections*, 364 F.3d 1148, 1151 (9th Cir. 2004) (citing *Reno v. ACLU,* 521 U.S. 844, 868 (1997)), including dissemination of motion pictures and video recordings. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S.

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[2] Discussing George Bush Sr.'s experience sitting in the stands at high school football games, Bissinger says that by "conjuring up an image of America as simple and pure as the scene of pomp in Memorial Stadium, by telling people that he was no different from any of them sitting in those packed stands and rooting for the Bulldogs or the Panthers, that he understood exactly how they felt and how they thought, about Friday night football, about life, about religion, about America, he managed to become the president of the United States." (*Id.* at 182.)

495, 501-502 (1952). "'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (quoting *Ex parte Jackson,* 96 U.S. 727, 733 (1938)). It would be unthinkable that the WIAA could limit who could use newsprint as a means of reporting on its games, or grant that right exclusively to one media outlet; it is equally unthinkable that the state could exercise such control over using the Internet as dissemination vehicle. "'The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.'" *Citizens United*, 130 S.Ct. at 917 (quoting *McConnell v. F.E.C.*, 540 U.S. 93, 341 (2003) (opinion of Kennedy, J.)); *Branzburg v. Hayes*, 408 U.S. at 703-705 (freedom of the press "'in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion'") (quoting *Lovell v. City of Griffin*, 303 U.S. at 452).

And while, as the district court put it, the Constitution may not "require the government to assist private entities in making a profit" (Op. 2), where speech is involved, the government may not restrict its dissemination by imposing a license or tax—regardless of whether the entity doing the speaking is, as most newspapers and broadcasters are, conducted for profit. *See Joseph Burstyn, Inc.*, 343 U.S. at 501-502 ("That books, newspapers,

and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."); *Smith* v. *California,* 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination takes place under commercial auspices."); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Citizens United*, 130 S.Ct. at 927-28.

Indeed, the Supreme Court has invalidated a "license tax . . . because of its direct tendency to restrict circulation" of for-profit newspapers. *Lovell v. City of Griffin*, 303 U.S. at 452 (citing *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936)). While the district court accepted at face value the WIAA's assertion of a "reasonable interest in trying to ensure that more of its games make it onto the internet" (Op. 34), the WIAA's exclusive rights licensing policy has had *precisely the opposite effect.* While there are over 3,500 WIAA-sponsored games per year that *could* be streamed over the Internet, WWWY streams only a small, cherry-picked fraction of those games (approximately 134 in 2008-2009). (*See* Dkt. 54, ¶ 8; Dkt. 79, ¶¶ 13-14.) However, under its exclusive licensing arrangement with the WIAA, WWWY is able to prevent the hundreds of other games it does *not* stream from reaching the Internet-reading public, by demanding that those who wish to stream those games pay a "rights" fee ($250 if the video was

produced by a single camera or $1,500 if produced by multiple cameras) *and* surrender their work product for sale by WWWY. (Dkt. 39, ¶12; Dkt. 46-2; Dkt. 78-3.)

The surcharge and surrender requirements restrict circulation for no conceivable regulatory purpose, and are no different from the tax on circulation deemed unconstitutional in *Grosjean,* 297 U.S. 233. And, as we next discuss, the restriction on speech here is equally if not more pernicious as *Grosjean,* because the WIAA has arrogated to itself, and its exclusive licensee, the sole, unfettered discretion to decide who has permission to use this medium to report on high school athletic events.

II. THE GOVERNMENT'S DELEGATION OF UNBRIDLED DISCRETION TO LICENSE CERTAIN TYPES OF REPORTING IS UNCONSTITUTIONAL REGARDLESS OF THE TYPE OF FORUM AT ISSUE.

Whether or not a public forum exists, the government cannot control information about its sponsored activities by means of licensing "approved" reporters. Nor can it condition the means of that reporting on the exercise of its (or its delegate's) sole, unilateral discretion. "[T]he 'restrictive power' of such a 'licenser'—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech"—was the original and paramount concern of the First Amendment's Framers. *Thomas v. Chicago*

Park Dist., 534 U.S. 316, 320 (2002) (quoting 4 W. Blackstone, Commentaries on the Laws of England 152 (1769)).

> The First Amendment's guarantee of "the freedom of speech, or of the press" prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the "evils" of the printing press in 16th- and 17-century England. The Printing Act of 1662 had "prescribed what could be printed, who could print, and who could sell."

Thomas, at 320 (citation omitted).[3]

The WIAA has established just such an unconstitutional licensing system for reporters covering its events—requiring credentials for media access and permission to use specific reporting technology, like Internet streaming—without providing any objective standards for granting, denying or revoking those licenses.

"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."

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[3] *See also Lovell v. City of Griffin*, 303 U.S. at 451-52 ("The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.'"); *Branzburg v. Hayes*, 408 U.S. at 726-27 (Stewart, J., dissenting) (to ensure "[t]he full flow of information to the public protected by the free-press guarantee," Court has "recognized that there is a right to publish without prior governmental approval") (citing *Near v. Minnesota*, 283 U.S. 697 (1931)).

MacDonald v. City of Chicago, 243 F.3d 1021, 1026 (7th Cir. 2001). The WIAA's media policies do just that. The WIAA claims to own "the rights to transmit, upload, stream or display content live during WIAA events and . . . to grant exclusive and non-exclusive rights or not to grant those rights on an event-by-event basis." (Dkt. 26-3 at 12.) The WIAA's claim of outright ownership of these rights epitomizes unbridled discretion.

Of even greater concern, however, is that the WIAA has delegated to WWWY absolute control over the use of Internet streaming at tournament events:

> Production and distribution rights include, and are not limited to, . . . content streaming through any platform and/or physical media. *All permissions granted, policies enforced and fees required will be at the sole discretion of the rights holder.* Detailed information regarding policies and fees are available upon request from When We Were Young Productions (608) 849-3200 ext. 225.

(Dkt. 26-2 at 16 (2008-09 Media Guide) (emphasis added).)

The WIAA may not constitutionally delegate to a private company, WWWY, the sole discretion to grant or deny permission to stream tournament events without any criteria whatsoever to guide the decision. Government cannot "make[] the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official" to do so "is an unconstitutional censorship or prior restraint upon the

enjoyment of those freedoms." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *accord City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

Such standardless discretion is dangerous for two reasons: it intimidates parties into censoring their own speech and renders the reasons behind the licensor's decision not only arbitrary but "in large measure effectively unreviewable." *Lakewood,* 486 U.S. at 758-59. "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official [or] some bureaucrat. Where discretion is absolute, man has always suffered." *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

These fundamental precepts apply regardless of whether the speech that is subject to the licensor's unbridled discretion occurs in the context of a public forum. "[T]he dangers posed by unbridled discretion" are "just as present in other forums"; hence, "there is broad agreement that, *even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment.*" *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schools*, 457 F.3d 376, 386-87 (4th Cir. 2006) (citing cases) (emphasis added). The unlimited authority the WIAA granted WWWY over Internet streaming is prohibited even in non-public forums because, as this

Court has held, "the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement." *Southworth v. Bd. of Regents*, 307 F.3d 566, 579 (7th Cir. 2002).

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

Lakewood, 486 U.S. at 763-64 (invalidating ordinance providing unbridled discretion over permits to place newsracks).

This is precisely what the WIAA has done: it has authorized Internet streaming of tournament events "for some but not for others," leaving permission in WWWY's sole discretion without any objective standards or guidance. That licensing scheme is unconstitutional. *See Child Evangelism Fellowship*, 457 F.3d at 387 ("[A] policy (like the one at issue here) that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny."); *accord DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-74 (7th Cir. 2001).

The district court below held that that absent "any evidence of a history of viewpoint discrimination or censorship on the part of plaintiffs, it is not reasonable to infer that the exclusive license will be used as a weapon for

silencing adverse opinions." (Op. 40.) The district court similarly suggests that "streaming a game in and of itself does not necessarily involve the opinions of the media company" (*Id.* at 48)[4], but acknowledges the obvious threat that plaintiffs could retaliate for "commentary that had accompanied a previous broadcast or more generally disapproved of positions taken by the media company." (*Id.*) The district court waved these serious risks away with the comment that plaintiffs had always "accept[ed] . . . requests to stream games in the past" and there was "no reason to believe" licenses would be issued "on the basis of viewpoint." (*Id.*)

With respect, that misunderstands the law. The news media's First Amendment rights are not subject to the grace or sufferance of the WIAA and its licensees, and the hope that they will act reasonably. The WIAA's policies threaten the censorship concerns enunciated by the Supreme Court, "even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. The law treats the very existence of unbridled discretion as a prior restraint because of the risk that the applicant may self-censor his or

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[4] A journalist wishing to stream footage from a WIAA-sponsored game is not necessarily going to slavishly document only the "game . . . itself," i.e., the action on the field or court; other newsworthy events may transpire during the game (a coach abuses a player on the sidelines; a fight breaks out in the stands). Reporters who record these events with the tool of streaming video are entitled to no less protection than those who have only pen and paper. As the public's surrogate (*Richmond Newsp., Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980))—its "eyes and ears"—the press is entitled to use all the tools of reportage at its disposal, without that usage being subject to government whim or favoritism.

her speech to please the licensor. *Id.* Where government "delegates overly broad discretion to the decisionmaker," a finding of unconstitutionality "rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). Here, nothing in the WIAA Internet streaming policies prevent WWWY from exercising its "discretion in a content-based manner." *Id.*

And in fact, the WIAA *does* explicitly attempt to regulate the content of speech about tournament events by reserving "the right to revoke or deny the video, audio or text transmission rights" of anyone who transmits "content or comments *considered inappropriate* or incompatible with the educational integrity of the tournament or host institution from which the transmission is originated." (Dkt. 26-3 at 12 (emphasis added).) This regulation offends the First Amendment's core premise: that the "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). This content-based regulation cannot withstand strict scrutiny, regardless of what rationale the WIAA may assert, because it is void for vagueness. Just as unbridled discretion risks self-censorship, a vague policy is inimical to First Amendment values

because of its "attendant dangers of arbitrary and discriminatory application"; "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *see also DeBoer*, 267 F.3d at 574 ("[T]he ambiguity in the 'benefits the public as a whole' requirement provides too great a risk that it could be used to engage in prohibited censorship of speech.").

III. THE GOVERNMENT'S "PROFIT MOTIVE" DOES NOT PERMIT IT TO CONFER THE EXCLUSIVE RIGHT TO USE CERTAIN MEDIA IN REPORTING THE NEWS, REGARDLESS OF THE FORUM IN WHICH THE REPORTED EVENT TAKES PLACE.

The athletic competitions that are the subject of this suit are staged primarily on public property, involving primarily public school athletes and supported primarily by public funds. (*See* Dkt. 26 ¶ 2; Dkt. 5 ¶ 20; Dkt. 43 ¶¶ 12, 14.) Yet the district court concluded that "WIAA invites the public to its members' games not for the purpose of fostering debate, but in substantial part to make money." (Op. 22.) WIAA's profit motive does not insulate it from the First Amendment's obligations. Having opened public tournament events to the public generally, and to coverage by the media, the WIAA cannot play favorites when it comes to speech. "The Constitution . . . assure[s] the public and the press equal access once government has opened its doors." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart,

J., concurring). The First Amendment commands that "[w]hen speakers and subjects are similarly situated, the State may not pick and choose." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983); *see also Thomas v. Chicago Park Dist.*, 534 U.S. at 325 ("Granting [permit] waivers to favored speakers . . . would of course be unconstitutional."). The WIAA's sale of preferential rights to report on high school tournament events clearly violates the First Amendment.

A. THE WIAA CANNOT EXCLUDE DEFENDANTS FROM THE DESIGNATED PUBLIC FORUM IT CREATED FOR MEDIA COVERAGE OF TOURNAMENT EVENTS.

In a *traditional* public forum—"places which by long tradition or by government fiat have been devoted to assembly and debate"—"the rights of the State to limit expressive activity are sharply circumscribed"; it may only enact content-neutral "time, place, and manner" restrictions or content-based rules that are "necessary to serve a compelling state interest" and have been "narrowly drawn to achieve that end." *Perry,* 460 U.S. at 45. A *designated* public forum is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). "Government restrictions on speech in a designated public forum

are subject to the same strict scrutiny as restrictions in a traditional public forum." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

As *amici* noted at the outset, since antiquity, athletic contests have been sponsored by the state and are by definition and "long tradition" public forums for assembly and public expression. In any event, the evidence below showed, *at the very least*, that the WIAA intentionally created a designated public forum for journalists at tournament venues, by opening them generally to the media for coverage of the events.[5] The Media Guide confirms that tournament venues are open generally to the public including the media by authorizing "legitimate news gathering media representatives" to request credentials for "covering and reporting from WIAA-sponsored tournaments." (Dkt. 26-3 at 1.) WIAA's media policies thus expressly authorize "general access for a class of speakers." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998).

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[5] The district court found it "telling of the merits of defendants' claim that they have failed to uncover a single case in which a court concluded that a public entity violated the First Amendment under circumstances bearing any resemblance to this case." (Op. 19.) If anything, the shoe should be on the other foot: Where the event is sponsored by the government, and is on public property, the presumption should be that a public forum exists—and "when the Government restricts speech, the Government bears the burden of proving the constitutionality of its position." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). *See also DeBoer v. Village of Oak Park*, 267 F.3d at 572 ("governmental restraint on freedom of expression 'need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers'") (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)).

A grant of exclusive rights to favored media companies like WWWY cannot survive the strict scrutiny applicable to any attempt to control access to a designated public forum. Giving WWWY absolute control over Internet streaming of tournament events is neither "necessary to serve a compelling state interest" nor "narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. It is nothing more than an "additional source of revenue" for the WIAA (Op. 2), which is not a compelling state interest in this context. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (government's stated "interest in raising revenue, standing alone, . . . cannot justify [its] special treatment of the press"). The Constitution does not permit a state actor to ration and sell First Amendment freedoms—for any purpose let alone to raise revenue.

The district court placed heavy reliance on the WIAA's claims to be "conducting business" or acting in a "commercial or proprietary capacity" (Op. 22), but those assertions do not *ipso facto* foreclose any public forum finding, and do not give the government carte blanche to ignore the restrictions of the First Amendment.

Profit-conscious fees are allowed *only* when "government acts in a proprietary capacity, that is, in a role functionally indistinguishable from a private business," like at a municipal airport that is statutorily required to operate as a self-sufficient business. *Atlanta Journal & Constitution v.*

Atlanta Dep't of Aviation, 322 F.3d 1298, 1310, 1312 (11th Cir. 2003). However, when "government act[s] facially or impliedly in its capacity as regulator or licensor [it] cannot profit from the exercise of First Amendment rights. . . ." *Id.* at 1312.[6] Here, the WIAA is clearly acting as a regulator and licensor of rights to report information about the events it sponsors, which are part of its public educational mission, not commercial events.

The preferential and exclusive right to stream tournament events that the WIAA has granted to WWWY, cannot be justified as a time, place and manner restriction because it does not apply "evenhandedly to all" who wish to use that reporting method. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Perry,* 460 U.S. at 55. Exclusive media rights are unconstitutional in a designated public forum.

B. THE WIAA'S EXCLUSIVE-RIGHTS POLICIES VIOLATE THE FIRST AMENDMENT EVEN IF TOURNAMENT VENUES ARE NOT PUBLIC FORUMS.

The exclusive rights the WIAA has granted to WWWY are unconstitutional even if tournament venues are *non*-public forums. That is because WIAA's policy of granting a private company an exclusive franchise

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[6] *Even though* the city was "acting as a proprietor" in *Atlanta Journal*, its policy was unconstitutional because it conferred unbridled discretion to "cancel a publisher's license for any reason whatsoever." 322 F.3d at 1311. "None of the Department's proffered reasons for regulation, *including its interest as a proprietor*, can justify this grant of discretion." *Id.* (emphasis added); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("The Government, even acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business.").

over a means of communication at government-sponsored public events itself violates the viewpoint-neutrality requirement.

In finding against defendants below, the district court pronounced that WIAA's "business decision that it will be more lucrative to give one company the rights to broadcast its tournament games . . . does not stifle speech or discriminate on the basis of viewpoint." (Op. 2.) That is incorrect. The "lucrative" arrangement between WIAA and WWWY is inconsistent with viewpoint neutrality because it invites the very kind of "self-censorship" that underpins the unbridled discretion doctrine. "It is not difficult to visualize a newspaper . . . feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its [newsrack] permit application." *Lakewood*, 486 U.S. at 757.[7] WWWY likewise has a strong financial incentive to please the WIAA in hopes of maintaining its control over Internet streaming of tournament events.

Exclusivity is fundamentally inconsistent with the neutrality requirement applicable in any forum. Whether addressing access to public

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[7] The district court's comment that defendants below "adduced no evidence showing that WIAA chose WYYY [*sic*] as a partner because it would provide more favorable coverage, nor that WYYY [*sic*] has engaged in self-censorship in order to 'please' WIAA" (Op. 39) again misunderstands the law. As noted, the First Amendment's concern is with the "*risk* of self-censorship"; defendants were not obliged to "ferret out" evidence of this threat. *Southworth v. Bd. of Regents*, 307 F.3d at 579; *see also Lakewood*, 486 U.S. at 757.

places, as in *Forsyth*, or to the means of distribution or channel of communication, as in *Lakewood*, the Supreme Court has repeatedly held that neutrality—ensured by definite and objective standards—is the constitutional touchstone for valid speech restrictions. The WIAA's "pick[ing] and choos[ing]" WWWY for preferential treatment violates these fundamental First Amendment principles. *Perry*, 460 U.S. at 55; *see also Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695, 699 (7th Cir. 1995) (even when government operates a commercial enterprise in a nonpublic forum, First Amendment does not allow it "a free hand in deciding whom to admit to its property and on what terms"). The WIAA not only picked and chose WWWY for favored treatment, it then delegated to WWWY the power to pick and choose licensees. The First Amendment guarantees newspapers and other media equal access to report tournament events by Internet streaming on the same terms and conditions that the WIAA applies to any other media company, including WWWY.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully suggest that the decision below was in error and that the Court should reverse and remand with instructions to deny the declaratory relief plaintiffs seek.

Dated: October 12, 2010

Respectfully submitted,

By: _____

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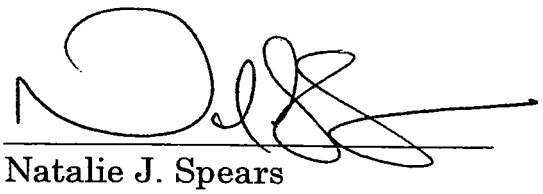
CIRCUIT RULE 31(e) STATEMENT

I, Natalie J. Spears, certify that an electronic version of the Brief of *Amicus Curiae* News Media Representatives has been provided on a disc to this Court on this 12th day of October, 2010, pursuant to Circuit Rule 31(e), and that the disc uploaded is virus free.

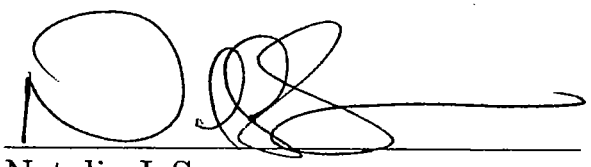


Natalie J. Spears

October 12, 2010

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29(d) AND 32(a)(7)

I, Natalie J. Spears, one of the attorneys for the News Media Representatives Amicus Curiae, hereby certify that the Brief of the News Representative Amicus Curiae complies with the type-volume limitations set out for amicus briefs in Federal Rule of Appellate Procedure 29(d) and 32(a)(7). The brief, including headings, footnotes and quotations, contains 6,973 words, as calculated by the Microsoft Word Tools word count function.



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October 12, 2010

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused hard and electronic copies of the Brief of *Amicus Curiae* News Media Representatives to be served on the persons listed below via e-mail and via U.S. Mail on this 12th day of October, 2010:

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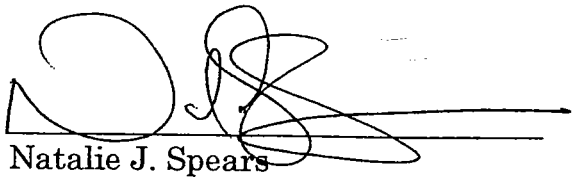

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