IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN LIBRARY ASSOCIATION, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	)	CIVIL ACTION NO. 01-CV-1303
MULTNOMAH COUNTY PUBLIC LIBRARY, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	)	CIVIL ACTION NO. 01-CV-1322

O R D E R

AND NOW this _____ day of _____, 2001, upon consideration of the Motion of Defendants to Dismiss Plaintiffs' Complaints, and the Response of those Plaintiffs thereto, it is hereby ORDERED that Defendants' Motion is DENIED.

It is further ORDERED that Defendants shall file their Answer to Plaintiffs' Complaints within twenty (20) days of the entry of this Order.

BY THE COURT:

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MULTNOMAH COUNTY PUBLIC LIBRARY, et al., Plaintiffs v. UNITED STATES OF AMERICA, et al. Defendants	)	Civil Action No. 01-CV-1322

RESPONSE IN OPPOSITION OF PLAINTIFFS THE AMERICAN LIBRARY ASSOCIATION, ET AL.,
TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINTS

Plaintiffs, the American Library Association, et al., hereby respond to the Defendants' Motion to Dismiss Plaintiffs' Complaints. For all of the reasons set forth in Plaintiffs' accompanying Memorandum of Law, which is incorporated herein by reference, Defendants' Motion to Dismiss should be denied and Defendants ordered to file an Answer to Plaintiffs' Complaints as set forth in the preceding proposed form of Order attached hereto.

Respectfully submitted,

_____

By One of Their Attorneys

Paul M. Smith
Theresa A. Chmara
Daniel Mach
Katherine A. Fallow
Jennifer S. Martinez
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
Phone: (202) 639-6000
Fax: (202) 639-6066

Elliot M. Mincberg
Lawrence S. Ottinger
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 467-4999
Fax: (202) 293-2672

Robert A. Nicholas
Wayne C. Stansfield
REED SMITH LLP
2500 One Liberty Place
Philadelphia, PA 19103-7301

Phone: (215) 851-8100
Fax: (215) 851-1420

COUNSEL FOR ALL PLAINTIFFS

COUNSEL FOR PLAINTIFFS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, FRIENDS OF THE PHILADELPHIA CITY INSTITUTE LIBRARY, PENNSYLVANIA ALLIANCE FOR DEMOCRACY, ELIZABETH HRENDA, and C. DONALD WEINBERG

June 29, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN LIBRARY ASSOCIATION, et al. Plaintiffs v. UNITED STATES OF AMERICA, et al. Defendants	)	Civil Action No. 01-CV-1303
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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' THE AMERICAN LIBRARY ASSOCIATION, ET AL., RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINTS

INTRODUCTION

The Children's Internet Protection Act (to be codified at 47 U.S.C. § 254(h) and 20 U.S.C. § 9134) (the "Act" or "CIPA") is facially invalid and inevitably will lead to the suppression of significant amounts of constitutionally protected speech in violation of the First Amendment. The Act requires public libraries that receive federal funding to install and enforce the use of blocking software on "all" of their computers with Internet access, "during any use of such computers," to prevent adults and minors from accessing visual depictions that are obscene or child pornography, and additionally during use by minors, to prevent minors from accessing

visual depictions that are harmful to minors. 47 U.S.C. § 254(h)(6)(B) & (C); 20 U.S.C. § 9134(f)(1) (emphasis added).

But as Congress was well aware, no technology exists that can effectively block the precise, legally defined categories of speech enumerated in the Act. See ALA Compl. ¶ 5. As alleged in plaintiffs' complaint – which must be accepted as true for purposes of this motion to dismiss – filtering software will result in "significant overblocking and underblocking," id. ¶ 40, and "all available filtering technology blocks access to a tremendous amount of constitutionally protected expression." Id. ¶ 5 (emphasis added). That reality cannot be ignored in assessing the constitutionality of the Act, especially as there is every reason to believe that Congress was deliberately trying to promote blocking of constitutionally protected sexually explicit materials – not just obscenity, child pornography, and speech that is harmful to minors.

Defendants attempt to avoid CIPA's First Amendment problems by hiding behind the fact that the unconstitutional restrictions are attached to a federal funding program. But the Supreme Court repeatedly has made clear that the mere fact that a restriction on speech is part of a spending program does not insulate it from First Amendment scrutiny, most recently applying the First Amendment to invalidate a speech restriction in a federal spending program in Legal Services Corp. v. Velazquez, 121 S. Ct. 1043 (2001) – a case which defendants conveniently relegate to a footnote on page 40 of their brief.

Defendants also try to save the statute by giving a broad reading to the Act's "disabling" provisions, which permit – but do not require – library authorities to disable blocking software "to enable access for bona fide research or other lawful purposes." Recognizing the inherent limitations of filtering software, defendants suggest that the disabling provisions will ensure that

no one is denied access to any material they have a constitutional right to view. Far from saving the statute, however, the disabling provisions actually exacerbate the Act's constitutional infirmities, for two reasons. First, the provisions will unconstitutionally stigmatize citizens who seek access to lawful material that may be sensitive, controversial, embarrassing, or offensive to some. In addition, the disabling provisions vest government officials with standardless discretion to decide whether or not to allow access to constitutionally protected materials.

Finally, defendants' motion ignores the legal standards governing both motions to dismiss and facial challenges. Plaintiffs' complaint cannot be dismissed on the basis of defendants' unsupported factual allegations. And this suit is ripe under well-established doctrines allowing pre-enforcement challenges to statutes that will result in the suppression of fully protected speech.

LEGAL STANDARD GOVERNING MOTIONS TO DISMISS

For purposes of defendants' motion to dismiss, the factual allegations in plaintiffs' complaint must be accepted as true and viewed in the light most favorable to plaintiffs. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985); Atlantic Adjustment Co. v. United States Dep't of Labor, 90 F. Supp. 2d 627, 628 (E.D. Pa. 2000). All reasonable inferences from the factual allegations must be drawn in plaintiffs' favor. See Atlantic Adjustment, 90 F. Supp.2d at 628.[1/] The purpose of a

1/ In addition to their motion to dismiss for failure to state a claim, defendants also assert that the Court lacks jurisdiction over the so-called "as-applied" claims of the individual plaintiffs and move to dismiss those claims pursuant to Rule 12(b)(1). Because defendants do not contest the factual allegations set forth in plaintiffs' complaint, the court should properly accept the complaint's factual allegations as true for purposes of the Rule 12(b)(1) challenge as well. Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000).

motion to dismiss is to test the sufficiency of a complaint, not to find facts or resolve the merits of the case. See Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

ARGUMENT

I. The First Amendment Plainly Governs This Case

Contrary to the tenor of the defendants' brief, this case is about the First Amendment, not the Spending Clause. The first half of defendants' brief ignores this fact and is therefore largely irrelevant; defendants discuss at length the four-factored test set forth in South Dakota v. Dole, 483 U.S. 203 (1987), for determining whether Congress' spending power has been constitutionally exercised. But as defendants ultimately acknowledge, the fourth South Dakota factor expressly prohibits Congress from exercising the spending power in a way that violates another constitutional provision. See id. at 210-11. That is the essence of plaintiffs' complaint – that the restrictions attached to federal funding under CIPA suppress speech and violate the First Amendment.

A. Spending Programs Are Subject to First Amendment Scrutiny

The Supreme Court has made clear that the mere fact that a restriction on speech is part of a spending program does not insulate it from First Amendment scrutiny. In a series of decisions including Rust v. Sullivan, 500 U.S. 173 (1991), and most recently Legal Services Corp. v. Velazquez, 121 S. Ct. 1043 (2001), the Court has drawn a distinction between situations in which the government acts as a speaker and those in which the government "'does not itself

speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.'" Velazquez, 121 S. Ct. at 1049 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995)). "When the government disburses public funds . . . to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995). But this "latitude for government speech" does not apply "to subsidies for private speech in every instance." Velazquez, 121 S. Ct. at 1049. Instead, when a government program is "designed to facilitate private speech, not to promote a governmental message," the First Amendment applies with full force. Id. In such cases, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." Id. Like the spending program restrictions invalidated under the First Amendment in cases such as Velazquez, Rosenberger, and FCC v. League of Women Voters of California, 468 U.S. 364 (1984), CIPA falls squarely into this latter category.

Unlike the program upheld in Rust, this case does not involve government speech. Rust involved a challenge to the Title X family planning program, which provided that "'[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.'" Rust, 500 U.S. at 178 (citation omitted). This had been interpreted to bar grantees from counseling patients about abortion. Id. at 198. As the Court later explained, "the counseling activities of the doctors under Title X amounted to governmental speech." Velazquez, 121 S. Ct. at 1048. When the Government acts as speaker, it necessarily has latitude to dictate the content of the speech. For example, "[w]hen Congress established a National

Endowment for Democracy to encourage other countries to adopt democratic principles . . . , it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." Rust, 500 U.S. at 194.

By contrast, when a government program is "designed to facilitate private speech" or to "encourage a diversity of views," the government is not free to restrict speech based on its content or viewpoint. Velazquez, 121 S. Ct. at 1049; League of Women Voters, 468 U.S. at 383, 392, 395; see also, e.g., Brooklyn Institute of Arts & Sciences v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999). For this reason, in Velazquez the Court struck down a law that prohibited attorneys funded with federal money through the Legal Services Corporation from making specified legal arguments that the Congress disfavored. The "salient" fact that distinguished Velazquez from Rust was that the Legal Services Corporation was "designed to facilitate private speech," not to act as a conduit for the government's message. Velazquez, 121 S. Ct. at 1049. Likewise, in Rosenberger, the Court invalidated the University of Virginia's refusal to fund student newspapers espousing a religious viewpoint when it funded other newspapers, explaining that "[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . It does not follow, however . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." 515 U.S. at 833-34 (citations omitted). And in FCC v. League of Women Voters of California, the Court invalidated a prohibition against "editorializing," regardless of viewpoint, by publicly funded

broadcasters, noting that the broadcasters "are engaged in a vital and independent form of communicative activity." 468 U.S. at 378.

A key factor in identifying impermissible restrictions on private speech in funding programs is whether "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." Velazquez, 121 S. Ct. at 1049. "Where the government uses or attempts to regulate a particular medium," courts should look at the medium's "accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations." Id. Thus, in FCC v. League of Women Voters of California, the Court considered "the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds." Velazquez, 121 S. Ct. at 1049. "The First Amendment forb[ids] the Government from using [a] forum in an unconventional way to suppress speech inherent in the nature of the medium." Id.

Like these cases, the instant case does not involve government speech, and "[t]he private nature of the speech involved here, and the extent of [CIPA's] regulation of private expression, are indicated . . . by the circumstance that the Government seeks to use an existing medium of expression and control it . . . in ways which distorts its usual functioning." Id. The blocking software mandated by CIPA fundamentally distorts the normal functioning of the marketplace of ideas that is the Internet. See ALA Compl. ¶¶ 27-31, 132.[2/] "The Internet is 'a unique and

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2/ Plaintiffs' factual allegations about the normal functioning of the Internet and public libraries as forums for speech must be taken as true at the motion to dismiss stage, providing yet another reason why defendants' motion must be denied.

wholly new medium of worldwide human communication.'" Reno v. ACLU, 521 U.S. 844, 850 (1997) (citation omitted). Currently, an estimated 400 million people use the Internet. ALA Compl. ¶ 29. Communication on the Internet can take a variety of forms, including e-mail, automatic mailing list services ("listservs"), "newsgroups," "chat rooms," and the "World Wide Web." Reno, 521 U.S. 851. As a result of its size and the ease of disseminating speech electronically, the Internet is like a vast town square, in which "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." Id. at 870. "[A]t any given time 'tens of thousands of users are engaging in conversations on a huge range of subjects.' It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'" Id. at 852 (citation and footnote omitted). In no way, therefore, can the vast majority of speech on the Internet be described as conveying a government-sponsored message.

Defendants nevertheless seek to analogize this case to Rust by saying that CIPA involves the Government subsidy of Internet access for specific and limited purposes. They characterize the e-rate and LSTA programs in public libraries as having an inculcative educational mission. But that assertion mischaracterizes both the mission of public libraries and what it means to give the public Internet access. Regardless of the setting, the material available on the Internet is so diverse that there can be "no programmatic message of the kind recognized in Rust." Velazquez, 121 S. Ct. at 1052.

And in fact, as we discuss more fully *infra*, the placement of the Internet terminals at issue here in public libraries undercuts, rather than supports, the Government's defense. For the Act would also distort the normal functioning of public libraries, whose traditional mission is to provide a broad range of information to meet patrons' individual interests and needs, not to tell

patrons what to read or think. See ALA Compl. ¶¶ 46-52. Public libraries serve primarily as forums for private speech, not mouthpieces for government propaganda. "A library is a mighty resource in the free marketplace of ideas." Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976). Public libraries have traditionally been "designed for freewheeling inquiry." Board of Education v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). While public libraries may serve some educational function in society, that function is fundamentally different from institutions such as public elementary and high schools. "Public libraries lack the inculcative mission that is the guiding purpose of public . . . schools . . . . As such, no curricular motive justifies a public library's decision to restrict access to Internet materials on the basis of their content." Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998); see also Pico, 457 U.S. at 915 (Rehnquist, J., dissenting) (distinguishing public libraries from public schools).

In addition, characterizing the restrictions as necessary to define the "educational" scope of the e-rate and LSTA programs is insufficient to save the statute. It is clear that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." Velazquez, 121 S. Ct. at 1052.[3/] This Court should reject defendants' attempts to pretend that the First Amendment has no application to this case because CIPA is part of a federal spending program.

3/ Defendants' claim that the e-rate and LSTA programs have "narrow educational purposes" is also belied by the fact that, aside from the provisions at issue here, they contain no other limitations on Internet usage to ensure that library patrons only use the Web for "educational purposes" rather than, say, entertainment, online shopping, or promulgating their own speech.

Finally, the Act's unconstitutionality is exacerbated by the fact that it extends to restrict speech beyond that which is actually subsidized by the federal funding programs. See ALA Compl. ¶¶ 6, 118-19. A public library participating in the e-rate or LSTA funding programs must certify that blocking software operates on "any of its computers with Internet access" during "any use of such computers," 20 U.S.C. § 9134(f)(1)(B) and 47 U.S.C. § 254(h)(6)(C) (emphasis added). Thus, the law requires libraries to block speech even on computers and Internet connections wholly paid for with non-federal money. This is unconstitutional under League of Women Voters, in which the Court found fatal the fact that the statute did not permit public broadcasting stations "to segregate its activities according to the source of its funding" or "to establish 'affiliate' organizations which could the use the station's facilities to editorialize with nonfederal funds." 468 U.S. at 400 (emphasis added); see also Rust, 500 U.S. at 196-97.

The government now argues that nothing prevents a library or library system from having a "separate set of facilities" which would offer uncensored Internet access. Defs.' Mot. at 41. In the first place, there is nothing to support the government's reading of the statute, which plainly requires a library to certify that it has installed filters on "any of its computers with Internet access." The government has promulgated no regulations to this effect, nor has it given any binding guidance as to how "separate" those facilities would have to be (e.g., is it enough that the computers be at a separate room in the same library, or is a separate building required?). But more generally, nothing in League of Women Voters prevented the people who worked at the public broadcasting station from building an entirely "separate set of facilities" with non-federal money; the question was whether they could "use the station's facilities to editorialize with nonfederal funds," so long as steps were taken to ensure that the federal money was not used to

subsidize the editorializing. 468 U.S. at 400. Similarly, nothing about the law in Velazquez prevented the Legal Services lawyers from opening entirely separate private legal services centers across town from the ones that received federal money, yet that did not save the law. Moreover, the government concedes that "it would be unusual indeed for a library to be in the position of having separately-funded connections to the Internet in the same facility as those which are federally funded." Defs.' Mot. at 41. It is simply unrealistic to expect that a local government would have the funds to build entirely separate buildings for the purpose of providing uncensored access; indeed, if a library had that much money, it could turn down the federal money in the first place and avoid the trouble of building a new, separate library.

B. The First Amendment Applies with Full Force in Public Libraries

The core value at stake here is the First Amendment right of public library patrons to receive constitutionally protected expression that has not been censored on the basis of content or viewpoint. It is well settled that the First Amendment encompasses not only the right to speak but also the right to listen. See, e.g., Reno, 521 U.S. at 874 (invalidating statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); Pico, 457 U.S. at 867-68 (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("th[e] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."); Lamont v. Postmaster General of the United States, 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them . . . [for] [i]t would be a barren marketplace of ideas that had only sellers and no buyers.") (Brennan,

J., concurring). The right to receive information extends to minors as well. See Pico, 457 U.S. at 868 (plurality opinion); Tinker v. Des Moines Indep. Cnty. School Dist., 393 U.S. 503, 511 (1969).[4/]

In Reno v. ACLU, the Supreme Court recently confirmed that the right to receive information applies without qualification to expression on the Internet and is entitled to maximum constitutional protection. 521 U.S. at 874. The right to receive information, moreover, "is vigorously enforced in the context of a public library, 'the quintessential locus of the receipt of information.'" Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (quoting Kreimer v. Bureau of Police, 958 F.2d 1242, 1255 (3d Cir. 1992)).

4/ Contrary to defendants' assertions, plaintiffs' complaint does not depend on the notion that public libraries have independent First Amendment rights. The Complaint makes clear that the library association plaintiffs in this case are suing not only on their own behalf and on behalf of their member libraries and librarians, but also on behalf of their members' patrons. See Complaint ¶¶ 13-18. Courts have recognized the ability of speech providers to assert their patrons' First Amendment rights. See, e.g., Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1099 (9th Cir. 2000), cert. denied, 121 S. Ct. 1228 (2001); Rothner v. City of Chicago, 929 F.2d 297, 301-02 (7th Cir. 1991); 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988 (4th Cir. 1995); Drive In Theatres, Inc. v. Huskey, 435 F.2d 228 (4th Cir. 1970).

In any case, the government has not shown that public libraries have no First Amendment rights. Although a few cases have declined to find that government entities have First Amendment rights, none of these cases have involved public libraries. And some decisions have suggested that government entities have First Amendment rights. See Creek v. Village of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996); Nadel v. Regents of the University of California, 28 Cal. App. 4th 1251, 1262 (1994) ("With the proper focus on the rights of listeners to receive information rather than on the identity of the speaker, it would seem irrelevant, for purposes of First Amendment applicability, whether the speaker is media or not, and government or not."). The argument for finding that public entities have First Amendment rights is particularly strong when the entity in question is devoted to communication and expression. For example, the Supreme Court has held that a state-owned public broadcast station is "engage[d] in speech activity" when it "exercises editorial discretion in the selection and presentation of its programming." Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998). In any event, because libraries have standing to assert the First Amendment rights of their patrons, this issue does not need to be resolved in this case.

Because the library is a "limited public forum, a type of designated public fora," it may not impose viewpoint- or content-based restrictions on patrons' right to receive information through the Internet. Kreimer v. Bureau of Police, 958 F.2d 1242, 1259 (3d Cir. 1992); see also Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 552, 563 (E.D. Va. 1998) ("Mainstream Loudoun II"); Sund, 121 F. Supp. 2d at 548. The Supreme Court has "'identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)). Traditional public fora are places, like public streets and parks, that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). "For the state to enforce a content-based exclusion" from a traditional public forum, it must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id.; Forbes, 523 U.S. at 677.

A designated public forum "consists of public property which the state has opened for use by the public as a place for expressive activity." Perry, 460 U.S. at 45. The government is not obliged to create a designated public forum, but once it does so it "is bound by the same standards as apply in a traditional public forum." Id. at 46. Thus, the state may not impose content-based or viewpoint-based restrictions on speech in a limited public forum unless the restrictions are "narrowly drawn to effectuate a compelling state interest." Id.; Forbes, 523 U.S.

at 677 ("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."); Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); Mainstream Loudoun II, 24 F. Supp. 2d at 562.[5/]

Although relied on by defendants, the Third Circuit's decision in Kreimer strongly supports plaintiffs' position. Kreimer made clear that libraries are designated "*for expressive* activity, namely, the communication of the written word." Kreimer, 958 F.2d at 1259 (quotation and citation omitted). While Kreimer noted that the right to receive information in a public library is not "unfettered," id. at 1255, the "significant countervailing interests" recognized in that case related to content-neutral rules of patron conduct designed "to foster[] a quiet and orderly atmosphere . . . conducive to every patron's exercise of their constitutionally protected interest in receiving and reading written communications." Id. at 1262 (quotation and citation omitted).

Thus, "[w]hile the nature of the public library would clearly not be compatible with many forms of expressive activity, such as giving speeches or holding rallies, . . . it is compatible with . . . the receipt and communication of information through the Internet." Mainstream Loudoun II, 24 F. Supp. 2d at 563. And "[i]f 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." Forbes, 523 U.S. at 677. Accordingly, libraries that have generally opened themselves to expression through the Internet may not exclude some of the speech in that medium on the

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5/ "Other government properties are either nonpublic fora or not fora at all. . . . The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress merely because public officials oppose the speaker's view.'" Forbes, 523 U.S. at 677-78 (quoting Cornelius, 473 U.S. at 800).

basis of content or viewpoint unless the restrictions are narrowly tailored to achieve a compelling government interest. See Mainstream Loudoun II, 24 F. Supp. 2d at 563.

Because an Internet connection provides immediate access to the entire Internet so "no appreciable expenditure of library time or resources is required to make a particular Internet publication available" and indeed "a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available," the blocking of Internet sites mandated by CIPA is akin to a library's purchasing an encyclopedia and tearing out or redacting some of its content, and not at all like libraries' acquisition decisions.[6/] Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998) ("Mainstream Loudoun I"). Thus, the only federal court to have considered the legality of mandatory Internet filtering to date held that the Loudoun County Libraries' filtering policy was subject to strict scrutiny and was facially invalid under the First Amendment. See Mainstream Loudoun II, 24 F. Supp. 2d at 568.[7/]

6/ Even a library's acquisition decisions cannot be based on viewpoint discrimination. Cf. National Endowment for the Arts v. Finley, 524 U.S. 569, 585, 587-88 (1998) (government must make inherently content-based decisions to "allocate competitive funding" based on "limited resources" which require it to deny "the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects," but even in such circumstances cannot engage in "invidious viewpoint discrimination.").

7/ The defendants' claim that the Mainstream Loudoun court "had before it not a broad facial attack on the power of libraries to engage in any and all filtering, but instead a First Amendment challenge to a specific local 'Policy on Internet Sexual Harassment' that included the installation and implementation of a particular technology protection measure," Def. Br. at 25 n.15, is plainly inaccurate. The Mainstream Loudoun court held the use of filters in general was facially invalid under strict scrutiny and as a prior restraint, and specifically declined to consider the defendants' argument that the particular filtering program they used was the least restrictive program available, stating that "our finding that the Policy is unconstitutional on its face makes any consideration of the operation of X-Stop moot." 24 F.Supp. 2d at 568.

Even in the more "conventional" legal context of removing books from library shelves, CIPA's restrictions would be problematic. In Pico, the Supreme Court held that government officials may not remove books from a school library "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" 457 U.S. at 854 (plurality opinion). "The principles set forth in Pico – a school library case – have even greater force when applied to public libraries," Sund, 121 F. Supp. 2d at 548, for as even the Pico dissenters recognized, while school libraries may have some inculcative function, public libraries are "designed for freewheeling inquiry." Pico, 457 U.S. at 915 (Rehnquist, J., dissenting). Public libraries also serve adults, not just children. CIPA's limits on the Internet in libraries, which are even more restrictive than the policies in Pico, cannot be upheld unless the restrictions are narrowly tailored to achieve a compelling government interest.[8/] See also, e.g., Brooklyn Institute of Arts & Sciences, 64 F. Supp. 2d at 203 (analogizing museum to public library and holding that City of

8/ CIPA also implicates the First Amendment overbreadth doctrine, which requires the facial invalidation of statutes that prohibit some unprotected speech but by their scope also reach a substantial amount of constitutionally protected speech. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); United States v. Kalb, 234 F.3d 827, 834 (3d Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3620 (U.S. Mar. 12, 2000) (No. 00-1417); Kreimer, 958 F.2d at 1265. "In such cases, it has been the judgment of [the Supreme] Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." Broadrick, 413 U.S. at 612. Overbreadth and narrow tailoring are in some senses flip sides of the same coin; a restriction that is overbroad and suppresses a substantial amount of constitutionally protected speech is, by definition, not narrowly tailored. See, e.g., Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) ("Quite obviously, the rule . . . that a statute . . . must be 'narrowly tailored' . . . prevents a statute from being overbroad.").

New York's decision to withdraw funding from museum because of objections to art exhibit that was described as, among other things, inappropriate for minors, violated First Amendment).

II. CIPA Violates the First Amendment Because It Conditions Funding on the Mandatory Installation and Use of Filtering Software That Necessarily Blocks Access to a Substantial Amount of Constitutionally Protected Expression.

CIPA's filtering mandate plainly violates the First Amendment because it conditions the receipt of federal funds on the installation and use of filtering software that "blocks substantial amounts of fully protected expression on the Internet based solely on the content and viewpoint of that expression." ALA Compl. ¶ 44. CIPA's unconstitutional reach is extensive: Libraries receiving e-rate discounts or LSTA funds for the provision of Internet access must certify that the blocking software is installed and used at all times, on all library Internet terminals, for both adults and minors. CIPA 20 U.S.C. § 9134(f)(1) and 47 U.S.C. § 254(h)(6)(B)-(C).[9/]

Defendants attack plaintiffs for "assuming" the constitutional shortcomings of available filtering software, arguing that "it cannot be presumed, or demonstrated that many (if any) library officials willingly would choose unconstitutional filtering policies in order to satisfy CIPA's conditions." Defs.' Mot. at 25. Defendants further argue that plaintiffs cannot maintain a facial challenge to CIPA because the law's requirements have not yet been implemented, see id. at 15, 25 & n.15, 30-32, and suggest that because libraries have not yet implemented the "technology protection measures" required by CIPA, it is possible that some libraries might choose a filtering program that would not run afoul of the First Amendment. Id. at 25 & n.15. Similarly, defendants argue that plaintiffs cannot maintain a facial attack on CIPA's disabling provisions

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9/ The Act's disabling provisions are discussed below, *infra* at Part III.

because of the possibility that library officials may not abuse the unfettered discretion granted by these provisions. Id. at 30.

Defendants' arguments are fatally flawed because they completely ignore basic principles governing facial challenges and motions to dismiss. At the motion to dismiss stage, all of plaintiffs' allegations must be accepted as true. See supra pp.3-4. Plaintiffs clearly allege – and intend to prove at trial – that there is no available filtering software that can satisfy the Act's requirements without also blocking access to a considerable amount of fully protected speech.[10/] Those allegations plainly state a claim for facial overbreadth. See, e.g., United States v. Kalb, 234 F.3d 827, 834 (3d Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3620 (U.S. Mar. 12, 2001) (No. 00-1417); Kreimer, 958 F.2d at 1265.[11/] Defendants offer neither facts nor law suggesting

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10/ See ALA Compl. ¶ 2 ("Any attempt to meet the Act's requirements inevitably will lead to the suppression of vast amounts of protected Internet speech that would otherwise be available to public library patrons."); id. ¶ 5 ("[N]o technology exists that can effectively block the precise categories of speech enumerated in the Act. . . . [A]ll available filtering technology blocks access to a tremendous amount of constitutionally protected expression."); id. ¶ 40 ("No existing filtering software can successfully block only the categories of visual depictions on the Internet enumerated in the Act without significant overblocking."); id. ¶ 110 ("As a practical matter, no technology exists that would effectively block this material without substantial overblocking and underblocking."); id. ¶ 114 ("Filtering software purporting to comply with the Act's requirements inevitably will block library patrons' access to vast amounts of constitutionally protected speech. Such software blocks a host of valuable expressive content and viewpoints on the Internet.").

11/ It is well established that individuals may challenge a law under the First Amendment based on allegations that the law is substantially overbroad or grants unfettered discretion to the government, even if there are instances in which the law may be constitutionally applied. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (plurality) (explaining that "imprecise laws" can be facially attacked on the grounds of overbreadth or failure to establish adequate standards to govern official discretion); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56 (1988) (individual may challenge unfettered permit law even if he has not been, and would not be, denied a permit); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798-99 (1984) (overbreadth doctrine permits individual to challenge law even if law could be constitutionally applied to litigant); see also Broadrick, 413 U.S. at 612; Freedman v. Maryland, 380 U.S. 51, 56 (1965). Underlying this line of cases is "'a judicial

anything to the contrary.[12/] To the extent that defendants disagree with plaintiffs' allegations, their disagreement is factual in nature, and such a dispute of fact precludes dismissal at this stage.

Because, as alleged by the plaintiffs, it is practically and technologically impossible to install constitutionally sound filtering software in public libraries, plaintiffs' complaint plainly survives defendants' motion to dismiss. Defendants' motion should be denied for the additional reason that, as a matter of law, it is theoretically impossible to design constitutionally appropriate filtering software. See ALA Compl. ¶¶ 43; 111-13. It is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to First Amendment protection.[13/] For this reason, government officials – including public librarians –

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prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" Taxpayers for Vincent, 466 U.S. at 799 (quoting Broadrick, 413 U.S. at 612); see also Forsyth County v. Nationalist Movement, 505 U.S. 123, 129-30 (1992) (explaining that the overbreadth doctrine is based on the recognition that an overbroad ordinance "creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, . . . and in cases where the ordinance sweeps too broadly, penaliz[es] a substantial amount of speech that is constitutionally protected") (quotation and citation omitted). Therefore, even accepting defendants' contention that there might be some instances in which CIPA could be constitutionally applied (a contention plaintiffs vigorously dispute), there simply is no merit to defendants' argument that plaintiffs may not state a facial challenge because of the possibility of some constitutional application of the law.

12/ Indeed, in questioning plaintiffs' allegations, defendants never actually argue (nor could they) that filtering software exists today that actually can block access to obscenity, child pornography, and harmful to minors material without also blocking a substantial amount of protected expression.

13/ See, e.g., United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826 (2000) ("We cannot be influenced . . . by the perception that the regulation in question [of 'sexually oriented programming'] is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."); Reno, 521 U.S. at 874-75 ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted); Carey v. Population

must apply strict, exacting standards when attempting to identify whether speech is unprotected or "illegal." As the Supreme Court recently explained, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817-18 (2000) (internal quotation marks and citation omitted).[14/]

Blocking decisions by private filtering companies – which typically refuse to disclose their blocking criteria or list of blocked sites – are not subject to any review, either by a proper judicial authority, or by the libraries who use the software. ALA Compl. ¶ 112. In the absence of proper blocking standards and adequate procedural safeguards (including prompt judicial review), decisions by private filtering companies as to what constitutes, for example, obscenity, amount to an unlawful scheme of "informal censorship." See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963).[15/] In any case, even if private software companies somehow

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Servs. Int'l, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

14/ See also, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963) ("[The Supreme Court's] insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated is . . . finely drawn. . . . The separation of legitimate from illegitimate speech calls for sensitive tools.") (quotation and citation omitted).

15/ The Supreme Court discussed an analogous censorship scheme in Bantam Books. In that case, the Court addressed a challenge to Rhode Island's "Commission to Encourage Morality in Youth," whose purpose was to "educate the public" on materials "containing obscene, indecent or impure language," and "to investigate and recommend the prosecution of all violations" of the state's obscenity laws. 372 U.S. at 59-60. Although the Commission had no formal enforcement or arrest power, it notified distributors that their books or magazines had been reviewed by the Commission and were deemed "objectionable for sale, distribution or display to youths under 18

were able to establish filtering criteria limited to the narrow legal definitions of "obscenity" or "harmful to minors," those categories of unprotected speech – which rely on some notion of "community standards" – cannot properly be applied to the Internet. "[B]ecause of the peculiar geography-free nature of cyberspace, a 'community standards' test would essentially require every Web communication to abide by the most restrictive community's standards." ACLU v. Reno, 217 F.3d 162, 175 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

CIPA's overbroad, unconstitutional reach was hardly an accident. Congress was well aware of the inherent problems of blocking software when it passed CIPA. See ALA Compl. ¶¶ 74-78. According to the panel appointed by Congress to "identify technological or other methods that will help reduce access by minors to material that is harmful to minors on the Internet," filtering technology "raises First Amendment concerns because of its potential to be over-inclusive in blocking content. Concerns are increased because the extent of blocking is often unclear and not disclosed." Commission on Child Online Protection Act, Report to Congress,

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years of age." Id. at 61. The Supreme Court ultimately invalidated the Commission's activities as a type of "informal censorship," id. at 71, rejecting the claim that constitutional strictures did not apply because the Commission did not "regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d] them of their legal rights." Id. at 66. The Court explained:

> This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions – the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation – . . . the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim.

Id. at 66-67.

Oct. 20, 2000, at 19-20, 22. This message was hammered home, and unrebutted by numerous witnesses at congressional hearings. See ALA Compl. ¶¶ 74-79 (citing testimony before Congress).

Congress, however, was hardly concerned about the collateral suppression of constitutionally protected speech. To the contrary, as the legislative history quoted in defendants' brief indicates, Congress targeted not only unprotected speech on the Internet, but also "pornography" and "indecent material," Defs.' Mot. at 8 (quoting S. Rep. No.106-141, at 2 (1999)), categories substantially broader than proscribable "obscenity," "child pornography," or "harmful to minors"materials.[16/] In essence, the statute is carefully crafted to give an appearance of restricting only unprotected speech, even though Congress knew it was doing much more.[17/]

16/ The only "compelling interest" purportedly advanced by CIPA – both as explained in the government's brief, and as indicated in the legislative history of CIPA – is that of "protecting children from exposure to sexually explicit material." Defs.' Mot. at 9 (quoting S. Rep. No. 106-141, at 7 (1999)) (emphasis added); see also, e.g., S. Rep. No.106-141, at 1 (1999) ("The purpose of this bill is to protect America's children . . .") (emphasis added). Indeed, the Senate Report dismissed the acknowledged First Amendment concerns over Internet filtering by focusing on the fact that the bill at that time, S. 97, required filtering "only while a computer is in use by a minor." Id. at 7. Yet in its final form, CIPA requires blocking software during adult use as well. See CIPA §§ 1712 and 1721 (to be codified at 20 U.S.C. § 9134(f)(1)(B) and 47 U.S.C. § 254(h)(6)(C), respectively)

17/ In addition, because of the "inherent imprecision of blocking technology, most popular filtering software typically blocks access to constitutionally protected speech of significant literary, artistic, political, or scientific value," often due to its content or viewpoint. ALA Compl. ¶ ¶ 44-45. As alleged in plaintiffs' complaint, popular filtering software has been shown to have blocked access to university safe-sex information pages, the Journal of the American Medical Association's HIV/AIDS information page, and the websites of Planned Parenthood, National Organization for Women, and Operation Rescues, Id. ¶ 36, as well as the websites for Super Bowl XXX, Congressman Dick Armey and Beaver College in Pennsylvania, sections of Edward Gibbon's Decline and Fall fo the Roman Empire, and passages of Saint Augustine's Confessions, Id. ¶ 38.

III. CIPA's Standardless Disabling Provisions Do Not Save This Otherwise Unconstitutional Statute.

Faced with the unavailability and impossibility of filtering software that comports with First Amendment strictures, the defendants rely on CIPA's disabling provisions to cure the Act's considerable constitutional flaws. See Defs.' Mot. at 24-34. Under CIPA's disabling provisions, a library authority "may disable the technology protection measure . . . to enable access for bona fide research or other lawful purpose." 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254(h)(6)(D). If anything, these completely discretionary provisions create even more constitutional problems than they solve.

A. The Disabling Provisions Will Impermissibly Chill Speech and Impose an Unconstitutional Stigma on Library Patrons.

Even if, in every circumstance, library authorities exercised their discretion to disable blocking software, the disabling provisions would impose an unconstitutional stigma and chilling effect on requesting library patrons. ALA Compl. ¶¶ 7, 122. In a variety of contexts, the Supreme Court has recognized the severe chilling effect of forcing citizens to publicly and openly request access to disfavored, though constitutionally protected, speech. See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 754 (1996) (noting that "written notice" requirement for access to "patently offensive" cable channels "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive channel'"); Lamont, 381 U.S. at 307 (striking requirement that recipients of Communist literature notify the

Post Office that they wish to receive those materials). Protected expression blocked by filtering software undoubtedly falls within that category.[18/]

The defendants misconstrue the constitutional ills flowing from the disabling provision when they suggest that requesting unfiltered access imposes no greater stigma than presenting a library card to check out a book. Defs.' Mot. at 33. The dangerous chilling effect of the former arises precisely because of the disfavored nature of filtered speech; most people are aware that filters often block access to materials that, although constitutionally protected, are undesirable, offensive, or reprehensible to some. By contrast, use of a library card, requests for materials "not maintained in the public stacks," or use of computers placed "in full view of library staff," see id., suggest nothing about the content of the requested items. Courts are loath to uphold library policies, such as CIPA's disabling provisions, that require patrons affirmatively to request access to sensitive or disfavored materials.[19/] See, e.g., Sund, 121 F. Supp. 2d at 551 n.23 (striking

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18/ It is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to First Amendment protection. See supra note 12. In addition, as alleged in plaintiffs' complaint, ALA Compl. ¶ 44, filters block significant amounts of constitutionally protected speech that is non-sexual in nature, either randomly or because the manufacturers deem the content too controversial. Patrons may be deterred from seeking access that is embarrassing or politically and socially controversial.

19/ Contrary to defendants' argument, see Defs.' Mot. at 33 n.22, to establish an unconstitutional stigma claim there is no requirement that the plaintiffs prove the likelihood of improper disclosure of information. In both Denver Area and Lamont, the mere expression of a fear of disclosure and its attendant chilling effect on speech sufficed. Denver Area Educ. Telecomm. Consortium, 518 U.S. at 754 (referring to claims "by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive channel'"); Lamont, 381 U.S. at 307 ("[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'"). In any event, even if plaintiffs' claim somehow were dependent on "evidence" that sensitive information will be revealed, see Defs.' Mot. at 33 n.22 (citing Fabulous Assoc., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 788 (3d Cir. 1990)), defendants' argument is not properly before this court prior to the development of a

down library policy requiring relocation of purportedly inappropriate children's books to adult section of library, explaining that, "because the only children's books located in the adult sections of the Library will be those removed under the [policy], the [policy] attaches an unconstitutional stigma to the receipt of fully-protected expressive materials"); Mainstream Loudoun I, 2 F. Supp. 2d at 797 (holding unconstitutional unblocking procedure in library Internet filtering policy because it "forces adult patrons to petition the Government for access to otherwise protected speech").[20/]

The discretionary nature of CIPA's disabling provisions – which permit, but do not require, library authorities to disable filtering software upon request, see 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254(h)(6)(D) (providing that authorities "may disable the technology protection measure") (emphasis added) – compound the stigma problem. As with the unblocking procedure rejected in Mainstream Loudoun, CIPA's disabling provisions are "more chilling than the restriction at issue in Lamont, because [they] grant[] library staff standardless discretion to refuse access to protected speech, whereas the statute at issue in Lamont required postal employees to

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factual record.

20/ Defendants' reliance on cases upholding harmful to minors statutes, see Defs.' Mot. at 33, is misplaced, for several reasons. First, there is no indication that any stigma claim even was raised in those cases. Second, those cases specifically address only harmful to minors materials, while Internet filtering inevitably blocks access to substantially more expression. In addition, the chilling effect created by CIPA's disabling provisions is particularly problematic because it requires library patrons to petition the government for access to protected speech; by contrast, requesting sensitive materials from private actors raises fewer constitutional concerns. Moreover, even laws that have sought to restrict "harmful to minors" material on the Internet have been struck down by the courts. See, e.g. Reno v. ACLU, 521 U.S. 844 (1997); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

grant access requests automatically." Mainstream Loudoun I, 2 F. Supp. 2d at 797 (citing Lamont, 381 U.S. at 302-04).

B. The Disabling Provisions Unconstitutionally Grant Unfettered, Standardless Discretion to Library Officials to Restrict Access to Speech.

The unfettered discretion contained in the Act's disabling provisions offers yet another, independent reason to strike down the statute. Although defendants repeatedly look to the disabling provisions as a way to cure CIPA's unconstitutional breadth, they conveniently gloss over the permissive nature of those provisions. As noted above, CIPA merely allows, but does not require, library authorities to disable Internet filtering software. See 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254(h)(6)(D) (providing that authorities "may disable the technology protection measure") (emphasis added). Nothing prevents a library authority from denying a disabling request for any reason (or no reason at all), and there are no procedures for an appeal or review of the decision. Accordingly, the disabling provisions fall within the long-disfavored category of statutes that "vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755 (1988).

Like a standardless licensing scheme, CIPA's disabling provisions place the library authority in the role of speech gatekeeper, whose decisions are neither constrained by any defined standards nor reviewable by a court. "The First Amendment prohibits the vesting of such unbridled discretion in a government official." Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992). See also, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.");

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (noting "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"). Without proper procedural safeguards – which are not only insufficient, but actually non-existent here – CIPA's disabling provisions, as with other prior restraints, cannot stand.

Defendants plainly misread the law in suggesting that, to qualify as an unconstitutional prior restraint on speech, a statute must effect a total ban on the dissemination of "information to the world." Defs.' Mot. at 32. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Reno, 521 U.S. at 880 (internal quotation marks and citation omitted). See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (striking down as prior restraint city ordinance requiring a permit to place newspaper boxes on city sidewalks, despite the availability of alternate means to distribute newspapers); Southeastern Promotions, 420 U.S. at 556 ("Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. . . . Thus, it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression of the musical in the community."); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 688 (1968) (noting that evils of prior restraints "are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (invalidating as prior restraint scheme of "informal censorship," notwithstanding fact that "morality" commission did not have enforcement powers and did not actually seize or ban

any books); Mainstream Loudoun II, 24 F. Supp. 2d at 569 (finding filtering policy to be a prior restraint, and rejecting argument that prior restraint doctrine is "limited to situations in which a government tries to restrict all speech within its jurisdiction").

CIPA's filtering mandate, even apart from the disabling provisions, is also a prior restraint because the blocking decisions made by private filtering companies effectively silence speech prior to its dissemination in public libraries, and prior to any judicial determination of the proper level of protection afforded that speech. See, e.g., Mainstream Loudoun II, 24 F. Supp.2d at 568-70 (invalidating Internet filtering policy as prior restraint).

Defendants' arguments challenging plaintiffs' ability to bring a facial challenge to the disabling provision simply miss the mark. Defendants' assertion that library authorities may exercise their discretion in lawful ways is simply irrelevant to the constitutional question whether the law grants unfettered discretion to government officials over speech. As with other prior restraints, the evils of the unbridled discretion in CIPA's disabling provisions "engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988); see also id. at 755-56 (citing numerous cases sanctioning facial challenges to laws granting officials unfettered discretion to regulate speech).

The fact that the disabling provisions impose no requirements on, but merely "allow library officials and local administrators to provide access to materials," Defs.' Mot. at 31 (emphasis added), is exacerbated by the vague, standardless language controlling the unblocking decision. There is simply no way for librarians to apply in any consistent manner the determination of what constitutes "bona fide research or other lawful purposes." The statute

provides absolutely no explanation as to the meaning of this vague phrase, and thus "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted." City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion). See also, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (footnotes omitted)).

In an effort to save the statute, the defendants boldly assert that "[n]othing could be clearer," Defs.' Mot. at 30, suggesting that the phrase "lawful purpose" obviously means "any purpose not related to accessing obscenity, child pornography, or when the access is by minors, to accessing materials that are harmful to minors," id. at 31. Absolutely nothing in the statute, however, suggests this interpretation, which would render the phrase "bona fide research" entirely superfluous.[21/] More importantly, the defendants cannot, as a legal matter, cure the disabling provisions' flaws simply by offering a favorable interpretation that does not appear in the Act itself. As the Supreme Court has explained, the defendants' post hoc reading of the statute

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21/ It is telling that the FCC simply refused to provide any interpretation of the open-ended disabling provisions. See In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 53 (rel. Apr. 5, 2001) ("We decline to promulgate rules mandating how entities should implement these provisions. Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determinations to the local communities, whom we believe to be most knowledgeable about the varying circumstances of schools or libraries within those communities.").

> presumes th[at] [government officials] will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. . . . The doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. . . . This Court will not write nonbinding limits into a silent . . . statute.

City of Lakewood, 486 U.S. at 770. See also, e.g., Morales, 527 U.S. 63-64 (fact that police department issued a "general order" limiting scope of loitering statute not a "sufficient limitation on the 'vast amount of discretion' granted to the police"); Reno, 521 U.S. at 884 n.49 ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.") (internal quotations and citation omitted).

Similarly, the defendants suggest that, notwithstanding the permissive "may" language of the disabling provisions, librarians always will disable filters whenever a patron provides "some reasonable assurance that he or she intends to use the Internet for lawful purposes." Defs.' Mot. at 30-31. Defendants appear to suggest that there will be no danger of arbitrary or inconsistent enforcement, because libraries need not make disabling decisions on a "case-by-case" or "individualized" basis. Again, this interpretation is wrong for several reasons. First, as noted above, CIPA itself contains none of these limitations on the libraries' discretion, and "we must assume that the ordinance means what it says." Morales, 527 U.S. at 63. Second, the Act, even as newly written by the defendants in this litigation, still would be unclear as to what constitutes "some reasonable assurance" of lawful purpose sufficient to avoid case-by-case determinations. Would a one-time oral statement by a patron suffice, or must the patron make this assurance prior

to each individual Internet session? Can a patron provide the "reasonable assurance" simply when she signs up for a library card? How much discretion does the library authority have to believe or disbelieve the patron's "reasonable assurance"?

Third, defendants' reading of the disabling provisions would render the statute itself essentially meaningless. If the defendants' present interpretation of the statute properly could be read into the Act, and if it meant that library authorities must take a patron's one-time "reasonable assurance" at face value without any ability to monitor or test that assurance, then the disabling exception would swallow CIPA's filtering requirement and render it entirely meaningless.[22/] See, e.g., Beck v. Prupis, 529 U.S. 494, 506 (2000) (noting "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous."); Williams v. Taylor, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'") (citations omitted). All adult patrons simply could declare their lawful intent at the outset, and the filters would never be turned on. If, on the other hand, library authorities were forced to make individualized determinations based on each patron's particular disabling request, the disabling provisions would effectively create a system of unconstitutional prior restraints, as described above.

Defendants' interpretation is thus untenable. But even accepting their position that "lawful purposes" includes everything but the purpose of gaining access to obscenity, child pornography, and harmful to minors materials, the disabling provisions would still be constitutionally infirm. Defs.' Mot. at 31. As the Supreme Court has made clear, "[t]he

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22/ In addition, a library faces the risk of losing funding if it disables filters too permissively.

separation of legitimate from illegitimate speech calls for sensitive tools." Bantam Books, 372 U.S. at 66 (quotation and citation omitted). As noted above, CIPA is completely devoid of the procedural safeguards required when the government, through a prior restraint, delineates between protected and unprotected speech. That courts have upheld "statutes that criminalize the distribution or display of obscene or harmful to minors materials," Defs.' Mot. at 32 (emphasis in original), is beside the point. Unlike criminal laws, which necessarily incorporate a host of procedural guarantees to protect against unconstitutional enforcement, prior restraints present the real danger of unreviewable limitations on speech. For this reason, the Supreme Court repeatedly has held that

> [t]he presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, 420 U.S. at 558-59. See also, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976) ("A criminal penalty . . . is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted . . . . A prior restraint, by contrast, . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."); Vance v. Universal Amusement Co., 445 U.S. 308, 316 (1980) (describing prior restraints as "more onerous and more objectionable than the threat of criminal sanctions"); Mainstream Loudoun II, 24 F. Supp. 2d at 568-69 ("[E]ven unprotected

speech cannot be censored by administrative determination absent sufficient standards and adequate procedural safeguards.").[23/]

The disabling provisions thus do nothing to cure CIPA's unconstitutional filtering mandate. This is even more obvious with respect to minors, who cannot invoke the disabling provision for libraries covered by the Act's e-rate requirements, even with parents' explicit permission and consent. See 47 U.S.C. § 254(h)(6)(D) (authorities "may disable the technology protection measure concerned, during use by an adult") (emphasis added).[24/] As described above, minors plainly enjoy First Amendment rights to receive information, see, e.g., Pico, 457 U.S. at 867-68 (plurality opinion); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975), and, as plaintiffs allege, filtering software "limits children's access to countless websites that are perfectly suitable and appropriate for minors." ALA Compl. ¶ 114. Even if disabling were a panacea for the Act's myriad constitutional flaws with respect to adults, CIPA would still violate minors' rights.[25/]

23/ Similarly, simply advising against unlawful Internet access as part of a broader library Internet use policy, see Defs.' Mot. at 31 (attacking sample less restrictive alternative proposed in ALA Compl. ¶ 125), does not raise the same constitutional dangers as unreviewable decisions to deny patron access to Internet speech.

24/ CIPA's disabling provision for LSTA recipients is not limited to adult use, see 20 U.S.C. § 9134(f)(3). The majority of libraries covered by the Act, however, are governed by Section 1721, the e-rate section, which trumps the LSTA section for libraries receiving both e-rate discounts and LSTA funds. See 20 U.S.C. § 9134(f)(1) (applying only to a library "that does not receive services at discount rates [e-rate discounts] under section 254(h)(6) of the Communications Act of 1934").

25/ In a footnote, defendants suggest that this problem can be cured by individualized assistance from librarians, who can conduct searches for minors, determine whether, in their view, the sites constitute "harmful to minors" materials, and "refer[] the child to an appropriate book or other offline publication." Defs.' Mot. at 31 n.20. This is an absurd suggestion, one inviting an even more egregious delegation of unfettered discretion than the disabling scheme

IV. Plaintiffs' Claims Are Ripe

Although not questioning the justiciability of any of the plaintiffs' facial challenges to CIPA, defendants nevertheless argue that the individual plaintiffs' "as applied" claims must be dismissed. That argument is frivolous. Simply put, the ALA's complaint nowhere asserts an "as applied" First Amendment challenge solely on behalf of the two named individual plaintiffs. Rather, the individual plaintiffs – like the library associations, library patron associations, and community organizations – allege in their complaint that CIPA is invalid on its face, because it is overbroad, vague, and will effectuate a prior restraint on library patrons' constitutionally protected speech.

Defendants nevertheless devote several pages of their brief to arguing that the individual plaintiffs' so-called "as applied" claims are not ripe for review. Defendants again argue that because it is not yet known how any library would implement CIPA's technology protection measures, this Court cannot at this time determine whether the Act would unconstitutionally burden the individual plaintiffs' speech. Defs.' Mot. at 42-43. But as noted previously, defendants' argument ignores the central premise of the ALA's complaint: Regardless of which technology protection measures a library installs, that technology will always overblock substantial amounts of protected expression. See ALA Compl. ¶¶ 5, 32-45, 75-78, 110-15. Defendants' contention that the resolution of the individual plaintiffs' claims depends upon a

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described above. A minor's right to receive information cannot be limited by the unreviewable decisions of librarians who, assuming they have the time and inclination to assist every minor who wishes to access the Internet, must engage in case-by-case content determinations for each requesting minor. Furthermore, as with the defendants' other limiting interpretations of CIPA, nothing in the statute even suggests – let alone mandates – this solution.

future contingency is therefore meritless. Along with the other plaintiffs, the individual plaintiffs assert that there are no circumstances under which the Act can be lawfully implemented.[26/]

These facial claims are plainly ripe for review. Indeed, defendants do not contend otherwise. Plaintiffs seek a declaratory judgment that CIPA is unconstitutional on its face. If CIPA is allowed to go into effect, the ALA and the state library associations face the denial of funding if they refuse to comply with CIPA's filtering provisions. Consistent with Supreme Court precedent, the library associations may bring a pre-enforcement challenge to an overbroad statute such as CIPA on behalf of their patrons, rather than wait until they are subjected to the coercive and chilling force of the law. See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988) (concluding that booksellers association had standing to bring First Amendment facial challenge on behalf of bookbuyers, and holding that "[w]e are not troubled by the pre-enforcement nature of this suit," where it was clear that the law would be enforced and "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); see also Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 148 (3d Cir. 2000) ("Federal court review is not foreclosed merely because there is a pre-enforcement challenge to a state statute."); Amato v. Wilentz, 952 F.2d 742, 749 (3d Cir. 1991) (recognizing standing of individuals to bring overbreadth challenges on behalf of third parties).

26/ Similarly, for the reasons discussed previously, see supra Part III, defendants are wrong when they suggest that the individual plaintiffs' challenge to CIPA's disabling provisions are not ripe because it is not known how each individual librarian will handle the disabling requests. As already explained, the individual plaintiffs challenge the disabling provisions on their face, alleging that the provisions give officials unfettered discretion. Defendants' argument that this claim is not ripe ignores the nature of facial challenges and is wholly without merit.

The patrons' facial claims are likewise ripe for review. As alleged in plaintiffs' complaint, implementation of such filtering provisions would result in substantial overblocking of websites regardless of which filtering software a library uses. As a result, patrons who use the Internet at libraries face a substantial threat that their access to websites will be blocked. Moreover, even if the sites sought by a particular individual patron were not blocked, that patron would still have standing to challenge CIPA under the overbreadth doctrine. The overbreadth doctrine allows individuals to bring facial First Amendment challenges to overbroad laws even if they have not suffered – or would not suffer – constitutional injury under those laws. See, e.g., Forsyth, 505 U.S. at 129; City of Lakewood, 486 U.S. at 755-56; American Booksellers Ass'n, 484 U.S. at 392; Taxpayers for Vincent, 466 U.S. at 798-99. Library patrons who use the Internet will be directly subject to CIPA's suppression of speech. Critically, defendants do not dispute that, accepting plaintiffs' allegations of overbreadth as true, some library patrons will have their access to websites blocked. In the context of a facial overbreadth claim, the named patron plaintiffs in this case, along with the associations representing library patrons who use the library Internet services, may properly raise a challenge to CIPA at this time.[27/]

Defendants' argument that the patrons' claims lack the "definiteness" central to the ripeness analysis is therefore meritless. The threat posed to library patrons' First Amendment rights by CIPA creates a real controversy that is not abstract or hypothetical, and does not rely on some possible future contingency; accordingly, patrons' facial challenge is ripe for review. See Presbytery of New Jersey v. Florio, 40 F.3d 1454, 1463-64 (3d Cir. 1994) (holding that pastor's

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27/ Ripeness is even less of a concern with respect to groups representing multiple patrons, since it is inevitable that some patrons will be denied access to speech they wish to receive.

facial challenge to statute on First Amendment grounds was sufficiently concrete to be ripe). Nor is there any merit to defendants' argument that the patrons' claims are not ripe because there is a need for factual development that cannot occur in this case. Defs.' Mot. at 42-43. The facts necessary to plaintiffs' facial challenge of overbreadth – facts showing that no technology exists that will not significantly overblock protected speech – can and will be developed in this case. The patrons' facial challenge thus present a sufficiently concrete dispute ripe for this Court's review. See Planned Parenthood of New Jersey, 220 F.3d at 148 (pre-enforcement challenge to abortion-related statute ripe where ample factual record developed during district court hearing).

CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion to dismiss.

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Respectfully submitted,

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Paul M. Smith
Theresa A. Chmara
Daniel Mach
Katherine A. Fallow
Jennifer S. Martinez
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
Phone: (202) 639-6000
Fax: (202) 639-6066

Elliot M. Mincberg
Lawrence S. Ottinger
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 467-4999
Fax: (202) 293-2672

COUNSEL FOR ALL PLAINTIFFS

Robert A. Nicholas
Wayne C. Stansfield
REED SMITH LLP
2500 One Liberty Place
Philadelphia, PA 19103-7301
Phone: (215) 851-8100
Fax: (215) 851-1420

COUNSEL FOR PLAINTIFFS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, FRIENDS OF THE PHILADELPHIA CITY INSTITUTE LIBRARY, PENNSYLVANIA ALLIANCE FOR DEMOCRACY,ELIZABETH HRENDA, and C. DONALD WEINBERG