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

PLAINTIFFS' JOINT POST-TRIAL BRIEF

INTRODUCTION

The mandatory blocking provisions of the Children's Internet Protection Act ("CIPA") impose unprecedented, sweeping federal speech restrictions on public libraries nationwide, in clear violation of the First Amendment. It is undisputed that installation of commercially available software causes the blocking of a large amount of speech that is constitutionally protected for all library patrons, and an even larger amount that is constitutionally protected for adults. Allowing wholly discretionary disabling, at least for adults, does not solve the resulting constitutional problem; indeed, it exacerbates it by making individual librarians into case-by-case standardless censors. Moreover, while the evidence shows that sexually explicit material on the Internet does pose some real challenges for libraries, it is also clear that libraries have available options for managing that problem that are much less restrictive than mandatory blocking – and just as effective.

It follows that any library induced into complying with CIPA would violate the First Amendment rights of patrons, which renders this funding statute invalid under South Dakota v. Dole, 483 U.S. 203 (1987). As plaintiffs alleged in their complaints and proved at trial, CIPA's requirement that libraries employ blocking software on all their computers is an impermissible content-based restriction on speech, a prior restraint, vague, and overbroad. In addition, CIPA imposes an unconstitutional condition on public libraries by distorting the usual functioning of those profoundly democratizing institutions and restricting the uniquely diverse medium of the Internet.

I. CIPA VIOLATES THE FIRST AMENDMENT RIGHTS OF LIBRARY PATRONS AND THEREFORE CANNOT BE SUSTAINED AS A VALID EXERCISE OF CONGRESS'S SPENDING POWER.

CIPA cannot be sustained as a valid exercise of Congress's spending power because it induces libraries that receive Internet funding to violate the First Amendment. As defendants concede, when Congress distributes funds to state and local government entities providing services, it cannot do so in a way that "induces [those entities] to engage in activities that would themselves be unconstitutional." South Dakota v. Dole, 483 U.S. 203, 210 (1987). Defendants are therefore wrong when they suggest that the funding nature of CIPA's restrictions remove this case from any heightened First Amendment scrutiny. To the contrary, the focus of the inquiry is on whether the law induces libraries to violate the First Amendment, and the level of scrutiny is drawn from the body of established First Amendment doctrine. Thus, there is no different First Amendment analysis under Dole. Strict scrutiny applies, and CIPA cannot satisfy the rigors of that analysis. Thus, because CIPA will induce library recipients to violate the First Amendment, it must be invalidated.

A. The Provision of Internet Access in Public Libraries Lies at the Heart of the First Amendment.

Through CIPA, Congress has inflicted a profound double injury upon the First Amendment. Not only does CIPA unduly restrict the most diverse, expansive medium ever created, it also compounds the problem by regulating that medium in one of the most democratizing, speech-enhancing institutions in America – the public library. By targeting the intersection of these two First Amendment fora, CIPA ultimately weakens both, severely

undermining the core constitutional values otherwise enhanced by the provision of Internet access in public libraries.

1. Speech on the Internet Enjoys Maximum Constitutional Protection.

The Internet is a unique, expansive medium for worldwide communication. There is an enormous array of information available on the Internet, including art, literature, medical and scientific information, humor, news, religion, political commentary, music, and government information. As the Supreme Court recognized in Reno v. ACLU, 521 U.S. 844, 870 (1997), expression on the Internet is "as diverse as human thought." Indeed, with its unprecedented breadth and scope, the Internet facilitates "vast democratic forums." Id. at 868.

The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides an opportunity for those with Internet access to communicate with a worldwide audience. Plaintiffs' Proposed Findings of Fact 20 (hereinafter "PFF").[1/] Currently, at least 400 million people use the Internet worldwide, including over 143 million Americans. PFF 21.

The World Wide Web (the "Web") is the best known category of communication over the Internet. The Web "allows users to search for and retrieve information stored in remote computers." Reno, 521 U.S. at 852. Currently, it is estimated that the Web comprises approximately two billion Web "pages," PFF 53, with about 1.5 million new web pages created each day, PFF 55. "The Web is thus comparable, from the readers' viewpoint, to . . . a vast library including millions of readily available and indexed publications." Reno, 521 U.S. at 853.

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[1]Throughout this brief, "PFF" cites refer to paragraph numbers in Plaintiffs' Proposed Findings of Fact.

Given the virtually boundless potential of expression on the Internet, the Supreme Court confirmed in Reno v. ACLU that "[t]his dynamic, multifaceted category of communication" is entitled to the highest level of First Amendment protection, without qualification. Id. at 870, 872.

2. Public Libraries Play a Fundamental Role in the Dissemination of Ideas and Information, Including Internet Speech.

Public libraries occupy a unique place in our democratic society. For many years, public libraries have served as invaluable resources for the communication and receipt of information and the free exchange of ideas. Indeed, the public library, by its very nature, is "designed for freewheeling inquiry." Board of Education v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). As such, the library is a "mighty resource in the free marketplace of ideas." Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976).

As much as any institution, the public library has safeguarded the vital First Amendment right to receive speech and expression.[2/] That right "is vigorously enforced in the context of a public library, 'the quintessential locus of the receipt of information.'" Sund v. City of Wichita

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[2]It is well settled that the First Amendment encompasses not only the right to speak but also the right to receive information. 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"); Board of Education v. Pico, 457 U.S. 853, 867-68 (1982) (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, 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. Sch. Dist., 393 U.S. 503, 511 (1969).

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)).

In its role as information provider, the public library is, for purposes of First Amendment analysis, a "limited public forum, a type of designated public fora." 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. 2d 552, 563 (E.D. Va. 1998) ("Mainstream Loudoun II"); Sund, 121 F. Supp. 2d at 548. As the Third Circuit made clear in Kreimer, libraries are designated "for expressive activity, namely, the communication of the written word." 958 F.2d at 1259 (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.

The defendants have suggested that some library boards have defined their fora to exclude one type of content – sexually explicit speech – and can therefore mandate the use of blocking software without violating the Constitution. That argument, however, is both legally and factually flawed. As an initial matter, it flies in the face of fundamental First Amendment principles, which make clear that once the government dedicates a forum to a general, speech-promoting use – in this case, the communication and receipt of the broadest spectrum of information – it cannot limit that use by disfavoring certain expression. See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995) (holding that once the government creates a forum to facilitate private expression, it may not exclude the entire category of religious speech); see also infra Part III.

Nor does the Constitution permit libraries to redefine their missions on an ad hoc basis to justify censorship. In defining its purpose as information-provider, the public library historically has offered a wide and diverse range of expression to the public and has prohibited exclusion of materials based on disfavored content or viewpoints. PFF 94. To that end, libraries continually reaffirm their central role in promoting intellectual freedom, and the vast majority of public libraries across the country – including all of the government's library witnesses, PFF 93 – have adopted or endorsed the Library Bill of Rights, Pls.' Ex. 1, the Freedom to Read Statement, Pls.' Ex. 9, and other policies safeguarding First Amendment rights. As in the funding context, libraries cannot now recast their speech-enhancing mission "lest the First Amendment be reduced to a simple semantic exercise." Legal Services Corp. v. Velazquez, 531 U.S. 533, 547 (2001).[3/]

CIPA's extensive, federally mandated incursion into the libraries' speech-enhancing function necessarily undercuts the institutions' primary purpose. CIPA's blocking mandate is particularly harmful in light of the crucial role libraries have played in making the extensive resources of the Internet available to the public. Today, free Internet access is available in nearly every one of the 16,000 public library across the country. PFF 74. As a result, over 14 million people in the United States use the public library for Internet access. PFF 84. For certain segments of the population, library Internet access is crucial. As numerous government studies have demonstrated, the "digital divide" persists, and many groups, including minorities, low-income persons, the less-educated, and the unemployed, are far less likely to have home Internet

[3]In addition, the newly defined mission now proposed by the government and some its library witnesses is not even accurate. As the evidence at trial showed, public libraries routinely provide access to some materials in their collections, including books, magazines, and videos, that feature nudity or are otherwise sexually explicit. PFF 96.

access. PFF 85-91. Not surprisingly, library Internet use for those groups far exceeds that of the general population. PFF 85-86. In fact, for the many Americans who cannot afford a personal computer or network connections, public libraries offer the only means of gaining access to the Internet. PFF 86-91.

The widespread availability of Internet access in public libraries is due, in large part, to the availability of public funding, including the funding programs regulated by CIPA. As of 2000, nearly 50% of public libraries received e-rate discounts, and approximately 70% of libraries serving the poorest communities receive those discounts. PFF 91, 462. Similarly, over 18% of public libraries receive LSTA or other federal grants, and more than 25% of libraries serving the poorest communities receive such grants. PFF 482. By conditioning federal funding on the installation and use of blocking software, CIPA transforms these democratizing programs into tools of nationwide, mandatory censorship.

3. Blocking Software Does Not Mirror Traditional Collection Development in Public Libraries.

Faced with the undeniably speech-enhancing nature of the Internet and the public library's indisputable status as a forum for freewheeling inquiry, the government has sought to cast CIPA's blocking mandate as somehow analogous to classic library collection development decisionmaking. That analogy, however, fails for a variety of reasons.

First, librarians have absolutely no involvement in the blocking decisions made by third-party blocking software companies. Those decisions are made by non-librarians who know nothing of a library's existing physical collections, the communities served by libraries, or the criteria used by librarians in selecting physical materials. In fact, because the software

companies treat their blocking lists as proprietary and refuse to provide those lists to customers, PFF 6, 125, libraries installing blocking software do not even know what Internet information they are withholding from the public. The extremely limited, sporadic unblocking performed at public libraries, PFF 281-83, hardly cures this fatal flaw.

Moreover, the selection of physical materials necessarily is limited by space and resource constraints inapplicable to the Internet. For this reason, all libraries offering public Internet access provide patrons with innumerable useless Web sites that they undoubtedly would not include in their physical collections. PFF 101. While some libraries have suggested that Internet access suffers from its own resource limitations, in that there are a limited number of terminals available, they are of an entirely different and less severe character than those constraining physical collections and can be addressed by time limits. In fact, blocking Internet access actually imposes its own resource limitations, not only because of the cost of the software, but also because the blocking and unblocking process creates delays in accessing information online. PFF 104.

To the extent classic collection development principles have any application in the Internet context, it is only through the selection of "recommended sites," which many libraries offer as a means of directing patrons to particularly useful or interesting Internet information. PFF 305. Just as physical collections necessarily are constrained by space and resource limitations, libraries can select and recommend only a small fraction of available Web sites. If anything, it is these lists of recommended sites – and not the unknown lists of block and unblocked sites – that most closely resemble the traditional selection of physical materials in libraries.

Unlike recommended site lists, general Internet provision is more consistent with the interlibrary loan process, through which libraries routinely make available to patrons materials and information not contained in the libraries' physical collection. As the undisputed evidence at trial made clear, interlibrary loan policy dictates that libraries assist patrons in borrowing materials from other libraries, regardless of whether the requested item falls within the borrowing library's collection development standards. PFF 98, 99, 339-40. Just as an interlibrary loan request need not conform to the borrowing library's physical selection criteria, patron Internet access need not comply with those criteria. In both cases, the library is fulfilling its traditional role by providing patrons with the broadest access to available information. PFF 14, 99, 101.

Finally, blocking Internet access involves an active, rather than passive exclusion of certain types of content. 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 or a magazine and tearing out or redacting some of its content. 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"). When a library declines to carry a book in hard copy, it conveys no discernable message about the content of that book. When a Web site is blocked on the library's Internet terminals, however, the library (through a software company) lets patrons know that it expressly disfavors the site's content.

B. The Uncontroverted Evidence Presented at Trial Establishes that the Blocking Software Used to Comply with CIPA Prohibits Library Patrons from Accessing a Vast Amount of Protected Speech.

The evidence presented at trial is unequivocal on a fundamental point: the software required to comply with CIPA's conditions blocks a substantial amount of speech far broader than the obscene, child pornography, and "harmful to minors" visual images prohibited by CIPA.

The government concedes that none of the blocking software companies offers content categories that are limited – or indeed tied in any way – to CIPA's legal definitions of obscenity, child pornography, or harmful to minors. PFF 3, 114. There is no judicial involvement in the blocking software companies' decisions about which Web sites to block, and no attempt is made by these companies to conform their decisions to the legal definitions of speech that is obscene, child pornography, or harmful to minors, or to take into account local community standards in making these determinations. PFF 3, 4, 114-16.[4/]

To the contrary, the categories used by blocking software companies to block sexually explicit content cover a vast range of material that does not fall within CIPA's prohibitions. To begin with, although CIPA requires libraries to protect against access to "visual depictions," no blocking software blocks images while allowing a patron to view the text. PFF 192.[5/] Moreover,

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[4]The list of prohibited sites compiled by blocking software companies are the same regardless of whether the particular software product is designed for use in a school, home, business, or library, and regardless of the geographic location of the user. The blocking software makers often employ the standard of the least tolerant audience in determining whether to add a site to the list. PFF 183, 195. For example, plaintiffs' expert Dr. Geoffrey Nunberg testified that the Web site salon.com was blocked as a "Sex" site by at least one blocking software company because the site – which contains a wide array of political, social, and cultural commentary – contained some minor reference to sex. PFF 222.

[5]The defendants presented evidence that the Tacoma, Washington public library has developed software that it uses in conjunction with commercial blocking software that blocks

the category definitions applied by the filter companies make it inevitable that they will block much more speech than CIPA requires. PFF3, 113-21, 157, 172-74. These definitions include a significant amount of content (such as erotic texts or non-erotic nude images) that would not be considered harmful to minors (let alone obscene) under CIPA's definition. PFF113-21, 172-74. And because the software does not differentiate adult use from use by minors, it inevitably blocks an additional large quantity of harmful to minors speech that is fully protected as to adults.[6/] Moreover, libraries can and do enable blocking software categories, such as N2H2's "Tasteless" category, that will block an entire category of content that is wholly unrelated to the Act's prohibited categories. PFF 172-74.

The overbroad sweep of the blocking software category definitions is compounded by the fact that the companies persistently block sites that clearly do not match even those definitions, a fact demonstrated by both plaintiffs' and defendants' experts. The study performed by blocking software expert Benjamin Edelman and the three librarian experts showed that four popular blocking software products incorrectly blocked between 4,300 and 6,300 pages that would be of

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images while allowing the text to be viewed. PFF 193. Tacoma's approach does not even approach curing the overbroad reach of its blocking software. That is because the blocked images are still determined according to the caprices of Tacoma's blocking software. Thus, if the blocking software used by Tacoma is enabled to block Playboy.com, pictures of automobiles and interviewees such as Jimmy Carter would be blocked along with pictures of Miss September. Moreover, if Tacoma's blocking software incorrectly blocks an entire site – a frequent occurrence, as discussed below – the images will also be wrongly blocked by Tacoma's technology.

[6]As explained in more detail below, see infra Part III, the software also blocks a significant amount of protected speech as to minors. First, the software blocks sites (such as the online version of Sports Illustrated) that are not harmful to minors of any age. Second, because the software does not differentiate between older minors and younger minors, it blocks a significant amount of speech that is fully protected as to older minors. PFF 171.

use or value in a public library. PFF 9, 158, 200-19, 224-40. It is undisputed that these pages represent only a small fraction of Web pages wrongly blocking by these blocking products. PFF 9, 158.

Both plaintiffs' and defendant's experts identified a number of Web pages that were incorrectly blocked by the software. Examples include: a page containing a report on "Male Sex Work & AIDS in Canada," PFF 220; "kittyporn.com," a parody site featuring pictures of kittens, PFF 221; a promotional site for the movie "The Opposite of Sex," id.; a page from Salon.com, a popular online magazine, PFF 222; http://www.afraidtoask.com/index.html, the homepage of one of the plaintiffs' Web site, which offers information on personal health issues, PFF 224; a Web site featuring links to informational and educational Web sites about menstruation, PFF 231; http://www.bi.org, a site serving the bisexual community, PFF 233; http://www.cancerftr.wkmc.com, the Web site for the Willis-Knighton Cancer Center in Shreveport, Louisiana, PFF 234; http://www.barcelonareview.com, an online journal of international contemporary fiction and poetry, PFF 236; http://www.girlsplace.com, a site devoted to providing news, health and recreational information to girls, PFF 237; http://www.muchlove.org, the Web site for a Southern California animal rescue organization, PFF 239; a site on teen sexual health, PFF 241; http://www.bored.com, a page on a Web site devoted to providing links to the "most interesting sites on the Web," PFF 247; http://www.altheweb.com, which provides a brief biography of former Vice President Gore, PFF 249; http://sportsillustrated.cnn.com, PFF 251; and http://www.goodbyemag.com/nov97, the November-December 1997 issue of the Goodbye Magazine, an online magazine devoted to obituaries, PFF 257.

That the overblocking errors made by blocking software are not merely isolated incidents, but instead are the result of limitations inherent to the products, was demonstrated by both Mr. Edelman and Dr. Nunberg. As Dr. Nunberg explained, the enormous size and constantly changing content of the World Wide Web forces blocking software makers to rely on automated tools, cursory human review, and classification techniques that will inevitably result in a significant amount of misclassification. PFF 129-52, 190-92. Among other things, blocking software companies typically block at the top-level of a Web site and as a result the individual pages within that site will be blocked even if they do not meet the content category definition. PFF 146-49, 189-90. And, even though content on certain sites may change daily or hourly, blocking software makers do not regularly re-review sites to ensure the accuracy of their classifications. PFF 150-52, 191. Further, certain architectural properties of the Web require blocking software companies to use a number of techniques, such as IP address blocking, and the blocking of so-called "loophole sites," that inevitably block a large amount of protected speech. PFF 42-45, 70-73, 186-89, 196-98.

At trial, not only did defendants fail to refute plaintiffs' evidence concerning the persistent and significant overblocking endemic to blocking software, they bolstered that evidence through their own witnesses. In his study of the Internet access logs of three libraries using blocking software to comply with CIPA, defendants' expert witness Cory Finnell found that of the sites blocked by these libraries, up to 15% were wrongly blocked. PFF 10, 159. To be sure, Mr. Finnell's results underestimate the actual percentage of wrongly blocked sites, both because of the numerous methodological flaws in his study and the fact that he judged the effectiveness of the blocks according to the blocking software companies' categories – which, as

plaintiffs have explained, are much broader than the images prohibited by CIPA. In any event, even accepting Mr. Finnell's estimated range of overblocking of 7% to 15%, PFF 10, 159, extrapolating those numbers means that in Greenville, South Carolina alone, thousands of patrons would be wrongly denied access to protected speech on the Internet every year. PFF 162.[7] And based on Mr. Finnell's estimates, the use of mandatory blocking software in all of America's libraries will wrongly block millions of access attempts to Web content that does not even meet the relaxed standards of blocking software companies. PFF 11, 166.[8] By the defendants' own estimates, then, the blocking software used to comply with CIPA will block library patrons' access to an enormous amount of Internet speech that should not be blocked according to either the law or the blocking software's own categories.

Although overblocking affects a wide variety of Web sites, the evidence showed that blocking software tends to block disproportionately sites dealing with gay-related issues, safe sex, sexual health, and family planning. PFF 220, 222, 230, 242, 245, 246, 347. For example, in his extremely limited study of blocking products, defendants' expert witness Chris Lemmons found that the software wrongly blocked sites such as lesbian.org, lesbian.com, sexrespect.com, and condomania.com, a site on teen sexual health, and a site discussing "The Bible and the Homosexual." PFF 241-46.

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[7]Because Greenville also blocks the categories of "Tasteless" and non-pornographic nudity, the rate of overblocking in Greenville, as measured against the Act's definitions, is certainly much higher than estimated by Mr. Finnell.

[8]David Biek of the Tacoma Public Library testified that he believes that the overblocking rate of the blocking software used by his library is lower than that found by Mr. Finnell. Mr. Biek's self-serving assessment that he is doing a good job was unsupported by any data and thus was unreviewable by either the plaintiffs or this Court. It is also flatly contradicted by Mr. Finnell's analysis of the Tacoma Public Library's logs. PFF 167.

Finally, the evidence at trial demonstrated that in addition to its overblocking problems, blocking software also fails to block a significant number of sexually explicit sites that arguably fall within CIPA's categories. Plaintiffs' experts explained that due to the enormous size and exponential growth of the Web, it is simply impossible for blocking software companies to keep up with the number of new sexually explicit sites. PFF 264-76. Because of inherent limitations associated with blocking software, these companies will fail to "harvest" and classify a substantial number of sexually explicit sites – for example, foreign language sites, and sexually explicit sites that cannot be found through spidering or other harvesting techniques. Id. That blocking software regularly fails to catch all sexually explicit Internet material was confirmed by the government's own experts. PFF 267.

C. CIPA's Content-Based Restriction on Speech Fails Strict Scrutiny.

By its terms and effect, CIPA imposes a content-based restriction on speech that is subject to strict scrutiny. CIPA's requirement that libraries take steps to prevent patron access to visual depictions that are obscene, child pornography, or harmful to minors draws a line between prohibited and acceptable speech on the basis of its content. To comply with CIPA, libraries must install commercial blocking software – the only feasible "technology protection measure" available to libraries to comply with CIPA's certification provisions – that blocks Web pages according to their content. Libraries that enable categories such as "adult/sexually explicit" and "nudity" will block patrons from viewing Web pages because of the content of those pages.[9/] Because, as explained above, see supra Part I.A.2, public libraries are public fora, CIPA's

[9]As noted above, in some instances the line drawn is even more invidious: evidence that the software tends to target sites with certain messages – for example, gay-related sites – demonstrates that some sites are blocked on the basis of viewpoint.

content-based restrictions on Internet access in libraries cannot be upheld unless they satisfy the most exacting scrutiny. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).[10/]

"Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991)); see also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("This Court has held time and time again: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'") (quoting Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984)). The presumption against CIPA's content-based distinction is not changed because it targets sexually explicit speech. To the contrary, it is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression

[10]CIPA's overbroad, unconstitutional reach was hardly an accident. Congress was well aware of the inherent problems of blocking software when it passed CIPA. 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, Oct. 20, 2000, at 19-20, 22. Congress, however, was hardly concerned about the collateral suppression of constitutionally protected speech. To the contrary, Congress targeted not only unprotected speech on the Internet, but also "pornography" and "indecent material," see S. Rep. No.106-141, at 2 (1999), categories substantially broader than proscribable "obscenity," "child pornography," or "harmful to minors"materials.

is entitled to First Amendment protection.[11/] Therefore, CIPA's provisions must be stricken unless they are narrowly tailored to serve a compelling government interest "without unnecessarily interfering with First Amendment freedoms." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (quoting Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980)). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." Playboy, 529 U.S. at 816; Reno, 521 U.S. at 879.

As the evidence at trial plainly establishes, CIPA will result in the suppression of a vast amount of Internet content and thus is far from narrowly tailored to serve the government's interest in prohibiting adults' access to images that are obscene or show child pornography. By using blocking software companies' categories to comply with CIPA, libraries will block an enormous amount of content that does not even approach the narrow confines of illegal speech for adults, as well as a substantial amount of speech that cannot be considered harmful to minors. Sexually explicit text, which is not covered by CIPA, will nonetheless be blocked because all currently available blocking software cannot block images only. Further, the tendency of blocking software companies to seek to satisfy the least tolerant consumer "means that any communication . . . will be judged by the standards of the community most likely to be offended

[11]See, e.g., Playboy, 529 U.S. at 826 ("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 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.").

by the message." Reno, 521 U.S. at 877-78.[12/] These characteristics of blocking software would be enough, standing alone, to render CIPA's restrictions constitutionally overbroad. But as the unequivocal evidence at trial showed, these products block a far wider range of fully protected speech. Such overblocking, as both the plaintiffs' and the defendants' experts demonstrated, is not constitutionally de minimis; rather, the use of blocking software in libraries will lead to the wrongful blocking of millions of attempts to access information each year. PFF 11, 166.

CIPA thus takes a meat ax approach to an area that requires far more sensitive tools. As a result, the law does not even approach the level of narrow tailoring required by the First Amendment. As the Supreme Court has 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." Playboy, 529 U.S. at 817-18 (internal quotation marks and citation omitted).

Contrary to defendants' suggestion, the overbroad reach of the blocking software is not remedied by the ability of libraries to customize the software products. Although libraries may choose which categories to enable, and have the ability to override manually the software's blocked sites list, it is simply impossible, as a practical matter, for librarians to winnow the software's blocking lists to block only those images covered by CIPA. Significantly, librarians do not have access to the blocked site lists of the software makers, and thus cannot review the lists to determine whether particular sites should be blocked or not. PFF 6, 125. Rather, the

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[12]See also ACLU v. Reno, 217 F.3d 162, 175 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001) ("[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.").

discovery of wrongly blocked sites is left up to trial and error. Given the hundreds of thousands of sites that may be contained on blocking lists, the fact that librarians may be able to unblock even hundreds of sites using this method would not fix the significant amount of unjustified blocking produced by the software.

Nor do the Act's disabling provisions cure the overbroad reach of CIPA's restrictions. As an initial matter, there are numerous technical constraints that make it difficult, if not impossible, to tailor blocking software so that it complies with CIPA. PFF 297-301. Consequently, libraries face serious technical obstacles to implementing the Act's disabling provisions.

More fundamentally, because of the stigma created by the requirement that a patron seek a librarian's approval before accessing a blocked site, the disabling provisions are essentially ineffective. Indeed, the disabling provisions exacerbate the constitutional infirmities of the law by imposing an unconstitutional stigma and chilling effect on requesting library patrons. 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 v. Postmaster General, 381 U.S. 301, 307 (1965) (striking requirement that recipients of Communist literature notify the Post Office that they wish to receive those materials).

Plaintiffs' patron and librarian witnesses testified that patrons would be unlikely to request unblocking of sites on sensitive topics because of the stigma attached to making such a request. PFF 277-79. This testimony is confirmed by common sense: it is hardly speculative to conclude that people will be reluctant to pursue the Act's disabling provisions if it requires them to reveal controversial, embarrassing, or sensitive facts. Along with basic notions of privacy, most people are aware that blocking software often block access to materials that, although constitutionally protected, are undesirable, offensive, or reprehensible to some. Indeed, the premise that patrons will not use the Act's disabling provisions because of the stigma attached to making unblocking requests was supported by the experience of defendants' own library witnesses. PFF 280-83. In Greenville, for example, the library received only 28 requests for unblocking during the nearly two years it has used blocking software, PFF 282; see also PFF 281, 283, despite the fact that during that same time, using the estimates of Mr. Finnell, there were tens of thousands of access requests that were wrongly blocked by Greenville's blocking software. The logical inference to be drawn from this example is that patrons are deterred from asking librarians to unblock sites. Thus, CIPA's disabling provisions do not solve the Act's unconstitutionally broad restriction on speech.[13/]

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[13]In analogous circumstances, courts have invalidated library policies that require patrons affirmatively to request access to sensitive or disfavored materials. See, e.g., Sund, 121 F. Supp. 2d at 551 n.23 (striking 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").

Just as CIPA is not narrowly tailored to serve the government's goal of preventing access to illegal obscenity and child pornography, CIPA cannot be justified as a means to protect children. CIPA is primarily defended as a means to protect minors from exposure to sexually explicit material in the public library. See S. Rep. No. 106-141, at 7 (1999) (important purpose of CIPA is that of "protecting children from exposure to sexually explicit material") (emphasis added); id. at 1 ("The purpose of this bill is to protect America's children . . .") (emphasis added). Because a law that prohibits speech to protect minors is by definition targeted at the content of that speech, this justification confirms that CIPA must satisfy strict scrutiny. Playboy, 529 U.S. at 811 ("The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. Section 505 is not justified without reference to the content of the regulated speech." (internal quotations and citations omitted); Reno, 521 U.S. at 868 ("And the purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech. Thus, the CDA is a content-based blanket restriction on speech . . . .").

CIPA's broad restriction on adult speech cannot be justified solely by reference to the government's interest in protecting children. Although the Supreme Court has "repeatedly recognized the governmental interest in protecting children from harmful materials[,] . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" Reno, 521 U.S. at 875 (citations omitted). But that is precisely what CIPA does: it requires libraries to ban adult patrons' access to a vast amount of Internet content in the name of protecting children from viewing sexually explicit material. "Surely, this is to burn the house

to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957); see also Denver Area, 518 U.S. at 759; Sable, 492 U.S. at 128; Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."); ACLU v. Reno, 217 F.3d 162, 173 (3d Cir. 2000). As the Supreme Court in Reno explained:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

521 U.S. at 874; see also Playboy, 529 U.S. at 814 ("[E]ven where the speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").

The remaining interest advanced by defendants in support of CIPA – the interest in preventing library patrons from engaging in behavior related to viewing sexually explicit material or otherwise offending other patrons by viewing such material in the public library – also fails to satisfy strict scrutiny. "This justification focuses only on the content of the speech and the direct impact that speech has on its listeners." Boos v. Barry, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.). Such a justification always warrants strict scrutiny. See id.; Playboy, 529 U.S. at 812-13; Reno, 521 U.S. at 868; Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 118 (1991). Indeed, the government's purported interest in shielding others from a viewer's reaction to speech is in itself suspect. "[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the

unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975). "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" Playboy, 529 U.S. at 813 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

Because CIPA's ban on speech is so wide, and includes a significant amount of Internet speech that is in no way related – much less tailored – to the images CIPA seeks to prohibit, the law fails strict scrutiny even without the existence of less restrictive alternatives. See id. At the very least, "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as [CIPA]." Reno, 521 U.S. at 879. Defendants have wholly failed to carry their burden of showing the absence of any less restrictive alternative that could further their interests "without unnecessarily interfering with First Amendment freedoms." Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980); see also Mainstream Loudoun II, 24 F. Supp. 2d at 566-67 (finding numerous less restrictive alternatives to mandatory blocking of Internet access in public library).

At trial, plaintiffs identified a number of alternative methods that, used alone or in conjunction, would further the government's stated interests in a manner far less burdensome on protected speech than the mandatory use of blocking software for all adults and all minors regardless of age. These alternatives include the optional use of blocking software; policies

under which parents decide whether their children will use terminals with blocking software; the use of blocking software only for younger children (either restricted to children's areas or through age identification policies); enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of privacy screens or recessed monitors; and the segregation of unblocked computers or placing unblocked computers in well-trafficked areas. PFF 303-09, 311-17.[14/]

These less restrictive alternatives may not be perfect, but the government failed to prove that they are sufficiently ineffective to justify Congress's decision to opt in favor of mandatory blocking software everywhere. To the contrary, 93% of America's libraries manage Internet-related issues without mandating such software for adults,[15/] and plaintiffs' libraries testified that they use many of the alternatives and receive few complaints. PFF 2, 309. At most, defendants presented two library witnesses who testified to unsuccessful experiences using privacy screens. But not one of the defendants' library witnesses explored the feasibility of using all of the other available options, or some combination of those options, including less restrictive use of blocking software (such as parental permission). See Playboy, 529 U.S. at 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."). At the same time, of course, blocking software is itself only marginally effective. Although the Greenville library witnesses testified

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[14]Suggested alternatives for addressing Internet use policies are contained in the ALA's Internet Toolkit. See Pls' Ex. 29.

[15]That a small minority of public libraries have required adult patrons to use blocking software in no way suggests that such policies are constitutional. In fact, in the only case litigated to a decision to date, a public library's mandatory filtering policy was found violative of the First Amendment. See Mainstream Loudoun II, 24 F. Supp. 2d at 570.

that the library's previous attempts to address problems related to patrons viewing sexually explicit Web sites had been ineffective, those problems persisted even after Greenville installed its blocking software. See Defs' Ex. 134. The testimony of plaintiffs' and defendant's expert witnesses, moreover, showed that blocking software regularly fails to block the material prohibited by CIPA. PFF 12, 264-76. At best, installation of blocking software will delay a patron's effort to locate sexually explicit Web sites; there will still be a multitude of such sites accessible to determined users of Internet terminals in libraries. Given the serious questions about the general efficacy of blocking software, and the near absence of evidence concerning the effectiveness of the proposed alternatives, defendants have utterly failed to carry their burden of showing that CIPA is the only effective means for serving the government's interest (assuming that interest could ever justify such a broad suppression of speech).

Further, it is not as if Congress was unaware of less restrictive alternatives when it passed CIPA. The legislation containing CIPA also contained the "Neighborhood Children's Protection Act," or "NCIPA," which unlike CIPA applies only to minors and requires schools and libraries to hold a public hearing and adopt and implement an Internet safety policy that addresses: "access by minors to inappropriate matter on the Internet"; "the safety and security of minors" when using email, chat rooms, etc. ; "unauthorized access, including so-called 'hacking,' and other unlawful activities by minors online"; unauthorized disclosure of minors' personal information; and "measures designed to restrict minors' access to materials harmful to minors." 47 U.S.C. § 254(l). NCIPA's provisions present a plausible, less-restrictive alternative to CIPA, in that under NCIPA, libraries must address and make localized decisions about Internet-related

issues,[16/] perhaps employing some of the alternatives suggested by plaintiffs. Congress's knowledge of NCIPA renders defendants' argument that CIPA is the only effective means for furthering the government's interest that much more suspect. See Playboy, 529 U.S. at 816.

Finally, for the same reasons that CIPA's lack of narrow tailoring fails strict scrutiny, the law is unconstitutionally overbroad. 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."). CIPA is therefore invalid under 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), cert. denied, 122 S. Ct. 918 (2002); 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.

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[16]Contrary to the defendants' repeated assertions, the "local determination of content" provision – which prevents the federal government from reviewing local determinations "regarding what matter is inappropriate for minors," 47 U.S.C. § 254(l)(2) -- applies only to NCIPA, and not to the more restrictive requirements of CIPA. This is clear both from the provision's reference to "inappropriate matter," a phrase only appearing in NCIPA, see id. § 254(l)(1)(A)(i), and from the fact that CIPA expressly defines the three categories of material it regulates.

D. CIPA Imposes an Unconstitutional Prior Restraint on Speech.

CIPA is unconstitutional for the additional reason that its blocking mandate imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, and prior to any judicial determination of the proper level of protection afforded that speech. By delegating the authority to restrict speech to third-party, non-governmental actors who will not reveal what they are censoring, moreover, CIPA exacerbates the constitutional infirmities inherent in any prior restraint. CIPA's disabling provisions inflict further First Amendment injury by vesting librarians with unbridled discretion to undo selectively the blocking companies' censorship decisions.

1. CIPA's Basic Blocking Requirements Create an Ongoing System of Unlawful Prior Restraint.

Even assuming, contrary to the overwhelming evidence presented at trial, that the "technology protection measures" identified in CIPA block only sexually explicit Web sites, CIPA still would impose an unlawful prior restraint on protected expression. As noted above, sexually explicit speech that does not fall within the narrow categories identified in CIPA is entitled to First Amendment protection. For this reason, government entities – including public libraries – must apply strict, exacting standards when attempting to identify whether speech is unprotected or "illegal." See, 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); see also, e.g., Playboy, 529 U.S. at 817-818. As with other prior restraints, however, CIPA impermissibly mandates that government entities silence expression prior to its dissemination, and well in advance – indeed, in the absence – of any judicial review of the speech in question. Without proper procedural safeguards – which are not only insufficient, but actually non-existent here – CIPA's blocking requirements cannot stand. See, e.g., FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (listing procedural requirements necessary to guard against unconstitutional prior restraints, including brevity of actual restraint, expeditious judicial review of decision, censor bearing burden of going to court and burden of proof); Freedman v. Maryland, 380 U.S. 51, 59 (1965).

CIPA's federally mandated system of prior restraints is not insulated from review merely because the information in question may be available to some patrons elsewhere. "[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, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (invalidating exclusion of the musical "Hair" from a municipal auditorium, and stating: "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, 372 U.S. at 66-67 (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").

Nor can the government shield CIPA's prior restraints from constitutional review simply by relying on the inapt analogy to traditional collection development policies. As noted above, see supra Part I.A.3, that analogy fails for a variety of reasons. For example, unlike with standard collection development, where trained library staff make selection decisions using their knowledge of available resources and the needs of their communities, a library purchasing and installing commercial blocking software cannot even learn what Internet information actually will be blocked and what will be made available to patrons. Indeed, by requiring libraries to delegate these crucial gatekeeping decisions to third-party software companies, CIPA effectuates an even more egregious system of ongoing prior restraints. The Supreme Court rejected a similar delegation of First Amendment decisionmaking authority 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. Bantam Books, 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 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. As with the prior restraint in Bantam Books, CIPA places the initial, unreviewable decision delineating protected from unprotected speech in the hands of non-governmental actors. In fact, CIPA extends the problem one step further, by conferring restrictive powers on private companies that refuse to disclose the results of their censorship decisions. PFF 6, 125. Even if filtering companies attempted to conform their blocking decisions to CIPA's three categories – which they indisputably do not, see PFF 3, 114, CIPA's blocking mandate would be constitutionally intolerable.

That courts have upheld statutes criminalizing the distribution or display of obscene or harmful to minors materials hardly justifies CIPA's ongoing prior restraints. 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 Ass'n 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.").

2. CIPA's Disabling Provisions Establish Additional Prior Restraints on Protected Expression.

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. 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, 420 U.S. at 553 ("[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").

Defendants' arguments challenging plaintiffs' ability to bring a facial challenge to the disabling provisions simply miss the mark. Defendants' hope that library authorities will 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, 486 U.S. at 757; see also id. at 755-56 (citing numerous cases sanctioning facial challenges to laws granting officials unfettered discretion to regulate speech).

In any event, the dangers of such unbridled discretion were illustrated by myriad inconsistencies in the disabling policies of the government's library witnesses in this case. In the Tacoma Public Library, for example, library staff will not unblock access to the Playboy.com Web site for adults, even though the library offers children unlimited access to Playboy magazine on microfiche. PFF 295. Similarly, staff making disabling decisions in the Tulsa, Oklahoma library would not unblock access to a sexually explicit photograph on that Internet, even though the same photograph is available, unrestricted, in the library's print collection. Id. Even if the evidence in this case indicated that the government library witnesses thus far have exercised their disabling authority in speech-protective ways, CIPA's standardless disabling provisions would, on their face, be unconstitutional. That the disabling process in libraries using blocking software is rife with inconsistencies simply underscores the constitutional dangers posed by those provisions.

E. CIPA's Disabling Provisions Are Unconstitutionally Vague.

CIPA's disabling provisions are also unconstitutionally vague because they "fail[] 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). There simply is no way for librarians to apply in any consistent manner the determination of what constitutes "bona fide research or other lawful purposes." The disabling provisions, moreover, impose no requirements on, but merely "allow library officials and local administrators to provide access to materials," further increasing

the likelihood of inconsistent application. See, 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).

Recognizing the impossibility of deciphering CIPA's disabling provisions with any precision, the government refused at trial to offer any interpretation of that language.[17/] Instead, in an effort to save the statute, the defendants eviscerated CIPA's central requirements by declaring that libraries can offer any interpretation whatsoever for the Act's disabling provisions, including one that sweeps within the "bona fide research" language "any time anybody wants to see hard core pornography." 4/4/02 Tr. at 157. This reading of the disabling provisions would render the entire statute 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 blocking requirement and make it

[17]It is telling that the FCC also 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.").

a nullity.[18/] 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 blocking software 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 effectively would create a system of unconstitutional prior restraints, as described above.

Furthermore, 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

> 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. at 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

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[18]In addition, a library faces the risk of losing funding if it disables filters too permissively.

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).

The defendants offer another strained reading of the Act's disabling language in an effort to avoid the fact that only one of the government's library witnesses even arguably complies with CIPA's requirement that blocking software be installed on all library computers, including staff computers. PFF 293. According to the defendants, leaving staff computers permanently unblocked satisfies the disabling provisions because the need to check patron disabling requests always constitutes a "bona fide research or other lawful purpose." PFF 291, 293. Again, defendants' new interpretation fails for several reasons. First, all but one of the testifying libraries offer unblocked access even to staff that have no involvement in the patron disabling process. PFF 293. Second and more importantly, the FCC's binding interpretation of CIPA expressly rejects the suggestion that libraries can leave staff computers permanently unblocked, for any reason. See In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 30 (rel. Apr. 5, 2001) ("CIPA makes no distinction between computers used only by staff and those accessible to the public. We therefore may not provide for any exemption from CIPA's requirements for computers not available to the public.").

Defendants appear to suggest that there will be no danger of arbitrary or inconsistent enforcement of the disabling provisions, 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 "bona fide research" or "other 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"? Is the determination based on the patron's purpose or the site's lawfulness?

F. CIPA Is Facially Invalid.

Defendants' argument that plaintiffs' facial challenge fails because some libraries already use mandatory blocking products is wrong as a matter of fact and law. First, contrary to defendants' suggestion, the evidence shows that the library witnesses presented by the government use blocking software in a manner that is constitutionally flawed for the same reasons that, as plaintiffs demonstrate herein, render CIPA facially invalid.[19/] Second, even if defendants had established that certain libraries conceivably could comply with CIPA without running afoul of the First Amendment, that would not defeat plaintiffs' facial challenge to the law. It is well-settled that First Amendment overbreadth claims constitute an exception to the general rule that in challenging legislation on its face, "the challenger must establish that no set of circumstances exists under which the [law] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Thus where, as here, plaintiffs assert that the law threatens to chill free speech – because it will censor a substantial amount of protected speech, because it is vague, and

[19]If the Court were to declare this statute unconstitutional, it would not necessarily be ruling that all use of blocking software is unconstitutional. For example, patron choice options such as those used by the Multnomah or Ft. Vancouver libraries would be permissible. PFF 308-09. Moreover, a system that blocked sites found to be obscene by a court – provided the content of those sites was unchanged – might also be permissible.

because the law creates a prior restraint – plaintiffs need not show that every library seeking to comply with CIPA will violate the First Amendment. See Morales, 527 U.S. at 79 n.2 ("As Salerno noted, the overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression.") (Scalia, J., dissenting); Reno, 521 U.S. at 893-94 (Salerno rule does not apply to facial attack on Communications Decency Act on the grounds of overbreadth) (O'Connor, J., concurring in part and dissenting in part); Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1252 n.13 (3d Cir. 1996) (Salerno rule does not apply to First Amendment challenges based on overbreadth); cf. Morales, 527 U.S. at 55-56 (voiding criminal law for vagueness even though constitutional applications were possible) (plurality).[20/]

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[20]The library and library association plaintiffs 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 ALA Complaint ¶¶ 13-18. Courts have recognized the ability of speech providers to assert their patrons' First Amendment rights. See, e.g., Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1099 (9th Cir. 2000), cert. denied, 532 U.S. 905 (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).

Because libraries have standing to assert the First Amendment rights of their patrons, the Court need not resolve the issue of whether public libraries also have independent 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).

It makes no difference that the law challenged in this case involves federal funding subject to analysis under South Dakota v. Dole. The First Amendment exception to the Salerno rule is premised on the recognition that even if the government may enforce a law restricting speech in a constitutional manner in some instances, the potential that the law can be used to restrict a substantial amount of protected speech requires invalidation of the law under the First Amendment. See Morales, 527 U.S. at 79 n.2 (Scalia, J., dissenting); see also Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973). That principle applies equally here: the remote possibility that some libraries may be able to comply with CIPA without violating the First Amendment does not change the fact that CIPA's provisions are so facially overbroad that they will induce libraries to use blocking software that will violate the First Amendment rights of patrons and Internet speakers. The defendants' argument that the First Amendment exception to Salerno is inapplicable to Congress's decision to fund the type of expressive activity involved here is both untenable and unsupported by any precedent.[21/]

II. CIPA IMPOSES UNCONSTITUTIONAL CONDITIONS ON THE RECEIPT OF FEDERAL FUNDS.

In addition to unlawfully inducing public libraries to violate the constitutional rights of patrons, CIPA also violates the First Amendment by imposing unconstitutional conditions on the libraries' receipt of federal funds. CIPA both distorts the usual functioning of public libraries and extends significant speech restrictions to privately funded Internet access. Here, as in Legal

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[21]Although the Court in Rust v. Sullivan applied the Salerno rule to appellants' First Amendment challenge to Title X regulations, that holding is inapposite here. Rust v. Sullivan, 500 U.S. 173, 183 (1991). Rust involved the government as speaker, and necessarily, when the government is speaking, it can shape the contours of its message. See, e.g., Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

Services Corp. v. Velazquez, 531 U.S. 533 (2001), "the program presumes that private, nongovernmental speech is necessary, and a substantial restriction is placed upon that speech." Id. at 544.[22/]

A. CIPA Distorts the Usual Functioning of the Public Library.

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 Velazquez, 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, 531 U.S. at 542 (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

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[22]Although the two federal programs restricted by CIPA plainly are important sources of funding for many libraries across the country, PFF 462, 475-78, 482, 491-92, the amount of funding is irrelevant to First Amendment analysis. To establish unlawful coercion, plaintiffs need demonstrate only that the funding condition at issue is unconstitutional. See, e.g., FCC v. League of Women Voters of California, 468 U.S. 364, 390 n.19 (1984) (invalidating federal funding restriction despite fact that "vast majority of financial support comes instead" from state, local, and private sources); id. at 400 (noting that condition would be unconstitutional even if recipient received only 1% of its overall income from federal program); cf. Forsyth County v. Nationalist Movement, 505 U.S. 123, 136 (1992) (striking down assembly and parade permit fee ordinance, and holding that "[n]either the $1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of the speech does not become more constitutional because it is a small tax.").

speech in every instance." Velazquez, 531 U.S. at 541. 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 Cal., 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, 531 U.S. at 541. 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, 531 U.S. at 542; 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, 531 U.S. at 542. 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, 531 U.S. at 543. "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, 531 U.S. at 543. "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, CIPA does not involve government speech, and "[t]he private nature of the speech involved here, and the extent of [the Act'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 supra Part I.A.1. In no way, therefore, can the vast majority of speech on the Internet be described as conveying a government-sponsored message. 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, 531 U.S. at 548.

And in fact, as discussed above, supra Part I.A.2, the placement of the Internet terminals at issue here in public libraries undercuts, rather than supports, the government's defense. CIPA 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. PFF 92-107. Public libraries serve primarily as fora for private speech, not mouthpieces for government propaganda. That over 93% of public libraries have

rejected mandatory blocking policies, see PFF 2, 309, confirms that CIPA's requirements fall well outside the usual functioning of public libraries.

CIPA's flaws also egregiously distort the usual functioning of public libraries and their ability to determine, on a local level, what information to provide to their communities. PFF 102, 107. Just as the statute struck down in Velazquez constrained attorneys in making choices central to the performance of their professional duties, CIPA unduly restricts librarians in exercising basic professional judgments about how and to what extent information and ideas will be made available to the public. PFF 102, 106. In Velazquez, the Court facially invalidated a funding condition that required recipients to make one particular professional choice, the decision not to challenge existing welfare law. Similarly, CIPA unlawfully requires e-rate and LSTA recipients to make one particular professional choice: the decision to mandate blocking software for all patrons. As the Supreme Court recently explained, "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." Playboy, 529 U.S. at 818.[23/]

B. CIPA's Speech Restrictions Impermissibly Extend Beyond Federally Funded Internet Service.

In addition to the unconstitutional conditions described above, CIPA's restrictions unlawfully cover library Internet access not even subsidized by the federal funding programs. Under the statute, a public library participating in the e-rate or LSTA funding programs must

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[23]In addition, because the e-rate and LSTA programs are designed to narrow the "digital divide," see supra Part I.A.2; PFF 83-88, 460, 480, CIPA distorts the function of those programs by perpetuating gaps in Internet access among various groups. Under CIPA, those who rely on public libraries for Internet service will have substantially more restricted access to information than will people who have Internet access at home.

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. PFF 82, 341. 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 then 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 has argued that nothing prevents a library or library system from having a "separate set of facilities" which would offer uncensored Internet access. 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 has conceded 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. to Dismiss, at 41. It is simply unrealistic to expect that a public library 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 facility.

III. CIPA IS UNCONSTITUTIONAL AS TO MINORS.

CIPA's constitutional infirmities apply with almost equal force to library patrons who are minors. 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) ("In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."). Although the government can proscribe a wider range of sexually explicit material for minors, restrictions of minors' speech must in other respects satisfy First Amendment scrutiny. Thus, outside those particular areas that have been recognized as a legitimate target of regulation with regard to minors, the government cannot impose content-based distinctions or prior restraints without satisfying strict scrutiny. See Erznoznik, 422 U.S. at 213-14 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.").

For many of the same reasons that CIPA violates the First Amendment rights of adult library patrons, its restrictions violate the speech rights of minors. Categories offered by

blocking software companies for libraries to comply with CIPA cover a large amount of Internet content that would not be considered harmful to minors under any standard. PFF 3, 114. And the substantial overblocking mistakes made by blocking software apply with equal force to young library patrons. For example, the software has been found to have blocked sites such as http://sportsillustrated.cnn.com, PFF 251; http://www.thesoccersite.co.uk, PFF 254; http://www.lakewood-lancers.org/index.htm (alumni listing for Lakewood High School in Lakewood, California), PFF 259; and http://www.hemlbros.com/index.htm (page describes the book "Piano Playing and Songwriting in 3 lessons), PFF 258. Moreover, because the blocking software products fail to distinguish between a six-year-old and a sixteen-year-old in determining which Web sites are considered sexually explicit, blocking software will restrict the access of older minors to sites on such important and sensitive topics as sexual health and sexual identity.[24/] As the testimony of plaintiff Emmalyn Rood so compellingly demonstrated, public library Internet access may be a teen's only viable source of such information – which, although possibly sexually explicit, is nonetheless fully protected by the Constitution. CIPA is therefore unconstitutional as to minors because it draws a content-based distinction that is not narrowly tailored to the government's interest in preventing minors' access to unprotected sexually explicit material, and because it effects a prior restraint on minors' access to speech.

Indeed, in one important respect, the law is even more constitutionally problematic with respect to minors. Unlike adults, minors cannot invoke the disabling provisions for libraries covered by the Act's e-rate requirements (which cover the vast majority of the funds at issue

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[24]As noted previously, see supra Part I.B, evaluations of blocking software has shown that these types of sites, which may contain graphic sexual images, are frequently blocked by blocking products under the "sex" or "adult" categories.

here). See 47 U.S.C. § 254(h)(5)(D) (authorities "may disable the technology protection measure concerned, during use by an adult") (emphasis added).[25/] Thus, a teen patron doing research on sexual health issues who seeks sites that are blocked has no right to ask the librarian to disable the software. This outright ban on disabling applies even when parents give explicit permission and consent for their children to see the blocked sites. There is simply no legitimate justification for such a prohibition. In Reno, the Court's invalidation of the CDA rested in part on the absence of an exception in the law for instances in which parents consented to their children viewing the prohibited material. 521 U.S. at 865. As the Court explained, the government's legitimate interest in protecting minors from viewing certain materials is tied – and finally subordinate – to parents' ultimate authority over the care and well-being of their children. See id. at 865 n.31 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); see also Playboy, 529 U.S. at 811 ("[T]he government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents . . . ."); Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 788 (3d Cir. 1990) ("The responsibility for making [decisions about whether to unblock home telephone access to sexually explicit speech] is where our society has traditionally placed it – on the shoulders of the parent."). Thus where, as

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[25]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").

here, CIPA both prohibits minors from viewing constitutionally protected material and interferes with the right of parents to determine the circumstances in which their children should be permitted to view sexually explicit materials, the law is squarely at odds with the Constitution. See Reno, 521 U.S. at 865; Bolger, 463 U.S. at 74-75.

By its terms, CIPA also imposes an unconstitutional prior restraint on minors. There is no support in the case law for relaxing the prior restraint standards as they apply to children. Loosening such standards, moreover, could be justified only to facilitate parental authority over the care of children – and not, as here, to override that authority. CIPA simply cannot be justified as a legitimate regulation of minors' First Amendment rights.

On this record, therefore, CIPA violates the constitutional rights of minors as well as adults. In the event the Court reaches a contrary conclusion, however, CIPA's severability provisions allow the Court to invalidate the law as it applies to adults without disturbing its provisions with respect to minors. "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) (citation omitted). Here, Congress has made its intent clear, in a "separability" clause applicable to each of the individual sections of CIPA, that invalidation of some of the law's provisions, or its application to certain individuals, should not disturb the validity of the remaining parts.[26/] It is textually possible to invalidate CIPA's requirements as they relate to

[26]Section 1712(a) of CIPA, which applies to LSTA funds, states with regard to its restrictions: "If any provision of this subsection is held invalid, the remainder of this subsection shall not be affected thereby provision." See 20 U.S.C. § 9134(f)(6). Section 1721(e) of the Act, which applies to e-rate funds, states: "If any provision of paragraph (5) or (6) of section 254(h) of the Communications Act of 1934, as amended by this section, or the application thereof to any person or circumstance is held invalid, the remainder of such paragraph and the application of such paragraph to other persons or circumstances shall not be affected thereby." The e-rate CIPA

adults while leaving the provisions applicable to computer use by minors intact. Thus, if this Court concludes that CIPA's requirements are unconstitutional as to adults but valid as to minors, the Court could, consistent with Congress's intent, sever the statute to reflect that holding.

CONCLUSION

For the foregoing reasons, CIPA should be declared unconstitutional and permanently enjoined.

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provisions applicable to public libraries are codified at § 254(h)(6) of the Communications Act. Section 1721(e) has not been codified.

Respectfully Submitted,

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