No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF APPELLEES

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Vartan Gregorian, ,
Address at the Kansas City Club (Oct. 17, 2002),

INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law (Brennan Center) submits this *amicus curiae* brief in support of the American Library Association, the Multnomah County Library Association and the other Appellees.[1]

The Brennan Center is a nonpartisan institute dedicated to implementing an agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Center was established in 1995 to honor the extraordinary legacy of Justice William J. Brennan, Jr.

The Brennan Center takes a particular interest in this case because it presents the Court with two important issues concerning the power of government to assert control over private speakers in subsidized speech settings. First, may the government censor constitutionally protected private speech in subsidized public libraries by ousting the professional editorial judgment of local librarians and replacing it with judgments dictated by elected federal officials? Second, may Congress displace librarians judgments even when the constitutionally protected private speech is privately funded?

the First Amendment and government speech subsidies, including as lead counsel in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), and as both counsel for *amici* and one of the *amici* in *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000), and in *NEA v. Finley*, 524 U.S. 569 (1998). The Brennan Center is currently participating as co-counsel in three district court cases in which the unconstitutional conditions doctrine plays a prominent role: *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C. argued Dec. 4-5, 2002) (three-judge court); *Dobbins v. Legal Servs. Corp.*, 01 Civ. 8371 (FB) (E.D.N.Y. filed Dec. 14, 2001); and *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

In this case, the district court declined to decide the unconstitutional conditions issues, preferring to rule on forum grounds. *American Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490 n.36 (E.D. Pa. 2002) (three-judge court). The Center believes that the district court s forum analysis is correct and that this Court need not reach the unconstitutional conditions issues. However, in the event that the Court determines to address these issues, the Center files this *amicus curiae* brief with the hope that its perspective on the unconstitutional conditions doctrine will assist the Court.

SUMMARY OF ARGUMENT

Under this Court s unconstitutional conditions jurisprudence, the law challenged in this appeal the Children s Internet Protection Act cannot survive because it conditions the receipt of government funding on the sacrifice of fundamentally important First Amendment rights. The law wreaks this constitutional havoc in the public library, a uniquely

and municipal governments, certain health issues and scientific matters, information about educational and employment opportunities, and even facts about sports and travel. By interfering in this way with the work of researchers, scholars, librarians, and web site publishers, the law effectively scissors out on command of the national government, and without regard to a librarian s professional judgment or a local community s need key chapters in the dynamic and vast encyclopedia of the Internet. Under the unconstitutional conditions doctrine, this extreme distortion of the library function plainly violates the First Amendment.

An equally troubling aspect of the challenged law is its application to every single computer in a public library even those computers the library pays for with its own private funds. At least since *Regan v. Taxation With Representation of Wash.* and *League of Women Voters*, this Court has made absolutely clear that the unconstitutional conditions doctrine does not allow the government to condition the receipt of a subsidy on the sacrifice of private expression that is privately financed the government must always afford speakers an adequate channel for such expression. The government insists in this case that libraries possess such an adequate channel in that they remain free to operate unfiltered computers in physically separate library facilities. Even if the challenged law permitted this, and it does not, forcing researchers to travel to remote facilities and to forego other key library resources, when the government offers no constitutionally cognizable justification, would impose an undue burden on researchers, make it less likely that valuable web sites will ever be accessed, and interfere with the administration and independence of libraries themselves. This interference with privately funded First Amendment protected expression constitutes an additional and independent violation of the unconstitutional conditions doctrine.

ARGUMENT

I. BY REQUIRING FEDERALLY SUBSIDIZED PUBLIC LIBRARIES TO CENSOR PRIVATE SPEECH ON INTERNET-CONNECTED COMPUTERS, THE GOVERNMENT DISTORTS THE TRADITIONAL FUNCTION OF PUBLIC LIBRARIES IN VIOLATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

A. The Unconstitutional Conditions Doctrine Bars the Government from Using Its Subsidy Programs to Suppress Private Speech in Ways that Distort the Underlying Forum.

Throughout its unconstitutional conditions jurisprudence, this Court has held that the government may not use its subsidy programs to suppress private speech in a way that distorts the underlying forum for that speech, particularly where, as here, the integrity of the forum is essential to the functioning of a free society. *See, e.g.*, *Velazquez*, 531 U.S. 533; *Southworth*, 529 U.S. 217; *Finley*, 524 U.S. 569; *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

In *League of Women Voters*, for example, the Court invalidated a federal law that had prohibited privately owned public broadcasting stations from engaging in editorializing if they received a grant of funds from the Corporation for Public Broadcasting. The Court held that since the purpose of public broadcasting is to offer a wide variety of views

on important social issues, the law

to promote free speech and creative inquiry. 515 U.S. at 834, 836. More recently, in *Southworth*, the Court upheld a public university

Velazquez addressed the constitutionality of a law that had prohibited federally subsidized legal aid lawyers from challenging welfare reform laws in the course of representing individual clients seeking welfare benefits. The Court declared the law unconstitutional because it prevented lawyers engaged in advancing private speech from advising their clients and . . . presenting arguments and analyses to the courts, thereby distort[ing] the legal system by altering the traditional role of the attorneys. *Id*. at 544. The Court added that by seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. *Id.* at 545. The Court distinguished its decision in *Rust* upholding a speech restriction applied to government-subsidized family planning physicians, on the ground that the physicians were advancing governmental speech as contrasted with private speech. The legal aid subsidy program, on the other hand, was subsidized by government to facilitate [the] private speech of the lawyers clients, not to promote a governmental message. *Id.* at 542.

In *Velazquez*, and in each of the cases discussed above, the government had enacted a restriction on private speech in order to regulate the use of public funds. The *Velazquez* decision, taken together with the unconstitutional conditions cases discussed herein, establishes the principle that the First Amendment bars the government from imposing restrictions on private speech in subsidized speech settings

to the functioning of our society that the Government s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the . . . First

when the restrictions distort the proper functioning of the underlying forum, especially when the integrity of that forum is essential to a free society. *Id.* at 543.

B. Subsidized Speech in Public Libraries Deserves the Same Vigorous First Amendment Protection Afforded Subsidized Speech In Public Universities, Public Broadcasting Systems and the Courts.

Public libraries are analogous to public universities, public broadcasting systems, and the courts as vital institutions in a free society. For this reason, this Court should hold that Congress power to control subsidized private speech in local public libraries is no greater than in these three settings.

Consider the example of public universities. In the university setting, the Court has consistently rejected government restrictions on speech that interfere with a public university s traditional role of educating students through wide exposure to [a] robust exchange of ideas . . . rather than through any kind of authoritative selection. *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal quotation marks and citation omitted). *See also Rosenberger*, 515 U.S. at 835-36 (discussing heightened need to protect free speech in universities, which are the center of our intellectual and philosophic tradition). In so holding, this Court has declared academic freedom in this subsidized setting to be of special concern to the First Amendment:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would

> imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Keyishian, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

This theory applies equally, if not more forcefully, to protect freedom of speech in public libraries.

scientific and artistic achievements and its collective memory. They are a source of

C. By Requiring Public Libraries to Censor Private Speech, the Government Distorts the Traditional Function of Public Libraries in Violation of the Unconstitutional Conditions Doctrine.

The government, through the Children s Internet Protection Act (CIPA),[4] censors private speech by requiring public libraries that receive either of two forms of federal benefits federal grants pursuant to the Library Services and Technology Act[5] (LSTA), or discounts for Internet access pursuant to the Telecommunications Act of 1996[6] (E-rate program) to

of constitutionally protected speech based solely on its content. *American Library Ass'n*, 201 F. Supp. 2d at 448, 490. *See also id*. at 454 (Software filters, by definition, block access to speech on the basis of its content.). This direct censorship of valuable speech is caused by the inherent technological limitations of filtering software programs, which, as the district court found, erroneously block a huge amount of speech that is protected by the First Amendment. *Id*. at 448. The district court explained further:

> Any currently available filtering product that is reasonably effective in preventing users from accessing content within the filter s category definitions will necessarily block countless thousands of Web pages, the content of which does not match the filtering company s category definitions, much less the legal definitions of obscenity, child pornography, or harmful to

blocked by the leading filtering software programs available to public libraries:

- *Speech by and about churches and religious groups*, including web sites for a Knights of Columbus chapter affiliated with St. Patrick s church in Fallon, Nevada; a Christian orphanage in Honduras; and a lesbian and gay Jewish Center in California;

- *Speech about politics and government*, including web sites for individual candidates for state and local office in Massachusetts and California; the government of Adams County, Pennsylvania; Wisconsin Right to Life; and an anti-death penalty group in Denmark;

- *Speech about health issues*, including web sites about allergies and halitosis, for the Willis-

- *Speech about travel*, including

valuable information that they would make available but for a government directive.

As the government concedes in this case, America s diverse public libraries share a common mission of providing patrons with a wide array of information and ideas. Brief for the United States (hereinafter U.S. Br.) at 20 (Consistent with their missions, public libraries seek to provide a wide array of information to the public.). *See also American Library Ass'n*, 201 F. Supp. 2d at 420. This mission requires public libraries to provide local communities with access to materials and information presenting all points of view on current and historical issues. *American Library Ass'n*, 201 F. Supp. 2d at 420 (quoting American Library Ass n, Library Bill of Rights (1980)). Although resource limitations obviously thwart public libraries from providing universal coverage within the space of their physical collections, public libraries nevertheless attempt to assist patrons in obtaining access to *all* materials except those that are illegal, by utilizing interlibrary loan systems, referrals to other libraries and, today, with the help of the federal government, the Internet. *Id.* at 421 (emphasis added).

Insofar as local librarians, as a practical matter, must make content-based decisions about which books to acquire for their libraries physical collections, these decisions are guided by professional standards that strive for balance in a library s collection, while counseling acquisition of materials of requisite and appropriate quality. . . . that would be of the greatest direct benefit or interest to the community. *Id*. These standards bar librarians from making collection decisions based on partisan or doctrinal disapproval of materials. *Id*. at 420 (quoting American Library Ass n, Library Bill of Rights). *See also Pico*, 457 U.S. at 870 (barring elected officials from removing school library books

based on narrowly partisan or political objections). These standards state that librarians must provide access to the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority, and that they must contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large. *American Library Ass'n*, 201 F. Supp. 2d at 420 (quoting American Library Ass n, Freedom to Read Statement (2000)). *See also Mainstream Loudon v. Board of Trs. of Loudon County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (*Loudon II*) (quoting local government resolution stating purpose of county s public library system is to offer the widest possible diversity of views and expressions and not to censor ideas).

Here, the government effectively forces public libraries to abandon this mission by requiring them to deny patrons access to a substantial amount of valuable information on the Internet that the libraries have decided should be made available. It is no answer to say that since librarians are able to exercise proper editorial judgments about which books to acquire for their librar(v)-19(a)-17(i)22(v)-19(e)-16(l)-2 Tf 265.796 0 TD <00b4>Tj 0 Tc 0 Tw /F1 12

To the contrary, by usurping the professional editorial judgment of local librarians about the material that should be kept in public libraries, and replacing it with judgments dictated by elected federal officials, CIPA distorts the basic functioning of public libraries. *See* U.S. Br. at 20 (conceding that to fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide their patrons.).[8] A librarian s exercise of her editorial discretion is a form of protected speech activity. *Cf. Forbes*, 523 U.S. at 674 (When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.). By supplanting that discretion with the government s decision to remove materials from a library s collection a decision that is imposed without regard to whether censored web sites contain valuable information that is protected by the Constitution and of direct benefit or interest to the community the government violates the First Amendment. *Cf. Finley*

U.S. Br. at 50, however, this argument is unavailing for at least two reasons. First, the government s brief cites no support in the statute or the legislative record for this proposition. Second, CIPA s speech regulation, rather than merely limiting the type of material that may be *obtained* with federal funds, is more accurately described as an attempt by Congress to override the professional judgments of local librarians by forcing them to *remove* material that they have already decided to obtain.

D. *Rust* Does Not Apply in This Case, Because Only Private Speech Is at Stake.

The government s reliance on *Rust* for the proposition that CIPA is an appropriate law because it merely defines the limit and scope of a government subsidy program, U.S. Br. at 50, is misplaced. *See Velazquez*, 531 U.S. at 547 (rejecting government attempt to recast a condition on funding as a mere definition of its program because the condition implicates central First Amendment concerns.). In *Rust*, the Court upheld federal regulations barring government-subsidized doctors from discussing abortion when providing family planning advice, explaining that the federal program, by definition, was designed to lead to conception and childbirth. 500 U.S. at 193. In post-*Rust* cases, this Court has clarified that *Rust* does not apply in situations where, as here, the government subsidizes private speech, as contrasted with government speech intended to advance a particular governmental message. In *Velazquez*, for example, the Court explicitly distinguished *Rust* as relying on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech. 531 U.S. at 541. *See also Southworth*, 529 U.S. at 229 (explaining that unlike *Rust*, *Southworth* does not raise the issue of the

government s right . . . to use its own funds to advance a particular message); *Rosenberger*, 515 U.S. at 834 (distinguishing *Rust* as inapplicable in cases where 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).

In this case, the government does not, and could not, dispute that by designing the LSTA and E-rate programs to provide Internet access to . . . libraries in low-income communities, *American Library Ass'n*, 201 F. Supp. 2d at 407, Congress has created a subsidy program not to communicate any particular governmental message, but to facilitate public libraries providing patrons with access to the vast amount of private speech available on the Internet. U.S. Br. at 3. *See also Reno v. ACLU*, 521 U.S. 844, 868 (1997) (stating that the Internet is a vast forum for private speech). Thus, unlike the regulations upheld in *Rust*, CIPA restricts private, nongovernmental speech. *Rust* consequently does not control this case. *See Velazquez*, 531 U.S. at 542-43.[9]

For the aforementioned reasons, the government s requirement that federally subsidized public libraries install

9. The government also misreads *Velazquez* as distinguishing *Rust* solely on the ground that the role of lawyers supported by federal funds who represent clients in welfare disputes is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control. U.S. Br. at 51-52 (emphasis in original). Rather, the *Velazquez* Court repeatedly stated its holding more broadly as relying on the salient point that, like the program in *Rosenberger*, which did *not* involve speech against the government, the LSC program was designed to facilitate private speech, not to promote a governmental message. *Velazquez*, 531 U.S. at 542.

filtering software on all computers, censoring a substantial amount of private speech, distorts the traditional functioning of public libraries in violation of the unconstitutional conditions doctrine.[10]

II.

Much as in *League of Women Voters*, the law challenged here also violates the First Amendment by requiring a public library that receives federal funds to operate filtering software with respect to *any* of its computers with Internet access during *any use* of such computers. 20 U.S.C. § 9134(f)(1); 47 U.S.C. § 254(h)(6)(B) & (C) (emphases added). This requirement imposes a flat ban against a library s use of even private funds to operate unfiltered computers in an effort to provide patrons with access to the full range of constitutionally protected speech on the Internet. This flat ban against the use of private funds to pursue First Amendment activity, on penalty of the loss of federal funding, imposes an unconstitutional condition on public libraries. *See League of Women Voters*, 468 U.S. at 399-400.

The government s attempt to rescue the statute by interpreting it to permit libraries to use non-federal funds to operate unfiltered computers, so long as they do so in physically separate facilities or branches, U.S. Br. at 51, fails for at least two reasons. First, the government s interpretation contradicts CIPA s plain terms, which expressly require a subsidized library to operate filtering software on all of its Internet-connected computers, without regard to funding source. Congress authorized no exceptions, including for privately funded computers. While courts have a duty to avoid constitutional questions through statutory construction, they are not free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties. *Lowe v. SEC*, 472 U.S. 181, 213 (1985) (White, J., concurring). *See also Miller v. French*, 530 U.S. 327, 341 (2000) ([T]he canon of constitutional doubt permits us to avoid such questions only where the saving construction is not plainly contrary to the intent of Congress.) (internal quotation marks and citation omitted). The government s

and citation omitted). However, *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983), and *League of Women Voters*, both indicate that physical separation between federally and non-federally funded activities is not required to ensure the integrity of government subsidy programs. And *Rust*, which upheld as reasonable a physical separation requirement in the setting of a federal family planning program, does not control this case.

Thus, in *Taxation With Representation*, this Court stressed that Congress may not unduly interfere with the ability of subsidized private speakers to use non-federal funds to pursue First Amendment activities. The Court held that Congress requirement that certain tax-exempt entities

bar would be cured if Congress permitted stations to use non-federal funds to establish affiliate organizations which could then use the station s facilities to editorialize with nonfederal funds, i.e., Congress could require legal, but not physical, separation. 468 U.S. at 400.

Rust is the only decision of this Court upholding a requirement that physically separate facilities be maintained

(finding an asserted interest valid but not compelling); and (2) are no more extensive than necessary to advance the government s interest,