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

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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.

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

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.

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 of a

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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 onl

That the overblocking errors made by blocking

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 mille

[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.

[10]CIPA's overbroad, unconstitutional reach was hardly

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).

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 – is also if

unwilling listener or viewer. Rather . . . the burden normally falls upo

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.

D. CIPA Imposes an Unconstitutional Prior Restraint on Speech.

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

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.

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

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." [illegible]

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.").

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

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[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.

[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 haFirst Amendment(d not reso)Tj47.2800 0.0uT,72Po00 dic liause

speech in every instance." Velazquez

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

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 Imper softwfully digar

[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

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

[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").

[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

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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