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 REPLY BRIEF

See Defs.' Post-Trial Br. at 17 n.11. But defendants cannot seriously pretend that this is not a First Amendment case; and as plaintiffs have already explained, the relevant analysis under Dole here is the First Amendment. Defendants acknowledge that South Dakota v. Dole forbids

The defendants concede, as they must, that "the physical space of the library is itself a public forum." Defs.' Post-Trial Br. at 21. Defendants then attempt to escape the implications of this conclusion – including, for example, the strict scrutiny applied to speech regulations in such a forum, see, e.g., Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-46 (1983) – by arguing that the library's provision of information via the Internet somehow limits the speech-enhancing nature of the library forum. Defs.' Post-Trial Br. at 18-26. This contention is meritless, for several reasons.

As an initial matter, the defendants cannot possibly define the public forum characteristics of the library in such a way as to exclude the library's central purpose, the provision of information. If, as the defendants admit, the library is a public forum for certain designated purposes, it is difficult to conceive how those purposes could fail to include "the communication of the written word," Kreimer v. Bureau of Police, 958 F.2d 1242, 1259 (3d Cir. 1992), and patrons' associated "constitutionally protected interest in receiving and reading written communications." Id. at 1262. Even if the public library is not a public forum for some purposes – for example, giving speeches or public assembly – the library remains, without question, "the quintessential locus of the receipt of information." Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (quoting Kreimer, 958 F.2d at 1255).[1/]

Next, it would strain both logic and First Amendment jurisprudence to conclude that a public forum, such as the library, becomes less constitutionally relevant when it advances its speech-disseminating mission through the diverse medium of the Internet. Far from being

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[1]This central purpose of the public library makes it wholly unlike the more restrictive government fora, such as military exchanges, cited by the government. See Defs.' Post-Trial Br. at 24 (citing General Media Communications, Inc. v. Cohen, 131 F.3d 273 (2d Cir. 1997)).

[2]As plaintiffs noted in their initial post-trial brief, the provision of recommended site lists – and not the broad availability of the rest of the Internet – most closely resembles a library's physical collection development. Unlike with blocking software, both recommended site lists and the selection of physical materials sends no disparaging message about the materials not

[3] Defendants' attempt to deny the unfettered nature of interlibrary loan is unavailing. As plaintiffs have shown, libraries will assist patrons in obtaining access to all materials except those that are clearly illegal. PFF 99. Defendants' citations to policies at Westerville and Tulsa, Defs.' Post-Trial Br. at 42, are not to the contrary. The Westerville library, for example, has never rejected an interlibrary loan request on the basis of content. In fact, under the library's new self-checkout system, content review of interlibrary loan requests will be impossible; Westerville patrons will be able to borrow materials from other libraries without any Westerville staff ever reviewing the request. See

[9]The government also argues that its library witnesses justifiably installed mandatory blocking in an effort to comply with state obscenity or harply

speech that is protected by the First Amendment. Ashcroft v. Free Speech Coalition, 2002 WL 552476, at *7 ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.").[11/] Even if there were, that would not justify CIPA's broad censorship of non-sexually explicit speech.

The government's defense of CIPA breaks down altogether when it comes to its burden of showing the absence of less restrictive alternatives. Defendants and their library witnesses claim that the use of mandatory blocking software for all patrons is justified to protect children from exposure to harmful to minors material. But there is no evidence that any of these libraries has ever tried, much less considered, the most obvious less restrictive way of furthering this purported purpose: using blocking software only during use by young children, with provisions allowing for parental consent. Thus, while Mr. Biek claims that mandatory blocking software was needed at his library to address the problem of teenagers accessing sexually explicit material on the Internet, Tacoma never tried using blocking software only for minors. The government therefore cannot claim that CIPA's requirement of mandatory blocking software is the only effective means for furthering its interests because it has not even explored, much less proven the ineffectiveness of, these other options.

Not only have defendants failed to show that no other less restrictive alternatives exist, they have not shown that blocking software is very effective at furthering the government's claimed goal of preventing the display of "hard core pornography." The government's brief essentially ignores the evidence that blocking products consistently fail to block a large amount

[11]Even the government's library experts admitted that it would not be proper for a librarian to prevent adults from accessing constitutionally protected sexually explicit materials. Cronin 3/29/02 at 96-97; Davis 4/1/02 at 103.

of the materials targeted by CIPA. See PFF 12, 264-76. Even the very limited study of government expert Chris Lemmons concluded that four commonly used blocking products failed to block 8% of 200 "hard core pornographic" sites chosen by Lemmons, with one of the most popular products, Cyber Patrol, failing to block over 17% of those sites. DPF 305, 308. That the implementation of mandatory blocking software is not effective at stopping individuals from accessing sexually explicit content on the Internet is demonstrated by the Greenville library, where complaints about such instances persisted even after Greenville installed its blocking software. See Defs' Ex. 134. Indeed, defendants concede that the blocking software does not solve the purported problem of patrons accessing sexually explicit Web content. Defs.' Post-Trial Br. at 29.

D. CIPA's Disabling Provisions Compound Its Constitutional Problems.

Plaintiffs already have shown that the provisions in CIPA allowing librarians to disable blocking software for "bona fide research or other lawful purposes" compound, rather than alleviate, CIPA's constitutional infirmities. The government's brief confirms this. First, in an attempt to salvage the statute's vagueness problems, the government asserts that the "bona fide research" language would permit a librarian to disable blocking software for a "pornography researcher." Defs.' Post-Trial Br. at 49. But the government goes on to suggest that under the same provision, a librarian would properly deny an identical request by an adult patron seeking disabling "for his own recreation." Id. at 49 n.37. The government's interpretation of the statutory language flies in the face of its argument that the "bona fide research" language invites no individualized determinations into the propriety of a patron's disabling request. Under the government's scenario, how would a librarian determine and verify whether the patron was

seeking access to blocked sites for "pornography research" rather than "recreation"? Would a permission slip be required? The government's hypotheticals make clear that the disabling provisions empower – and indeed require – librarians to make the kind of ad hoc and subjective judgments that create the danger of arbitrary and inconsistent applications of the law. As a result, the disabling provisions are hopelessly and unconstitutionally vague. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

Second, the defendants' contention that the disabling provisions will have no chilling effect on library patrons' speech once again rests upon a distortion of the nature of plaintiffs' claims. See Defs.' Post-Trial Br. at 46. Contrary to defendants' assertion, the right at issue is not an absolute right to receive speech anonymously, but the right of library patrons not to have to petition the government for access to disfavored speech to which they are lawfully entitled. See Denver Area, 518 U.S. at 754; Lamont v. Postmaster General, 381 U.S. 301, 307 (1965); Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 551 n.23 (N.D. Tex. 2000); Mainstream Loudoun v. Board of Trustees of the Loudoun County Library ("Mainstream Loudoun I"), 2 F. Supp. 2d 783, 797 (E.D. Va. 1998).[12/] The experience of the government's testifying witnesses shows that

[12]Contrary to defendants' argument, see Defs.' Post-Trial Br. at 47 n.35, to establish an unconstitutional stigma claim there is no requirement that the plaintiffs prove the likelihood of improper disclosure of information. In both Denver Area and Lamont, the mere expression of a fear of disclosure and its attendant chilling effect on speech sufficed. Denver Area, 518 U.S. at 754 (referring to claims "by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive channel'"); Lamont, 381 U.S. at 307 ("[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'").

Nor is there any merit to defendants' argument that any stigma suffered by adult patrons is justified by the interest in protecting children, relying on cases upholding harmful to minors statutes. See Defs.' Post-Trial Br. at 47. First, there is no indication that any stigma claim even

librarians may look with disfavor upon certain types of speech in making disabling decisions, even if that speech is fully protected by the Constitution (and indeed, even if the Web content is indistinguishable from material in the library's non-digital collection). Thus Mr. Biek testified that he would not disable Playboy.com for a 45-year-old physician, even though his library offers unrestricted access to Playboy, even for children, elsewhere in the library collection. See Biek 3/28/02 at 135; PFF 295. The deterrent effect of wholly discretionary disabling is evident in the strikingly low number of unblocking requests received by these libraries. See PFF 280-83.

Third, defendants concede that the distinction between the e-rate disabling provisions (which do not allow disabling for minors under any circumstances) and the LSTA disabling provisions (which allow disabling for adults and minors) is wholly irrational. Defs.' Post-Trial Br. at 48. Plaintiffs' opening brief demonstrates that the e-rate provisions' total ban on disabling for minors – even with parental consent – imposes an impermissible prior restraint on minors and unjustifiably burdens their First Amendment rights and the rights of their parents. Defendants do not even attempt to defend this restriction; to the contrary, they admit that there is no rational basis for it. Accordingly, the e-rate provisions' ban on disabling for minors plainly cannot be sustained as a valid restriction of minors' speech.

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was raised in those cases. Second, those cases specifically address only harmful to minors materials, while Internet blocking software indisputably blocks access to substantially more expression. In addition, the chilling effect created by CIPA's disabling provisions is particularly problematic because it requires library patrons to petition the government for access to protected speech; by contrast, requesting sensitive materials from private actors raises fewer constitutional concerns. Moreover, even laws that have sought to restrict "harmful to minors" material on the Internet have been struck down by the courts. See, e.g. Reno v. ACLU, 521 U.S. 844 (1997); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

II. CIPA'S UNCONSTITUTIONAL CONDITIONS ARE FATAL TO THE ACT.

Defendants raise a number of arguments to justify the egregiously unconstitutional conditions imposed by CIPA, none of which saves the statute. As an initial matter, defendants focus on the open question whether libraries, as public entities, have independent First Amendment rights. Defs.' Post-Trial Br. at 53-57. But this determination is unnecessary to the Court's resolution of plaintiffs' claims. Libraries plainly have standing to assert their patrons' rights, see Pls.' Post-Trial Br. at 38 n.20. In addition, public libraries are best positioned to challenge the use of the federal government's spending power to conscript them into a massive distortion of private communication in an area specifically designed to "encourage a diversity of views." Velazquez, 531 U.S. at 542;

[13]In addition, as explained in plaintiffs' initial brief, it hardly helps defendants' position that some small minority of libraries receiving the conditioned funds may be willing to block patrons' Internet access. Just as in Velazquez, where some of the recipient legal services attorneys might have chosen voluntarily to challenge existing welfare law, CIPA is also constitutionally infirm because it establishes a funding condition that seeks to take away a basic, professional choice about how to provide information to the public. See Pls.' Post-Trial Br. at 44.

[14]Defendants do not even attempt to invoke such a limitation on LSTA grants.

Of course, Internet service in public libraries – including that funded in whole or part by e-rate discounts – necessarily includes the daily, continuous provision of non-educational online materials.

There is no indication, moreover, that e-rate funding has ever been limited to educational purposes. As the defendants concede, the FCC has never denied any library e-rate discounts because the Internet access provided by the library failed to meet the "

[15]In fact, no library's application for e-rate discounts has been denied on the basis of any Internet content provided by the library. PFF 468.

[16]The defendants' strained reliance on a supposed "educational purposes" limitation fails for an additional reason. The term "educational" in this context is not defined with any precision, but certainly encompasses Internet information that will be blocked under CIPA. Indeed, one of the defendants' library experts defines "education" as "[t]he whole corpus of human experience that has contributed to who we are as a people [and] a species." Davis 4/1/02 at 102.

("[T]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." (quoting Consolidated Edison Co. v. Public Service Comm'n of NY, 447 U.S. 530, 537 (1980))).

Defendants, moreover, offer little justification for the unduly broad reach of CIPA's conditions, which extend to privately funded Internet service in libraries. See Pls.' Post-Trial Br. at 44-46. As in League of Women Voters, CIPA impermissibly requires a library receiving e-rate discounts or LSTA grants to block all Internet access, even if the recipient "receives only 1% of its overall income from [federal] grants." 468 U.S. at 400.

Defendants' heavy reliance on government speech cases such as Rust v. Sullivan, 500 U.S. 173 (1991), and Regan v. Taxation With Representation, 461 U.S. 540 (1983), is wholly unavailing. As the Supreme Court repeatedly has made clear, where, as in Rust and Regan, the funds at issue merely advance government speech, rather than facilitating a broad range of private speech, the analysis is "altogether different." Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000) (distinguishing Rust and Regan). See also, e.g., Velazquez, 531 U.S. at 541 (Rust concerned program that "amounted to governmental speech"); Rosenberger, 515 U.S. at 833 (government in Rust "used private speakers to transmit specific information pertaining to its own program"). The public library, on the other hand, is "designed for freewheeling inquiry,"[17/] Board of Educ. v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), and therefore may not be profoundly distorted through

[17]Like a university, distinguished from the government speech program in Rust, the public library "is a traditional sphere of free expression so fundamental 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 . . . ." Rust, 500 U.S. at 200.

funding conditions like those in CIPA. Velazquez, 531 U.S. at 541; Rosenberger, 515 U.S. at 833-34; League of Women Voters, 468 U.S. at 378, 383, 392, 395.

III. THE INDIVIDUAL PLAINTIFFS' CLAIMS ARE RIPE.

Contrary to defendants' repeated assertions, the claims of the individual plaintiffs in this case are ripe for review. The evidence shows that the individual patron plaintiffs regularly use the library for information to which they will be wrongly denied access if CIPA is upheld, given the record on blocking software. See PFF 343-351; 389-400; 422-438. Likewise, it is undisputed that all of the Web sites of the individual plaintiffs have been blocked by at least one popular blocking product, and these plaintiffs have a realistic fear that they will continue to be blocked. PFF 210, 352-56; 439-59. In any event, defendants' ripeness argument is nothing more than a variation on their refusal to recognize that the plaintiffs in this case assert First Amendment facial challenges to CIPA. Where, as here, a law threatens to suppress a substantial amount of protected speech, plaintiffs may bring a pre-enforcement challenge, even if they have not suffered – or would not suffer – constitutional injury under those laws. See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988); Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56 (1988); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798-99 (1984); see also Presbytery of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1463-64 (3d Cir. 1994) (facial challenge to statute on First Amendment grounds was ripe); Planned Parenthood v. Farmer, 220 F.3d 127, 148 (3d Cir. 2000) ("Federal court review is not foreclosed merely because there is a pre-enforcement challenge to a state statute.").

[18]The defendants do not dispute the ripeness of claims brought by

Respectfully Submitted,

COUNSEL FOR ALL ALA PLAINTIFFS:

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COUNSEL FOR ALL MULTNOMAH PLAINTIFFS:

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