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

RESPONSE OF PLAINTIFFS MULTNOMAH COUNTY PUBLIC LIBRARY ET AL. TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs challenge the constitutionality of the misnamed Children's Internet Protection Act (CIPA), a federal law that applies to every local library in the country that receives funds under two popular federal programs. Although the traditional role of libraries is to provide access to all information sought by patrons, Complaint, ¶¶72-82, CIPA requires libraries to install "technology protection measures" to block certain content on every Internet access terminal, regardless of whether used by adults or minors, patrons or staff.

As alleged in the Complaint, all of these programs block access to a wide range of clearly protected speech. Complaint, ¶¶87-121. There are no "technology protection measures" that block only content prohibited by CIPA, Complaint, ¶¶84, 86, 114, or that block all content prohibited by CIPA. Complaint, ¶¶ 85, 86, 114. There is no way that any computer program can constitutionally block access only to unprotected speech. Complaint, ¶¶86, 113, 114. The only existing "technology protection measures" are created by private companies that block speech based on criteria that are significantly broader than that defined by CIPA. Complaint, ¶87. The companies alone decide which speech to block, and generally keep their decisions secret. Complaint, ¶¶96, 97.

In other words, CIPA will inescapably require libraries to install a system of secret censorship that blocks access by adults and minors to constitutionally protected speech. Even with technology protection measures installed, libraries will not have fully complied with the law because complete compliance is impossible. Although the law will be censorious and ineffective, libraries already use successful methods to assist patrons in finding material that they want and avoiding material they do not want. Complaint, ¶131.

Defendants have moved to dismiss the Complaints in these consolidated cases, arguing that CIPA is constitutional because libraries could avoid CIPA's censorship scheme by giving up the federal funds. As discussed more fully below, defendants' motion must be denied because plaintiffs have clearly alleged facts supporting their claim that CIPA requires libraries to set up a system of prior restraint that violates the First Amendment.

STATEMENT OF FACTS

Plaintiffs are a diverse group of public libraries, library associations, library patrons and Internet authors and publishers from across the country. Complaint, ¶1. All will be significantly harmed if libraries are forced by CIPA to block protected speech on the Internet.

The Internet is a logical extension of the public library. It offers an unprecedented range of information and serves as a public meeting place, accessible by all. Complaint, ¶¶68, 69. Over 1.5 billion web pages, message boards and discussion groups, are available to 400 million users. Complaint, ¶¶65, 112. By providing information on the Internet, speakers or "publishers" reach a worldwide interactive audience. Complaint, ¶69. Never before has communication and sharing of information among so many individuals been so simple. Complaint, ¶66. See *Reno v. ACLU*, 117 S.Ct. 2329, 2335 (1997).

The traditional role of libraries is to disseminate the widest possible range of information and ideas to the public for free. Complaint, ¶72. Libraries have played a crucial role in making the extensive resources of the Internet available to the public on an equitable basis. Complaint, ¶75. Almost all of the country's 16,000 libraries now provide library patrons with free Internet access. Complaint, ¶76. For example, plaintiff Multnomah County Public Library serves the Portland, Oregon area. It provides more than 400 Internet terminals to the public, and estimates

that up to 18,000 users per week access the Internet at the terminals in its Central Library alone. Complaint, ¶132, 136. Plaintiff South Central Library System (SCLS) provides services to fifty member libraries in central and southern Wisconsin, ranging in population from 604 in North Freedom to 200,000 in Madison. Complaint, ¶162. SCLS offers Internet access through 300 computer stations. Complaint, ¶164.

Internet access at libraries is particularly important for library patrons who cannot afford home computers or Internet access for themselves or their families. Complaint, ¶¶79, 80. For example, plaintiff Carolyn Williams has no Internet access at home and must rely on library access. Complaint, ¶206. Library Internet access is equally important to those who live in rural areas where high speed Internet access is simply unavailable from home. Complaint, ¶81. These individuals often depend on local libraries as their only connection to the Internet. Complaint. ¶¶80, 81, 181. From the Wisconsin dairy farmers who go online at plaintiff South Central Library System to purchase equipment, to plaintiff and high school student Marnique Tynesha Overby who uses the Internet at her local library in Philadelphia to complete homework assignments, the Internet provides an essential means of equalizing access and obtaining information from willing speakers. Complaint, ¶¶79, 164, 196, 197, 210.

The plaintiffs who are Internet authors and publishers ("web site plaintiffs") provide a broad spectrum of speech on the Internet, from plaintiff Jeffrey Pollock's political platform to sexual health discussions on plaintiff AfraidToAsk.com bulletin boards. Complaint, ¶¶213, 245, 221. All of the material these plaintiffs publish on the Internet is constitutionally protected. Complaint, ¶213. Nevertheless, each of their web sites is blocked by one or more leading blocking programs. Complaint, ¶212. Many blocking programs discriminate on the basis of

viewpoint to block web sites with information on "alternative lifestyles" or other "controversial" information. Complaint, ¶215. Plaintiffs PlanetOut Corporation and Ethan Interactive d/b/a/ Out In America are two of the many web sites that are blocked under these categories apparently merely because they provide information of interest to lesbian and gay communities. Complaint, ¶¶228, 241. Plaintiff Emmalyn Rood explored her own sexual orientation online by accessing plaintiff PlanetOut and similar sites at a branch of the Multnomah County Public Library; she does not want CIPA to block her from accessing them in the future. Complaint, ¶¶198-200. Blocking programs also block many pages devoted to reproductive health care and safer sex information. Complaint, ¶215. Plaintiffs Planned Parenthood Federation of America, Inc. and Safersex.org specifically seek to prevent the spread of sexually transmitted diseases and avoid unwanted pregnancies; each is blocked by at least one major blocking software product. Complaint, ¶¶212, 238, 250. The web site plaintiffs fear that CIPA will prevent many library patrons around the country from accessing their speech. Complaint, ¶214.

CIPA applies to all libraries that receive funds from either of two federal programs. The "universal service" or "e-rate" program mandates discounts from telecommunications companies for public libraries. 47 U.S.C. § 254(h). The Library Services and Technology (LSTA) program provides grants to library agencies to enhance technology for libraries and library patrons. 20 U.S.C. § 9101 *et seq*. CIPA requires public libraries that receive funds under either program to install "technology protection measures" on all Internet access terminals. When adults access the Internet, the "technology protection measures" must block obscenity and child pornography. When minors access the Internet, the measures must also block material that is harmful to minors. 20 U.S.C. § 9134 and 47 U.S.C. § 254(h); Complaint, ¶3.

There are no "technology protection measures" that comply with CIPA. Complaint, ¶¶84, 85. It is impossible for computer programs to block only unprotected speech or all unprotected speech. Complaint, ¶¶84, 85, 121, 122, 125. There is no way to fix or adapt the available programs to meet the requirements of CIPA. Complaint, ¶¶86, 114. Even a congressional commission and the Attorney General have agreed. Complaint, ¶¶116, 118.

In addition to their failure to block all of the Internet content required by CIPA, no technology blocks access to content communicated through e-mail, chat or online discussions. Complaint, ¶92. The only feasible way to prevent access to prohibited content through these interactive online features is to block access to all of the content in them, regardless of whether it is prohibited. Complaint, ¶98.

Overblocking is another inevitable flaw in these programs. Plaintiffs have alleged that available programs block thousands of sites with protected speech. Complaint, ¶105. In addition to the web site plaintiffs in this case, the major blocking programs have been found to block such sites as the map of Disney World, the San Francisco Examiner, Seventeen magazine, a Detroit radio station, the Quakers, the Mormon Church, the Glide Memorial Church, the Ontario Center for Religious Tolerance, Nizkor (a Holocaust remembrance site), the HIV/AIDS Information Center of the Journal of the American Medical Association, the National Academy of Clinical Biochemistry, the Laboratory of Molecular Medicine at Michigan State University, the University of Minnesota, the University of Newcastle's computer science division, Nike shoes, Doc Marten shoes, Hasbro Toy Company, a grocer, a Japanese baseball team, an Indiana soccer team, a list of all the passengers on the Mayflower, and the Supreme Court's decision in *Roe v. Wade*. Complaint, ¶¶104-110.

Making matters even worse, blocking program vendors generally refuse to disclose their lists of blocked sites even to their customers. Complaint, ¶97. Libraries that install these programs have no way to know what is blocked. Employees of the program vendors decide which sites to block using their subjective judgment and criteria that do not match CIPA's. Complaint, ¶95.

For libraries that receive e-rate funding, CIPA contains a provision for adult patrons to request access to a blocked web site, but only if they can establish that they have a "bona fide research or other lawful purpose." Neither the e-rate nor the LSTA restrictions provide any method for web speakers to request that a library unblock a site wrongly blocked. In addition, the e-rate restrictions do not allow minors to request unblocking. 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3).

Plaintiffs in this case do not understand what constitutes either a "bona fide research" purpose or any "other lawful purpose." Complaint, ¶¶130, 183. Libraries do not understand these terms or how they should be applied. Complaint, ¶130. Patron plaintiffs will be deterred from accessing constitutionally protected speech by having to request permission to view a particular site. Complaint, ¶184. For example, plaintiff Mark Brown would be uncomfortable divulging the details of his online research about his mother's lumpectomy to a librarian to gain access to web sites about reconstructive breast surgery. Complaint, ¶187.

There are many alternative methods for addressing the government's alleged interests without mandating the use of technology protection measures. The library plaintiffs have been using a variety of measures to guide patron usage of the Internet and have had very few complaints or problems. Complaint, ¶131. For example, plaintiff Multnomah County Public

Library utilizes a host of methods to assure that its patrons have safe and efficient access to the full range of information available on the Internet. Last year alone, over 2,000 library patrons benefited from Internet classes and volunteer "Techno Hosts" who assist patrons in their online searches. Complaint, ¶139. Multnomah County Library offers privacy screens that not only protect the privacy of the patron who is online, but prevent others from inadvertently viewing material that they may consider objectionable. Complaint, ¶141. Library patrons at Multnomah County Library also have optional blocking software at their disposal should they choose to use it. Complaint, ¶142.

ARGUMENT

I. The Court Must Accept the Facts in the Complaint as True.

In considering a motion to dismiss for failure to state a cause of action, the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1465 (3rd Cir. 1994). The complaint should not be dismissed unless defendants can demonstrate that no set of allegations will support it. *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855 (3rd Cir. 1994). Dismissal is also inappropriate where plaintiffs' legal conclusions are supported by the pleaded facts even if the facts are also consistent with some other legal conclusion. Id.[1]

[1] The government suggests that the Court must dismiss because it cannot accept plaintiffs factual "premises" (Def. Br. at 24), "assumptions" (*id*.), or "predict[ions]." Def. Br. at 29-30. Of course, plaintiffs have not proffered premises, assumptions, or predictions, but allegations that must be taken as true on a motion to dismiss. Thus, it is irrelevant that the government directly contradicts facts in plaintiffs' Complaint by suggesting that blocking programs have significantly improved "with respect to coverage and customization." Def. Br. at 28, n.19. The government's suggestion that the court must "presume" that governmental officials will act constitutionally is similarly irrelevant at this stage of the case. Def. Br. at

II. CIPA Violates the First Amendment and Imposes An Unconstitutional Condition on Libraries Who Participate in Certain Federal Programs.

A. CIPA Imposes a Prior Restraint on Protected Speech and Fails Strict Scrutiny.

Notably, the government's only real argument for dismissal is that CIPA is a valid condition on federal funds as a matter of law. See discussion *infra* at §II.B. It does not even attempt to argue that CIPA would be constitutional if imposed as a direct mandate on public libraries. The government cannot avoid plaintiffs' claim, clearly supported by the facts alleged in the Complaint, that CIPA requires libraries to impose a classic system of prior restraint which presumptively violates the First Amendment. This system is no less unconstitutional simply because Congress chose to impose it indirectly on libraries that participate in certain federal programs.[2]

Plaintiffs have alleged that there are no technology protection measures that can distinguish between protected and unprotected speech, nor any measures that can block access to all of the speech that Congress wants blocked. Complaint, ¶¶84-85, 89. In addition, CIPA forces libraries to delegate the decision about whose speech to block to private third parties -- the producers of available technology protection measures -- the vast majority of which will not even reveal to the libraries what speech they are blocking. Complaint, ¶¶88-97. Thus, by requiring libraries to install technology protection measures, CIPA requires them to establish a system of ongoing prior restraints against protected speech. As the Supreme Court held over fifty years

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[2] The defense is particularly inapposite with respect to the e-rate program, which does not even involve the use of federal funds. Complaint, &50. The federal treasury does not disburse any of the e-rate funds; instead, the federal government requires telecommunication companies to offer libraries reduced rates. It is thus doubtful, to say the least, that conditions on e-rate funding could be analyzed as if they were federal funds appropriated from the treasury pursuant to the spending clause. In addition, CIPA applies to

ago, and has confirmed on numerous occasions, "the chief purpose of the [First Amendment] is to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (striking down statute that permitted a perpetual injunction against "a malicious, scandalous and defamatory newspaper, magazine or other periodical").

It is particularly antithetical to the values underlying the First Amendment for the government to impose a prior restraint on material at a public library, which is "the quintessential locus for the receipt of information." *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d. Cir. 1992). "A library is a mighty resource in the free marketplace of ideas." *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976).

Plaintiffs will prove that available technology protection measures function literally as automated censors, blocking speech in advance of any judicial determination that it is unprotected. They arbitrarily and irrationally block speech that is fully protected, by speakers such as plaintiffs AfraidToAsk.com (providing online medical advice about highly personal health care issues), The Alan Guttmacher Institute (providing research articles and analyses about, e.g., contraceptive use and abortion), and Jeffrey Pollock (a Republican congressional candidate in the 2000 election). Complaint, ¶¶221-227, 244-246; see also *supra* Statement of Facts. Technology protection measures routinely block thousands of additional Internet speakers whose speech is not between protected and unprotected speech, even for minors. Complaint, ¶¶105-110.

"[A]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70

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privately funded computers as well as computers bought with public funds. See *infra* §II.C

(1963) (morality commission, whose purpose was to recommend prosecution of obscenity, imposed unconstitutional prior restraint by sending notices to booksellers that certain books were objectionable). A postmaster who opened all letters and refused to deliver letters with the word "sex" in them would clearly be violating the First Amendment's rule against prior restraints. See *Blount v. Rizzi*, 400 U.S. 419 (1971) (striking down statute that allowed Postmaster General to halt use of mail for commerce in allegedly obscene materials). Similarly, the government may not force libraries to block access to protected speech on the Internet simply because it disfavors the content. See *Mainstream Loudoun v. Loudoun County Library*, 2 F.Supp.2d 783, 795-96 (E.D. Va. 1998) (*Loudoun* I).

Even assuming that there were available technology protection measures that could block access only to illegal materials -- and plaintiffs allege that there are not -- the mandatory use of such programs in public libraries is still undoubtedly an unconstitutional prior restraint. As the Supreme Court reminds us, "a free society prefers to punish those few who abuse the rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975) (municipal board's denial of permission for performance of the rock musical "Hair" at a city auditorium, because of reports that the musical was "obscene," was an unconstitutional prior restraint); see also *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970) (holding that sheriff's practice of seizing R-rated movies as obscene was an unconstitutional prior restraint). The decisions by blocking program vendors "to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Bantam Books*, 372 U.S. at 70. The government may not constitutionally require libraries to let private companies make secret decisions about

what Internet sites library patrons may view.

As the Supreme Court has said, unlike a criminal penalty, "[a] prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes" it at least for the time." *CBS Inc. v. Davis*, 510 U.S. at 1317. CIPA will unquestionably block the exchange of speech that willing speakers could otherwise communicate to willing listeners in public libraries.

Only one federal court has considered the constitutionality of a policy that requires all library patrons to use technology that blocks access to Internet speech. In *Mainstream Loudoun v. Loudoun County*, the court first denied a motion to dismiss, holding that the policy clearly implicated the First Amendment. *Loudoun* I, 2 F.Supp.2d 783. Contrary to the government's characterization of the case, the court's ultimate ruling on the merits did not rest on the actual application of the particular blocking technology used by the library, but rather voided the blocking policy on its face: "Because the Policy has neither adequate standards nor adequate procedural safeguards, we find it to be an unconstitutional prior restraint." 24 F.Supp.2d 552 (E.D.Va. 1998) (*Loudoun* II). CIPA forces libraries to engage in precisely the same system of prior restraint.

Even if CIPA is not clearly invalid as a prior restraint, plaintiffs claim that it is unconstitutional because it fails to meet the strict scrutiny required of content-based regulations of speech. *Reno v. ACLU*, 117 S. Ct. at 2343-48; *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). The law is far from narrowly tailored to meet any compelling interest. Complaint, ¶257. The government argues that it has a valid interest in protecting children. See *e.g*. Def. Br. at 8-9; 28, n.18, 33. Yet CIPA does not even purport to

restrict materials only to minors, but on its face "suppresse[s] speech adults [a]re constitutionally entitled to send and receive." *Loudoun* I, 2 F.Supp.2d at 796; *Lorillard Tobacco Co. v. Reilly*, No. 00-596, slip op. at 34 (S. Ct. 6/28/01) (rejecting restrictions on tobacco advertising aired at protecting minors and noting that they also prevented adult access to protected speech); *Reno v. ACLU*, 117 S. Ct. at 2329 (invalidating Communications Decency Act, which made it a crime to communicate "indecency" to minors on the Internet); *ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000) (striking down Child Online Protection Act, which made it a crime to communicate material "harmful to minors" on the web); *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957).

The government also argues that libraries are only required to block access to obscenity, child pornography and material that is harmful to minors. But CIPA mandates that all patrons use technology protection measures, which plaintiffs allege will inevitably block a large quantity of protected speech. In addition, all of the available technology protection measures fail to protect against access to much prohibited speech. Complaint, ¶¶84-85. Thus, CIPA will be woefully ineffective in achieving its aim to prevent access to illegal speech.[3] As the *Loudoun* court noted, "even when government regulation of content is undertaken for a legitimate purpose . . . the means it uses must be a 'reasonable response to the threat' which will alleviate the harm 'in a direct and material way.'" *Loudoun* I at 797 (quoting *Turner Broadcasting v. FCC*, 512 U.S. 622, 624 (1994)). Plaintiffs have alleged that there are much less restrictive and more effective ways to assist patrons in avoiding unwanted content of all kinds, including content that

[3] Defendants imply that libraries need merely make "efforts to materially reduce" access or a "good faith effort to materially reduce." Def. Br. at 19, 26. This limiting language appears nowhere in the statute, and would do nothing to prevent the blocking of protected speech under CIPA.

could be unprotected. Complaint, ¶131; see also *Loudoun* II at 566.

B. CIPA Distorts the Usual Function of a Library -- To Provide Access to the Widest Possible Range of Ideas and Information.

CIPA's obvious censorship scheme is not magically transformed into a constitutional one merely because Congress imposed it on libraries who receive funds through federal programs. After a lengthy analysis of tangential cases and issues, even the government eventually concedes -- correctly -- that CIPA "cannot have the effect of coercing funding recipients into violating the constitutional rights of others." Def. Br. at 24. Yet that is precisely what plaintiffs have alleged. Indeed, given the allegations of the Complaint, the government's acknowledgement essentially admits that dismissal is inappropriate. Indeed, defendants cite not a single case in which a constitutional challenge to a condition on government funds was resolved on a motion to dismiss.

The most recent and relevant Supreme Court case involving First Amendment limitations on conditions attached to funding statutes is *Legal Services Corp. v. Velazquez*, __U.S. __, 121 S.Ct. 1043 (2001). Not surprisingly, defendants relegate discussion of this dispositive case to a footnote at the back of their brief. See Def. Br. at 40, n.29. In *Velazquez*, the Court invalidated a restriction on funding because the program funded private speech, not governmental speech, and because the restriction distorted the traditional function of the medium. CIPA is unconstitutional for the same reasons.

The Legal Services Corporation ("LSC") was established to distribute federal funds to eligible local grantee organizations "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 121 S.Ct. at 1046. Congress, however, prohibited legal representation funded by

recipients of LSC moneys if the representation involved an effort to amend or otherwise challenge existing welfare law. *Id*.

The Court held that this condition on the use of LSC funds violated the First Amendment rights of LSC grantees and their clients.[4] When the government "creates a limited forum for speech," or "establishes a subsidy for specified ends," "certain restrictions may be necessary to define the limits and purposes of the program." *Id*. (citing, *inter alia, Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991). However, when the government "designs a program to facilitate private speech, and not to promote a governmental message," and "seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning," the distorting restriction must be struck down. *Id*. at 1050 ("[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). These rules follow a long line of cases which limit restrictions that may be placed on government benefits. See *FCC v. League of Women Voters of Cal*., 468 U.S. 364, 396-97 (1984) (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; First Amendment forbade the government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium); *Rosenberger v. Rector*, 515 U.S. 819, 833 (1995) (striking down funding restrictions on student newspapers because the university was a "traditional sphere of free expression so fundamental to the

[4] *Velasquez* also condemned the program because it required viewpoint discrimination. 121 S.Ct. at 1049, citing *Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000). Plaintiffs have alleged in this case that available technology protection measures often engage in the most blatant viewpoint discrimination.

functioning of our society" and the funding program was designed to "encourage a diversity of views from private speakers"); *Lamb's Chapel v. Center Moriches Union Free School Dist*., 508 U.S. 384, 394 (1993) (government may not use subsidy to "favor some viewpoints or ideas at the expense of others").

Like the program at issue in *Velazquez*, the e-rate and LSTA programs in CIPA were designed to facilitate private speech -- between library patrons and Internet speakers -- not to promote a governmental message. *Velazquez*, 121 S.Ct. at 1049. Congress established these programs specifically to provide library patrons with access to the diverse speech of the Internet. Complaint, ¶¶48-53, 61, quoting 47 U.S.C. § 254(h) (purpose of statute is to ensure Internet access "in all regions of the Nation"); § 254(b)(3). Just as in *Velazquez*, CIPA takes an existing medium of expression, the public library, and distorts its usual functioning. 121 S. Ct. at 1049. "The First Amendment forb[ids] the Government from using for[a] in an unconventional way to suppress speech inherent in the nature of the medium." *Id*. (citing *League of Women Voters of Cal.*, 468 U.S. at 396-97).

Plaintiffs have alleged that the traditional function of libraries includes providing confidential access to a wide variety of uncensored information. Complaint, ¶¶72-82, 122, 130. Just as public universities and the press are traditional spheres of free expression, see *Rust*, 500 U.S. at 199-200 (citing *Keyishian v. Board of Regents*, 384 U.S. at 603, 605-6), the very purpose of public libraries is to provide free access to books, ideas, resources, and information for education, employment, enjoyment and self-government. Libraries celebrate and preserve democratic society by making available the widest possible range of viewpoints, opinions, and

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Complaint, &88.

ideas. Complaint, ¶72. The Internet has now provided unprecedented opportunities to expand the scope of information from around the globe that is available to users in public libraries, at substantially less cost than comparable amounts of printed material. If there was ever a context in which government should not be allowed to impose content controls through subsidies, it is the public library. Especially in public libraries, "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982).

As the Supreme Court has held, the only setting in which the government is permitted to discriminate on the basis of content in funding speech is where the government itself "is the speaker or . . . enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. at 199); *Velazquez*, 121 S.Ct. at 1046. When libraries offer diverse information resources to the public, they certainly do not provide government speech. Nor are Internet content providers "government speakers." *Id*. at 1049.

The government implies that the restrictions are justified because the e-rate and LSTA programs were established only for "educational purposes." The language of their implementing statute is much broader. The e-rate program is designed to ensure Internet access in "all regions of the Nation," 47 U.S.C. § 254(h), and the mission of the LSTA program includes the promotion of "targeted library services to people of diverse geographic, cultural and socioeconomic backgrounds, to individuals with disabilities, and to people with limited literacy or economic skills." 20 U.S.C. § 9122(5).

Even if the programs were established for "educational purposes," this very broad statement of purpose is of course consistent with the general mission of public libraries, and in

no way justifies the censorship scheme required by CIPA. Congress presumably has no problem with library patrons accessing sports web sites, Stephen King fan sites, or stamp collector sites, though some might argue over whether such sites are "educational." In addition, as the Supreme Court responded to a similar argument made by the government in *Velazquez*, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." 121 S.Ct. at 1052. Far from being justified by the purpose of the federal programs or the traditional function of libraries, CIPA distorts them in precisely the manner found unconstitutional in *Velazquez*.

C. CIPA's Unconstitutional Mandate Extends Beyond Government Spending Because It Applies to Privately Funded Computers.

CIPA is also invalid because its unconstitutional conditions reach far beyond the funded programs. See *League of Women Voters of Cal.*, 468 U.S. at 400 (conditioning funding to public broadcast stations to those that do not "engage in editorializing" not justified under Spending Clause; even a station that received only one percent of its overall income from federal grants was barred absolutely from all editorializing, and such station would have no way of limiting use of federal funds to noneditorializing activities and would be barred from using even wholly private funds to finance such activity); *Velazquez*, 121 S. Ct. at 1051.

Remarkably, the government argues that "CIPA contains nothing that would prohibit a library or library system from providing unrestricted access to the Internet so long as it does so through an affiliate organization that is suitably distanced from facilities supported by government subsidies." Def. Br. at 35-36. But the statutory language contains precisely such a prohibition, providing that in order for a library to obtain federal funding under the e-rate or LSTA

program, it must install technology protection measures on all of its computers offering Internet access.[5] In other words, if a library funds only half of its Internet terminals through the e-rate or LSTA programs, it must nevertheless install technology protection measures on all of its terminals or lose the federal funds.

Even if allowed under CIPA, it is unreasonable and impractical, and beyond any power conferred by the Spending Clause, to require libraries to "create" new facilities just to house unrestricted Internet terminals when they do not want to restrict Internet access in the first place. See *League of Women Voters of Cal*., *supra*. The e-rate and LSTA programs were designed specifically to provide Internet access to libraries most in need because they serve significant populations of indigent persons who have no other access to the Internet. See *Velazquez*, 121 S.Ct. at 1051 ("The restriction on speech is even more problematic because . . . [t]here will often be no alternative source for the client to receive vital information . . ."). Libraries are a vital point of access to the Internet for many library patrons who cannot afford home computers or Internet access. Complaint, ¶¶189, 197, 206. The Hartford Public Library, a member of plaintiff Connecticut Library Association, receives an 89 percent e-rate discount because of the high number of low income people it serves. Complaint, ¶146. Libraries have no alternative "separate set of facilities" where they could provide unfiltered access to the Internet, and "creating" these new facilities would be so costly as to swallow the benefit of the funding programs. Thus, "with respect to the . . . services Congress has funded, there is no alternative

[5] See 47 U.S.C. § 254(h)(6)(i)-(ii) (library must certify that technology protection measures are in place on "*any* of its computers with Internet access" and "during *any* use of such computers") (emphasis supplied); 20 U.S.C. §9134(f)(1)(B)(i)-(ii) (same). Not a word in the statute or its implementing regulations suggests that a library or its Board of Directors may create a separate entity to operate unrestricted terminals without violating the statute.

channel for [the] expression . . . Congress seeks to restrict." *Velazquez*, 121 S. Ct. at 1051.

D. The "Bona Fide Research" Exception Exacerbates CIPA's Constitutional Defects.

Defendants argue that CIPA's "bona fide research" exception vitiates any of the constitutional problems with the statute. In fact, the exception only worsens the statute's defects. Libraries that receive e-rate funding may only "disable the technology protection measure . . . during use by an adult, to enable access for bona fide research or other lawful purpose." 47 U.S.C. §254(h)(6)(D); see also Defs. Br. at 10 and 31, n. 20 (no unblocking for minors under any circumstances). Libraries that receive LSTA funds may do the same, but the exception is not limited to adults. 20 U.S.C. §9134(f)(3). The statute provides no definition of "bona fide research or other lawful purpose" and plaintiffs have alleged that they do not understand the terms.[6] Complaint, ¶130. In addition, it would be "practically and technologically infeasible for the library plaintiffs to install a technology protection measure that could be temporarily disabled upon" that showing. Complaint, ¶129. Moreover, the statute only provides that libraries "may" unblock. It does not require them to do so.

Ignoring the overall language of CIPA's unblocking exception, defendants argue that librarians may unblock sites for any "lawful purpose," not merely one that involves "bona fide research." Def. Br. at 30-31. This broad interpretation of the statute would make the "bona fide research" language irrelevant. All lawful access would be permissible and therefore language

[6] Citing *South Dakota v. Dole*, 483 U.S. 203 (1987), defendants argue that CIPA's conditions are "unambiguous" because the statute clearly requires libraries to certify compliance. Def. Br. at 19-21. That ignores the vagueness inherent in the statute's mandates. The library plaintiffs do not understand the meaning of the "bona fide research" exception, and the patron plaintiffs do not know whether they would be entitled to it. Plaintiffs likewise have no idea what technology protection measures will suffice to constitute compliance. In the FCC regulations regarding the e-rate provisions in CIPA, the agency refused to respond to requests for guidance on these questions. FCC Report and Order, 01-120 (March 30, 2001)

specifically protecting "bona fide research" would be unnecessary. Though the "lawful purpose" language is vague, an interpretation that requires librarians to determine whether a patron has a specific "lawful purpose" such as "bona fide research" is more consistent with the language of the statute.

Defendants also argue that CIPA does not require libraries to make unblocking decisions on a "case-by-case" basis, but they fail to offer any alternative consistent with the language of the statute. Def. Br. at 31. Even under a broad interpretation, the language of the unblocking exception contemplates review of every individual request from a patron. The technology must be running during "any" use of the Internet. *E.g*. 47 U.S.C. §254(h)(6)(C). Libraries may only disable it "during use by an adult, to enable access for bona fide research or a lawful purpose" 47 U.S.C. §254(h)(5)(D) (applying to e-rate participants); see also 20 U.S.C. §9134(f)(3) (similar exception for libraries who only participate in LSTA program, but not limited to adults).[7] By definition, all library patrons will not share the same "purpose" when they access the Internet. The focus of the exception on a specific "adult" and "purpose" implies that libraries must make a case-by-case determination for each and every library patron that seeks access.

Even applying the most generous reading, the unblocking exception is a classic example of a standardless licensing scheme which violates the long-standing First Amendment principle prohibiting the government from requiring permission before granting access to protected speech. In *Lamont v. Postmaster General*, 381 U.S. 301, 381 (1965), the Supreme Court held

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at &34, &35 ("this proceeding is not the forum to determine whether such measures are fully effective").

[7] It is not clear under the statute if a librarian may unblock access to sites that contain material that is "obscene," "child pornograph[ic]," or "harmful to minors." If the librarian may not unblock such sites, then the exception is an acknowledgment that non-obscene (*i.e.* constitutionally protected) sites will be blocked by existing "technology protection measures."

unconstitutional a statute that directed the Postmaster General not to deliver communist propaganda to postal patrons unless they first returned to the Post Office a card bearing their names and addresses and specifically requesting that such materials be sent to them, *id*. at 302-04, "because it require[d] an official act [returning the reply card] as a limitation on the unfettered exercise of the addressees' First Amendment rights." *Id*. at 305. Just as in *Lamont*, CIPA's unblocking policy "forces adult patrons to petition the Government for access to otherwise protected speech." See *Loudoun* I, 2 F.Supp.2d at 797. CIPA is even more offensive than the statute in *Lamont*. In *Lamont*, the Postmaster performed the ministerial act of automatically granting access. Here, librarians are required to make individual determinations.

As plaintiffs have alleged, the vast majority of library patrons will never seek permission under CIPA's unblocking scheme. Complaint, ¶183. They will be unwilling to ask for access to a blocked site because they are seeking "sensitive, controversial information that would be awkward to reveal to a stranger; because of the stigma and burden of asking for access to a site that is blocked; because of the discomfiture of having to justify why they need access to the site for a 'bona fide research purpose,' because an administrator wrongly refuses to unblock a site; or because they need the information immediately." *Id*. This chilling effect is yet another vice of a government-mandated permission requirement.[8] *Denver Area Ed. Telecomm. Cons. V. FCC*, 518 U.S. 727 (1996) (invalidating statute that would require cable subscribers to seek permission

[8] Defendants argue that any deterrent effect on access to speech is justified either by an asserted lack of confidentiality inherent in libraries or by the compelling interest in protecting children. Def. Br. at 33. But plaintiffs have specifically assert that "privacy and anonymity rights" are "longstanding practices and policies of the library community." Complaint, &130. They have also alleged that there are more effective, narrowly tailored alternatives for assisting all patrons in avoiding unwanted content. Complaint, &131. See also *e.g.* Complaint, &&139-142, 149, 158, 165, 170. Resolution of these factual disputes is inappropriate on a motion to dismiss.

before they could access sexually explicit programs); *Reno*; *Reno v. ACLU*, 117 S. Ct. at 2337 (noting that password requirement would discourage online users).

In addition, such a standardless system of prior restraint is never tolerated unless "it operate[s] under judicial superintendence and assure[s] an almost immediate judicial determination of the validity of restraint." *Bantam Books*, 372 U.S. at 70; see also *Freedman v. Maryland*, 380 U.S. ___, at 58-9 (1965); *Heller v. New York*, 413 U.S. 483, 492 (1973) ("judicial determination of [an] obscenity issue in an adversary proceeding" required before a film's exhibition could be restrained by seizing all copies); *Copies of Books v. Kansas*, 378 U.S. 205 (1964) (confiscations of books and films deemed "obscene" unconstitutional in the absence of prior adversarial hearing); *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961) (rigorous procedural safeguards must be employed before the government may seize that which it subjectively determines is "obscene").

The defects of the unblocking exception are not avoided because CIPA refers only to illegal speech, as defendants suggest. Def. Br. at 32 and n. 21. It does not apply only to illegal speech and its censorious impact will not be confined to only illegal speech. In any event, courts have struck down numerous government efforts to squelch allegedly "obscene" speech because they lack standards and judicial review. See *e.g.*, *DriveIn Theatres*, 435 F.2d 228; *Bantam Books*, 372 U.S. 58. CIPA has no protections at all. Web speakers have no way to learn whether they have been blocked or whether librarians have refused to unblock their speech. Complaint, ¶217. Patrons have no way to appeal a decision denying access.

In short, the "bona fide research" exception in CIPA requires a system in which librarians, untrained in the law, make unreviewable legal determinations that suppress speech.

The Loudoun court held that a similar unblocking system was unconstitutional because "[i]t is undisputed that the Policy lacks any provision for prior judicial determinations before material is censored," and is "completely lacking in standards." *Loudoun* II at 569. This was inherent in "defendant's willingness to entrust all preliminary blocking decisions -- and, by default, the overwhelming majority of final decision[s], to a private vendor." *Id*.

Defendants argue that the Court should not assume that librarians will abuse their discretion in deciding whether to grant access to blocked sites. They assert that CIPA's requirements are consistent with the "discretion" library officials already have to "make determinations regarding the availability of library materials."[9] Def. Br. at 29-30. But as the *Loudoun* court noted, "[u]nlike more traditional libraries . . . considerations of cost or physical resources cannot justify [the government's] decision to restrict access to Internet materials." *Id*. at 795. The government is comparing apples to oranges -- a librarian's decision about what books to offer on the shelves, when limited by funds and shelf space, is quite different from a federal government mandate that requires librarians to determine whether patrons have a legitimate purpose each time they want access to protected speech on the Internet.

III. The First Amendment Claims of All of the Plaintiffs Present a Ripe Case or Controversy.

Defendants' motion also asks the Court to dismiss the patron and web site plaintiffs' claims as unripe.[10] Def. Br. at §III. Defendants correctly suggest that the essence of the ripeness

[9] Even defendants concede that this "discretion" is limited by the First Amendment. Def. Br. at 27, n. 17, citing *Board of Ed. v. Pico*, 457 U.S. 853 (1982) (holding that decision to remove books from school library was unconstitutional).

[10] Defendants may be making a standing argument wrongly couched as a ripeness argument. All of the plaintiffs clearly have standing to bring this facial challenge. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988). To the extent that there is any question of standing, it is clear that this case may proceed so long as one plaintiff has standing. *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990). In

doctrine is to ensure that courts do not reach "abstract disagreements." Def. Br. at p. 42, quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). The ripeness doctrine considers "[t]he probability [that a] future event occurring is real and substantial [and] of sufficient immediacy and reality to warrant the issuance of a declaratory judgement." *Presbytery of New Jersey v. Florio,* 40 F.3d 1454, 1463 (3d Cir. 1994) (internal quotations and citations omitted) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460 (1974)).

Defendants incorrectly apply the doctrine to the facts of this case. Neither of their two principal arguments, "that the parties do not know how CHIPA ultimately will be administered by any library," and that plaintiffs would not "suffer any hardship should this Court withhold judicial consideration of the First Amendment claims," has merit.

The first argument aims at the wrong target, because all of the plaintiffs' attack CIPA on its face, and the allegations of the Complaint make plain that the statute will operate unconstitutionally regardless of the details of its implementation in particular libraries. Plaintiffs have alleged that no library is capable of constitutionally implementing the requirements of CIPA. Complaint, ¶125. Use of blocking programs will inevitably block constitutionally protected speech, including that of the Web site plaintiffs, and prevent the patron plaintiffs from accessing that speech.

Defendants ignore dozens of cases allowing pre-enforcement First Amendment facial challenges.[11] See, *e.g., Virginia v. Am. Booksellers Assoc., Inc.*, 484 U.S. 383, 393 (1988)

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addition, because of their role in the system of freedom of expression, plaintiffs may assert the issues of their patrons, users and readers. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988); *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 789-99 (1984).

[11] *Laird v. Tatum*, 408 U.S. 1 (1972), cited by defendants, is easily distinguishable. In *Laird*, the Court

(allowing pre-enforcement suit challenging statute barring display of material "harmful to minors" because plaintiffs have well-founded fear of enforcement, and the "alleged danger of the statute is one of self-censorship"); *Buckley v. Valeo*, 424 U.S. 1, 116 (1976) (holding First Amendment claim was ripe because while challenged Commission had not yet exercised its powers, the "date of their all but certain exercise" was drawing near); *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (noting that impending injury, as opposed to consummated injury, can be sufficient for ripeness in context of First Amendment claim); *Steffel v. Thompson*, 415 U.S. 452, 523-24 (1974) (holding, in challenge to criminal trespass statute used to coerce plaintiff not to distribute anti-Vietnam War leaflets at local mall, that claim is still ripe despite lack of pending prosecution, because threat of prosecution exists); *Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1469 (3d Cir. 1994) ("To the extent . . . that [other courts have] held that a facial challenge to a statute that seeks to proscribe otherwise protected First Amendment conduct . . . is not ripe until a concrete factual situation is before the court, we disagree").

Defendants' second argument is also without merit, as there is no question that all of the plaintiffs will be harmed by CIPA's blocking requirements. The Complaint more than adequately alleges the ways in which CIPA presents a real and substantial threat to the First Amendment rights of both the web site plaintiffs and the patron plaintiffs. The government does not deny that CIPA will force libraries throughout the nation to install blocking programs. Plaintiffs will prove that these programs block a wide range of protected web sites. Complaint,

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held that plaintiffs' First Amendment challenge to an Army intelligence program monitoring civilian protests was unripe. Although plaintiffs claimed that Army information gathering that could lead to action against them would chill their speech, the Court determined this was too attenuated to create an imminent threat. Unlike *Laird*, plaintiffs' claims here depend not on subjective chill or inhibition, but on the fact that all of the available blocking programs will eliminate protected speech.

¶¶104-110. From plaintiff and Libertarian candidate Wayne Parker's political commentary to plaintiff Naturist Action Committee's communication with the public about the nudist lifestyle, the web site plaintiffs provide valuable information to the public. Complaint, ¶¶213, 232, 234, 235. Nevertheless, each of the web site plaintiffs and thousands of other valuable pages of information are currently blocked by one or more of the leading blocking programs. Complaint, ¶212.

In addition, each of the patron plaintiffs has alleged that they conduct research in their libraries seeking the kind of information that is blocked by the leading blocking programs. *E.g*. Complaint, ¶¶187, 189, 193, 199, 209. For example, plaintiff William Rosenbaum is disturbed that the Quaker web site has been blocked, since this would prevent him from accessing the full spectrum of information about his religion. Complaint, ¶203. All of the named library and library association plaintiffs also sue on behalf of their library patrons. The complaint alleges that most library patrons will be deterred or unable to qualify for CIPA's unblocking exception. Complaint, ¶183. As many libraries will no doubt be forced to install blocking programs as a result of CIPA, the government does not, and could not, contend that the case is too attenuated to be ripe.

The central issue in this case -- whether the government can require libraries to impose a system of prior restraint that will harm library patrons and Internet speakers -- is clearly ripe for review based on the facts pleaded in the Complaint.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully ask the Court to deny defendants' motion to dismiss.

Respectfully submitted,

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