No. 02-361

IN THE
Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

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

Appellees.

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

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AUTHORS GUILD, INC., CENTER FOR DEMOCRACY AND TECHNOLOGY, COMIC BOOK LEGAL DEFENSE FUND, MAGAZINE PUBLISHERS OF AMERICA, NATIONAL WRITER'S UNION, PUBLISHERS MARKETING ASSOCIATION, PEN AMERICAN CENTER, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Cited Authorities

INTRODUCTION AND INTEREST OF THE *AMICI*[1]

Amici Association of American Publishers, Inc., American Booksellers Foundation for Free Expression, American Society of Journalists and Authors, American Society of Newspaper Editors, Authors Guild, Inc., Center for Democracy and Technology, Comic Book Legal Defense Fund, Magazine Publishers of America, National Writer's Union, Publishers Marketing Association, PEN American Center, and Society of Professional Journalists are organizations whose members – including writers, editors, book and magazine publishers, and booksellers – have a profound interest in the vigorous exercise of their own First Amendment rights as well as those of the reading public.[2] *Amici*'s members are responsible for providing the reading public with ideas and information in every literary genre, both in traditional print media and, increasingly, over the Internet. As such, *amici* are concerned with safeguarding the ability of library patrons to access online the full range of the constitutionally protected materials that they write, publish, market, distribute, and sell.

As representatives of entities and individuals that both depend upon and sustain the rights guaranteed by the First Amendment, *amici* have long fought to safeguard those rights as they pertain to creators, distributors, and recipients of expressive works against abridgement by government, including attempts to censor content on the Internet. The Children's Internet Protection Act (CIPA) represents the government's latest attempt to muzzle the uniquely powerful communicative medium that is the Internet. *Amici* submit this brief in support

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1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained, and are herewith lodging, the written consents of the parties to the filing of this brief.

2. *Amici* are more fully described in the Appendix.

of Appellees' effort to invalidate Congress' constitutionally insensitive attempt, through CIPA, to condition the receipt of federal funds by public libraries on the implementation of censorship in the form of Internet filtering. In doing so, *amici* seek to vindicate "the central concern of the First Amendment . . . that there be a free flow from creator to audience of whatever message [an expressive work] might convey." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring).

The vast majority of public libraries in this country have embraced the Internet as a cost-effective means of dramatically expanding the amount of information available to their patrons. In providing Internet access, public libraries have created designated public fora for expressive activity. Consistent with the First Amendment, content-based regulation of that expressive activity can only be carried out in a manner that can survive strict scrutiny, which CIPA's mandated filtering cannot. The district court's exhaustive factual findings convincingly document the conclusion that mandated filtering of Internet-enabled computers in public libraries is an ill-conceived means of preventing library patrons from accessing child pornography, obscenity, and, in the case of minors, material that is "harmful to minors." The unavoidable suppression by filtering software of valuable, constitutionally protected expression, such as that created by many of *amici*'s members, covering a vast range of essential subjects, from sexuality to politics, demonstrates that CIPA is not a narrowly tailored means of advancing Congress' goal of ensuring that library computers are not used to access unprotected sexual material.

While *amici* are sensitive to the desirability of shielding both minor and adult library patrons from unlawful images, Congress cannot seek to achieve that goal using means that subvert the very purpose of offering Internet access to library patrons by suppressing protected expression.

Appellants' characterization of CIPA as merely giving libraries a means to exercise "broad discretion to make content-

based judgments in selecting material for their collections," in the same manner as they decide whether to acquire particular books, is misguided. App. Br. at 12. In reality, CIPA *deprives* local libraries of the discretion to determine appropriate guidelines for Internet usage. CIPA takes such decisions away from libraries and delegates them to software filtering companies whose proprietary criteria for blocking material are completely hidden from public scrutiny. This is in no way analogous to a decision by librarians to acquire a book on Mark Twain rather than one on rap music, for example. It is, instead, analogous to the scissoring by a government contractor of important articles from a magazine to which the library subscribes and to which library patrons expect full access.

The autonomy interests of local communities are ill-served by the choice with which CIPA, as a practical matter, presents many of them: offering no Internet access, on the one hand, or offering it only as radically abridged by third-party censors, on the other. The Constitution does not permit Congress to impose this unpalatable choice. The less restrictive alternatives catalogued by the district court, several of them recommended by two government studies, permit local communities and their public libraries to establish policies governing Internet usage by children and adults while making available the vast resources of the Internet for those who may rely on libraries as their only means of Internet access.

Because of these infirmities, *amici* urge the Court to affirm the district court's ruling that CIPA is an unconstitutional exercise of Congress' spending power.

SUMMARY OF ARGUMENT

As this Court has recognized, the Internet has become a modern-day publishing house, with immense amounts of material available twenty-four hours a day, and more content being added by the second. From the largest newspapers to the most unknown individuals, the Internet has become a preeminent means of distributing information throughout the world. The

vast majority of public libraries in the country have embraced the Internet, which dramatically enhances their ability to make ideas and information available to their patrons. The Children's Internet Protection Act, which conditions certain federal funding on the mandatory use of Internet filters by public libraries, would severely diminish the capacity of library patrons to access constitutionally protected materials via the Internet.

The district court correctly concluded that a public library's provision of Internet access constitutes a designated public forum and that CIPA's content-based restrictions on that forum are subject to strict scrutiny. Appellants' attempt to avoid public forum analysis by analogizing Internet filtering to a library's collection development practices is flawed. By arguing that a library has broad discretion in determining which books and magazines to include in its collection and should have the same discretion to filter the Internet, Appellants mischaracterize the effect of CIPA, which in fact *deprives* libraries of discretion to establish Internet use guidelines. Moreover, several key differences between a library's traditional collection development practices and its provision of Internet access, such as the lack of editorial judgment involved in providing Internet access in a library, undermine Appellants' strained analogy.

Appellants also err in claiming that even if a library's provision of Internet access is a designated public forum, only reasonableness review should apply. Libraries have decided to provide unfiltered Internet access to their patrons for expressive activity, and CIPA regulates expressive activity that is consistent with that forum. As such, Appellants carry the burden of demonstrating that CIPA is narrowly tailored to serve a compelling government interest using the least restrictive means. This is a burden Appellants cannot meet. As the district court correctly determined, in attempting to restrict obscenity, child pornography, and material harmful to minors – the targets of CIPA – Internet filters block substantial amounts of constitutionally protected material, ranging from World Wide Web sites devoted to the Bible to sites addressing health-related

issues. Additionally, numerous less restrictive alternatives, including Internet usage policies and more flexible filtering schemes, are available. Appellants have failed to demonstrate that these alternatives would be less effective than mandated Internet filters on all library computers. Accordingly, CIPA must be struck down because it would cause libraries to violate the First Amendment rights of library patrons.

ARGUMENT

In 2000, Congress enacted the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, which requires that in order to receive grants under the Library Services and Technology Act, 20 U.S.C. §§ 9101, *et seq*. (LSTA), and "E-rate" discounts under the Telecommunications Act of 1996, 47 U.S.C. § 254, public libraries must certify that on every Internet-enabled computer (whether or not purchased with government funds), they are using a "technology protection measure" that prevents patrons from accessing "visual depictions" that are "obscene," "child pornography," or in the case of minors, "harmful to minors." 20 U.S.C. § 9134(f)(1)(A) (LSTA); 47 U.S.C. §§ 254(h)(6)(B) & (C) (E-rate). *See also American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 406-07 (E.D. Pa. 2002). In other words, CIPA mandates Internet filtering by public libraries as a condition of receiving sorely needed federal funding for computers, equipment, and Internet access.

The three-judge district court panel unanimously invalidated CIPA as an unconstitutional exercise of Congress' power under the Spending Clause on the ground that it requires libraries to violate the First Amendment rights of their patrons as a condition of receiving federal funds. *American Library Ass'n*, 201 F. Supp. 2d 401. *See also South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (Congress' spending power is subject to restrictions, including a bar on funding conditions that induce the recipient to violate constitutional provisions). In so holding, the court below rejected the government's claim that CIPA's filtering requirement should be subject only to rational basis or

reasonableness review. Instead, applying strict scrutiny, the court held that CIPA is not narrowly tailored, in part because all currently available filtering software necessarily blocks a substantial amount of material that is not obscene, child pornography, or harmful to minors. The court also found that the existence of less restrictive alternatives to filtering rendered CIPA unconstitutional. As explained below, the district court was correct in all respects.

I. THE INTERNET FURTHERS THE PURPOSE OF LIBRARIES IN FOSTERING FREEWHEELING INQUIRY

CIPA must be evaluated in light of the mission of libraries and the relationship of Internet access to that mission. Public libraries in America for centuries have played a special role in the circulation of ideas, the education of the citizenry, and the promotion of enlightened discourse. The roots of this tradition trace to Benjamin Franklin, who in 1731 founded the first subscription library in the American colonies. In his autobiography, Franklin extolled the achievements of the nation's libraries: "These libraries have improved the general conversation of the Americans, made the most common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges." BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (1793) (cited in Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 220 (2001)).

No less so than in the eighteenth century, public libraries today embody and further the free expression and freedom of thought and inquiry that are protected by the First Amendment. As federal courts have noted, a public library is a place of "freewheeling inquiry," *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), a "mighty resource in the free marketplace of

ideas," *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976), and the "quintessential locus of the receipt of information," *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992). The district court in this case observed that public libraries "generally share a common mission – to provide patrons with a wide range of information and ideas." *American Library Ass'n*, 201 F. Supp. 2d at 420.

This mission has benefited enormously from the virtually limitless resources that the Internet has made available at the touch of a button to library patrons throughout the country. More than ninety percent of the nation's public libraries now provide public access to the Internet, and many of these libraries allow patrons to explore this virtual encyclopedia with few restrictions. *American Library Ass'n*, 201 F. Supp. 2d at 422.

As this Court has recognized, the Internet's remarkable success in expanding the "marketplace of ideas" has produced unprecedented benefits for content providers, immeasurably enriching and amplifying their communicative powers: "From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997) ("*ACLU*"). Today, for example, most major newspapers and magazines, from *The New York Times* to *Newsweek*, offer online editions of their publications, typically as quickly as – if not more quickly than – the hard copies hit the streets. In similar fashion, traditional book and magazine publishers sell and offer samples of their content online. These include Random House, which has a section of its site devoted to "e-books" (http://www.randomhouse.com/ebooks), and HarperCollins, whose site provides extensive descriptions and excerpts of its books (http://www.harpercollins.com). Barnes & Noble now sells both traditional print ebooks and e-books over the Internet. (http://www.barnesandnoble.com), while *Slate* magazine (http://

slate.msn.com), a journal of commentary on politics and culture, is one of the Internet's premier publications.

Many authors have taken advantage of the Internet to reach new audiences with greater immediacy. In an ongoing experimental endeavor, Stephen King recently turned to the Internet to publish a serial novel on his Web site (http://www.stephenking.com). *See* M.J. Rose, *Stephen King, the E-Publisher,* WIRED NEWS, June 11, 2000, *at* http://www.wired.com/news/culture/0,1284,36915,00.html. Political commentators have similarly embraced the "weblog" phenomenon and supplemented their publications in print magazines with daily analysis of current events on the World Wide Web. *See*, *e.g.*, Andrew Sullivan, *The Daily Dish*, *at* http://www.andrewsullivan.com; Mickey Kaus, *Kausfiles*, *at* http://www.kausfiles.com. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *ACLU*, 521 U.S. at 870. Several of the respondents in this case exemplify the range of valuable, and sometimes controversial, information available on the Internet to readers throughout the world. *See American Library Ass'n*, 201 F. Supp. 2d at 415-16.

As most public library libraries throughout the country have recognized, the vast and diverse materials accessible on the Internet, which change daily, add depth and breadth to the potential experience of library patrons, many of whom have no means of Internet access other than their local library. *See American Library Ass'n*, 201 F. Supp. 2d at 422. In the words of Appellee ALA, "The Internet is a rich and educational resource for information, ideas and entertainment. No other medium has provided us with so much information so easily." American Library Association, *Libraries & the Internet Toolkit*, *available at* http://www.ala.org/alaorg/oif/internettoolkit.html ("ALA *Internet Toolkit*"). For readers, the Internet is one of the best means of exposure to a diversity of

views and expressions, as well as goods and services. "The Web is . . . comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *ACLU*, 521 U.S. at 853.

Of course, some of the material available on the Internet is pornography that is illegal for minors, adults, or both, although, as this Court has recognized, "users seldom encounter such content accidentally." *ACLU*, 521 U.S. at 854. CIPA represents an attempt by Congress to curb the use of the Internet by library patrons to access such material. But, as explained below, because CIPA seeks to restrict speech in a public forum in a way that interferes with the flow of valuable, constitutionally protected information over the Internet, and thus impedes the mission of libraries, it fails strict scrutiny and must be struck down.

II. FORUM ANALYSIS APPLIES TO THE PROVISION OF INTERNET ACCESS IN PUBLIC LIBRARIES

A. Internet Access in Public Libraries Is a Designated Public Forum

When the government regulates expressive activity on public property, those regulations are subject to constitutional scrutiny under the standards established by this Court's public forum doctrine. The Court has recognized three categories of public fora: the traditional public forum, the designated, or limited, public forum, and the nonpublic forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). In a traditional public forum, such as streets and parks, any content-based restrictions on speech must be narrowly tailored to advance a compelling government interest, and there must be no less restrictive alternative. *Id.* at 45; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Similarly, when the government creates a designated public forum, which consists of "public property which the state has opened for use by the public as a place for expressive activity," the government "is bound by the same standards as apply in a traditional public

forum." *Perry*, 460 U.S. at 45-46. *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (government creates a public forum "by intentionally opening a nontraditional forum for public discourse"). In a nonpublic forum, government regulations must be merely reasonable and viewpoint-neutral. *Id.* at 46.

In determining whether the government has created a designated public forum, the Court looks to "the policy and practice of the government," as well as to "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id. See*, *e.g.*, *Kreimer*, 958 F.2d at 1259-62 (holding that public library was limited public forum based on government's intent in opening library to expressive activity, broad extent of use granted, and nature of forum and its compatibility with expressive activity).[3]

As the district court correctly determined, a public library creates a designated public forum when it provides Internet access. First, Internet access in a library is obviously compatible with "expressive activity"; indeed, it is perhaps the most powerful medium for expressive activity ever invented. Further, as noted, providing Internet access helps libraries advance one of their central purposes: the dissemination of ideas. As Appellee ALA's "Freedom to Read Statement" advises:

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3. In identifying the relevant forum, the Court looks to the access sought by the speaker. "In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Cornelius*, 473 U.S. at 801 (for purposes of exclusions from a federal employee charity drive, proper forum is not entire federal workplace, but charity drive to which respondents sought access). Because the access sought that is at issue here is to the Internet, not to libraries as a whole, the district court held that the "relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, such as the Internet, but rather the specific forum created when the library provides its patrons with Internet access." *American Library Ass'n*, 201 F. Supp. 2d at 456. The unique characteristics of the Internet fully support this aspect of the court's decision.

"It is in the public interest for publishers and librarians to make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority." American Library Association, *Freedom to Read Statement*, *available at* http://www.ala.org/alaorg/oif/freeread.html. The longstanding deliberate "policy and practice" of libraries across the country of making the Internet available to library patrons greatly enhances the ability of libraries to further that interest. It is clear, therefore, that Internet access in public libraries is a designated public forum for exploration of "the widest diversity of views and expressions." *Id.*

The only other court to address the constitutionality of Internet filtering in public libraries, the Eastern District of Virginia in *Mainstream Loudoun v. Board of Trs. of Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998), determined that Loudoun County intended to designate the county's libraries as public fora "for the limited purposes of the expressive activities they provide, including the receipt and communication of information through the Internet." *Id.* at 563. The court also concluded that the county had broadly opened the libraries to the public at large and that the nature of the libraries was compatible with the receipt and communication of information through the Internet. *Id.* The court thus held that a library is a limited public forum for purposes of its analysis of the constitutionality of mandated Internet filtering in county libraries. *Id.*

As is evident from the *Loudoun* decision, designated public forum analysis is appropriate in this case whether the forum is deemed to be Internet access (as the district court held) or the library as a whole (as the *Loudoun* court held).[4] This conclusion

4. The *Loudoun* court struck down a county policy that required all county libraries to install Internet filtering software to block material that was obscene, child pornography or harmful to minors, on the ground that it was an unconstitutional prior restraint. *Amici* believe CIPA is unconstitutional on that ground as well, for the reasons stated in *Loudoun*. Since the district court did not reach that issue, *amici* do not address it further herein.

is reinforced by the numerous other decisions in which public libraries have been held to be designated public fora.[5]

B. Appellants' Claim That Internet Filtering Is No More Subject to Judicial Scrutiny Than Library Collection Development Is Flawed

Appellants attempt to avoid forum analysis altogether by characterizing Internet filtering as a library collection development practice. They argue that libraries have broad discretion in determining which books, magazines, and other materials to include in their collections, and that the same deference must be accorded to a library's decision to install Internet filtering software. App. Br. at 17-32. Thus, Appellants assert that

> a public library's need to exercise judgment in making collection decisions depends . . . on the traditional role that public libraries play in our society in identifying material that is suitable and worthwhile for their patrons. A library is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source.

Id. at 28. This assertion is misguided in several respects.

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5. *See*, *e.g.*, *Kreimer*, 958 F.2d at 1259 ("[T]he Library constitutes a limited public forum, a type of designated public fora."). *See also Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) ("Examples of designated public fora include . . . public libraries."); *Neinast v. Board of Trs. of Columbus Metro. Library*, 190 F. Supp. 2d 1040, 1043 (S.D. Ohio 2002) ("[A] public library clearly is a limited public forum."); *Armstrong v. District of Columbia Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) ("The parties correctly assert that a public library is a limited public forum for purposes of constitutional analysis."); *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) ("The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis.").

First, the characterization of mandated filtering as an exercise of the library's traditional discretion with respect to the composition of its collection ignores the fact that CIPA actually *deprives* libraries of discretion in establishing appropriate Internet usage guidelines. CIPA leaves the library no discretion except as to the specific filtering software utilized and the circumstances in which to permit unblocking upon request. Because many libraries rely on federal assistance in order to afford computers and Internet connectivity, *see American Library Ass'n*, 201 F. Supp. 2d at 414-15, they have no realistic alternative but to comply with CIPA by using Internet filtering software if they are to offer Internet access. Hence, it is wholly inapposite for Appellants to equate Congress' mandate that library Internet access be filtered – the inevitable consequence of which, as the district court found, is to deprive library patrons of substantial amounts of constitutionally protected expression – with the exercise of the library's discretion regarding the composition of its collection. Libraries do not "collect material from the Internet," App. Br. at 28; rather, they make the Internet as a whole available and allow library patrons to do the "collecting."

In reality, installing filtering software involves outsourcing acquisition decisions to third parties whose methodology for discriminating between permissible and impermissible content is proprietary and thus not subject to review by librarians or the public. *American Library Ass'n*, 201 F. Supp. 2d at 430. Mandatory Internet filtering is properly understood as tantamount to a library subscribing to the *New Republic* magazine but only receiving it after an outside vendor has torn out all articles that refer to Dick Armey or Dick Cheney because they contain the keyword "dick" – without disclosing why such articles were censored. *See* Marjorie Heins & Christina Cho, *Internet Filters: A Public Policy Report*, National Coalition Against Censorship (Fall 2001), *available at* http://www.ncac.org/issues/internetfilters.html (documenting a similar finding).

There are also other significant differences between a library's traditional collection development practices and the required use of Internet filters. By providing Internet access, a library permits patrons to receive vast amounts of speech "without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." *American Library Ass'n*, 201 F. Supp. 2d at 462. By contrast, in selecting materials to include in its collection, librarians regularly use their editorial discretion, review the materials, and make judgments as to what to acquire, based on a variety of criteria. *Id.* at 463. As the district court put it, "[t]he essence of editorial discretion requires the exercise of professional judgment in examining the content that the government singles out as speech of particular value." *Id.* Internet filtering involves no such judgment by librarians.

In addition, when a library decides to include a book or magazine in its collection, the library becomes the owner of that material; it becomes a (more or less) permanent part of the library's collection. When a library provides access to the Internet, by contrast, the library does not lay claim to the Internet, much of which, in any event, is transitory in nature. Hence, content on the Internet does not carry the library's imprimatur even to the limited extent the printed books, magazines, and newspapers in the library's collection do.

Finally, libraries often provide Internet access for purposes that are not comparable to putting books on the shelf. Some libraries, for instance, allow patrons to use the Internet to check e-mail, participate in chat rooms, and play online games. *Id.* at 422. These distinct characteristics and capabilities of the Internet expose the flaws in Appellants' effort to depict Internet access as nothing more than an extension of the library's collection. That mischaracterization elides distinctions that are critical to the proper resolution of this case.

III. CIPA MUST, BUT CANNOT, SURVIVE STRICT SCRUTINY

A. Reasonableness Review Does Not Apply, as Internet Filters Regulate Speech That Is Consistent With the Purposes of the Forum

Appellants argue that even if a library's provision of Internet access is deemed a designated public forum, reasonableness review, rather than strict scrutiny, should apply to mandatory filtering. App. Br. at 38-39. It is true that in creating a public forum, the government may confine the forum "'to the limited and legitimate purposes for which it was created,'" *id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)), and that any limitations in defining the forum must be "'reasonable in light of the purpose served by the forum.'" *Id.* at 39 (quoting *Rosenberger*, 515 U.S. at 829 (internal quotations omitted)). But Appellants are wrong to claim that because the purpose of library-provided Internet access is to facilitate research, learning, and recreation, and because the material required to be filtered by CIPA is inconsistent with that purpose, only a reasonableness standard of review should apply. *Id.* at 38.

Appellants' argument rests upon the fallacious premise that the government has created the forum, namely Internet access sanitized of obscenity, child pornography, and material harmful to minors. In fact, the actual forum – unfiltered Internet access in public libraries – long predates CIPA. By 1996, nearly five years before the passage of CIPA, almost half of the nation's public libraries provided Internet access. John Carlo Bertot *et al.*, *1996 National Survey of Public Libraries and the Internet: Progress and Issues*, National Commission on Libraries and Information Sciences, *available at* http://slis-two.lis.fsu.edu/~cmcclure/nspl96/NSPL96_T.html (figure 5 shows that in 1996, 44.6 percent of public libraries provided Internet access). As of June 2000, six months before CIPA was signed into law, 95.7 percent of public libraries provided Internet access. Of those, less than 10 percent used filtering software on all their

computers, and only an additional 15 percent used filtering software on some of their computers. John Carlo Bertot *et al.*, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, National Commission on Libraries and Information Sciences, at 11, 18, *available at* http://www.nclis.gov/statsurv/2000plo.pdf.

It is clear, then, that by the time Congress enacted CIPA, the great majority of public libraries had already determined to provide their patrons with unfiltered Internet access as a forum for expressive activity. Only after those fora had been created did Congress seek to regulate them through CIPA. Thus, CIPA does not define the parameters of a forum, as the school district did in *Perry* with respect to its internal mail system or the federal government did in *Cornelius* with respect to the charity drive. Rather, CIPA imposes content-based restrictions on expressive activity within a preexisting forum that properly are subject to strict scrutiny. *See Playboy*, 529 U.S. at 811-13.

B. CIPA Is Not Narrowly Tailored to Serve the Government's Interest in Preventing the Dissemination of Obscenity, Child Pornography, and Material Harmful to Minors

Strict scrutiny requires a statute that regulates speech based on its content to be narrowly tailored to promote a compelling government interest using the least restrictive means. *Playboy*, 529 U.S. at 813; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). As the district court exhaustively documented, CIPA fails strict scrutiny because it is not narrowly tailored to serve the government interest in preventing the dissemination of obscenity, child pornography, and, in the case of minors, material that is harmful to minors. *American Library Ass'n*, 201 F. Supp. 2d at 475-79.

To the contrary, the extremely poor fit between, on the one hand, filtering software, which is neither capable of evaluating

images nor calibrated to the legal definitions of obscenity, child pornography, and material harmful to minors, and, on the other, the government's objective of ensuring that obscenity, child pornography, and material harmful to minors are not available over the Internet in public libraries, renders CIPA fatally overbroad. Lack of precision in regulating speech is not justified by valid governmental goals. *See*, *e.g.*, *ACLU*, 521 U.S. at 875 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." (citations omitted)); *Sable*, 492 U.S. at 128 ("The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive.").

The substantial overblocking catalogued by the district court is of particular concern to *amici*. As the district court found, Internet filters suffer from multiple inherent inadequacies that result in the blocking of vast amounts of constitutionally protected material. These deficiencies include: (1) automated review of blocked sites that fails to distinguish accurately between appropriate and inappropriate content; (2) human review of blocked sites that is hampered by limited resources and human error, including the desire to "err of the side of caution" by overblocking and lack of training in the legal definitions of obscenity, child pornography, and harmful to minors; (3) blocking of entire Web sites even when only a small minority of their pages contain objectionable material; (4) blocking by IP address that erroneously filters out thousands of Web pages; (5) blocking sites that archive pages that have been removed from the Web by their original publisher; and (6) the failures of filtering companies to engage in regular re-review of Web pages, which change on an ongoing basis. *American Library Ass'n*, 201 F. Supp. 2d at 433, 448-49. Moreover, as noted, the district court also found that the category

definitions of filtering software do not correspond to the legal definitions employed in CIPA and that the word-based search modes employed by software filters are not able to evaluate images. Thus, "[n]o presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors." *Id.* at 449.

The government's own expert concluded that between six and fifteen percent of the blocked Web sites to which library patrons sought access contained no content that met even the filtering software's definitions of sexually explicit content. *American Library Ass'n*, 201 F. Supp. 2d at 475-76. The court noted numerous examples of erroneously blocked sites that contained valuable content that was not even sexual in nature. These blocked sites ranged from the site of the Knights of Columbus Council 4828 (http://msnhomepages.talkcity.com/SpiritSt/kofc4828), blocked by Cyber Patrol, to a Columbia University health question-and-answer site (http://www.goaskalice.com.columbia.edu), blocked by Smartfilter. *American Library Ass'n*, 201 F. Supp. 2d at 446-47. As the district court noted,

> At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case. . . . Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definition, such as "pornography" or sex."

Id. at 449.

In addition to the record amassed below, numerous studies have similarly shown that the lack of precision inherent in filtering software results in the blocking of valuable, lawful material, often based on the presence of a keyword that, in

another context, might be associated with sexual content. Among sites that have been blocked in studies of filtering software are:

- The Jefferson Bible (http://www.angelfire.com/co/JeffersonBible), a Web site containing Biblical passages selected by Thomas Jefferson, blocked by N2H2's BESS filtering software;
- a Web page from *Mother Jones* magazine's site (http://bsd.mojones.com/hellraiser_central), blocked by BESS;
- The Smoking Gun (http://www.smokinggun.com), a popular Web site providing primary legal and other documents relating to current events, blocked by BESS;
- the Web page of "American Government and Politics," a course at St. John's University (http://users.aol.com/drblw/homepage.htm), blocked by BESS;
- the home page for Donna Rice Hughes's book, *Kids Online: Protecting Your Children in Cyberspace* (http://www.protectkids.com), blocked by Cyber Sentinel;
- the home pages for the Center for Democracy and Technology (http://www.cdt.org), the ACLU (http://www.aclu.org), and Electronic Frontier Foundation (http://www.eff.org), and the American Family Association (http://www.afa.net), all blocked by ClickSafe;
- numerous Web sites related to homosexuality, including A Different Light Bookstore (http://www.adlbooks.com), blocked by CYBERsitter;
- ZapHealth (http://www.zaphealth.com), a health-education Web site, blocked by Cyber Patrol; and

- the online version of *Explore Underwater* magazine (http://www.exploreuw.com), blocked by Cyber Patrol.

See generally Heins & Cho, *Internet Filters: A Public Policy Report*. Many classic works of literature, or passages from them, also have been blocked, including *The Grapes of Wrath* because of a passage in which a woman lets a starving man suckle at her breast, *The Jungle Book*, *Moby Dick*, and the following passage from Robert Frost's "Stopping by the Woods on a Snowy Evening" because of use of the word "queer": "My little horse must think it queer/To stop without a farmhouse near." *Id.*

The imprecision of the filtering software required by CIPA, which leads to the blocking of sites that have nothing to do with sex, as well as of those that discuss sex and sexuality in a non-prurient, informational manner, renders it even worse in terms of its impact on protected speech than the imprecision of the terms "indecent" and "patently offensive" in the Communications Decency Act, which this Court struck down as vague and overbroad. *See ACLU*, 521 U.S. at 878 (CDA's restrictions "may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library"). *Amici* strongly believe that the Constitution does not permit the government to require library patrons to pay such a high price in terms of the suppression of protected Internet content as a condition of their libraries qualifying for federal funding.

The consequence of CIPA is to distort the medium of the Internet as available in public libraries by interfering with its normal, lawful use. In other contexts, the Court has found interference with expression in a manner that distorts the functioning of a communicative forum to be impermissible. *See*, *e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (restriction on federal funding program prohibiting use of funds to challenge welfare laws held unconstitutional in part because it "distorts the legal system by altering the traditional role of the attorneys" receiving funding); *FCC v. League of*

Women Voters of Cal., 468 U.S. 364, 384 (1984) (striking down statute forbidding noncommercial educational broadcasting stations from engaging in editorializing as a condition of receiving certain federal funds and noting that through the statute Congress sought "to limit discussion of controversial topics and thus to shape the agenda for public debate").

Appellants' response to CIPA's severe overbreadth problem is to fall back on the flawed analogy to library collection development. Thus, it argues that a public library "does not have an obligation to add material to its collection simply because the material is constitutionally protected." App. Br. at 40. But this claim ignores the marked differences, discussed above, between a library's provision of Internet access and its collection development practices. The critical point is that public libraries have decided to make the totality of the Internet available to their patrons (subject to certain restrictions in some libraries) but, under CIPA, they are told that they can no longer do so if they want government money.

Appellants' assertion that the overblocking problem is not constitutionally significant because library patrons need only ask a librarian to unblock the site or, in the case of adults, disable the filter, App. Br. at 42-44, is wrong. This Court has recognized the right to receive constitutionally protected information without having to disclose personal information in order to do so. *See*, *e.g.*, *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (striking down provisions of federal law regulating sexually explicit programming on cable television in part because requirement that subscriber make written request to view such material could have a chilling effect); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (requirement that individuals must specifically request to receive "communist political propaganda" through the mail "is almost certain to have a deterrent effect, especially as respects those who have sensitive positions"). The district court was presented with, and credited, testimony attesting to the existence of a chilling effect. *See American Library Ass'n*,

201 F. Supp. 2d at 411 ("[R]equiring library patrons to ask for a Web site to be unblocked will deter many patrons because they are embarrassed, or desire to protect their privacy or remain anonymous.").

Nor does the fact that blocked content "is certainly available in numerous other places, including other computers with Internet access," Brief of American Center for Law and Justice *et al.* at 16, cure CIPA's constitutional deficiencies. The availability of other venues for censored speech does not justify a content-based abridgement of such speech. *See*, *e.g.*, *ACLU*, 521 U.S. at 879 (rejecting government's contention that CDA's prohibitions on modalities such as chat rooms, newsgroups, and mail exploders are constitutional because speakers could still engage in restricted speech on World Wide Web); *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[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.").[6] Moreover, approximately one-fifth of Internet users with a household income of less than $15,000 rely upon public libraries for Internet access. *American Library Ass'n*, 201 F. Supp. 2d at 422.

Because CIPA effectively requires libraries to block substantial amounts of constitutionally protected content on the Internet, Appellants' claim that CIPA is narrowly tailored fails.[7]

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6. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) ("Whether Petitioner might have used some other, privately owned, theater in the city for the production is of no consequence."). The claim made by some of Petitioner's *amici* that CIPA is a content-neutral "time, place, and manner method of restricting access" to unprotected material, Brief of National Law Center for Children and Families *et al.* at 19, is without merit. As the district court recognized, "[s]oftware filters, by definition, block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny." *American Library Ass'n*, 201 F. Supp. 2d at 454.

7. *Amici* note that this case has no bearing on the right of copyright owners to deny access to works that are protected by digital rights management technology.

C. Appellants Have Not Shown That Less Restrictive Alternatives Would Not Advance the Government's Interest

Appellants also fail to rebut the district court's finding that there are a number of less restrictive alternatives that would be as effective, if not more effective, than CIPA in protecting library patrons from inappropriate online content without blocking access to protected material. Contrary to Appellants' claim (*see* App. Br. at 44), "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* at 815.

The district court recognized several such less restrictive means that many libraries have already adopted, including Internet use policies posted in prominent locations; requiring patrons to sign forms agreeing to comply with the policies; and presenting patrons with a screen displaying the policies when they sign on to a computer. *American Library Ass'n*, 201 F. Supp. 2d at 480. In addition, just as libraries regularly track patrons' book check-outs, they can review Internet activity. As the district court noted, any violations of such policies can result in a number of sanctions that a library might opt to impose. *Id.* at 481. While such policies might not be perfect, they are certainly no less effective than Internet filters and are far more effective in allowing access to material that does not even arguably constitute obscenity, child pornography, or harmful-to-minors material. *Id.* at 480-81. Among the other measures recommended by Appellee ALA is teaching children how to use the Internet and to be critical users of information. *See* ALA *Internet Toolkit*.

The government's assertion that Internet filters are the most effective and least restrictive means of achieving its goals is at odds with an October 2000 report issued by the Commission on Child Online Protection. Commission on Child Online

Protection, *Report to Congress* (Oct. 20, 2000), *available at* http://www.copacommission.org/report. In that report, a congressionally-created commission studied methods to help reduce access by minors to sexually explicit material on the Internet. Among the methods examined were Internet filters, about which the report stated: "This technology raises First Amendment concerns because of its potential to be over-inclusive in blocking content. Concerns are increased because the extent of blocking is often unclear and not disclosed, and may not be based on parental choices." *Id.* at 19-22. Equally noteworthy, the commission did not recommend the mandatory use of Internet filters as a means of protecting minors, and advised that protective measures be "voluntary." *Id.* at 39. The commission expressed support for several other less restrictive alternatives, including the adoption of Internet use policies and the implementation of public education campaigns on protecting children from inappropriate Internet material. *Id.* at 39-46. *See also* National Academy of Sciences, *Youth, Pornography, and the Internet* (May 2002) (expressing concerns over Internet filters and support for alternative strategies).

In other contexts, this Court has heard arguments that the voluntary use of filtering can be part of a less restrictive alternative to government-imposed censorship. In litigations concerning the Communications Decency Act and the Child Online Protection Act, many of the *amici* advanced the view that among the less restrictive alternatives to censorship of Internet speech are governmental actions to promote and facilitate the voluntary use of filtering software by parents. *See*, *e.g.*, *ACLU*, 521 U.S. at 877 (noting the significance of "user-based" alternatives to governmental action). These "least restrictive alternative" arguments further highlight why CIPA is unconstitutional.

Less restrictive alternatives to CIPA that involve filtering include libraries offering some computers with filters and others without filters, *see American Library Ass'n*, 201 F. Supp. 2d at 484, and giving parents the option to decide whether young

minors can access the Internet unfiltered. *Id.* at 482. These possibilities are consistent with the "user empowerment" approach of placing technology and decision-making in the hands of parents and users, and not the government, to control access to Internet content.

The Court recently considered whether voluntary, parent-controlled alternatives could represent a less restrictive alternative to government-mandated blocking of content. In *Playboy*, the Court held that governmental attempts to promote voluntary efforts by parents to protect their children from sexual content are a less restrictive alternative to blocking mandated by statute. 529 U.S. at 827. Specifically, the Court ruled that a statute that required cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon parental request. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815. The Court made clear that

> it is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. 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.

Id. at 824. As noted, it is the government's burden to show that such a plausible less restrictive alternative would not be effective. *Id.* at 816. It has not done so here.

The critical difference between the use of blocks and filters in *ACLU* and *Playboy*, on the one hand, and the use of filters in the CIPA statute, on the other, is this: CIPA mandates that filters be imposed on Internet access as a condition of receiving federal funding. It is by mandating that filters be imposed on all computers in public libraries that the government crosses the line into unconstitutional censorship.

The unnecessary restrictiveness of CIPA is highlighted by its requirement that filters be imposed on *all* computers in a library that accepts federal funding under the E-rate or LSTA programs, even those in the private offices of research librarians. *American Library Ass'n*, 201 F. Supp. 2d at 413 ("[T]he FCC has concluded that 'CIPA makes no distinction between computers used only by staff and those accessible to the public.'" (citation omitted)). Thus, even in contexts where there is no question that a library professional can make his or her own judgment about what content is necessary and appropriate, CIPA still mandates the imposition of filters.

The voluntary use of filtering technology is certainly among the many available tools that parents and users can employ to address concerns about Internet content. When those tools are mandated by statute, however, the government uses technology not to empower users but to censor them. As the Court stated in *Playboy*, 529 U.S. at 818:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. 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.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that CIPA is an unconstitutional exercise of Congress's spending power and that the entry of a permanent injunction should be affirmed.

Respectfully submitted,

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APPENDIX — THE *AMICI*

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. The AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. AAP's members are actively involved in the Internet; they create electronic products to accompany and supplement their printed books and journals; create custom educational materials on the Internet; and have Web pages and provide information to the world on the Internet.

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The American Society of Journalists and Authors (ASJA) is the national organization of independent nonfiction writers, with more than 1,000 members across the country. The mission of the ASJA is to promote the welfare and professional rights of writers and to defend against censorship and other actions that would abridge free communication. As book authors and magazine writers, the ASJA's members have a strong interest in defending against any action that would limit the public's freedom to read.