No. 02-361

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

BRIEF OF CITIES, MAYORS AND COUNTY COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amici[2] are cities, mayors and county commissioners committed to providing Internet access in their public libraries to enhance the educational tools and research resources available to library patrons. For *Amici*, this case is about choice. *Amici* desire to retain the ability to choose the type of Internet access they provide their citizens and how they will develop and administer policies regarding the regulation of Internet usage in their libraries. The decision of the district court in this case hinders the ability of all cities and counties across the country to decide the type of Internet access they are willing to subsidize, forcing local government to choose between knowingly providing illegal and child pornography and providing no Internet access at all.

[1] Appellants and Appellees have consented to the filing of this brief. Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] City of Coppell, Texas; Candy Sheehan, Mayor, City of Coppell, Texas; City of Muskego, Wisconsin; Mark A. Slocomb, Mayor, City of Muskego, Wisconsin; Charlie Roberts, Mayor, Tooele City, Utah; Bruce Barrows, Mayor, City of Cerritos, California; Ross Duckett, Mayor, Mustang, Oklahoma; Joseph O. Seeber, Mayor, Tyler, Texas; Jeff Fisher, County Judge (Head County Commissioner), Van Zandt County, Texas; Robert Speaks, Mayor, Tavares, Florida; Gene Casey, Mayor, Lewisville, Texas; David Lillard, County Commissioner, Shelby County, Tennessee; James W. Coutts, Mayor, City of Cedarburg, Wisconsin; Sharon Emmert, County Commissioner, Smith County, Texas; Jerry Bach, Mayor, City of Wisconsin Rapids, Wisconsin.

SUMMARY OF ARGUMENT

The Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, offers to subsidize filtered Internet access to any local community library. Local cities and communities have the choice. The lower court's decision takes choice away by banning filtering as unconstitutional.

This sweeping decision is based upon a novel right – the right of citizens to compel the government to provide access to particular Internet websites. This right does not exist. *See Board of Ed. v. Pico*, 457 U.S. 853 (1982) (Burger, C.J., dissenting). Congress may pick and choose which information it wishes to subsidize. Citizens have no right to force Congress to subsidize their speech because Congress has chosen to subsidize other speech. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

Library decisions as to what goes into the library are subject to rational basis review, not strict scrutiny. The same speech should not be treated differently because it is a printed, rather than electronic, version. Applying strict scrutiny to library decisions as to what materials come into the library would be disastrous, wresting authority from local communities.

Cities, mayors, county commissioners and other local officials, not courts, should make the decisions about what materials should be in the local library. Local officials are closer to those they represent and can be more responsive and effective in knowing and serving the needs of their community. Cities should not be forced to choose between knowingly providing illegal and child pornography or providing no access at all.

The decision below should be reversed, restoring the authority of neighborhoods, communities and local libraries across the United States.

ARGUMENT

I. CITIZENS HAVE NO CONSTITUTIONAL RIGHT TO COMPEL THE GOVERNMENT TO SUBSIDIZE AND PROVIDE ACCESS TO PARTICULAR INTERNET WEBSITES.

The district court articulated the right at issue in the case as "the specific right of library patrons to access information on the Internet, and the specific right of Web publishers to provide library patrons with information via the Internet." *American Library Ass'n v. United States*, 201 F.Supp.2d 401, 456 (E.D. Pa. 2002), J.S. App. 108a. These two "specific" rights can be condensed into one right: the right of citizens to receive information subsidized by the government. This right forms the basis for the decision. This right, however, does not exist.

This is not a case where the government is singling out any publication for a penalty. This is not a case about Congress imposing a restriction on libraries regarding what materials they may provide their patrons. This is not even a case about Congress attempting to stop the proliferation of child and illegal pornography. This is simply a case about Congress choosing what it will and will not subsidize. No citizen is denied the right to access constitutionally protected material under CIPA.

A. The right does not exist.

The district court's holding rests on a precarious foundation. At the heart of the district court's holding is a novel right: the right of citizens to receive information subsidized by the government. This right is almost identical to the right criticized by Chief Justice Burger in his dissent in *Board of Ed. v. Pico*, 457 U.S. 853 (1982), joined by both Justice Rehnquist and Justice O'Connor. As Chief Justice Burger's dissent aptly pointed out, "[n]ever before today has the Court indicated that the government has an *obligation* to aid a speaker or author in reaching an audience." *Id.* at 888 (1982) (Burger, C.J., dissenting) (emphasis in original).[3] That statement strikes at the very heart of the issue of this case. While the district court artfully crafted a forum analysis to justify enforcing the *obligation* referenced in *Pico*, this case is not a typical forum/free speech case but seeks the recognition of a right forcing the government to provide access to particular Internet sites.

It is not hard to see that "a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (internal citation omitted). Such a funding scheme, designed to eliminate certain viewpoints from public discourse, is undoubtedly subject to a high level of scrutiny. Such a tactic by the government may easily rise

[3] It is important to note that the plurality in *Pico* did not successfully create such a right with precedential value.

to the level of actual interference with protected activity. But, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977). This difference lies at the heart of this case. This case is about state encouragement. In order to transform this case into a case about state interference with a protected activity, there must be a constitutional right being infringed. Under CIPA, websites and websurfers alike are free to disseminate information and access all of the information available on the Internet. There is no interference with the right to disseminate or access information on the Internet. In order for this case to rise to the level of being an interference with a protected right, there must be a right for citizens to receive information subsidized by the government. Yet this "fundamental right" is nowhere to be found.

Chief Justice Burger's dissent in *Pico* further emphasizes the novelty of this "right" by pointing out how ridiculous it would be to hold that the need to have an informed citizenry "would support a constitutional 'right' to have public libraries." *Pico*, 457 U.S. at 888 (Burger, C.J., dissenting). Of course, if there is no constitutional right to have public libraries, as there is not, there can be no constitutional right to have a library provide access to any information at all. The government, recognizing that some content may not be appropriate for a public library, may simply choose "not to be the conduit for that particular information." *Id.* at 889. The district court is attempting to force a judicial override of such a decision by turning a library into a "slavish courier of the material of third parties." *Id.*

B. Congress may freely pick and choose which information it will subsidize without violating a constitutional right.

This is not a case where Congress is singling out publication of particular content for a penalty. *See*, *e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). A mere "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980). CIPA does not ban access to any websites, nor does CIPA ban websites from publishing their content. Just as Chief Justice Rehnquist pointed out in his dissenting opinion in *Pico* that the right to receive information is not violated when books are readily available elsewhere, so too is the right to receive information via the Internet not violated when the Internet may be accessed in any number of places, including one's home, one's place of employment or even accessed for free in any number of Internet cafes. *See Pico*, 457 U.S. at 915 (Rehnquist, C.J., dissenting).

Everyone in the world may access all of the content every website has to offer by logging on to the Internet. Congress is in no way restricting the dissemination of information, nor is Congress singling out specific content to be restricted or burdened in the public domain. Thus, there is no "direct external control" of the general availability of any Internet websites. *Id.* at 886 (Burger, C.J., dissenting). Congress simply chose to subsidize filtered Internet access. Congress choosing to subsidize access to some information, but not other information, does not create a penalty for websites or library patrons.

This is not a case where Congress is withholding an independent benefit from a person because that person exercised a constitutionally protected right. *See*, *e.g.*,

Sherbert v. Verner, 374 U.S. 398 (1963). This is a case about Congress refusing to grant a benefit to a person to finance the person's exercise of a constitutionally protected right, which Congress has the power to do. Under the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In unconstitutional conditions cases, the right and the benefit are separate. *See*, *e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958) (the right was free speech, the benefit was a tax exemption); *Rutan v. Republican Party*, 497 U.S. 62 (1990) (the right was freedom of association, the benefit was a job); *Perry v. Sindermann*, 408 U.S. 593 (1972) (the right was free speech, the benefit was a job).

If the right and the benefit are the same, then it is not an "unconstitutional condition" case, but rather resembles *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, the right in question was the right of doctors and organizations to disseminate information regarding abortion as a legal method of family planning. The benefit at stake was government funding that specifically excluded funding the dissemination of information regarding abortion. The right at stake and the benefit were inseparable. When the right and the benefit are inseparable, the correct inquiry is whether the government is permitted by the Constitution to choose what messages it is willing to subsidize. Conversely, the inquiry is whether citizens have a right to force Congress to subsidize their speech when Congress chooses to subsidize other speech.

While this Court has held "that the government may not deny a benefit to a person because he exercises a constitutional right,"[4] "this Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right." *Regan*, 461 U.S. at 545. No citizen is entitled to have Congress fund their acquisition of information, nor is any publisher entitled to have Congress fund their dissemination of information. Congress may freely pick and choose what messages it will subsidize within the scope of the project it is seeking to fund. *See Rust*, 500 U.S. at 193-94.

It cannot be disputed that Congress is under no obligation to subsidize the exercise of a constitutional right. The district court, however, sought to override this rule by treating Internet access in a library as a constitutional right. Such analysis is flawed. When the government provides books, encyclopedias, dictionaries, reference materials, magazines, newspapers, videos, cassette tapes, compact discs, albums and electronic media to its citizens in a library, the government may pick and choose for what materials it is willing to pay. Even the district court stated that "generally, the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review." *American Library Ass'n*, 201 F.Supp.2d at 462, J.S. App. 120a. Clearly, the government may subsidize access to

[4] *Regan, Secretary of the Treasury v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) (*citing Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); *see also Speiser v. Randall*, 357 U.S. 513 (1958).

whatever information it rationally chooses to provide to its citizens.

As drafted, CIPA "does not attempt to suppress the communication of ideas." *New York v. Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., dissenting). There is no requirement for Congress to take an all-or-nothing approach to the decision of whether to subsidize Internet access to all materials on the Internet or subsidize nothing. All-or-nothing approaches to First Amendment jurisprudence are generally disfavored. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 401 (1992) (White, J., concurring) (O'Connor, J. and Blackmun, J., joining). To say that Congress, once it chooses to subsidize Internet access, *must* subsidize access to the entire Internet ignores the Court's holding in *Rust*. *See Rust*, 500 U.S. at 193.

C. Congress defined the scope of its subsidization project as providing filtered Internet access.

The government, just because it provides a vast array of information within its library system, does not suddenly lose the ability to define the scope of the project it is continuing to fund or subsidize. Otherwise, a library that provides hundreds of thousands of books, with such a wide variety of content and viewpoints, would suddenly find itself facing higher and higher levels of scrutiny and without the ability to continue to define the scope of information it is willing to purchase or subsidize for its citizens. The district court held that the government loses its ability to define exactly what messages and content it is willing to subsidize when the amount of information it is willing to subsidize grows too large. *See American Library Ass'n*, 201 F.Supp.2d at 460, J.S. App. 115a. Such a holding

blatantly ignores Congress' authority to define the scope of messages it is willing to subsidize.

The scope of the project is the key to this entire case. Congress is free to define the scope of the project it is funding; Congress is free to "fund one activity to the exclusion of others." *Rust*, 500 U.S. at 193. Congress is free to choose not to fund activities beyond the scope of its project. *See id.* at 194. Like in *Rust*, this is "a case of the Government refusing to fund activities, including *speech*, which are specifically excluded from the scope of the project funded." *Id.* at 195 (emphasis added). If Congress desires to only fund speech that meets a certain category, without funding other speech, it may do so while defining the category of funded speech as narrowly or as broadly as it would like. Therefore, the essential question to be addressed in this case is: what is the scope of the project?

Under CIPA, the scope of the project was to subsidize *filtered* Internet access. Of course Congress understood that filtering technology is not perfect. It can be assumed without question that Congress knew that filtering Internet access would undoubtedly lead to the blocking of websites containing valid educational materials. However, Congress simply chose, in light of these obvious circumstances, to limit the scope of its subsidization of Internet access to only *filtered* access. Congress may have restricted the scope of its subsidization of Internet access only to websites that end with dot-org or dot-gov or any other limited set of websites. Such a decision by Congress would not offend the First Amendment because Congress is free to choose for what information it will subsidize access.

Congress is free to "make a value judgment" favoring a particular type of Internet access over another type of Internet access and "implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). Congress made a value judgment that filtered Internet access was more beneficial for the general welfare than unfiltered Internet access. It does not matter whether the filtering program is perfect or flawed. It does not matter if the filtering program blocks hundreds or even millions of websites that contain educational speech. As long as Congress is paying for the Internet access, Congress can choose the category of information to which it is willing to subsidize access. Congress chose filtered Internet access. Therefore, Congress may implement its judgment by only funding filtered Internet access. If the library wants unfiltered Internet access, the library can simply choose not to participate in Congress' subsidization program.

Congress' solution to the proliferation of child and illegal pornography on the Internet does not have to be perfect. Congress does not have to wait until there is a filtering program available that blocks all information harmful to minors, obscenity and child pornography while never blocking a single website containing constitutionally protected speech.[5] "A statute is not invalid under the

[5] It is not difficult to imagine that even if technology was available that would perfectly filter Internet access to the satisfaction of the district court in this case, some plaintiffs would invoke the argument that such filtering is not good enough because it is too broad. They might argue that it is necessary to have filtering programs that filter each word on each individual page such that even a child pornography webpage could be accessed, with only the very specific offending words

(Continued on following page)

Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen v. Ward*, 279 U.S. 337, 339 (1929). CIPA is not a perfect solution, but it is a solution well within the power of Congress to create.

Plaintiffs have ample access to the more complete Internet access they seek. There is, however, no constitutional right to force municipalities and other local governments to subsidize their Internet desires. Such a new "right" would, in fact, dramatically weaken the authority of municipalities and locally elected officials over their libraries.

II. MUNICIPALITIES CANNOT EFFECTIVELY FUND AND PROVIDE LIBRARIES TO THEIR CITIZENS IF STRICT SCRUTINY IS TO BE APPLIED TO THEIR DECISIONS OVER WHAT GOES INTO THE LIBRARY.

The district court was careful to point out that the right at issue was not whether there is a "First Amendment right to compel public libraries to acquire certain books or magazines for their print collections." *American Library Ass'n*, 201 F.Supp.2d at 456, J.S. App. 108a. The court even stated that the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review." *Id.* at 462, J.S. App. 120a. We agree. The district

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and parts of the pictures blacked out, leaving all of the "constitutionally protected speech" on the page untouched. The picture of the child's face would be viewable, for example, with only the clear offending content of the photograph blacked out.

court, however, applied strict scrutiny to information acquired by the library via the Internet.

A. There is no distinction between printed speech and speech on the Internet.

The district court pointed out that the Internet is open to anyone that wishes to be a town crier. Yet, this is true of letters to the editor sections of magazines and newspapers. Without question, newspapers receive a considerable amount of protection and enjoy a vast expanse of freedom to print what they choose to print.[6] If the library may pick and choose which newspapers and magazines to which it will subscribe with only rational basis review, then it is baffling why a library may not pick and choose which electronic messages it is willing to allow to pass through its front door without extreme judicial oversight under strict scrutiny.

There seems to be some confusion regarding the operation of the Internet that caused the district court to apply a completely different standard of judicial review to the Internet than it would to printed material. There is a sense from the district court's opinion that the fact that anyone may publish a website, publish information on message boards and engage in endless chat room conversations on an immeasurable number of topics somehow

[6] *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.").

distinguishes the Internet from the print media. Such a conclusion ignores the obvious.

On the Internet, message boards have moderators, which act as censors blocking any speech that is deemed inappropriate for the message board. Thus, on a sports-related message board, a discussion of politics will be deleted by the moderator. This is exactly what happens in the print media. A discussion of politics in a letter to the editor for *Sports Illustrated* would not be published. On the other hand, there may be a political publication that would not print a letter to the editor or an article related to sports. Some websites ban profanity and pornography while other websites promote such things, just as some magazines and books contain no profanity or pornography by design and some magazines and books promote profanity and pornography as their main topics. In addition, any person may start a publication, newsletter, or write a book that could eventually make its way to the library, much the same way any person may create a website and publish information.

If a library, as the district court admits, may use any rational criteria for choosing to stock some printed materials rather than others, a library should also be able to pick and choose which electronic materials it is willing to stock for its patrons with the same standard of review. Thus, if the library wants to stock *Sports Illustrated* but chooses not to stock other publications, a court will not inquire into that decision any deeper than to assess whether the library could have had any rational reason for excluding

Time, *Hustler*, *Playboy*, the *NAMBLA Bulletin*[7] or any other publication.

The world of printed speech is extremely vast. There are millions of publications available for a library to choose when determining what materials it would like to make available to its patrons. The library, for any rational reason, may choose to acquire some materials for its patrons, but not other materials. Some of these decisions may be based on a value judgment; some of these decisions may be based on economic considerations. Libraries enjoy the right to exclude a vast number of speakers from their collections without significant judicial inquiry. To apply strict scrutiny to the exclusion of the very same speakers because they are speaking through an electronic forum is absurd.

Under the lower court's rationale, if a library chose not to subscribe to the *NAMBLA Bulletin*, which a library could do for any number of rational reasons, that same library would be unable to filter the electronic version of that same publication on the Internet without facing heightened judicial scrutiny. Yet, the exclusion is for the very same publication. The district court failed to adequately explain why the electronic version of a publication deserves greater protection than the printed version. Such a distinction does nothing more than trivialize the First Amendment by creating a meaningless distinction for speech in an electronic format.

[7] The *NAMBLA Bulletin* is the official publication of the North American Man/Boy Love Association.

B. The prior review distinction drawn by the district court between printed materials and electronic materials on the Internet is invalid.

The lower court theorized that library content-based restrictions on their materials other than the Internet are not subject to strict scrutiny because the library exercises "editorial discretion."[8] This assumes the library reviews all materials before it provides them to the public. It is unreasonable to believe that any library reads an entire encyclopedia set before placing it on the shelf. Thus, the very foundation of this distinction is invalid.

Libraries, and indeed the municipalities that principally fund libraries, do not review all print materials that enter their libraries. Such a task would be daunting on an unparalleled scale. The city of Cerritos, California,[9] for example, receives 30,000 new books, CD-ROMs, DVDs, books on tape and books on compact disc every year, not including numerous magazine and newspaper subscriptions. Yet, the city only employs twenty-two full-time and five half-time librarians. It is not only preposterous to suggest that the limited library staff reviews all 30,000 individual materials brought into the library each year, it is physically impossible to do so.

Librarians must field numerous requests for help finding materials, check-out books for patrons, re-stock library shelves, catalogue and shelve new materials,

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[8] *American Library Ass'n*, 201 F.Supp.2d at 464, J.S. App. 125a.

[9] *Amicus* Mayor Bruce Barrows is the mayor of the City of Cerritos, California.

collect late fees, organize activities for children, conduct library tours, coordinate the use of library space by outside groups, assist patrons with Internet access and process library card applications. Even if all twenty-seven Cerritos librarians spent every working hour reviewing materials without ever attempting to fulfill their mission of actually running the library, they still could not give even a cursory review of all 30,000 materials each year. Libraries absolutely do not review all tangible materials before they are placed for use by the public. In many cases, the libraries and municipalities that fund and run them rely on other peoples' opinions or simply do not know the content of many materials on the shelves. The prior review distinction attempted for suddenly applying strict scrutiny to subsidized Internet access is untenable.

C. Lessening governmental prior review of private speech should lessen, not raise, the standard of scrutiny.

The more government involves itself in making decisions regarding what speech will be allowed and what speech will not be allowed, the more judicial scrutiny is heightened. When prior review by the government is required before speech may be freely disseminated, there is a concern that a byproduct of such prior review is a chilling effect on speech. A court should view prior review, just like prior restraint, with much skepticism; "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). It is surprising that the lower court would reason that when libraries engage in prior review, they are subject to only rational basis, but when they do not engage

in prior review on the Internet, they are subject to strict scrutiny.

The court was correct in the first part of its analysis – libraries make content-based decisions on which materials come into their doors everyday. These decisions are not subject to strict scrutiny, or libraries could not function and would be subject to a litigation frenzy. Applying a stricter scrutiny to government decisions because there is less *government* editorial and prior review of materials makes no sense.

III. MUNICIPALITIES AND LOCAL COMMUNITIES, NOT COURTS, SHOULD MAKE THE DECISIONS ABOUT WHAT MATERIALS SHOULD BE IN THEIR LOCAL LIBRARIES.

This is not a case about whether Congress may impose a filtering requirement, but is a case about whether municipalities have the choice to impose a filtering requirement on the Internet access they provide through their public libraries. The decision below, if affirmed, will bar all municipalities and other local officials from filtering in their libraries.

A. This case is an attempt by libraries to use courts to override the local authority of municipalities that create, fund, and set policy for the libraries.

The library does not enjoy total autonomy in making decisions. The local governments of municipalities have the power to create criteria used by the libraries for certain decisions a library makes, including criteria used for the acquisition of materials for the library's collection.

Municipalities want to retain the right to choose the criteria their libraries will use in assessing *all* material made available to library patrons. The district court effectively took that right away by declaring Internet access in a public library to be a public forum where governmental regulation is viewed under strict scrutiny by our courts.

Chief Justice Burger's dissent in *Pico* warned of the court becoming a "super censor," interfering with local control of a school library. *Pico*, 457 U.S. at 885 (Burger, C.J., dissenting). Such a warning must be heeded in the present case. Libraries are built, staffed and filled with materials because local communities, through their elected representatives, choose to spend their tax dollars on such an endeavor. The libraries are built and maintained for the community, by the community. Their very existence is local in nature. The district court's decision strikes at the very heart of this traditionally local endeavor by wresting control away from local municipalities and appointing courts as "super censors" of local decisions concerning whether to knowingly provide child pornography, obscenity and materials harmful to minors.

This case is anomalous to say the least. The library plaintiffs in this case ask this Court to rule that *they* are in violation of the Constitution if they filter. This bizarre claim is all the more puzzling since the libraries seek an opinion limiting their freedom to make decisions regarding what materials they are willing to provide their patrons. Such a tactic suggests that these plaintiff libraries and library associations are attempting to use this case and use the Court to advance their views and agenda on the unwilling populace and local governments who have authority over them.

Municipalities have the ultimate control and final say of library policy. Officials, elected by the citizens of their local community, make decisions regarding library policy and what materials they are willing to provide their citizens. If citizens are unhappy with their decisions, such as the decision to filter Internet access in the library, the citizens are free to choose another leader or set of leaders through the democratic process. The library associations and library plaintiffs in this case are seeking to circumvent this democratic process and insert the Court as a barrier between them and the municipalities that govern them.

If this were not the case, then the libraries and library associations that are plaintiffs in this case would not have claimed that CIPA's filtering requirement is an unconstitutional condition. If it is unconstitutional for the federal government to subsidize filtering, then it also becomes unconstitutional for the municipality to require filtering. The opinion below strikes at the very heart of local control and the authority of local citizens and their representative government.

B. Many Municipalities will choose to stop providing Internet access if forced to provide unfiltered Internet access.

As stated by this Court on a number of occasions, it is the goal of the First Amendment "to secure the widest possible dissemination of information." *Buckley v. Valeo*, 421 U.S. 1, 49 (1976) (internal citations omitted). At first blush, it may seem to be the case that this noble goal is achieved by affirming the district court's opinion. However, that is not the case. If this Court affirms the district court's opinion, it will reduce Internet access in many

communities. Many mayors, county commissioners and municipalities, including the ones represented in this brief, will provide no Internet access at all rather than provide unfiltered Internet access that includes child pornography and obscenity.

Amicus City of Muskego, Wisconsin, for example, is adamant that should it lose the ability to filter out child pornography, it would immediately stop funding the T-1 line, resulting in all thirty computer stations in its library losing their connection to the Internet. The City of Tyler, Texas,[10] when it first decided to provide Internet access, did so on the condition that it would stop immediately if filtering was ever stopped. All of the mayors, county commissioners and cities represented in this brief would immediately move to shut down Internet access if the lower court's decision were affirmed.

A decision that only unfiltered access is allowed would eliminate the choice of what type of Internet access a municipality could provide. The district court seemed to be motivated by the concept that filtering Internet access somehow restricted the free flow of information. Considering that the free flow of information is a positive aspect of a free society, it is important to promote the widest dissemination of ideas and information as possible. Increasing the number of choices for municipalities with regard to the type of Internet access they provide in their libraries is consonant with this aspiration. If the Court chooses to ban filtering as a tool for governmental entities to use to keep

[10] *Amicus* Mayor Joseph O. Seeber is the mayor of the City of Tyler, Texas.

child pornography and obscenity out of the public library, then many municipalities will be left with no choice but to take drastic steps to choke off *all* electronic discourse in the public library.

It is the responsibility and power of local governments to choose the approach most effective in protecting their communities, not one district court solution mandating an approach for the whole country. If a group of plaintiffs asserting a new right to government subsidized access to Internet sites can strip a city of its ability to keep itself from promoting child pornography, then representative local government is weakened, whereby libraries, by filing a lawsuit in a court, can usurp the very city that gave birth to it in the first place. Municipalities will be left with no other alternative but to shut off access or choose to knowingly provide access to child pornography, material harmful to minors and obscenity. Many, including *amici*, will choose to shut off access.

IV. THERE ARE NUMEROUS RATIONAL BASES FOR KEEPING PORNOGRAPHY OUT OF THE PUBLIC LIBRARIES.

Local communities have many rational bases for filtering. Research has uncovered that "child molesters often use pornography to seduce their prey, to lower the inhibitions of the victim, and to serve as an instruction manual."[11] Seventy-seven percent of convicted child

[11] Marshall, W.L., Ph.D., *Pornography and Sexual Offenders*, *in* PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 189 (D. Zillmann & J. Bryant eds., 1989); Dr. Marshall's Curriculum Vitae is available at http://www.rockwoodpsyc.com/cv-bill.html.

molesters that molested boys and eighty-seven percent of convicted child molesters that molested girls in one study *admitted* to the regular use of hard-core pornography, material readily available on the Internet with no filtering system.[12] Many cities and communities desire to protect the children of their communities by choosing not to pay for the tools of the trade for child molesters. Their communities may consider providing free Internet access to child and other illegal pornography to be indistinguishable from actually promoting such criminal activity. A ruling that strips the right of local government to choose not to subsidize such criminal and extremely dangerous behavior would endanger millions of children since the local government, the bastion of law and order in every community, would be unable to choose its most effective means to protect its citizens.[13]

Many cities will act because innocent children are targeted by obscene pornographic websites that seek to expose themselves to unwitting children who are attempting to use the Internet for legitimate educational research. A child that is seeking to log on to www.whitehouse.**gov**, the official White House website, in order to view a video

[12] MARSHALL, W.L., PH.D., A REPORT ON THE USE OF PORNOGRAPHY BY SEXUAL OFFENDERS (Ottawa, Canada, Federal Department of Justice, 1983).

[13] While Appellees offer other approaches, such as a "tap on the shoulder," the government need not negate the effectiveness of other solutions. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (internal citation omitted) ("Where rational-basis scrutiny applies, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negate any reasonably conceivable state of facts that could provide a rational basis for the regulation.").

of Barney, the President's dog, romping around the White House, is in for an extremely vulgar surprise if she instead types www.whitehouse.**com**, which is a hard-core pornographic website extremely harmful to minors. To rule that municipalities are powerless to choose not to fund access to such intentional traps for the unwary youth when attempting to simply provide access for a child-friendly view of the White House would be egregious.

The proliferation of obscenity has a detrimental impact on a local community. Oklahoma City, for example, chose to do something about their rising incidence of rape by closing over 150 sex-oriented businesses (peep shows, massage parlors, bookstores, theaters, etc.) from 1983 to 1988. During that span of five years, the incidence of rape in Oklahoma City decreased by 26%. During that same period, the incidence of rape increased 20.8% throughout the entire state.[14] Municipalities need the local control necessary to affect change in their communities by reducing the factors that put women at a high risk for sexual violence. Such local control includes having the power to choose not to pay for access to the very obscenity it is trying to combat to save the lives of women in the community.

Even the federal government agrees that "empirically verifiable connections have been established between illegal pornography and violent sex related crimes, including the rape of women and molestation of children."[15] A

[14] OKLAHOMA STATE BUREAU OF INVESTIGATION, RAPE STATISTICS – OKLAHOMA CITY VS. BALANCE OF OKLAHOMA, 1983-1988.

[15] U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, BEYOND THE PORNOGRAPHY COMMISSION: THE FEDERAL RESPONSE (Washington, DC: GPO, July 1988), p. iv.

study of sex offenders reported that fifty-six percent of the rapists and 42 per cent of the child molesters in the sample said that pornography played a role in their offenses.[16] Even this Court has recognized the harmful effects of pornography on children. *See Ferber*, 458 U.S. at 758; *FCC v. Pacifica Foundation*, 438 U.S. 726, 757-58 (1978).

Local municipalities, being the smallest form of government in this country and most sensitive to the needs of their unique communities, are in the best position to determine the type of Internet access they will provide for their citizens. Local government is uniquely positioned to significantly impact the welfare of women and children. This Court should not stifle the ability of municipalities to protect vulnerable members of society from sexual predators. There are many rational bases which could lead municipalities to choose to filter Internet access in the best interests of their community. The decision below should be reversed.

[16] Abel, G., *in* EINSIEDEL, E.F., SOCIAL SCIENCE REPORT. PREPARED FOR THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, U.S. DEPARTMENT OF JUSTICE (Washington, D.C., 1986).

CONCLUSION

Cities, mayors, county commissioners and other local officials should be free to choose the type of Internet access they will subsidize. There is no individual right for citizens to compel government to finance their Internet desires. The lower court's opinion, based on a non-existent right, destroys the choices local communities may make concerning their Internet access in their libraries. The decision below should be reversed.

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