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.*,
Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

JOHN CORNYN
Attorney General of Texas

JULIE CARUTHERS PARSLEY
Solicitor General

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

AMY WARR
Assistant Solicitor General
Counsel of Record

JEFFREY S. BOYD
Deputy Attorney General for Litigation

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICUS CURIAE*

QUESTION PRESENTED

Whether public libraries' use of filtering devices on computers used by library patrons for Internet access violates those patrons' rights under the First Amendment.

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The State of Texas, as *amicus curiae*, files this brief in support of Appellants and asks the Court to note probable jurisdiction.

INTEREST OF *AMICUS CURIAE*

The First Amendment issue in this case is of great importance to the people of Texas. The district court's erroneous decision that the First Amendment prohibits public libraries from utilizing filtering software on computers used by library patrons for access to the Internet will likely result in children being exposed to obscene, indecent, and harmful material—and inhibit efforts to combat Internet-related crimes against children. Moreover, the district court's erroneous First Amendment holding could prevent Texas from enacting and enforcing, as an exercise of its police powers, laws mandating or even encouraging use of filtering

software in its public libraries. Accordingly, whether the First Amendment permits public libraries to utilize filtering software for Internet-connected computers used by library patrons is an important issue the Court should decide.

Texas has given prevention and prosecution of computer and Internet-related crime—including child pornography—high priority. Two years ago Texas Attorney General John Cornyn created an Internet Bureau—a new division in the Texas Attorney General's Office that assists local law-enforcement agencies in combating computer and Internet-related crimes. The mission of the Internet Bureau is to provide a safe electronic environment for the communication of information and ideas and the transaction of commerce. This goal is threatened by the district court's ruling that libraries, and, by extension, other governmental entities, may not require or even encourage the use of Internet-filtering devices on publically provided Internet access to screen out obscene or harmful material.

Texas takes no position on Congress's ability, through its spending power, to command the use of Internet filters in public libraries or require their use by State or local governmental entities. *Amicus curiae* addresses only the effect of the district court's erroneous First Amendment analysis on a State's ability to effectively combat Internet-related crime and, through the use of its police powers, to enact and enforce laws related to Internet filtering in places where Internet access is publically available, to prevent children from being exposed to obscene, indecent, or harmful material.

ARGUMENT

I. THE FIRST AMENDMENT QUESTION IS SUBSTANTIAL.

"There is a vast amount of sexually explicit material available via the Internet." *Am. Library Ass'n, Inc. v. United States*, 201 F.Supp.2d 401, 420 (E.D. Pa. 2002). And children are seeing it. Based on interviews with a nationally representative sample of 1,501 young people ages 10 to 17 who used the Internet regularly, the National Center for Missing and Exploited Children and the Crimes Against Children Research Center found that one in four children had experienced an unwanted exposure to indecent pictures in the past year. DAVID FINKELHOR *ET AL.*, CRIMES AGAINST CHILDREN RESEARCH CENTER, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH 13 (2000). Indeed, accidental exposure to sexually explicit websites can be difficult to avoid. *Am. Library Ass'n*, 201 F.Supp.2d, at 419.

States, as well as the federal and local governments, have a strong interest in protecting children from viewing—in public libraries—the vast amount of sexually explicit material available over the Internet. They have an equally strong interest in protecting children from the secondary effects of the availability of these materials, such as the attraction to libraries or similar public places of persons who might victimize children. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (upholding zoning restrictions on adult theaters because such restrictions were aimed at preventing secondary, rather than primary, effects of such theaters). The ability to filter these materials through the use of software is an important weapon in States' and libraries' child-protection arsenals.

Simply put, public libraries cannot become places where there is a very real risk that children might be exposed—intentionally or unintentionally—to obscene, pornographic, or otherwise harmful materials. Parents should not be afraid to send their children to the

library, either because they might be exposed to such materials or because the library's free, filterless computers might attract people with a propensity to victimize children. Although, at present, filtering may be an imperfect technology, it remains a valuable and reasonable tool for protecting children that should not be forbidden to public libraries or to the government.

II. STRICT SCRUTINY DOES NOT APPLY TO A PUBLIC LIBRARY'S FILTERING OF OBSCENE, INDECENT, OR HARMFUL MATERIAL FROM PUBLICALLY PROVIDED INTERNET ACCESS.

Of the three recognized types of forums—the traditional public forum, the limited or designated public forum, and the nonpublic forum—only the traditional public forum, such as streets and parks, are subject to strict scrutiny so that any restriction must be narrowly tailored to achieve a compelling governmental interest. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). A limited or designated public forum may be limited to certain purposes, provided that any restrictions are reasonable with respect to those purposes and that the restrictions are viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing cases). And, in a nonpublic forum, restrictions may be based not only on content but also on "speaker identity" as long as the restrictions are "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983)).

Because the government's ability to limit speech varies with the nature of the forum, correctly defining the forum is vital.[1] *See*

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1. Should the Court agree with Appellants that a public library is not correctly viewed as a forum of any type and that any restriction on the contents of the library, including the Internet, need only meet a rational

Cornelius, 473 U.S., at 797. This is where the district court stumbled.

Although the court determined that a public library is a limited public forum, *see Am. Library Ass'n*, 201 F.Supp.2d, at 457, it did not apply the "reasonableness" and viewpoint neutrality test necessitated by that forum. Instead, the district court essentially held that publically provided Internet access creates a public forum within a limited forum, requiring the application of strict scrutiny. "We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum," *id*., at 457, but "[i]n providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons." *Id.*, at 410; *see id.*, 466-70 (analogizing the Internet to traditional public fora).

Applying this extraordinary reasoning, the district court held that "under the public forum doctrine," *id.*, at 489, the filtering was not narrowly tailored to meet a compelling governmental interest because material other than that which is pornographic, obscene, or harmful could be blocked as well. *See id.*; *see also id.*, at 470-84.

But by focusing solely on the Internet, and ignoring the environment in which the Internet is accessed, the district court's decision runs afoul of the Court's admonition that context is *always* a central concern when determining the permissibility of restrictions on speech. *See, e.g., Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 746-47 (1978) ("Indeed, we may assume, *arguendo*, that [the George Carlin "filthy words"] monologue would be protected in other contexts. Nonetheless, the

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basis review, J.S., at 14-20, it is clear that the district court erred in not only applying strict scrutiny here, but in engaging in a forum analysis at all.

constitutional protection accorded to a communication . . . need not be the same in every context.").

The district court's *per se* characterization of the Internet as a traditional public forum—and its rote application of strict scrutiny, despite the fact that it had earlier determined that the point of access was in a limited public forum—has troubling implications. For instance, under the district court's analysis, the decision of a school to utilize Internet filtering software to shield children from obscene or harmful material similarly would be subject to strict scrutiny. It would be immaterial that the schools themselves are not considered to be a traditional public forum generally. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-93 (1993) (school was not a public forum as to after-hours access by various groups). Under this reasoning, strict scrutiny would be required solely because of the district court's view that the Internet is viewed as a *per se* traditional public forum, regardless of the context in which it is accessed.

Rather than permit this approach to control, the appropriate level of scrutiny should be decided with reference to the entire context of the speech that is being restricted. *See Pacifica*, 438 U.S., at 746-47. Context matters because "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value,' . . . vary with the circumstances." *Id.*

Indeed, this Court's First Amendment jurisprudence demonstrates not only that context matters, but that context can dictate whether a particular restriction on speech passes constitutional muster. *See id.* For instance, while upholding the imposition of a penalty against a broadcaster for airing George Carlin's "filthy words" monologue, the Court noted that such a monologue might be protected in another context. *See id.* Indeed, context—and, specifically, where the material was accessed—was the paramount consideration in *Pacifica*. The fact that a person, in

the privacy of his or her home, could switch the radio station and inadvertently be exposed to potentially disturbing material was an important factor in the Court's decision to uphold the restriction. *Id.,* at 748.

By focusing exclusively on the Internet, the district court ignored the Court's emphasis on context—which requires consideration of the forum in which potentially objectionable material is accessed. Because objectionable material is being accessed in a public library environment, the character of that environment should control the constitutional inquiry. And because a public library is not a public forum, a focus on the reasonableness of the restriction, not strict scrutiny, should apply.

III. INTERNET FILTERING BY PUBLIC LIBRARIES PASSES CONSTITUTIONAL MUSTER.

Because public libraries are not public fora, Internet filtering need only be viewpoint neutral and reasonable in light of the purpose served by the forum.[2] *See Rosenberger*, 515 U.S., at 829. Filtering satisfies this test.

Unlike restrictions on materials espousing a certain viewpoint, filtering does not discriminate based on viewpoint but instead restricts an entire genre from access that does not further the purposes of the library. *Cf. United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) (holding total daytime ban of sexually oriented broadcasts unconstitutional in part because certain speakers were targeted); *see also Rosenberger*, 515 U.S., at 829-30 (when determining whether the "exclusion of a class of speech is legitimate," Court has drawn a "distinction between, on the one hand, content discrimination, which may be permissible if it

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2. Of course, if rational basis is the appropriate test, then it is easily met using the same rationale.

preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

Moreover, the use of filtering software is a reasonable response to the dangers posed by the large quantity of sexually oriented material available on the Internet. And filtering is reasonable in light of the nature of the public library forum. A library is a place for reading, research, and study, all of which require a quiet atmosphere with minimal distractions. Moreover, libraries are frequented by children. Even children too young to read come to libraries to attend story hours or other educational activities or simply accompany their parents or older siblings. And, it is likely that parents regard public libraries as an appropriate, educational place for children to spend time after school or on weekends.

Accordingly, public libraries are not appropriate places for adults to view material that is indecent or harmful to minors. If an adult were viewing such material on a library computer, it easily could be visible to people on nearby computers or to passersby—including children. The appearance on a library computer screen of sexually explicit material could disrupt the quietude of the library. In addition, it could harm children within viewing range. Most troubling are the potential secondary effects of prohibiting the use of filters. The resulting free, unfiltered access could attract people likely to victimize children to public libraries.

Filtering software, while still technologically imperfect, minimizes the chance that children will be exposed to obscene, indecent, or harmful material. Filtering software also minimizes the potential disruption of the library's quiet environment. Moreover, adults who wish to access material blocked by the filtering software may do so at a cyber café or elsewhere. For these reasons, the use of filtering software is reasonable, viewpoint neutral, and passes constitutional muster.

PRAYER

The Court should note probable jurisdiction.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
HOWARD G. BALDWIN, JR.
First Assistant Attorney General
JEFFREY S. BOYD
Deputy Attorney General for Litigation
JULIE CARUTHERS PARSLEY
Solicitor General
AMY WARR
Assistant Solicitor General
Counsel of Record
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

October 7, 2002

COUNSEL FOR *AMICUS CURIAE*