No. 02-361

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

_____

UNITED STATES OF AMERICA, *et al.*,

Appellants,

-v-

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

Appellees.

_____

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

BRIEF OF APPELLEES MULTNOMAH COUNTY PUBLIC LIBRARY, *et al.*

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INTRODUCTION

This Court should affirm the unanimous decision of a three-judge court striking down the Children's Internet Protection Act (CIPA), 20 U.S.C. § 9134 (f); 47 U.S.C. § 254 (h)(6), the first statute in our nation's history that imposes federal speech restrictions on local libraries around the country. Based on extensive findings of fact from an eight-day trial, the lower court correctly held that CIPA induces public libraries to violate the First Amendment when they offer free Internet access to patrons. The statute requires libraries to install blocking programs that inevitably censor a substantial amount of protected speech for adults and minors. Indeed no blocking program offers content categories that are limited -- or even tied in any way -- to CIPA's legal definitions of obscenity, child pornography, or material that is "harmful to minors." In contrast to the ineffective blocking programs mandated by CIPA, which are both overly broad and ultimately ineffective, libraries around the country have devised a number of less restrictive ways to assist patrons who wish to avoid content they find offensive. Under this Court's well-established First Amendment rules, CIPA fails the strict scrutiny required of content-based speech restrictions.

Ignoring the extensive trial record, the government argues that CIPA should be upheld under rational basis review because it is consistent with the traditional discretion of libraries to select books for their collections. Yet under CIPA, the federal government, not a local librarian, dictates what speech libraries nationwide must exclude from the patrons. The federal government, not a local librarian, requires library patrons and staff to use blocking programs manufactured by private companies for profit. It does so knowing that these companies: (1) use their own broad content categories to block speech rather than the statute's

legal definitions of unprotected expression; (2) block huge amounts of text though the statute requires blocking of images only; (3) refuse to disclose their secret block lists to the federal government, local governments, or libraries that must install them; and (4) make their decisions without any input from or regard for the views of librarians or local communities, much less prior judicial review. The government also knows that the blocking programs, if installed: (1) will block library patrons and staff from accessing speech that does not meet the categories of the law or the separate, broader categories defined by the private companies; (2) will block speech that local librarians and local communities have chosen to provide to patrons; (3) will block library patrons and staff from reading constitutionally protected speech literally millions of times; and (4) cannot reliably block the speech defined by the statute.

Far from an exercise of local discretion, CIPA substitutes the federal government's judgment for that of librarians. After closely considering local concerns, 93% of all public libraries chose not to mandate the use of blocking programs. The federal government now seeks to override those decisions, and to install private software companies as censors in our nation's libraries. Because CIPA threatens to distort the democratic, speech-enhancing qualities of both public libraries and the Internet, the three-judge court correctly enjoined its enforcement.

COUNTERSTATEMENT OF THE CASE

Two suits challenging the constitutionality of CIPA were filed in the United States District Court for the Eastern District of Pennsylvania, and were consolidated. The plaintiffs in this case (hereinafter "Multnomah plaintiffs") include large urban libraries serving Portland, Oregon and Santa Cruz, California; library systems serving rural and suburban communities in south central Wisconsin and

Westchester County, New York; and state library associations in Connecticut, Maine, and Wisconsin. The Multnomah plaintiffs also include seven individuals who use their local libraries for Internet access. For example, plaintiff Emmalyn Rood used the Internet at her library in her early teens to "research issues relating to her sexual identity." J.S. App. 22a. Finally, the Multnomah plaintiffs include eight Web sites that were blocked by major blocking programs even though they provided no information that was illegal. Two of the Web sites are for political candidates. AfraidtoAsk.com and Planned Parenthood provide medical information about sex. PlanetOut provides information of interest to gay and lesbian communities. *Id.* at 23a-24a.

Pursuant to the statute, a special three-judge court was convened. After a period of discovery, the court held an eight-day trial at which it heard the testimony of twenty witnesses and admitted hundreds of exhibits, including depositions. *Id.* at 6a. On May 31, 2002, before the statute would have required libraries to install blocking programs, the three-judge court unanimously concluded that the statute was unconstitutional and enjoined its application. The court made "extensive findings of fact," *id.* at 7a, that consume almost one hundred pages in the Appendix to the Jurisdictional Statement. The government does not argue that any of these facts are clearly erroneous.

A. The Three-Judge Court's Findings of Fact

1. Public Libraries and Internet Access

The three-judge court made a number of findings about the nature of public libraries and their provision of Internet access to the public. Specifically, the court found that libraries share a common mission to provide patrons with the widest possible range of information and ideas. J.S. App. 33a. *See also e.g.* J.A. 35-36 (Morgan testimony); 79-

80 (Cooper testimony); 423-442 (Chelton Rebuttal Report). That principle was endorsed by all of the librarians that testified below, and is incorporated into the American Library Association's Bill of Rights and Freedom to Read Statement. J.A. 358-50, 366-73 (PX 1, 9). In practice, however, libraries cannot carry every book on their shelves because of limited space. Faced with this physical constraint, librarians apply professional standards to select particular books, tapes, and other materials for their collections in order to meet the needs of their local communities. J.S. App. 35a; J.A. 36 (Morgan testimony).[1] In making these assessments, librarians try to provide library patrons with the books they want to read. Librarians do not, generally speaking, limit their library collections to books that the staff considers "worthy" or "educational." *E.g.* J.A. 79-80 (Cooper testimony); 423-442 (Chelton Rebuttal Report). Libraries routinely provide access to purely recreational material, including some that is sexually explicit. J.S. App. 32a-33a; *See also e.g.* J.A. 40-41 (Morgan testimony); 80, 84-85 (Cooper testimony); 428 (PX 83, Chelton Rebuttal Report).

Librarians also routinely provide patrons with access to materials not in their collections "through the use of bibliographic access tools and interlibrary loan programs." J.S. App. 34a; J.A. 42-43 (Morgan testimony); 83-84 (Cooper testimony). They do not apply selection criteria when using these methods; instead, they provide the patron with any resource they can obtain. J.A. 79-80 (Cooper testimony). Some libraries allow patrons to obtain interlibrary loan materials without going through a librarian. J.A. 83 (Cooper testimony).

[1] For example, one of the branches of the Portland, Oregon library stocks Russian language materials for its Russian émigré population. J.A. 81 (Cooper testimony).

All of the defendants' experts agreed that, either through direct selection or through techniques such as interlibrary loan, libraries should provide patrons with any information they seek so long as the information is legal. J.A. 266-67 (Cronin testimony), 293 (Davis testimony). Librarians are trained to use just about any means to assist a patron in obtaining information he or she seeks. J.S. App. 33-34a. Increasingly, they turn to the Internet, which "vastly expands the amount of information available to patrons of public libraries." J.S. App. 36a.

"The vast majority of public libraries offer Internet access to their patrons." *Id.*; Jt. Trial Stip. para 263. There is an enormous demand for the service. J.S. App. 36a. "Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it." *Id*. Indeed, libraries are the primary source of Internet access for poor families. *Id*. at 36a-37a, 130a.

The court found that the provision of Internet access at public libraries is notably different than the selection of materials for physical collections. *Id*. at 120a-127a. Through the Internet, librarians provide access to a vast range of Internet content regardless of any librarian's judgment that patrons will want to read any particular page or that any particular page meets professional selection standards. *Id*. at 124a. "[W]hen public libraries provide their patrons with Internet access, they intentionally open their doors to vast amounts of speech that clearly lacks sufficient quality to ever be considered for the library's print collection." J.S. App. 123a. Indeed, "almost none" of the Web sites made available will have been reviewed by "either the library's collection development staff or even the filtering companies." *Id*. at 125a, 137a (libraries do not exercise "editorial discretion" on the Internet). Library Internet access works so that "[a]ny member of the public with Internet access could … tonight jot down a few musings

on any subject under the sun, and tomorrow those musings would become part of public libraries' online offerings." *Id.* at 125a. To the extent that libraries find it necessary to place limits on Internet access, the vast majority of libraries merely ration limited resources and make no content-based exclusions. *Id.* at 36a.

2. Statutory Requirements

The Children's Internet Protection Act (CIPA) applies to every local library in the country that receives funds under two popular federal programs. *Id.* at 14a-16a. Under CIPA, libraries must install and operate "technology protection measures" on every computer that provides Internet access. 47 U.S.C. § 254(h)(6); 20 U.S.C. § 9134(f). These measures must be functioning on computers used by staff as well as patrons, adults as well as minors, and computers privately funded as well as those subsidized by the federal program. J.S. App. 18a. When the computer is being used by an adult, the "technology protection measures" must "protect against access" to "visual depictions" that are obscene or child pornography. When the computer is being used by a minor (under 17), it must additionally prevent access to "visual depictions" that are "harmful to minors." 47 U.S.C. § 254(h)(6); 20 U.S.C. § 9134(f); J.S. App. 202a.

The statute applies to any library that receives federal funds from either the "e-rate" program or as an LSTA grant. 47 U.S.C. § 254(h); 20 U.S.C. § 9134; J.S. App. 14a-16a. More than fifty percent of public libraries participate in one or both of these programs; there are over 16,000 libraries nationwide. GX 37 at 4, Public Libraries and the Internet 2000: Summary Findings and Data Tables, Tr. 10/28/02 at 47. If the library is receiving e-rate funding (most libraries do), a library administrator "may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful

purpose." 47 U.S.C. § 254(h)(6)(D); J.S. App. 168a n.33. If the library receives no e-rate funding, but does receive LSTA funds, it may disable the "technology protection measure" for adults or minors "for bona fide research or other lawful purpose." 20 U.S.C. § 9134(f)(1) and (3).

3. Available Blocking Programs

Because Internet blocking programs are the only "technology protection measures" currently available for libraries to comply with CIPA, the three-judge court made extensive findings about their operation and efficacy. J.S. App. 48a-94a. Internet blocking programs, or filters, are software products created and sold by private companies for profit. These products categorize and then block speech on the Internet. For example, one well-known product, Websense, has created 30 categories ranging from "Abortion Advocacy" to "Job Search" to "Tasteless" and "Adult." *Id*. at 50-51a. If a library utilizes the software, persons attempting to access a site on the category list will be blocked from doing so. *Id.*

There is no technology in existence, or likely to come into existence, that can "protect against access" to the categories defined by the statute. *Id*. at 6a, 11a, 68a; Jt. Trial Stip. para 274, 291. All of the existing products use categories much less precisely defined, and much broader, than the statute. J.S. App. 49a-51a. None even purports to apply the legal categories defined by the statute. Jt. Trial Stip. para 291. "[T]here is no judicial involvement in the creation of the filtering software companies' category definitions." J.S. App. 51a. All of the existing products apply their categories uniformly without regard to local values or community standards. *Id.*

Although the statute only requires blocking of "visual depictions," none of the available products categorizes based

solely on visual depictions and none blocks visual depictions without also blocking text. *Id.* at 56a, 93a. Neither judges nor librarians are involved in the products' decision to categorize and block particular Web sites. *Id.* at 51a, 53a; Jt. Trial Stip. para 292. Web pages that are blocked by the products are not notified. J.S. App. 53a.

The products consider their block site lists "to be proprietary information, and hence . . . unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking." J.S. App. 7a; Jt. Trial Stip. para 290. Neither the federal government, which mandates its use, nor the librarians who must install it, nor the patrons and staff who must live with it, can obtain a list of the speech that has been blocked. J.S. App. 52a-53a.

All of the parties agreed, and the court found, that all of the available products substantially overblock, *i.e.*, they block sites that do not fit either the category definitions established by the companies or the differently (and more narrowly) defined statutory categories. *Id.* at 7a, 8a, 11a, 12a, 48a-94a. J.A. 131-223 (Nunberg testimony), 295-357 (Edelman testimony), 467-474 (PX 109, Janes report); PX 110-119, 122-123, 128-135, 162A-K, 165-169 (screen shots, lodged with the Court). All of the products also substantially underblock, *i.e.*, they fail to block sites that meet the category or statutory definitions. J.S. App. 22a, 68a-94a.

4. Blocking of Protected Speech

As the three-judge court concluded, the software mandated by CIPA "erroneously block[s] a huge amount of speech that is protected by the First Amendment." J.S. App. 91a; 12a. The court estimated the number of Web pages erroneously blocked to be "[a]t least tens of thousands . . .

even when considered against the filtering companies' own category definitions." *Id*. at 93a. The number that are blocked and do not meet the statute's categories, is "of course much higher." *Id.* The court found that it is difficult to calculate overblocking rates accurately, though a number of witnesses tried. *Id.* at 68a-79a. The court ultimately found that even defendants' expert identified rates of overblocking of "between nearly 6% and 15%." *Id.* at 49a. These rates "greatly understate the actual rates of overblocking that occurs" for a variety of reasons. *Id.* at 79a, 75a-76a. Because of the vast amount of content on the Web and large number of library patrons around the country who access the Internet daily, defendants' expert admitted that even using his estimate, library patrons would be wrongly denied access to Web sites *millions of times*. Finnell testimony 4/1/02 at 178-179.

Multnomah plaintiffs' expert, Mr. Edelman, devised and implemented a process to identify Web pages blocked by four leading commercial blocking programs that do not fit within those programs' self-defined blocking categories. Mr. Edelman first created a database of Web page addresses, including substantial portions of site listings from the popular Yahoo and Google Web directories. Each address from the database was tested against each blocking program to determine which programs blocked which pages. Most of these Web pages were tested multiple times over a period of several months. Edelman submitted a CD-ROM that contained screen shots of over 6,000 sites, most of which the court found were examples of overblocking. J.S. App. 79a-86a; J.A. 467-474 (Janes expert report). The CD-ROM, which has been lodged with the Court, also contains an index to the sites, listing the site name and information about it from the site itself and from the Google and Yahoo index system, the dates on which it was blocked, the product that blocked it, and the product category assigned it. The court found that "many times the number of pages that Edelman

identified are erroneously blocked by one or more of the filtering programs that he tested." J.S. App. 85a-86a.

Largely on the basis of its own analysis of the Edelman CD-ROM, the three-judge court identified a number of specific examples of sites or pages that had been overblocked, whether measured by the statutory categories or the broader product categories. *Id.* at 86a-89a. Each of the plaintiff Web sites was wrongly blocked. J.A. 299 (Edelman testimony); Supp. Lodging 22 (PX 122-23, Edelman CDs). Two of those sites, by Wayne L. Parker and Jeffery Pollock, were created by political candidates to promote their candidacy. J.S. App. 24a. Another site, afraidtoask.com, is operated by a doctor and provides information about medical issues that many people find embarrassing. For example, afraidtoask.com has a section discussing normal variations in penis size. Many of those accessing afraidtoask.com do so through mechanisms that ensure their anonymity. J.A. 237 (Bertman testimony). Another of the sites, planetout.com, is a gay rights site that was one of the sites plaintiff Emmalyn Rood tried to access as she was doing research about her sexual identity. J.A. 223-32 (Rood testimony). In addition, the undisputed evidence at trial showed the following examples of wrongly blocked sites: The Web page of the Republican National Committee, JX 5 at 59, Walker deposition, Tr. 4/3/02 at 90; a Calgary Firefighters Museum site, Supp. Lodging 22, 108-109 (PX 123, 168); a site teaching piano playing, Supp. Lodging 22, 99 (PX 123, 165); the cover of Cosmopolitan magazine, Supp. Lodging 81 (PX 162G); a juggling site, Supp. Lodging 72 (PX 162B); a site about Navy units, Supp. Lodging 19-21 (PX 119); a teen health site on sexually transmitted disease, PX 160A, Tr. 3/28/02 at 217; an abstinence site, Supp. Lodging 22 (PX 123), PX 160E, Tr. 3/28/02 at 217; and a scholarly discussion of biblical attitudes towards homosexuality, PX 160D, Tr. 3/28/02 at 217. The Edelman CD-ROM, provides numerous other

examples. Supp. Lodging 22 (PX 122-23); *See also* J.A. 187-199 (Nunberg testimony); Plaintiffs' Joint Proposed Findings of Fact, 221-263.

Library experts testified that at least several hundred of the examples of overblocking were sites librarians would affirmatively select for the library's collection if traditional selection methods applied to the Internet. J.S. App. 82a n. 17. For example, many libraries affirmatively refer patrons to the site of the Lewis Knighten Cancer Center, but it was blocked. Lipow testimony, 4/2/02 at 153; Supp. Lodging 31 (PX 129). Another site blocked was alphasearch, a major search engine to which many libraries link. Lipow testimony, 4/2/02 at 154; Supp. Lodging 37 (PX 130). All of these sites are collected, and screen shots provided, in Appendix A on the Edelman CD-ROM.

5. The Inevitability of Overblocking

The three-judge court also concluded that all blocking programs *inevitably* overblock and underblock because of limitations inherent in the technology, and made lengthy findings in support of this conclusion. J.S. App. 48a-94a; 150a-151a. It ultimately found that there is no "technology protection measure" that will do what CIPA requires without also blocking access to a vast amount of speech that is constitutionally protected for both adults and minors. *Id*. at 7a, 12a, 13a, 48a-94a. As an initial matter, all of the products necessarily overblock because the categories of speech they use are broader than the categories defined by the statute, and because their blocking decisions are based on text as well as image. *Id.* at 51a, 60a; 74a; *compare* J.S. App. 49a-51a *with* 71a-18a; Jt. Trial Stip. para 312; *see also* J.A. 181 (Nunberg testimony). A number of other factors inevitably cause overblocking.

First, categorizing the Web is an impossible task in part due to "the Internet's size, rate of growth, rate of change, and architecture." J.S. App. 68a, 54a. The majority of Web pages cannot be found by the methods used by the software companies. *Id.* at 28a-29a, 56a. Those pages are accessible through a variety of means by library patrons. *Id.*; J.A. 156, 176 (Nunberg testimony). Even the portions of the Web that software companies can find, the "indexable Web," consists of at least 2 billion pages. J.S. App. 30a. Approximately 1.5 million pages are added each day. J.S. App. 30a; *See also* J.A. 168 (Nunberg testimony). The content of particular Web sites is also highly dynamic, with pages constantly being removed or changed. J.S. App. 29a-30a. "Individual Web pages have an average life span of approximately 90 days." *Id*.

Second, to review all of the dynamic content on the Web, blocking software companies have hired "between eight and a few dozen employees." *Id*. at 60a. Software companies must use a combination of automated search techniques and human review to categorize the vast content on the Web, both of which are subject to serious error. J.A. 162-168 (Nunberg testimony). At least one of the products allows computers to make decisions about sites to block without human review. J.S. App. 60a. These sites are listed solely on the basis of text and without reference to any visual image. Jt. Trial Stip. para 309. The products very rarely review a site again once they have initially categorized it, though content changes constantly. J.S. App. 53a, 64a-65a; Jt. Trial Stip. para 323. It is obvious that a comprehensive review and evaluation of Web sites by these companies is impossible. J.S. App. 68a, 54a.

Third, the products are unable to differentially block access to video files, audio files, chat rooms, or discussion groups. Regardless of whether a movie, for example, contains one or a dozen sexually explicit scenes, the products

must either block or fail to block the entire movie. J.A. 335 (Edelman testimony).

Fourth, the products overblock because they primarily block at the level of the root domain rather than at the level of an individual Web page. J.S. App. 61a. To take one example from the record, at least one product blocks all of the pages in the online magazine Salon (www.salon.com), no matter how innocuous, because there are some pages in Salon that they believe meet their criteria. *Id.* at 62a. There may be hundreds or thousands of pages under a single root URL. Jt. Trial Stip. para 243.

Fifth, the Internet's addressing system causes serious overblocking or underblocking. Every Web page can be located by its Web address (a URL such as www.uscourts.gov) or its IP address (a series of numbers). J.S. App. 26a-28a, 62a. Millions of Web pages with vastly different content may share a single IP address. *Id.* If the software companies fail to block by IP address, users could bypass the blocking program by accessing forbidden sites using the IP address. If the product blocks by IP address, users will be unable to access any of the multiple sites at a given IP address, no matter how harmless the content. *Id.* All of the companies block by IP address as well as URL. J.A. 321 (Edelman testimony). One company said that it received fifty complaints a week about overblocking caused by IP blocking. J.A. 199 (Nunberg testimony).

Sixth, overblocking is caused by so-called "loophole" sites. J.S. App. 62a-64a. Loophole sites allow a user to access a site using a Web address other than its primary address. There are three major kinds of loophole sites: caches (*e.g.*, Google provides its own cache copy of any Web page it indexes), translation sites (which provide a Web page roughly translated into another language), and anonymizers (which allow access to a Web page while

masking the user's identity). *Id*. To take one of these examples: Google searches for Web sites. When it finds a site, such as afraidtoask.com, it automatically makes a copy of that site (in a "cache") and gives it a name such as "http://216.239.57.100/…www.afraidtoask.com…" The entire content of afraidtoask can be accessed from this alternate address as well as afraidtoask's original address. The blocking products must either prevent access to all loophole sites, which "necessarily results in a significant amount of overblocking, because the vast majority of pages that are cached, for example, do not contain content that would match a filtering company's category definitions" or must allow access "thus resulting in substantial underblocking." *Id*. at 64a. The Google cache alone represents hundreds of millions of sites. J.A. 205 (Nunberg testimony). All of the products block loophole sites. J.A. 200, 205 (Nunberg testimony).

Finally, the evidence established that all of the blocking programs also inevitably underblock due to the same inherent technological problems that lead to overblocking. In addition, the companies' human reviewers only review a very small percentage of the Web. The vast majority of Internet content is deemed not to meet the blocking company categories and is thereby excluded from human review by computers using an imprecise and secret method of text analysis. J.S. App. 53a-64a. For that small percentage not excluded by a computer, "[h]uman reviewers generally focus on English language Web sites, and are generally not required to be multi-lingual." *Id.* at 60a. Even with the products engaged, a library patron will be able to find material that meets either the categories of the statute or the categories set by the products. J.A. 179 (Nunberg testimony); *see also* PX 121 at 27-8, Edelman expert report, Tr. 4/2/02 at 127; JX 8 at 12, 164, Dussome deposition, Tr. 4/2/02 at 90; JX 9 at 93, Gallagher deposition, Tr. 4/2/02 at 90; JX 10 at 14, Blakeman deposition, Tr. 4/2/02 at 90.

6. The Inadequacy of CIPA's Unblocking Provisions

The three-judge court also made findings about the feasibility of unblocking sites wrongly blocked by the programs, and the effect of requiring patrons to seek permission to access blocked sites. CIPA allows, but does not require, libraries to unblock sites upon the request of an adult patron (or a minor in some cases) with a "bona fide research or other lawful purpose." 20 U.S.C. §9134(f)(3); 47 U.S.C. §254 (h) (6)(D). All of the blocking software products offer a method for doing some unblocking. J.S. App. 52a.

The feasibility of unblocking according to the requirements of the statute was not established. The products do not permit multiple people to unblock. Thus, only one person in a library system, no matter how large or busy the system, can have authority to unblock. J.A. 336-37, 339 (Edelman testimony). The products also do not permit a librarian to unblock text while continuing to block only a specific visual image or vice versa. J.A. 223 (Nunberg testimony). The government failed to prove that any product was capable of unblocking for adults but not minors, for one patron or one terminal only (as opposed to all patrons or all terminals), or for only a specified time period based on a particular patron's purpose. J.A. 341-342 (Edelman testimony).

Even assuming that unblocking according to the statute were feasible, the court found that "many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." J.S. App. 47a, 172a. For example, plaintiff Emmalyn Rood testified "that she would have been unwilling as a young teen to ask a librarian to

disable filtering software so that she could view materials concerning gay and lesbian issues." J.S. App. 47a. Similarly, plaintiff Mark Brown testified that he would have been unwilling to ask a librarian to unblock a site when doing research on his mother's breast cancer. J.S. App. 172a-73a. Plaintiff Dr. Bertman testified that many users came to his site, afraidtoask.com, through one of the "loophole" methods, an anonymizer, to preserve their anonymity. J.A. 237 (Bertman testimony). Thus, even though he is a physician, and even though his site assures readers that it will protect their privacy, his readers did not even want him to know the address of the computer from which they accessed his information.

The court also found that "[t]he pattern of patron requests to unblock specific URLs in the various libraries involved in this case" confirmed that "patrons are largely unwilling to make unblocking requests unless they are permitted to do so anonymously." J.S. App. 47a. For example, defendants' expert testified that the Greenville Public Library in South Carolina wrongly blocked close to a hundred sites in a two-week period (a serious underestimate of actual overblocking, as the court found), but the library has received only twenty-eight unblocking requests in almost two years. *Id*.

Even when sites were unblocked, the process took "between 24 hours and a week." *Id*. at 46a. Because most libraries have more demand for Internet access than Internet access terminals, they often limit the time each patron may use the computer. J.A. 73-74 (Morgan testimony). Librarians testified that few patrons would interrupt their limited access time to request an override. *Id*.; J.S. App. 174a.

7. The Inability of Any Library To Comply with the Statute

The government did not provide evidence of a single library that was in compliance with the statute. The government offered testimony from some libraries that currently use blocking software. All but one refused to block staff computers, although staff blocking is required by the statute. Ewick testimony 4/3/02 at 31; J.A. 259 (Sudduth testimony). These libraries made both blocking and unblocking decisions based on the categories defined by the software companies, not the more limited categories defined by the statute. JX 1 at 42-43; Dooley Deposition, Tr. 4/3/02 at 90; JX 2 at 35-36, Majilton Deposition, Tr. 4/3/02 at 90; JX 3 at 77, Stewart Deposition Tr. 4/3/02 at 90; JX 4 at 25-26, Saferite Deposition Tr. 4/3/02 at 90; JX 5 at 32-34, Walker Deposition, Tr. 4/3/02 at 90; Biek testimony 3/28/02 at 111-12; James testimony 3/29/02 at 15; Belk testimony 3/29/02 at 58. The Westerville, Ohio and Greenville, South Carolina libraries blocked categories as broad as "tasteless." Barlow testimony 4/1/02 at 26; James testimony 3/29/02 at 16. Though the statute requires blocking only of images, all but one library blocked text as well as images, and made unblocking decisions based on text as well as images. *E.g.* Barlow testimony 4/1/02 at 52-54; James testimony 3/29/02 at 15. Tacoma, which blocked only images, blocked any image, no matter how innocuous, on a page that met the blocking software company's category. Biek testimony 3/28/02 at 48. "None of these libraries [proffered by the government] makes differential unblocking decisions based on the patrons' age. Unblocking decisions are usually made identically for adults and minors. Unblocking decisions even for adults are usually based on suitability of the Web site for minors." J.S. App. 47a; JX 4 at 14, 45, 70, Saferite

deposition, Tr. 4/3/02 at 90; JX 5 at 34, Walker deposition, Tr. 4/3/02 at 90; Biek testimony 3/28/02 at 113; James testimony 3/29/02 at 15; Belk testimony 3/29/02 at 71; Barlow testimony 4/1/02 at 42, 44. The libraries all blocked or unblocked a site for all their patrons for all time; none unblocked for only one patron or for a limited time period. JX 1 at 48-49, Dooley deposition Tr. 4/3/02 at 90; Barlow testimony 4/1/02 at 33; Ewick testimony 4/3/02 at 33, 57. *See also* J.A. 341-42 (Edelman testimony). Though the statute permits unblocking only for "bona fide research purposes," no library used this standard in determining whether to unblock a site. *E.g.* Belk Testimony 3/29/02 at 71-73.

Government witnesses who currently use blocking software in their libraries all admitted that the programs both overblocked and underblocked. *E.g.* J.S. App. 77a-78a. Indeed, even in Tacoma where a librarian claims to review a list of every single site blocked to see if he can find errors, there is still overblocking. *Id.* at 46a, 78a, 173a. Defendants' experts agreed that all of the libraries they studied demonstrated both overblocking and underblocking. *Id.* at 71a-79a. No library was able to unblock sites without a delay, often of up to a week. *Id.* at 174a.

The use of blocking software reached stark levels of irrationality and arbitrariness. For example, in Tacoma, the library on which the government most heavily relied, the witness testified that the software blocked patrons from viewing the pictures in the online version of Playboy magazine. If asked to unblock these pictures, even by a middle-aged, female sex researcher, he said he would refuse to do so. At the same time, the library allowed all patrons, regardless of age, to view the same pictures in Playboy magazine on microfilm machines that were functionally indistinguishable from the library's computers. J.A. 250-252 (Biek testimony).

8. Less Restrictive Alternatives

Prior to the hammerlock imposed by CIPA, more than 90% of public libraries had exercised their local discretion not to require the use of blocking programs, in part because of their deficiencies. J.S. App. 3a, 45a; Jt. Trial Stip. para 271; *see also* J.A. 54 (Morgan testimony); 104 (Cooper testimony). Instead, as the three-judge court found, libraries have developed a variety of methods for assisting patrons in finding the content they want and avoiding unwanted content. J.S. App. 37a-48a.

Some libraries offer patrons the option of voluntarily using blocking software. *Id.* at 45a; J.A. 53 (Morgan testimony). Some of those libraries allow parents to decide whether their child will use blocking software or not. J.A. 53 (Morgan testimony); J.S. App. 162a-163a. When library patrons are given the chance to use blocking software, 80% refuse to use the software. J.A. 56 (Morgan testimony).

Many libraries also offer "training to patrons on how to use the Internet, including how to access the information they want and to avoid the materials they do not want." J.S. App. 41a. Among other things, libraries offer links to sites that have been screened by librarians and found to be especially valuable for library patrons. *Id.* at 41a-42a. These links do "not preclude patrons from attempting to access other Internet Web sites." *Id.* at 42a.

In addition, libraries have devised a variety of techniques for minimizing the risk that a patron will view material he or she finds objectionable on a computer being used by another patron. *Id.* at 42a-44a. Some libraries place their monitors so that it is difficult for non-users to see the screen. Others offer "privacy screens" or provide recessed monitors so that passers-by cannot see another user's screen. *Id.* Other libraries put the monitors in the middle of high

traffic areas to inhibit users from accessing objectionable material. J.S. App. 44a. Libraries also offer software that automatically erases a screen if there is no activity by a patron for a specified time in order to assure that the next user not be subjected to material that user finds objectionable. J.A. 58 (Morgan testimony).

Though the government seeks to justify use of blocking software by describing behavioral problems in the library, the three-judge court found that behavioral problems existed in libraries before there was an Internet and persist even in libraries that use blocking software. Libraries continue to deal with behavior problems by enforcing general behavioral rules. J.S. App. 41a, 146a-47a; J.A. 462-66 (PX 106, Multnomah County Library Policy).

Most libraries also have Internet use policies that prohibit users from accessing illegal material. J.S. 37a. In the event that librarians observe material on a user's Internet screen that is clearly illegal, they can and do call the police. J.A. 61 (Morgan testimony); 453-61 (PX 105, Multnomah County Library policy); *see also* Hamon testimony, 3/25/02 at 217-221.

Methods other than blocking software have proven very effective in minimizing any problems caused by some patrons objecting to material in the library. Libraries that did not use mandatory blocking software testified that they had very few complaints related to the content of Internet sites. J.A. 61-69 (Morgan testimony); 109-111 (Cooper testimony). The three-judge court found that the government had not provided any evidence of the relative feasibility, cost, and effectiveness of these various alternatives to blocking software. J.S. App. 45a, 146a.

B. The Three-Judge Court's Legal Analysis

The three-judge court held that CIPA was unconstitutional because it induces libraries "to engage in activities that would themselves be unconstitutional." *Id.* at 97a. The court analogized to the public forum doctrine, finding that "[a]lthough a public library's provision of Internet access does not resemble the conventional notion of a forum as a well-defined physical space, the same First Amendment standards apply." *Id*. at 108a (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)). More specifically, the court found that strict scrutiny applies because CIPA – and the blocking programs it imposes – single out disfavored speech for exclusion based on content in a forum otherwise designated for unrestricted expressive activity on a wide range of topics. *Id*. at 118a.

Although the court found that the state would have a compelling interest in preventing access to illegal speech, the government had to prove that CIPA's blocking mandate "is narrowly tailored to further those interests, and that no less restrictive means of promoting those interests exists." *Id* at 148a. "Given the substantial amount of constitutionally protected speech blocked by filters studied," the court concluded that CIPA was "not narrowly tailored." J.S. App. 149a. The court also held that "there are plausible, less restrictive alternatives to the use of software filters that would serve the government's interest." *Id*. at 158a. Finally, the court concluded that the disabling provisions of CIPA did not cure its unconstitutionality. "[T]he content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will

often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed." *Id*. at 176a.

SUMMARY OF ARGUMENT

As the three-judge court recognized, "[t]he legal context in which this extensive factual record is set is complex," and "[t]here are a number of potential entry points into the analysis." *Id.* at 9a. Ultimately, under all of the core constitutional principles, CIPA "lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Reno v. American Civil Liberites Union*, 521 U.S. 844, 874 (1997).

1. CIPA regulates protected speech on the basis of its content. Under this Court's longstanding precedents it would clearly be unconstitutional if imposed as a direct mandate on public libraries. *See Reno*, 521 U.S. at 879; *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 813 (2000); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Butler v. Michigan*, 352 U.S. 380 (1957). CIPA's censorship system is no less constitutional simply because Congress chose to impose it indirectly on libraries. As the government concedes, Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). CIPA fails this test because it induces libraries to use blocking software that *inevitably* blocks access to a huge amount of protected speech.

Internet access at public libraries uniquely promotes First Amendment values. Because CIPA seeks to selectively and arbitrarily exclude protected speech from a vast democratic forum otherwise dedicated to unrestricted online communication, it is properly subject to strict scrutiny.

Applying strict scrutiny, CIPA must be struck down because the government failed to prove it is narrowly tailored to serve a compelling government interest. *See Reno*, 521 U.S. at 879. *Playboy,* 529 U.S. at 813; *Sable*, 492 U.S. at 126.

2. CIPA's blocking mandate also imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, without judicial review or even the semblance of First Amendment due process.

3. As a condition on the receipt of a federal benefit, CIPA is equally unconstitutional. It requires libraries to block speech even where Internet terminals are wholly funded by non-federal dollars, and distorts the usual function of public libraries in providing uncensored access to information on the Internet.

In summary, under any legal theory, government-mandated blocking programs are blunt instruments in an area that requires far more sensitive tools. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). "The First Amendment requires the precision of a scalpel, not a sledgehammer." J.S. App. 156a. As this Court has explained, and as the case so clearly demonstrates, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated," suppressed, or punished "is finely drawn." *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Error in marking that line "exacts an extraordinary cost." *Playboy*, 529 U.S. at 817-18.

ARGUMENT

I. The Three-Judge Court's Injunction Should Be Affirmed Because CIPA Induces Public Libraries To Violate The First Amendment.

A. CIPA's Content-Based Restrictions On Speech Are Subject to Strict Scrutiny.

1. Like Traditional Public Forums, Internet Access at Public Libraries Promotes Core First Amendment Values.

If there was ever a context in which government should not be allowed to impose content controls through its spending power, it is Internet access at public libraries. As the three-judge court correctly found, public libraries and the Internet have many qualities analogous to traditional public forums, which are entitled to the utmost protection of the First Amendment. Sidewalks and public parks are protected by strict scrutiny because their "speech-facilitating character . . . makes them distinctly deserving of First Amendment protection." J.S. App. 129a. Like these traditional forums, Internet access at public libraries "uniquely promote[s] First Amendment values." *Id.* The very purpose of public libraries is to provide free access to books, ideas, resources, and information for education, employment, enjoyment and self-government. J.A. 35-36 (Morgan testimony), 79-80 (Cooper testimony); 423-442 (Chelton Rebuttal Report). The public library is "the quintessential locus for the receipt of information." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992); *see also Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) ("A library is a mighty resource in the free marketplace of

ideas.") (citing *Abrams v. United States*, 250 U.S. 616 (1928) (Holmes, J., dissenting); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) ("The right to receive information is vigorously enforced in the context of a public library."). Like other traditional forums, public libraries are "generally open to any member of the public" who enters them. J.S.App. 129a-130a. By providing free access to information, public libraries have always played an equalizing role that allows all individuals, regardless of their income level, to participate fully in our democracy by becoming informed, literate, educated, and culturally enriched. Especially in public libraries, "the State may not, consistently with the spirit of the First Amendment, 'contract the spectrum of available knowledge.'" *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

The Internet has now provided unprecedented opportunities to expand the scope of information from around the globe that is available to users in public libraries, at substantially less cost than comparable amounts of printed material. Though the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds," *Reno*, 521 U.S. at 870, large segments of our society still lack access to the Internet at home or work. J.S. App. 36a-37a. "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." *Id.* at 130a and n.26.

In addition to opening their doors to all members of the public seeking information, public libraries are like traditional public forums because they provide broad access to a wide range of speakers when they offer Internet access. "By providing patrons with Internet access, public libraries in effect open their doors to an unlimited number of potential

speakers around the world, inviting the speech of any member of the public who wishes to communicate with library patrons via the Internet." J.S. App. 134a. As this Court found, content on the Internet is "as diverse as human thought." *Reno*, 521 U.S. at 870.

In fact, the volume and diversity of speech on the Internet "far exceeds the volume of speech available to audiences in traditional public fora." J.S. App. 134a. As this Court explained in striking down prior attempts to censor this important medium,

> 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.

Reno, 521 U.S. at 870. *See also* LESSIG, CODE 167, 185 (1999) ("The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. . . . The model for speech that the framers embraced was the model of the Internet – distribute, non-centralized, fully free and diverse.").

Because of the Internet's speech-enhancing qualities, "the growth of the Internet has been and continues to be phenomenal," *Id*. at 885. "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." *Playboy*, 529 U.S. at 818. Internet access at public libraries "presents unique possibilities for promoting First Amendment values," J.S. App. 136a, and the three-judge court thus correctly held that CIPA's content-based restrictions are subject to strict scrutiny. J.S. App. 138a.

2. Strict Scrutiny Applies Because the Government Seeks to Selectively Exclude Protected Speech From a Vast Democratic Forum.

Library Internet access is also subject to strict scrutiny when viewed as a designated public forum, because the government seeks to selectively and arbitrarily exclude protected speech from a forum otherwise dedicated to unrestricted online communication. A designated public forum is "property that the State has opened for expressive activity by part or all of the public." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Arkansas Education Telev. Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Regulation that excludes disfavored content from a designated forum is "subject to the same limitations as that governing a traditional public forum." *Lee*, 505 U.S. at 678; *see also Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998); *cf. Kreimer*, 958 F.2d at 1259. The three-judge court correctly noted that "the relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, . . . but rather the specific forum created when the library provides its patrons with Internet access." J.S. App. 108a; *see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Internet access at public libraries easily qualifies as a designated public forum. As the lower court explained, "where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored." J.S. App. 118a. Conversely, "the more narrow the range of speech that the government

chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions." *Id.* at 112a. Thus, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), this Court applied heightened scrutiny to invalidate a town's exclusion of the rock musical "Hair" from a theater otherwise open for the public at large to use for performances. In *Rosenberger*, 515 U.S. at 833, this Court applied strict scrutiny in striking down funding restrictions on student newspapers because the funding program was designed to "encourage a diversity of views from private speakers." And in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated prohibitions against editorializing by public radio networks under strict scrutiny because the federal program broadly funded diverse speech on a wide range of subjects. *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (holding that school board may not exclude certain speakers from meetings open to direct citizen involvement).

Applying these principles to this case, there may be no better example of a diverse range of speakers, viewpoints, and readers than Internet access at public libraries. "The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to any member of the public who wishes to speak." J.S. App. 135a-136a. "[B]y providing patrons with even filtered access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional

judgment, determines to be particularly valuable." *Id.* at 121a.

When public libraries provide Internet access, they "create[] a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed." *Id.* at 125a. By forcing libraries to use blocking programs, CIPA "risk[s] fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects." *Id.* at 126a.

Because CIPA is properly subject to strict scrutiny, it is presumptively invalid, and must be struck down unless the government can prove it is narrowly tailored to serve a compelling government interest. *See Reno*, 521 U.S. at 879; *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126. Over ninety pages of factual findings, none disputed by the government, establish that the government failed to meet their burden in this case.

B. CIPA's Content-Based Restrictions Fail Strict Scrutiny.

1. The Mandated Use of Blocking Programs Is Not Narrowly Tailored To Prevent Access to Illegal Speech.

As the three-judge court's detailed findings clearly establish, CIPA suppresses a vast amount of Internet content, that is fully protected by the First Amendment, and is thus not narrowly tailored to serve the government's interest in prohibiting access to illegal images. Blocking programs "block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that,

while possibly harmful to minors, are neither obscene nor child pornography." J.S. App. 148a-149a. Even the defendants' own expert concluded that "between 6% and 15%" of blocked Web pages contain no content that meets "even the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography." *Id* at 149a. This evidence "significantly underestimate[s] the amount of speech that filters erroneously block, and at best provide[s] a rough lower bound on the filters' rates of overblocking."[2] *Id*. Defendant's expert conceded that even using his estimate, library patrons would be wrongly denied access to Web sites millions of times. Finnell testimony 4/1/02 at 175-179.

Indeed, given the fundamental flaws of blocking programs, the three judge court found that the mandatory use of such programs by public libraries is inherently too blunt a tool to satisfy the constitutional requirements of narrow tailoring. J.S. App. 152a. "[A]ny technology protection measure that blocks a sufficient amount of speech to comply with CIPA . . . will necessarily block substantial amounts of speech that does not fall within these categories." *Id*. at 151a. Because automated methods of reviewing content are severely flawed,

> [f]iltering companies are left with the Sisyphean task of using human review to

[2] The government's argument that plaintiffs' expert testimony established only a 1% overblocking rate is a shocking mischaracterization of the evidence and the court's findings. Govt. Br. at 34-35. Edelman specifically testified that his research did not attempt to establish an overblocking percentage, due to the inherent difficulties of doing so. J.A. 296-306, 350-356 (Edelman testimony). The court itself issued detailed factual findings about those difficulties, J.S. App. 85a (accepting government argument that Edelman's results cannot be generalized beyond his 6,775 sites), and found that all of the evidence significantly *underestimated* the actual amount of overblocking. *Id.* at 85a-86a.

> identify from among the approximately two billion Web pages that exist, the 1.5 million new pages that are created daily, and the many thousands of pages whose content changes from day to day, those particular Web pages to be blocked.

Id. at 150a. To cope with the Web's size, blocking programs use a variety of techniques, which necessarily cause them to block protected content. See also Section A5, *supra*.

They routinely block every page of a Web site that contains only some content falling with the companies' own definitions; they block text as well as images; they block entire Web sites containing fully protected speech simply because those sites share IP addresses with sites that fall within their category definitions; they block access to entire video files, audio files, chat rooms, and discussion groups regardless of how little content meets their category definitions; and they generally fail to review pages again once categorized to determine whether the content has changed. J.S. App. 150a.

"[T]he filters required by CIPA block substantial numbers of Web sites that even the most puritanical public library patron would not find offensive." J.S. App. 155a. For example, the products blocked the Lakewood High School alumni page and a political party in Uganda. J.A. 318; 326 PX 166, 169 (screen shot). They also blocked a soccer site in the United Kingdom and *The Journal of Contemporary Obituaries.* PX 162 I, 162 K (screen shots, lodged) Finnell testimony 4/1/02 at 161-169.

The government failed to produce evidence of *any* blocking program "that avoids overblocking a substantial amount of protected speech." *Id*. at 151a. Yet it contends that blocking millions of Web pages, most with content

nowhere close to the line of illegal speech, is a "negligible" side effect of its mission to prevent access to illegal speech. As this Court said just last term, "[t]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 1401 (2002).

Just as all programs necessarily overblock, they all necessarily fail to block access to sites that clearly fall within their own category definitions for sexually explicit material, and that may be illegal. J.S. App. 65a-66a. Because of the nature of all classification systems, "[t]here is an inherent tradeoff between any filter's rate of overblocking . . . and its rate of underblocking." *Id*. at 66a. The government's library witnesses who used blocking programs all experienced underblocking problems in their libraries. *Id*. at 77a. Even with blocking programs installed, then, any determined patron will easily be able to access sexually explicit material on library computers. J.A. 179 (Nunberg testimony). CIPA fails to achieve the government's goal to prevent access to illegal material "in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994). As Justice Scalia wrote in *The Florida Star v. B.J.F.*, "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [defendant's] supposedly vital interest unprohibited." 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring). CIPA clearly fails the strict scrutiny required when fundamental First Amendment rights are at stake. *Reno*, 521 U.S. at 874.

2. Libraries Have Other Less Restrictive Means to Help Patrons Find What They Want and Avoid Unwanted and Illegal Content.

Even assuming that the breadth of CIPA's impact on protected speech could ever be justified, *see Butler v. Michigan*, 352 U.S. 380 (1957), the government clearly failed to meet its "heavy burden . . . to explain why a less restrictive provision would not be as effective as [CIPA]." *Id.* at 879. As the three-judge court found, a number of alternative methods further the government's stated interests in a manner far less burdensome on protected speech than the mandatory use of blocking programs for all adults and all minors, including library staff. J.S. App. 157a-167a; see generally Section A8, *supra*. The vast majority of America's libraries use these methods, and not mandatory blocking for adults, to help patrons find information they want and avoid unwanted and illegal content. Plaintiffs' libraries testified that they receive few complaints when using these methods. *Id.* While these alternatives may not be perfect, the government failed to prove that they are less effective than blocking programs. As the lower court found, the government offered no data "comparing the use of library computers to access child pornography and . . . obscenity in libraries that use blocking software and in libraries that use alternative methods." *Id.* at 161a. Especially because blocking programs are themselves far from effective, "[i]t is no response that [a less restrictive alternative] . . . may not go perfectly every time." *Playboy*, 529 U.S. at 824.

In particular, almost all libraries have Internet use policies that forbid access to illegal content.

> Libraries can ensure that their patrons are aware of such policies by posting them in prominent places in the library, requiring patrons to sign forms agreeing to comply with the policy before the library issues library cards to patrons, and by presenting patrons, when they log on to one of the library's Internet terminals, with a screen that requires the user to agree to comply with the library's policy before allowing the user access to the Internet.

J.S. App. 158a. Almost all libraries also offer training in Internet usage, and provide lists of Web sites selected by librarians as appropriate for children or of particular relevance to their local communities. Section A8, *supra*. Some libraries place unblocked computers in well-trafficked areas to discourage violations of Internet use policies. Other libraries have installed privacy screens or recessed monitors, or have segregated computer terminals, to prevent unwanted exposure to material viewed by others. J.S. App. 165a-166a.

Similar alternatives exist to prevent minors from accessing material harmful to minors. Some libraries also offer the *optional* use of blocking software. Others have policies that allow parents to decide whether their children will use blocking programs, or policies that require only younger children to use them. *Id*. at 162a-163a. CIPA replaces parental decision-making about appropriate Internet use with the federal government's blanket judgment. "A court should not assume that a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 824. In sum, the government "failed to show that the less restrictive alternatives . . . are ineffective at furthering the government's interest." J.S. App. 167a.

C. The Disabling Provisions Fail to Cure CIPA's Defects.

The three-judge court held that CIPA's disabling provisions do not cure its constitutional defects. J.S. App. 167a-177a. For a host of reasons, that conclusion was correct. As an initial matter, libraries that receive e-rate funding may only override the software for *adults* with "bona fide research or other lawful purpose[s]." 47 U.S.C. § 254(h)(6)(D). For teenagers in thousands of libraries across the country, the provision is no help at all in alleviating CIPA's tremendous overblocking of protected speech. Furthermore, any inquiry into a patron's purpose is contrary to good librarianship. J.A. 122 (Cooper testimony).

The provisions are also unworkable for practical reasons. It is not possible to unblock visual images without also unblocking text and vice versa. Section A6, *supra*. The government also failed to prove that any software permits unblocking for a single patron based on his purpose, while continue to block access by those with less "bona fide" purposes. *Id.* In addition, processing unblocking requests could take up to a week. J.S. App. 46a.

To make matters worse, the unblocking provisions are impossibly vague. J.S. App. 167a-170a. The statute refers to the patron's "purpose" and not the nature of the site. Thus, it appears to require librarians to inquire into the "bona fide" nature or "lawfulness" of the patron's purpose in seeking to access a site regardless of whether the site is illegal. The government asks the Court to ignore the word "purpose" and to treat the provision as permitting unblocking of any lawful site. But this interpretation would render the "bona fide research" language superfluous.

Even assuming the government's interpretation would provide any useful guidance to librarians, it would

place librarians in the business of making essentially unreviewable decisions concerning the legal categories of obscenity. This Court has repeatedly required that those decisions be made by courts, not by administrative officials, even in the context of non-criminal proceedings. *Blount v. Rizzi*, 400 U.S. 410 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Librarians have repeatedly disavowed any expertise in making these legal judgments and expressed certainty that the provision would result in arbitrary and inconsistent judgments by different individual librarians with different values and concerns. J.A. 124 (Cooper testimony).

Finally, even putting aside the provision's infeasibility, vagueness, and delegation of judgments to administrative officials, the disabling provision still unconstitutionally deters patrons from accessing protected speech. As the lower court held, the "requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." J.S. App. 170a. This Court has struck down numerous content-based restrictions that require recipients to identify themselves before being granted the right to access or communicate disfavored speech. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301 (1965) (invalidating federal statute requiring postmaster to halt delivery of communist propaganda absent affirmative request); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (striking down federal law requiring cable users to request sexually explicit programming in writing); *Playboy*, 529 U.S. at 803 (invalidating law requiring cable users to request access to scrambled sexually explicit programming). As this Court explained just last term, "It is offensive -- not only to the values protected by the First Amendment, but to the very notion of a free society -- that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible & Tract Society of New*

York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080, 2089 (2002) (striking down local ordinance that prohibited door-to-door canvassers from "promoting any cause" without first obtaining a permit). It is equally offensive that a citizen must obtain government approval before accessing protected but disfavored speech on the Internet in her public library.

The deterrent effect of the disabling provisions is "a matter of common sense as well as amply borne out by the trial record." J.S. App. 172a. For example, plaintiff Emmalyn Rood testified that as a gay teen she would have been unwilling to ask a librarian to disable blocking programs so that she could research issues related to her sexual identity. J.S. App. 47a. Plaintiff Mark Brown would have been equally embarrassed to ask a librarian to unblock sites when he was researching his mother's breast cancer. *Id*. at 172a-73a. Many patrons would also not want to relinquish precious time during their Internet sessions to request unblocking that may take up to week. J.A. 127 (Cooper testimony); J.S. App. 46a. Significantly, the three-judge court found that the reluctance of patrons to request unblocking is also established "by the low number of patron unblocking requests, relative to the number of erroneously blocked Web sites, in those public libraries that use software filters and permit patrons to request access to incorrectly blocked Web sites." *Id*. at 173a.

Ignoring specific findings of the three-judge court, the government argues that requiring patrons to ask permission to view blocked sites is no different than other questions patrons ask of librarians daily. The analogy misses the mark. Librarians know from experience that patrons are unwilling to discuss their private concerns, and for that reason offer services to allow patrons to ask questions of librarians, or check out books, even through interlibrary loan, anonymously. J.A. 83 (Cooper testimony). Library patrons

can generally access print material without identifying themselves, by simply taking a book off a shelf and reading it at a library desk.

Even more fundamentally, asking a librarian to unblock a site that may be illegal is vastly different than asking for help to find a book. When a book is in the library's catalogue, the library has sent the unmistakable signal to the patron that it will assist the patron in getting that book. When a patron attempts to access an Internet site and is presented with a message, "THIS SITE IS BLOCKED BY THE LIBRARY DUE TO FEDERAL LAW REQUIRING BLOCKING OF OBSCENITY AND OTHER ILLEGAL SPEECH," the patron is sent an equally unmistakable signal that the library disapproves of the site. The patron may not know that the decision to block the site was not made by a librarian, but by an employee of a software company in California. The patron may also not know that the software is astonishingly inaccurate. For example, if the software blocks the Republican National Committee Web site, the patron may wrongly conclude that the site is mis-named and is really a site with sexually explicit material. The deterrent effect of the disabling provisions thus far exceeds even the common reluctance of patrons to seek assistance.

Given the content-based burden the disabling provision imposes on protected speech, and its strong deterrent effect, the provision "fail[s] to cure CIPA's lack of narrow tailoring." *Id*. at 177a; *see also Playboy*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree").

D. The Government's Arguments Ignore the Record and Misconstrue the Relevant Law.

Rather than grapple with the findings and overwhelming evidence against them, the government argues that the First Amendment is practically irrelevant to this case because CIPA's federal filtering requirement is consistent with a library's traditional collection decisions and thus subject only to rational basis review. This analysis ignores the three-judge court's specific findings to the contrary, and is flawed in numerous ways. First, CIPA imposes the federal government's censorship standard on libraries nationwide, and is thus a far cry from a library's exercise of its own editorial judgment. Indeed, 93% of libraries had already decided, after much review, *not* to mandate filters for all users. CIPA directly overrides those local decisions. Mandated filtering under CIPA, by definition, *eliminates* rather than preserves library discretion.[3]

Second, the lower court found that there are "fundamental differences" between the book selection process and the provision of Internet access. J.S. App. 124a. Unlike decisions to include books in their print collections, when offering Internet access librarians do not exercise editorial discretion and select only pre-approved speech for inclusion. When public libraries provide patrons with Internet access, they allow any member of the public to

[3] The government also implies that under the three-judge court's rationale, there would be a "perverse incentive" for public libraries to make available less information to preserve their discretion. The government offered no evidence at trial to support the theory that libraries would offer access only to preselected sites if they could not mandate filters. Their own witnesses specifically rejected that approach. J.S. App. 42a.

receive speech "from anyone around the world who wishes to disseminate information over the Internet." *Id.* at 137a-138a. CIPA is thus easily distinguishable from cases cited by the government which upheld the government's exercise of editorial discretion in selecting certain speech for inclusion in a state-created forum. As the three-judge court explained, in those cases "the state actor exercising the editorial discretion has at least reviewed the content of the speech that the forum facilitates." J.S. App. 121a (citing *NEA v. Finley*, 524 U.S. 569 (1998) (NEA examined the content of artworks it chose to subsidize on the basis of artistic excellence); *Forbes*, 523 U.S. at 673 (public broadcaster specifically reviewed and approved each speaker permitted to participate in debate). In providing patrons with even filtered Internet access, "a public library creates a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed." *Id*. at 125a, 123a, 7a. Unlike a public library's decision to carry books on a selected topic, "members of the general public . . . define the content that public libraries make available to their patrons on the Internet." *Id.* at 124a-125a. Moreover each of the cases cited by the government involved practical limits on the number of speakers that could be accommodated; these limits simply do not apply to Internet access.

Third, the government again misstates the record when it suggests that using filters is akin to the reliance by some libraries of third-party vendors or book reviews to make book selection decisions. Govt. Br. at 27. These resources are a transparent means of assisting librarians in including material in their collections. As the three-judge court specifically found, when using these resources "librarians still retain ultimate control over their collection development and review all of the materials that enter their library's collection." J.S. App. 35a; see also *Id.* at 123a. In stark contrast, blocking programs censor rather than select,

and libraries have no idea what Web sites the program ultimately blocks. *Id.* at 125a.

Fourth, the government argues that there is no tenable ground for subjecting book collection to rational basis review and Internet access to strict scrutiny. Yet this Court has recognized that there may well be different types of forums, subject to differing levels of scrutiny, within the same physical space or organizational structure. So, for example, a televised debate with "an open-microphone format" is subject to strict scrutiny, while a debate in which the same station controls the content is not. *Forbes*, 523 U.S. at 680; *cf. Cornelius*, 473 U.S. at 801-02 (recognizing that different standards would apply to the federal charity drive than to the federal workplace generally); *Widmar*, 454 U.S. at 264 (applying different standard to university meeting facilities than to state university generally). In addition, the issues that warrant less-than-strict-scrutiny in collection decisions (the necessity of choice, in light of cost and space constraints), are simply not present when Congress mandates censorship at public library Internet terminals nationwide.

Fifth, the government argues that the three-judge court's approach must be wrong because it "would risk transforming the role of public libraries in our society." Govt. Br. at 19. That argument is exactly backward. In fact, it is CIPA that risks changing librarians from information providers into censors. CIPA forces libraries to install filters that, out of the "vast democratic forum" of the Internet, "single out for exclusion particular speech on the basis of its disfavored content." *Id.* at 138a.

Finally, the government suggests that mandated filtering is reasonable because "a library patron would only infrequently need to have access to a Web site that has been blocked in order to obtain the information he or she seeks."

Govt. Br. at 34. This argument approaches the absurd. It implies that the Internet contains only facts, and not fiction, art, opinion, and vast amounts of unique expression. By analogy, the government would hardly sanction the removal of Edgar Allen Poe from library shelves because Charles Dickens remains available, or suggest the painter Yves Tanguy as an appropriate substitute for Frida Kahlo, or the Beatles for Beethoven. Even Web sites containing factual information can, of course, be unique. Plaintiff Jeffrey Pollock used his Web site to promote his campaign for Congress; when it was blocked, it was little comfort that Web users could reach his opponent's site. This Court has held that "one 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." *Reno*, 521 U.S. at 880. The government suggests an even more twisted re-writing of the First Amendment: that one speaker may be silenced so long as another remains free to speak.[4]

II. CIPA Imposes A Prior Restraint On Speech.

CIPA's blocking mandate also imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, without judicial determination or even the semblance of First Amendment due process. *See generally*, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (invalidating film censorship statute as prior restraint because it lacked several procedural safeguards necessary "to obviate the dangers of a censorship system"). Though the three-judge court did not reach plaintiffs' prior restraint argument, it warrants analysis as an

[4] CIPA would clearly fail constitutional scrutiny even under rational basis review. There may be no better example of irrationality than mandated government use of a product that secretly categorizes and blocks a huge amount of speech that comes nowhere close to the type of content the law was intended to restrict

independent reason for striking down the statute. The only other court to consider the constitutionality of mandatory Internet blocking at a public library invalidated the practice as a prior restraint. *See Mainstream Loudoun*, 24 F. Supp. 2d at 570 (because mandatory blocking policy "has neither adequate standards nor adequate procedural safeguards," it is an unconstitutional prior restraint). By mandating the use of blocking programs that block speech that is not even close to the line between protected and unprotected speech, CIPA imposes a classic system of prior restraint which presumptively violates the Constitution. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931) (stating that "the chief purpose of the [First Amendment] is to prevent previous restraints upon publication"). Blocking programs function literally as automated censors, blocking speech in advance of any judicial determination that it is unprotected. They arbitrarily and irrationally block thousands of Web pages that are fully protected. In this Court's words, "[t]his is . . . the essence of censorship." *Id.*

A postmaster who opened all letters and refused to deliver letters with the word "sex" in them would clearly be violating the First Amendment's rule against prior restraints. *See Blount v. Rizzi*, 400 U.S. 410 (1971) (striking down statute that allowed Postmaster General to halt use of mail for commerce in allegedly obscene materials). As the Court has explained, "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *Id.* at 416 (citations omitted). Similarly, having chosen to fund Internet access, the government "may not thereafter selectively restrict certain categories of Internet speech because it disfavors their content." *See Mainstream Loudoun*, 2 F. Supp. 2d at 795-96.

"[A]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its

constitutional validity." *Bantam Books*, 372 U.S. at 70 (morality commission, whose purpose was to recommend prosecution of obscenity, imposed unconstitutional prior restraint by sending notices to booksellers that certain books were objectionable); *see also Conrad*, 420 U.S. at 559 (municipal board's denial of permission for performance of the rock musical "Hair" at a city auditorium, because of reports that the musical was "obscene," was an unconstitutional prior restraint); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970) (invalidating as "unconstitutional prior administrative restraint" a sheriff's practice of seizing and terminating exhibition of R-rated movies).

The government argues that a library's use of filters is no more a prior restraint than a library's decision not to subscribe to Playboy. But CIPA is a federal mandate for all libraries nationwide who participate in much-needed funding programs, not a local library book collection decision.

The government once again argues that the speech can be obtained elsewhere. Once again, this court has rejected that argument. *Reno*, 521 U.S. at 880. Surely Dallas could not have defended its movie censorship on the grounds that the movie could be seen in Houston or, at a later time, it was available on video. *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968). In addition, for many Americans, their only means of accessing the Internet is at a library. Section A1, *supra.*

In marked contrast to the local book selection process, CIPA cuts libraries out of the decision-making process entirely. In fact, by delegating the authority to restrict speech to third-party, non-governmental actors who will not reveal what they are censoring, or the rules being used, CIPA compounds the constitutional infirmities inherent in any prior restraint. Additionally, the government's

argument ignores the public forum qualities of the Internet even in public libraries. There is no question that the decisions of blocking programs "to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Bantam Books*, 372 U.S. at 70. CIPA's disabling provisions inflict further First Amendment injury by vesting librarians with unbridled discretion to undo selectively the blocking companies' censorship decisions. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) ("The First Amendment prohibits the vesting of such unbridled discretion in a government official"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" is unconstitutional absent "narrow, objective, and definite standards to guide the licensing authority"). CIPA's censorship system comes nowhere close to the judicial review that is required when First Amendment rights are at stake. *See, e.g.*, *Freedman*, 380 U.S. at 58-59.

III. CIPA Imposes an Unconstitutional Condition on Funding of Internet Access at Public Libraries.

CIPA is also an unconstitutional condition on the receipt of a federal benefit. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The statute requires any library that participates in the e-rate or LSTA programs to install blocking software on "*any* of its computers with Internet access" during "*any* use of such computers." 20 U.S.C. 9134(f)(1)(B); 47 U.S.C. § 254(h)(6)(C) (emph. added). CIPA requires libraries to block speech even where Internet terminals are wholly funded by non-federal dollars. This Court invalidated exactly that practice in *League of Women Voters*, holding that the government may not use its spending

power to bar grantees "from using even wholly private funds to finance its" expressive activity. 468 U.S. at 400.

Although the three-judge court did not rule on plaintiffs' unconstitutional conditions claim, it included a lengthy footnote analyzing the relevant cases. J.S. App. 180a-188a n.36. Because "the First Amendment is not phrased in terms of who holds the right, but rather what is protected," J.S. App. at 183a n.36, plaintiffs clearly have a valid unconstitutional conditions claim based on the First Amendment rights of their patrons.[5] *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 409 (1974) (recognizing that First Amendment protects the right to receive information); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (booksellers have standing to sue on behalf of their customers); J.S. App. 188a n.36. As this Court has explained, "the question must be whether [the government is] abridg[ing] expression that the First Amendment was meant to protect." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Contrary to the government's argument, then, it is irrelevant that CIPA imposes its conditions on libraries rather than on their patrons directly. Govt. Br. at 41. This Court has previously entertained unconstitutional conditions claims both by the organizations that receive federal funding and their constituents. *See e.g.*, *Velazquez*, 531 U.S. at 537 (lawyers and clients sued to declare restriction on advocacy invalid); *Rust v. Sullivan*, 500 U.S. 173, 181 (1991) (doctors and patients sued to invalidate restriction on use of Title X funds); *League of Women Voters*, 468 U.S. at 370 n.6 (station owner and viewers sued to invalidate conditions on station's receipt of federal funds).

[5] Thus, this Court need not decide whether public libraries, as municipal entities, have their own independent First Amendment rights.

In *Velazquez*, the Court invalidated a restriction on funding because the program funded private speech, not governmental speech, and because the restriction distorted the traditional function of the medium. 531 U.S. at 544-45. Similarly, CIPA distorts the usual function of public libraries to provide uncensored access to information. The Legal Services Corporation ("LSC") was established to distribute federal funds to eligible local grantee organizations "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *Id*. at 536. Congress, however, prohibited legal representation funded by recipients of LSC moneys if the representation involved an effort to amend or otherwise challenge existing welfare law. *Id*.

The Court held that this condition on the use of LSC funds violated the First Amendment rights of LSC grantees and their clients.[6] When the government "designs a program to facilitate private speech, and not to promote a governmental message," and "seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning," the distorting restriction must be struck down. *Id*. at 534 ("[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). *See also League of Women Voters*, 468 U.S. at 396-97 (prohibitions against editorializing by public

[6] *Velasquez* also condemned the program because it required viewpoint discrimination. 531 U.S. at 533, citing *Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000). Because blocking programs make their censorship decisions in secret, there is no way to know whether they are viewpoint discriminatory. For example, blocking programs may block content targeted to the gay and lesbian community not because it is actually sexually explicit, but because the vendors disapprove of that lifestyle. The potential for viewpoint discrimination certainly adds to its constitutional defects. *See Mainstream Loudoun,* 24 F. Supp. 2d at 565-67.

radio networks were an impermissible restriction, even though the government enacted the restriction to control the use of public funds; First Amendment forbade the government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium). When the government conversely "establishes a subsidy for specified ends," "certain restrictions may be necessary to define the limits and purposes of the program." *Id*. (citing, *inter alia*, *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991)).

CIPA seeks to distort an existing medium of expression at public libraries by requiring them to:

> (1) deny patrons access to constitutionally protected speech that libraries would otherwise provide to patrons; and (2) delegate decision making to private software developers who closely guard their selection criteria as trade secrets and who do not purport to make their decisions on the basis of whether the blocked Web sites are constitutionally protected or would add value to a public library's collection.

J.S. App. 187a n.36. Like the improper effect of the funding restriction this Court invalidated in *Velazquez*, "[b]y interfering with public libraries' discretion to make available to patrons as wide a range of constitutionally protected speech as possible, the federal government is arguably distorting the usual functioning of public libraries as places of freewheeling inquiry." J.S. App. 187a n.36.

CONCLUSION

For the reasons stated above, the judgment of the three judge court should be affirmed.

Respectfully Submited,

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