UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Parents, Families, and Friends of Lesbians and Gays, Inc., et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 2:11-cv-04212-NKL
Camdenton R-III School District, et al.,	)	
Defendants.	)	

SURRESPONSE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. Blocking Library Materials Is Not School-Sponsored Speech or a Curricular Decision.

ADF asserts that "the District's internet access represents the District's speech, and it deserves deference on such curricular matters." ADF Br. at 7; *accord id.* at 4, 5. That is incorrect: library resources are not "the District's speech," and restrictions on those resources are not curricular decisions governed by *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

The Supreme Court in *Pico* was crystal clear that restrictions on library resources are not curricular decisions.

> Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869 (1982) (plurality) (emphasis in original). Recognizing the sharp line that *Pico* drew between curricular decisions and the school library, the lower courts have consistently held that restrictions on library resources are not governed by the more deferential *Hazelwood* standard that applies to

curricular decisions or school-sponsored speech. *See Case v. Unified Sch. Dist. No. 233, Johnson County, Kan.*, 895 F. Supp. 1463, 1469 (D. Kan. 1995) (applying *Pico* instead of *Hazelwood*); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 & nn.29-30 (5th Cir. 1995) (removal of school library book is a non-curricular matter and not governed by *Hazelwood*).

Even if *Pico* had not already resolved this issue, *amici* would still be wrong to categorize library Internet resources as curricular speech. In order to qualify as curricular speech, the speech must be an "expressive activit[y] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Camdenton R-III does not place its imprimatur on every website available on the school's library computers. To the contrary, the Camdenton High School student handbook contains a disclaimer warning students that:

> The district does not guarantee the accuracy or quality of information obtained from the Internet or use of its technology resources. ***Access does not include endorsement of content or the accuracy of the information obtained.***

Student Handbook at 46, http://camdentonschools.schoolwires.net/chs/lib/chs/hshandbook.pdf (emphasis added). Having specifically disclaimed endorsement of the speech made available through library Internet resources, Camdenton R-III cannot now use the curricular-speech doctrine to exercise greater control over students' right to receive information.

Moreover, even without such a disclaimer, there would be no risk of students reasonably perceiving Camdenton R-III as endorsing the content of every uncensored website available on the Internet. As the Supreme Court has explained, "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality); *accord Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1509 (8th Cir. 1994) (extending this analysis to junior-

high-school students). Indeed, if allowing Internet access to a website constituted school sponsorship, then every time a school allowed students to access a website for a religious organization, the school would be violating the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-10 (2000) (student prayer at football game violated the Establishment Clause because it constituted school-sponsored speech); *Roberts v. Madigan*, 702 F. Supp. 1505, 1512-14 (D. Colo. 1989) (school could not use Establishment-Clause concerns to remove Bible from school library but could remove Bible from teacher's classroom).[1]

II. *Amici* Misstate the Burden of Proof and the Evidentiary Standard.

This is a preliminary-injunction motion, not a trial on the merits. Plaintiffs are not "required to prove [their] case in full at a preliminary-injunction hearing." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "At this stage in the proceeding, the court does not decide whether the movant will ultimately win, nor must the movant prove a greater-than-fifty-percent likelihood of success." *Henderson v. Biltbest Prods. Inc.*, No. 4:10CV01503, 2010 WL 5392828, at *3 (E.D. Mo. Dec. 22, 2010). Plaintiffs only need to establish a "fair chance" of prevailing on the merits. *Planned Parenthood v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008).[2]

Amici are also incorrect in asserting that Plaintiffs bear the ultimate burden of proving that the District's censorship was unconstitutional. Once the plaintiff makes a prima facie case

[1] To the extent that *amici* argue that Internet access is government speech, they are similarly mistaken. Identifying government speech "boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party." *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009). As discussed above, no reasonable observer could conclude that the District endorses every website that it does not censor on a viewpoint-neutral basis. *Cf. id.* at 868 (explaining that a vanity license plate with the message "ARYAN-1" could not be regulated as government speech because "[n]o reasonable observer would believe that the State of Missouri is endorsing white supremacy").

[2] *Amici* criticize the Plaintiffs for not producing a piece of smoking-gun evidence in which a school official admits subjective dislike of LGBT-supportive viewpoints. Even if such evidence were required -- and it is not, *see infra* Section III -- the Plaintiffs have not yet had an opportunity to conduct any discovery or depose the relevant decision makers about their subjective motivations. *See Pico*, 457 U.S. at 873 n.25 (discussing deposition testimony of school officials); *Campbell*, 64 F.3d at 190 (same); *Case*, 895 F. Supp. at 1470 (same); *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003) (same).

showing an infringement of students' right to receive information, the burden of proof shifts to the defendants to justify the constitutionality of the speech restriction. "[T]o avoid a finding that it acted unconstitutionally, the board must establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information. Bare allegations that such a basis existed are not sufficient." *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 777 (8th Cir. 1982) (citations omitted); *see also Salvail v. Nashua Bd. of Ed.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979) ("[I]n justifying restrictions on students' right to receive information, school authorities must bear the burden of showing a substantial government interest to be served by the restriction." (internal quotation marks and citations omitted)); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 684 (D. Me. 1982) ("The burden of persuasion that there has been no unnecessary abridgement of [F]irst [A]mendment rights rests with the defendants."); *cf. Phelps-Roper v. Koster*, 734 F. Supp. 2d 870, 878 (W.D. Mo. 2010) (in First Amendment cases "burden is on the government to show that there is evidence supporting its proffered justification, including objective evidence showing that the restrictions serve the interests asserted").

III. *Amici* Misstate the Constitutional Test Under *Pratt, Pico,* and *ALA*.

Amici accuse Plaintiffs of improperly applying "forum analysis" to Internet filtering. But the only parties claiming that library Internet resources are a nonpublic forum are the Defendants. *See* Def. Opp. Sugg. at 8-9. The apparent disagreement between Defendants and their *amici* is understandable because the plurality opinion in *American Library Association* is difficult to parse. *See* Lillian R. BeVier, *United States v. American Library Association: Whither First Amendment Doctrine?* 55 Sup. Ct. Rev. 163 (2003). The plurality's statement that "forum analysis and heightened judicial scrutiny" do not apply is in considerable tension with its reliance on nonpublic forum cases. *See United States v. Am. Lib. Ass'n ("ALA")*, 539 U.S. 194, 206-07

(2003) (analogizing library to nonpublic forum at issue in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985)). Indeed, although the plurality explains why Internet access is not a public forum or a limited public forum, which are subject to "heightened judicial scrutiny," it never discusses nonpublic forums, which are not. *See* Def. Opp. Sugg. at 8-9; Anne Klinefelter, *First Amendment Limits on Library Collection Management*, 102 Law Lib. J. 343, 361 n.99 (2010).

Plaintiffs do not seek to resolve the disagreement between Defendants and their *amici*, or to argue that the school library should be labeled as a nonpublic forum, subsidized speech, or something else. Plaintiffs simply advance the same constitutional test used by the only courts that have examined Internet filtering after *ALA*. *See Bradburn v. N. Cent. Reg'l Lib. Dist.,* 231 P.3d 166 (Wash. 2010); *Crosby v. S. Orange County Cmty. Coll. Dist.*, 172 Cal. App. 4th 433 (Cal. Ct. App. 2009). Both cases have interpreted the *ALA* plurality to require that filtering be viewpoint neutral and reasonable in light of the historical purposes of the library. *See* Plaintiffs' PI Sugg. at 15-16.

Amici's efforts to shield school library censorship from the requirements of reasonableness and viewpoint neutrality should be rejected. *Amici* repeatedly assert that the concept of "viewpoint discrimination" as used in cases of nonpublic forums and subsidized speech is different than the invidious "dislike of ideas" at issue in *Pico*. But *amici* cite no support for that proposition. The Supreme Court decided *Pico* in 1982 -- before it refined the concept of viewpoint discrimination in nonpublic forum cases such as *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983), and *Cornelius*. The concept of viewpoint discrimination discussed in those later cases closely parallels the invidious discrimination discussed in *Pico*. *See Perry*, 460 U.S. at 49 (defining viewpoint discrimination as a policy "intended to discourage one viewpoint and advance another"); *Cornelius*, 473 U.S. at 812-13 (defining viewpoint

discrimination as exclusions "motivated by a desire to suppress a particular point of view"). There is no reason to think that the viewpoint discrimination discussed in those cases is any different than the unconstitutional suppression of ideas discussed in *Pico*.

Even if *Pico* did require a more stringent *mens rea* than cases involving nonpublic forums or subsidized speech, *amici* are fundamentally wrong in asserting that library censorship is unconstitutional only if the school officials expressly admit that they are motivated by a desire to suppress disfavored ideas. As *amici* note, litigants do not have "windows into [people's] souls." ADF Surreply Sugg. at 8. Government actors' motivations must be inferred from their objective conduct. *See* Plaintiffs' Reply Sugg. at 8-9. In many classic cases of library censorship, the school officials either gave no explanation for their actions or gave neutral explanations that the court rejected as insufficient. *See, e.g.*, *Pratt*, 670 F.2d at 778 (school board gave no explanation for films' removal and later claimed removal was due to violent content); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (school board gave no official explanation for its decision).

Amici are also wrong in arguing that a school district is not bound by any standard of reasonableness in censoring library materials. *Pratt* specifically stated that the school district "must establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information." *Pratt*, 670 F.2d at 777. And the *ALA* plurality's decision was premised on the idea that it was "entirely reasonable" for libraries to use filters to block pornography in light of the traditional role of the school library. *ALA*, 539 U.S. at 208 (plurality). Similarly, although *amici* repeatedly quote Justice Breyer's statement in his *ALA* concurrence that a library's Internet access is not a public forum, *amici* ignore the actual test Justice Breyer proposed, which required: "a 'fit' between the legislature's ends and the means

chosen to accomplish those ends -- a fit that is not necessarily perfect, but reasonable." *Id.* at 218 (Breyer, J., concurring in judgment) (internal quotation marks and citations omitted).

Indeed, even under the more lenient standard used for curricular speech, the school district must show that its restrictions are "reasonably related" to legitimate pedagogical goals. If reasonableness applies in the context of curricular speech, it certainly must apply in the context of restrictions on non-curricular speech, which are afforded greater protections.

IV. School Districts May Not Selectively Suppress Disfavored Viewpoints About Sexuality By Labeling Them Pervasively Vulgar.

Camdenton R-III claims that its only interest in blocking LGBT-supportive websites is to comply with the Children's Internet Protection Act ("CIPA"). But as demonstrated in Plaintiffs' previous submissions, other types of filtering software from reputable companies do not discriminate against LGBT-supportive websites and actually do a better job at blocking pornography than does URL Blacklist. If the District's concern is blocking pornography, then it makes no sense for the District to rely on software from an anonymous website that makes no guarantees of service and does not even purport to comply with CIPA. A hapless effort at complying with CIPA is not a "substantial and reasonable" justification for using URL Blacklist to discriminate against LGBT-supportive websites. *Pratt*, 670 F.2d at 776.

Implicitly recognizing that the District cannot justify its discriminatory filter by relying solely on CIPA, *amici* volunteer an additional argument that all the sites in the "sexuality" category -- including the sites for GLSEN, GSA Network, Day of Silence, and the Trevor Project -- can be blocked as "pervasively vulgar." In support of that claim, *amici* cite to an article from a conservative website that sought to discredit Kevin Jennings, the founder of GLSEN, when he was named assistant deputy secretary of education for the Office of Safe and Drug Free Schools.

The headline of the article is: "Obama's 'Safe Schools Czar' Is Promoting Child Porn in the Classroom." ADF Surreply Sugg. at 9 n.11.

According to *amici*, even though GLSEN, GSA Network, Day of Silence, and the Trevor Project do not contain materials that are sexually explicit in any way, the websites should be blocked because they provide a long list of books for and about LGBT teenagers, some of which contain first-person narratives of teenagers' sexual experiences. The books that are criticized by *amici* may be offensive to some readers -- indeed, GLSEN recommends that parents review the books for mature content -- but they are certainly not "child porn." ADF Surreply Sugg. at 9 n.11. Many of the books have been placed on recommended reading lists for teenage readers by the American Library Association and the School Library Journal.[3] By *amici*'s logic, the ALA's website should be blocked too; in fact, the ALA webpage for LGBT literature already is listed in the "sexuality" category and blocked for students at Camdenton R-III. *See* Pls' PI Sugg. Ex. A-5 at 74 (listing the website ala.org/ala/mgrps/rts/glbtrt/index.cfm as a "sexuality" site).

Amici's brief vividly illustrates how a purported concern for blocking sexually explicit material can serve as a tool for advancing a particular political or social agenda. Indeed, *amici*'s list of offensive books is eerily reminiscent of the list of "objectionable" books compiled by the Heritage Foundation and a local conservative organization, which sparked the censorship at issue in the *Pico* litigation. The list of books was "devoted principally to quotations of vulgar and indecent language referring to sexual and other bodily functions and crude descriptions of sexual

[3] *See* Outreach to Underserved Populations: Bibliography for LGBT Teens (2000), http://www.ala.org/ala/aboutala/offices/olos/outreachresource/gayteens21stcenturyaccessfuture.cfm (listing *Reflections of a Rock Lobster*, *Queer 13: Lesbian and Gay Writers Recall Seventh Grade*, *Passages of Pride: True Stories of Lesbian and Gay Teenagers*, and *Growing Up Gay: a Literary Anthology*); Booklist's Rainbow List: 2008, http://www.booklistonline.com/The-Rainbow-List/pid=2662110 (listing *The Full Spectrum: A New Generation of Writing*); School Library Journal, *Free Speech Group Protests GLBT Book-banning at NJ School District* (May 19, 2010), http://www.schoollibraryjournal.com/slj/articles/censorship/884661-341/free_speech_groups_protest_glbt.html.csp (noting that *Revolutionary Voices* was named one of School Library Journal's best adult books for high school students in 2001).

behavior." *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist*, 638 F.2d 404, 408 (2d Cir. 1980) (opinion of Sifton, J.). The books at issue in *Pico* were far more sexually explicit and included far more profanity than the LGBT-related books condemned by *amici*.[4] But the Supreme Court nevertheless held that the school district could not selectively remove the books to suppress certain disfavored viewpoints in the name of protecting against vulgarity. *See Pico*, 457 U.S. at 874-75 (plurality); *Pico*, 638 F.2d at 437 (Newman, J., concurring) ("[T]he bona fides of a school's claim of concern with vulgarity or sexual explicitness may be refuted by evidence that other books with similar passages were not removed."); *Salvail*, 469 F. Supp. at 1274 & n.4 (school's purported concern with sexual content of Ms. Magazine undermined by fact that school did not remove other library materials with similar sexual content).

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[4] Excerpts from the books removed in *Pico* are reproduced in an appendix to Justice Powell's dissenting opinion. They include:

> There are white men who will pay you to fuck their wives. They approach you and say, "How would you like to fuck a white woman?" "What is this?" you ask. "On the up-and-up," he assures you. "It's all right. She's my wife. She needs black rod, is all. She has to have it. It's like a medicine or drug to her. She has to have it. I'll pay you. It's all on the level, no trick involved. Interested?" You go with him and he drives you to their home. The three of you go into the bedroom. There is a certain type who will leave you and his wife alone and tell you to pile her real good. After it is all over, he will pay you and drive you to wherever you want to go. Then there are some who like to peep at you through a keyhole and watch you have his woman, or peep at you through a window, or lie under the bed and listen to the creaking of the bed as you work out. There is another type who likes to masturbate while he stands beside the bed and watches you pile her. There is the type who likes to eat his woman up after you get through piling her. And there is the type who only wants you to pile her for a little while, just long enough to thaw her out and kick her motor over and arouse her to heat, then he wants you to jump off real quick and he will jump onto her and together they can make it from there by themselves. . . .
>
> 'shitty, goddamned, pissing, ass, goddamned beJesus, screwing life's, ass, shit. Doris was ten and had humped with who knows how many men in between ... her current stepfather started having sex with her but good ... sonofabitch balling her' . . .
>
> 'Another day, another blow job ... If I don't give Big Ass a blow he'll cut off my supply ... and LittleJacon is yelling, "Mama, Daddy can't come now. He's humping Carla." . . .
>
> 'She first became aware of the warm tense nipples on her breasts. Her hands went up gently to clam them.' 'In profile, his penis hung like a stout tassle. She could even tell that he was circumcised.' . . .

Pico, 457 U.S. at 897-903 (Powell, J., dissenting) (internal quotation marks and citations omitted).

URL Blacklist's "sexuality" filter engages in the same sort of selective censorship criticized in *Pico* and *Salvail*. By going to the page for Focus on the Family (which is categorized by URL Blacklist as religion), students can read articles such as "Your Husband's Sex Drive Is God's Gift to You," and "What is Focus on the Family's perspective on the issues of oral and anal sex?"[5] At ChristianAnswers.net (also categorized as Religion), students can read "Personal Stories from those affected by sexual sin," which provides narratives about teenage experiences with masturbation and sex.[6] But because these experiences are condemned as sinful, they are saved from the "sexuality" filter. *See also* Am. Compl. ¶ 51 (listing examples of websites discussing sexual orientation in the context of condemning homosexuality).

Not one of Plaintiffs' websites or the other websites listed in the Complaint is sexually explicit. The websites are from suicide-prevention hotlines, religious organizations, political campaigns, legal advocacy groups, and charitable organizations. *Amici* have every right to oppose the "Homosexual Agenda" on their own websites. But this Court should reject their attempt to seize upon the District's web-filtering software as a means to silence opposing viewpoints under the pretext of protecting children from pornography.

Conclusion

For all these reasons, and the reasons set forth in Plaintiffs' previous submissions, the Court should reject *amici*'s arguments and grant Plaintiffs' motion for a preliminary injunction.

[5] *See* http://www.focusonthefamily.com/marriage/sex_and_intimacy/understanding-your-husbands-sexual-needs/your-husbands-sex-drive-is-gods-gift-to-you.aspx; http://family.custhelp.com/app/answers/detail/a_id/25923.
[6] *See* http://www.christiananswers.net/love/stories.html.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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