IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN LIBRARY ASSOCIATION, et al. Plaintiffs v. UNITED STATES OF AMERICA, et al. Defendants	)	Civil Action No. 01-CV-1303
MULTNOMAH COUNTY PUBLIC LIBRARY, et al., Plaintiffs v. UNITED STATES OF AMERICA, et al. Defendants	)	Civil Action No. 01-CV-1322

PLAINTIFFS' JOINT POST-TRIAL REPLY BRIEF

INTRODUCTION

The defendants' assertion that this is not "a First Amendment case" is but one in a series of desperate attempts to save CIPA from invalidation. Having rejected the First Amendment's application to this matter, the defendants nonetheless admit that the public library is a public forum. They proceed to qualify that concession, however, with the puzzling suggestion that the library is a public forum for something other than the provision and receipt of information. Next, in continuing their struggle to find some reasonable, limiting interpretation of CIPA's disabling provisions, the defendants merely underscore the constitutional flaws of those provisions. Moreover, in attempting to argue that CIPA does not impose an unconstitutional condition, the defendants grasp at inapposite government speech cases and illusory, purportedly pre-existing "limitations" on e-rate discounts that have never been – indeed, could never be – applied to the funds at issue in this case. In the end, the defendants' arguments all fail at their central goal: to justify, or somehow render irrelevant, the fact that CIPA's sweeping mandate inevitably will lead to the blocking of vast amounts of constitutionally protected information in public libraries.

I. CIPA'S CONTENT-BASED RESTRICTION ON INTERNET SPEECH IN THE LIBRARY VIOLATES THE FIRST AMENDMENT.

A. This Is a First Amendment Case.

Plaintiffs' opening brief explains why traditional First Amendment doctrine governs plaintiffs' challenge to CIPA. Thus, CIPA must satisfy strict scrutiny, and plaintiffs need not show that every library seeking to comply with CIPA will violate the First Amendment in order to prevail on their facial challenge. Although conceding that First Amendment claims are an exception to the general rule for facial challenges, the government blithely declares that this is not "a First Amendment case," but rather must be analyzed under South Dakota v. Dole.

See Defs.' Post-Trial Br. at 17 n.11. But defendants cannot seriously pretend that this is not a First Amendment case; and as plaintiffs have already explained, the relevant analysis under Dole here is the First Amendment. Defendants acknowledge that South Dakota v. Dole forbids Congressional funding schemes that induce recipients to violate the constitutional rights of third parties. See 483 U.S. 203, 210 (1987). In this case, plaintiffs have shown that CIPA is facially overbroad because it requires libraries to use blocking software that necessarily will result in the impermissible suppression of a substantial amount of protected speech. See, e.g., Ashcroft v. Free Speech Coalition, 2002 WL 552476, __ S. Ct. __, at *7 (U.S. Apr. 16, 2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, [a law] is unconstitutional on its face if it prohibits a substantial amount of protected expression."). The statute thus creates a significant risk that it will induce libraries to violate the First Amendment rights of its patrons. As such, CIPA cannot be sustained on its face as a valid exercise of Congress's spending power under Dole, regardless of whether an individual library could implement CIPA's requirements in a way that did not violate the First Amendment. Defendants' argument to the contrary turns the overbreadth doctrine on its head.

B. Internet Speech in Public Libraries Is Fully Protected by the First Amendment.

In an attempt to shield CIPA from any serious constitutional scrutiny, the defendants mischaracterize the nature of both the Internet and the public library, arguing for an analysis that is legally and factually flawed and would render the substantial amount of overblocking in libraries essentially irrelevant.

The defendants concede, as they must, that "the physical space of the library is itself a public forum." Defs.' Post-Trial Br. at 21. Defendants then attempt to escape the implications of this conclusion – including, for example, the strict scrutiny applied to speech regulations in such a forum, see, e.g., Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-46 (1983) – by arguing that the library's provision of information via the Internet somehow limits the speech-enhancing nature of the library forum. Defs.' Post-Trial Br. at 18-26. This contention is meritless, for several reasons.

As an initial matter, the defendants cannot possibly define the public forum characteristics of the library in such a way as to exclude the library's central purpose, the provision of information. If, as the defendants admit, the library is a public forum for certain designated purposes, it is difficult to conceive how those purposes could fail to include "the communication of the written word," Kreimer v. Bureau of Police, 958 F.2d 1242, 1259 (3d Cir. 1992), and patrons' associated "constitutionally protected interest in receiving and reading written communications." Id. at 1262. Even if the public library is not a public forum for some purposes – for example, giving speeches or public assembly – the library remains, without question, "the quintessential locus of the receipt of information." Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (quoting Kreimer, 958 F.2d at 1255).[1/]

Next, it would strain both logic and First Amendment jurisprudence to conclude that a public forum, such as the library, becomes less constitutionally relevant when it advances its speech-disseminating mission through the diverse medium of the Internet. Far from being

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[1]This central purpose of the public library makes it wholly unlike the more restrictive government fora, such as military exchanges, cited by the government. See Defs.' Post-Trial Br. at 24 (citing General Media Communications, Inc. v. Cohen, 131 F.3d 273 (2d Cir. 1997)).

"inconsistent with expressive activity," Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 803 (1985), the Internet embodies the essence of expressive activity. See, e.g., Reno v. ACLU, 521 U.S. 844, 870, 872 (1997). If libraries are public fora designated for the communication and receipt of information, the Internet surely amplifies that mission by vastly expanding the amount of materials available to patrons. See, e.g., PFF 74-76; Pls.' Joint Supplemental Findings of Fact ¶ 30.

That it may be permissible for a library "to limit its Internet service solely to websites selected by library staff," Defs.' Post-Trial Br. at 23, is beside the point.[2/] In fact, as with traditional public fora such as parks and streets, a library need not offer any Internet access at all. But although the library is under no constitutional obligation to provide any public Internet access, or to expand public Internet service beyond the limited offering of selected recommended sites, "as long as it does so it is bound by the same standards as apply in a traditional public forum." Perry, 460 U.S. at 46. "Reasonable time, place and manner regulations are permissible" – such as content-neutral limitations on patron use of chat rooms, or time limits on computer use – but "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Id. at 60. As plaintiffs have demonstrated, CIPA falls well short of these requirements.

In seeking constitutional latitude for CIPA's sweeping restrictions, the defendants argue that the relevant forum in this case is "the library's collection of materials to be made available to the public." Defs.' Post-Trial Br. at 20. Even accepting that definition, however, libraries

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[2]As plaintiffs noted in their initial post-trial brief, the provision of recommended site lists – and not the broad availability of the rest of the Internet – most closely resembles a library's physical collection development. Unlike with blocking software, both recommended site lists and the selection of physical materials sends no disparaging message about the materials not recommended or selected. See Pls.' Post-Trial Br. at 8-9.

historically have "made available to the public" both materials in the libraries' physical collection – which necessarily are limited by resource and space limitations, PFF 104 – and materials and information from other sources, through, for example, bibliographic access tools and interlibrary loan programs. PFF 98.[3/] As with interlibrary loan, a library providing broad Internet access (beyond simple recommended site lists) opens a window to an enormous amount of information not otherwise available in the library's physical collection.[4/] When doing so, the library cannot, consistent with the First Amendment, selectively close that window to one type of disfavored content.[5/]

Defendants' theory that libraries can comply with constitutional strictures simply by defining their fora to exclude one category of speech – so-called "pornographic" materials, Defs.' Post-Trial Br. at 1, 22 – fails for two additional reasons. First, accepting defendants' argument

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[3] Defendants' attempt to deny the unfettered nature of interlibrary loan is unavailing. As plaintiffs have shown, libraries will assist patrons in obtaining access to all materials except those that are clearly illegal. PFF 99. Defendants' citations to policies at Westerville and Tulsa, Defs.' Post-Trial Br. at 42, are not to the contrary. The Westerville library, for example, has never rejected an interlibrary loan request on the basis of content. In fact, under the library's new self-checkout system, content review of interlibrary loan requests will be impossible; Westerville patrons will be able to borrow materials from other libraries without any Westerville staff ever reviewing the request. See Barlow 4/1/02 at 58-59. Similarly, Tulsa's interlibrary loan policy hardly requires, as the defendants suggest, that patron requests "meet collection policies." Defs.' Post-Trial Br. at 42. The library's written policy, in fact, states the opposite requirement: "Interlibrary Loan Service will attempt to provide materials not available at Tulsa City-County Library. Requests to borrow from other libraries will be limited to those items that do not fall within the scope of Tulsa City-County Library's collection development objectives . . ." Pls.' Ex. 66H (emphasis added); Joint Ex. 4 (Saferite Dep.), at 78-79.

[4]Even the handful of libraries that have chosen to block Internet access from the outset indisputably provide access to innumerable online materials that the libraries never would carry in their physical collections.

[5]For similar reasons, defendants are also wrong when suggesting that prior restraint doctrine does not apply in the public library context.

would render every governmental speech restriction permissible once the state describes the relevant forum to incorporate that restriction. But as plaintiffs have already explained, as in the funding context, the government cannot recast a speech limitation as a mere forum definition, "lest the First Amendment be reduced to a simple semantic exercise." Legal Services Corp. v. Velazquez, 531 U.S. 533, 547 (2001).[6/]

Second, even if it were legally sound, defendants' theory – indeed, much of their defense of CIPA – rests on the faulty premise that blocking software actually blocks only a limited class of Internet speech. The government declares that instances in which these products block non-sexually explicit sites "are relatively rare." Defs.' Post-Trial Br. at 39. That assertion is flatly contradicted by the overwhelming evidence presented at trial, which shows that overblocking is a rampant, unsolvable problem. See Pls.' Post-Trial Br. at 10-14. Indeed, even the government's own experts confirmed that, if used in public libraries nationwide pursuant to CIPA's requirements, blocking software would improperly block millions of access attempts every year. See PFF 11, 166.[7/] The undisputed evidence demonstrates that the erroneous blocks cover a wide array of non-pornographic information that is perfectly appropriate for use in any public library. PFF 213-15. Thus, even if the government could disregard basic First Amendment principles

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[6]For example, under defendants' theory, the government in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), lawfully could have denied auditorium access to any performance that was not "clean, healthful[] entertainment," as outlined in the auditorium's original dedication. Id. at 549 & n.4.

[7]Government expert witness Cory Finnell estimated that between 7% and 15% of the unique sites blocked by three of the government's testifying library witnesses – Tacoma, Westerville, and Greenville – were completely innocuous sites that did not match even the blocking companies' broad definitions of sexual explicitness. PFF 10, 159.

and library practice, and could redefine the relevant library forum to include everything but so-called "pornography,"[8] CIPA's broad mandate still would not pass constitutional muster.

C. The Government's Own Evidence Demonstrates Why CIPA Fails Strict Scrutiny.

In light of the overwhelming evidence of blocking software's broad censorial sweep, defendants have failed to carry their burden of showing that CIPA's restrictions are narrowly tailored to serve a compelling governmental interest. Contrary to the government's contention, the practices of its library witnesses do not accomplish narrow tailoring. Defendants argue that the experience of these witnesses demonstrates that libraries can sufficiently customize blocking software to ameliorate any overblocking errors. But Mr. Finnell's study shows that even with efforts to tailor the software, these libraries still block a substantial number of innocuous sites that are protected for both adults and minors. PFF 159-163. In an effort to minimize the impact of these overblocking numbers, the government relies in large part on testimony by David Biek of the Tacoma Public Library that his library's software correctly blocks 98% of the time. Yet the government fails to acknowledge that Mr. Biek's self-serving assessment of the performance of his library's blocking software is entirely unsupported by any data, and is directly contradicted by Mr. Finnell's findings. Indeed, Mr. Finnell's analysis of the Tacoma logs indicated an overblocking rate that was over three times higher than Mr. Biek's estimate. PFF 160, 167.

Defendants simply have not justified such a substantial infringement on protected speech. The government asserts that CIPA's provisions further libraries' interest in protecting against illegal materials, but it has not shown (and cannot show) that this interest justifies such a wide-

[8]Whatever defendants and their library witnesses mean by the term "pornography," it undoubtedly encompasses far more speech than the narrow categories defined in CIPA.

ranging suppression of fully protected speech. See Ashcroft v. Free Speech Coalition, 2002 WL 552476, at *13 ("The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech."); see also, e.g., United States v. Playboy Entm't. Group, 529 U.S. 803, 817-18 (2000).[9/] Likewise, as plaintiffs explain in their opening brief, the government's purported interest in protecting children from exposure to sexually explicit materials cannot justify a blanket ban on adults' access to such constitutionally protected speech. See Ashcroft v. Free Speech Coalition, 2002 WL 552476, at *11 ("[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it."). All of the government's library witnesses apply the same blocking standards to adults and minors,[10/] thereby "reduc[ing] the adult population . . . to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957); see also Reno v. ACLU, 521 U.S. 844, 877 (1997); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 128 (1989); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983). And there simply is no legitimate government interest in preventing adult patrons from accessing sexually explicit

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[9]The government also argues that its library witnesses justifiably installed mandatory blocking in an effort to comply with state obscenity or harmful to minors statutes. But all of those states exempt libraries and librarians from these laws, either by statute or authoritative legal interpretation. See, e.g., Ind. Code § 35-49-3-4(2); Ohio Rev. Code Ann. § 2907.31(C)(1); S.C. Code Ann. § 16-15-385(C)(2); Wash. Rev. Code §§ 9.68.100, 9.68.015; Pls.' Ex. 66G; Tenn. Op. Atty. Gen. No. 00-030 (Feb. 22, 2000).

[10]The government's libraries regularly treat adults and children the same for the purpose of unblocking as well as for the blocking categories they enable. For example, Mr. Biek testified that the Tacoma library will refuse to unblock sites that may be considered harmful to minors even if the request comes from an adult patron. PFF 295.

speech that is protected by the First Amendment. Ashcroft v. Free Speech Coalition, 2002 WL 552476, at *7 ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.").[11/] Even if there were, that would not justify CIPA's broad censorship of non-sexually explicit speech.

The government's defense of CIPA breaks down altogether when it comes to its burden of showing the absence of less restrictive alternatives. Defendants and their library witnesses claim that the use of mandatory blocking software for all patrons is justified to protect children from exposure to harmful to minors material. But there is no evidence that any of these libraries has ever tried, much less considered, the most obvious less restrictive way of furthering this purported purpose: using blocking software only during use by young children, with provisions allowing for parental consent. Thus, while Mr. Biek claims that mandatory blocking software was needed at his library to address the problem of teenagers accessing sexually explicit material on the Internet, Tacoma never tried using blocking software only for minors. The government therefore cannot claim that CIPA's requirement of mandatory blocking software is the only effective means for furthering its interests because it has not even explored, much less proven the ineffectiveness of, these other options.

Not only have defendants failed to show that no other less restrictive alternatives exist, they have not shown that blocking software is very effective at furthering the government's claimed goal of preventing the display of "hard core pornography." The government's brief essentially ignores the evidence that blocking products consistently fail to block a large amount

[11]Even the government's library experts admitted that it would not be proper for a librarian to prevent adults from accessing constitutionally protected sexually explicit materials. Cronin 3/29/02 at 96-97; Davis 4/1/02 at 103.

of the materials targeted by CIPA. See PFF 12, 264-76. Even the very limited study of government expert Chris Lemmons concluded that four commonly used blocking products failed to block 8% of 200 "hard core pornographic" sites chosen by Lemmons, with one of the most popular products, Cyber Patrol, failing to block over 17% of those sites. DPF 305, 308. That the implementation of mandatory blocking software is not effective at stopping individuals from accessing sexually explicit content on the Internet is demonstrated by the Greenville library, where complaints about such instances persisted even after Greenville installed its blocking software. See Defs' Ex. 134. Indeed, defendants concede that the blocking software does not solve the purported problem of patrons accessing sexually explicit Web content. Defs.' Post-Trial Br. at 29.

D. CIPA's Disabling Provisions Compound Its Constitutional Problems.

Plaintiffs already have shown that the provisions in CIPA allowing librarians to disable blocking software for "bona fide research or other lawful purposes" compound, rather than alleviate, CIPA's constitutional infirmities. The government's brief confirms this. First, in an attempt to salvage the statute's vagueness problems, the government asserts that the "bona fide research" language would permit a librarian to disable blocking software for a "pornography researcher." Defs.' Post-Trial Br. at 49. But the government goes on to suggest that under the same provision, a librarian would properly deny an identical request by an adult patron seeking disabling "for his own recreation." Id. at 49 n.37. The government's interpretation of the statutory language flies in the face of its argument that the "bona fide research" language invites no individualized determinations into the propriety of a patron's disabling request. Under the government's scenario, how would a librarian determine and verify whether the patron was

seeking access to blocked sites for "pornography research" rather than "recreation"? Would a permission slip be required? The government's hypotheticals make clear that the disabling provisions empower – and indeed require – librarians to make the kind of ad hoc and subjective judgments that create the danger of arbitrary and inconsistent applications of the law. As a result, the disabling provisions are hopelessly and unconstitutionally vague. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

Second, the defendants' contention that the disabling provisions will have no chilling effect on library patrons' speech once again rests upon a distortion of the nature of plaintiffs' claims. See Defs.' Post-Trial Br. at 46. Contrary to defendants' assertion, the right at issue is not an absolute right to receive speech anonymously, but the right of library patrons not to have to petition the government for access to disfavored speech to which they are lawfully entitled. See Denver Area, 518 U.S. at 754; Lamont v. Postmaster General, 381 U.S. 301, 307 (1965); Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 551 n.23 (N.D. Tex. 2000); Mainstream Loudoun v. Board of Trustees of the Loudoun County Library ("Mainstream Loudoun I"), 2 F. Supp. 2d 783, 797 (E.D. Va. 1998).[12/] The experience of the government's testifying witnesses shows that

[12]Contrary to defendants' argument, see Defs.' Post-Trial Br. at 47 n.35, to establish an unconstitutional stigma claim there is no requirement that the plaintiffs prove the likelihood of improper disclosure of information. In both Denver Area and Lamont, the mere expression of a fear of disclosure and its attendant chilling effect on speech sufficed. Denver Area, 518 U.S. at 754 (referring to claims "by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive channel'"); Lamont, 381 U.S. at 307 ("[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'").

Nor is there any merit to defendants' argument that any stigma suffered by adult patrons is justified by the interest in protecting children, relying on cases upholding harmful to minors statutes. See Defs.' Post-Trial Br. at 47. First, there is no indication that any stigma claim even

librarians may look with disfavor upon certain types of speech in making disabling decisions, even if that speech is fully protected by the Constitution (and indeed, even if the Web content is indistinguishable from material in the library's non-digital collection). Thus Mr. Biek testified that he would not disable Playboy.com for a 45-year-old physician, even though his library offers unrestricted access to Playboy, even for children, elsewhere in the library collection. See Biek 3/28/02 at 135; PFF 295. The deterrent effect of wholly discretionary disabling is evident in the strikingly low number of unblocking requests received by these libraries. See PFF 280-83.

Third, defendants concede that the distinction between the e-rate disabling provisions (which do not allow disabling for minors under any circumstances) and the LSTA disabling provisions (which allow disabling for adults and minors) is wholly irrational. Defs.' Post-Trial Br. at 48. Plaintiffs' opening brief demonstrates that the e-rate provisions' total ban on disabling for minors – even with parental consent – imposes an impermissible prior restraint on minors and unjustifiably burdens their First Amendment rights and the rights of their parents. Defendants do not even attempt to defend this restriction; to the contrary, they admit that there is no rational basis for it. Accordingly, the e-rate provisions' ban on disabling for minors plainly cannot be sustained as a valid restriction of minors' speech.

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was raised in those cases. Second, those cases specifically address only harmful to minors materials, while Internet blocking software indisputably blocks access to substantially more expression. In addition, the chilling effect created by CIPA's disabling provisions is particularly problematic because it requires library patrons to petition the government for access to protected speech; by contrast, requesting sensitive materials from private actors raises fewer constitutional concerns. Moreover, even laws that have sought to restrict "harmful to minors" material on the Internet have been struck down by the courts. See, e.g. Reno v. ACLU, 521 U.S. 844 (1997); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

II. CIPA'S UNCONSTITUTIONAL CONDITIONS ARE FATAL TO THE ACT.

Defendants raise a number of arguments to justify the egregiously unconstitutional conditions imposed by CIPA, none of which saves the statute. As an initial matter, defendants focus on the open question whether libraries, as public entities, have independent First Amendment rights. Defs.' Post-Trial Br. at 53-57. But this determination is unnecessary to the Court's resolution of plaintiffs' claims. Libraries plainly have standing to assert their patrons' rights, see Pls.' Post-Trial Br. at 38 n.20. In addition, public libraries are best positioned to challenge the use of the federal government's spending power to conscript them into a massive distortion of private communication in an area specifically designed to "encourage a diversity of views." Velazquez, 531 U.S. at 542; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995).[13/]

The tenuousness of the defendants' position is highlighted by their desperate reliance on a supposed "educational purposes" limitation in the e-rate program.[14/] Defs.' Post-Trial Br. at 62 (arguing that "educational purposes" limitation "fundamentally distinguishes this case from Velazquez"). It goes without saying that public libraries provide information not only for educational purposes, but also for recreational, professional, and other purposes, PFF 95; the defendants did not even attempt to refute this fundamental point at trial, because they could not.

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[13]In addition, as explained in plaintiffs' initial brief, it hardly helps defendants' position that some small minority of libraries receiving the conditioned funds may be willing to block patrons' Internet access. Just as in Velazquez, where some of the recipient legal services attorneys might have chosen voluntarily to challenge existing welfare law, CIPA is also constitutionally infirm because it establishes a funding condition that seeks to take away a basic, professional choice about how to provide information to the public. See Pls.' Post-Trial Br. at 44.

[14]Defendants do not even attempt to invoke such a limitation on LSTA grants.

Of course, Internet service in public libraries – including that funded in whole or part by e-rate discounts – necessarily includes the daily, continuous provision of non-educational online materials.

There is no indication, moreover, that e-rate funding has ever been limited to educational purposes. As the defendants concede, the FCC has never denied any library e-rate discounts because the Internet access provided by the library failed to meet the "educational purposes" requirement of the universal service statute. PFF 469.[15/] Having ignored this provision throughout the history of the e-rate program, the government cannot now invoke some dormant "limitation" to suit its present censorial purposes.[16/] Cf. Barnhart v. Walton, 122 S. Ct. 1265, 1270 (2002) (when construing statute, Court places great weight on agency's historical interpretation (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522, n. 12 (1982))).

Furthermore, contrary to the defendants' suggestion that unconstitutional conditions attach only where a condition amounts to viewpoint discrimination, Defs'. Br. at 60-61, content-based funding conditions undoubtedly are constitutionally suspect. The invalidated regulation in FCC v. League of Women Voters, 468 U.S. 364 (1984), for example, was merely content-based, restricting all "editorializing" by recipients, regardless of viewpoint. See id. at 383 ("[T]he scope of § 399's ban is defined solely on the basis of the content of the suppressed speech."); id. at 384

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[15]In fact, no library's application for e-rate discounts has been denied on the basis of any Internet content provided by the library. PFF 468.

[16]The defendants' strained reliance on a supposed "educational purposes" limitation fails for an additional reason. The term "educational" in this context is not defined with any precision, but certainly encompasses Internet information that will be blocked under CIPA. Indeed, one of the defendants' library experts defines "education" as "[t]he whole corpus of human experience that has contributed to who we are as a people [and] a species." Davis 4/1/02 at 102.

("[T]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." (quoting Consolidated Edison Co. v. Public Service Comm'n of NY, 447 U.S. 530, 537 (1980))).

Defendants, moreover, offer little justification for the unduly broad reach of CIPA's conditions, which extend to privately funded Internet service in libraries. See Pls.' Post-Trial Br. at 44-46. As in League of Women Voters, CIPA impermissibly requires a library receiving e-rate discounts or LSTA grants to block all Internet access, even if the recipient "receives only 1% of its overall income from [federal] grants." 468 U.S. at 400.

Defendants' heavy reliance on government speech cases such as Rust v. Sullivan, 500 U.S. 173 (1991), and Regan v. Taxation With Representation, 461 U.S. 540 (1983), is wholly unavailing. As the Supreme Court repeatedly has made clear, where, as in Rust and Regan, the funds at issue merely advance government speech, rather than facilitating a broad range of private speech, the analysis is "altogether different." Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000) (distinguishing Rust and Regan). See also, e.g., Velazquez, 531 U.S. at 541 (Rust concerned program that "amounted to governmental speech"); Rosenberger, 515 U.S. at 833 (government in Rust "used private speakers to transmit specific information pertaining to its own program"). The public library, on the other hand, is "designed for freewheeling inquiry,"[17/] Board of Educ. v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), and therefore may not be profoundly distorted through

[17]Like a university, distinguished from the government speech program in Rust, the public library "is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted . . . ." Rust, 500 U.S. at 200.

funding conditions like those in CIPA. Velazquez, 531 U.S. at 541; Rosenberger, 515 U.S. at 833-34; League of Women Voters, 468 U.S. at 378, 383, 392, 395.

III. THE INDIVIDUAL PLAINTIFFS' CLAIMS ARE RIPE.

Contrary to defendants' repeated assertions, the claims of the individual plaintiffs in this case are ripe for review. The evidence shows that the individual patron plaintiffs regularly use the library for information to which they will be wrongly denied access if CIPA is upheld, given the record on blocking software. See PFF 343-351; 389-400; 422-438. Likewise, it is undisputed that all of the Web sites of the individual plaintiffs have been blocked by at least one popular blocking product, and these plaintiffs have a realistic fear that they will continue to be blocked. PFF 210, 352-56; 439-59. In any event, defendants' ripeness argument is nothing more than a variation on their refusal to recognize that the plaintiffs in this case assert First Amendment facial challenges to CIPA. Where, as here, a law threatens to suppress a substantial amount of protected speech, plaintiffs may bring a pre-enforcement challenge, even if they have not suffered – or would not suffer – constitutional injury under those laws. See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988); Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56 (1988); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798-99 (1984); see also Presbytery of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1463-64 (3d Cir. 1994) (facial challenge to statute on First Amendment grounds was ripe); Planned Parenthood v. Farmer, 220 F.3d 127, 148 (3d Cir. 2000) ("Federal court review is not foreclosed merely because there is a pre-enforcement challenge to a state statute.").

Moreover, the concerns underlying the ripeness doctrine simply are not present here. Defendants do not dispute that the facial claims of the other plaintiffs are ripe in this case, and that the Court may adjudicate those claims, based on the extensive record developed at trial.[18/] Thus, the "basic rationale of the ripeness requirement" – "'to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements,'" Artway v. Attorney General of State of New Jersey, 81 F.3d 1235, 1246-47 (3d Cir. 1996) (quoting Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967)) – is not implicated. Because this Court will resolve the common claims of all plaintiffs, and because the record establishes the particular claims of the individual plaintiffs with sufficient concreteness, defendants' ripeness arguments must be rejected.

CONCLUSION

For the foregoing reasons, CIPA should be declared unconstitutional and permanently enjoined.

[18]The defendants do not dispute the ripeness of claims brought by plaintiff library associations, library patron associations, and community organizations, all of which bring claims on their own behalf and on behalf of their members.

Respectfully Submitted,

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