

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

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

DEFENDANTS' POST-TRIAL BRIEF

PRELIMINARY STATEMENT

As Defendants have maintained from the outset, and as the record now demonstrates, the Children's Internet Protection Act ("CIPA") is a valid exercise of Congress' broad power under the Spending Clause. Art. I, § 8. Congress may condition the receipt of federal subsidies on public libraries' efforts to exclude potentially illegal materials from the materials they offer via the Internet.

Plaintiffs in these facial challenges to CIPA have failed to overcome the weight of authority affirming the breadth of Congress' power under the Spending Clause. The record shows that conditioning federal funds and subsidies available to public libraries on the use of technology protection measures set to filter access to pornographic websites enables libraries to do what they have otherwise done with ease in selecting physical materials – "protect against access to" child pornography, obscenity, and material that, with regard to minors, is harmful to minors. Application of a content filter neither induces libraries to violate the First Amendment, nor distorts the usual or traditional function of the public library.

SUMMARY OF ARGUMENT

Selection is the essence of professional librarianship. The record before this Court demonstrates that libraries generally do not select pornographic materials for their physical collections, either for adult or minor patrons. This has little, if anything, to do with lack of funds, space, or demand for the material. Indeed, the evidence shows that public libraries do not so much as consider pornographic magazines like *Hustler* and *Penthouse*, or XXX videos, for inclusion in their traditional collections, regardless of the "protected" status of some of this material.

As the library communities in Tacoma, Washington and Greenville, South Carolina well know, however, libraries do not have the luxury of passive avoidance when it comes to

pornographic websites made available through a library's Internet connection. Rather, the only reasonably effective manner by which to opt out of offering the thousands of sites like www.1hotteenpussy.com, www.lesbiansex.com, and www.kinky.com, is to enable a content filter to exclude them from the library's Internet offering. This is no more a "prior restraint" on speech than a library's exclusion of *Hustler* magazine. The First Amendment does not strip librarians of their professional stewardship of library collections, regardless of the medium in which information is delivered; they may deny access to hardcore pornography without providing notices and hearings to interested parties, and without the general "judicial superintendence" of the prior restraint doctrine. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963).

Plaintiffs darkly suggest that this selection process raises the specter of secret government censorship. To be sure, for obvious reasons, the voluminous lists of porn sites these products categorize is deemed proprietary by the filtering companies. The record shows, however, that libraries do not need access to these lists to make an informed selection decision, any more than they need access to the entire list a publisher reviews in the process of compiling a list of recommended items public libraries may wish to purchase. Libraries choose categories for exclusion after testing the products; review the performance of the filter in light of their policies; override mistakes in categorization; and reserve the right to alter the content categories as they deem necessary. Filters are treated as a new selection tool used by libraries to exclude from their Internet collections material that would never pass the threshold of their physical collections. They are no more a "black box" than numerous other selection tools, like publishers' recommended lists, upon which many libraries rely heavily in making selections. Indeed, if anything, the content filters offer greater transparency than these traditional tools. With only a

few clicks libraries can, and do, determine which websites are most popular with their patrons, as well as which sites are most frequently intercepted by the filter, and in which category.

Information concerning the identity and content of every single website that has been intercepted by the filter is readily available.

Plaintiffs' argument that no library can constitutionally apply a content filter is premised entirely on the proposition that the library is a public forum open to all expression, regardless of its content. The relevant forum in these cases is the library's collection of digital materials, not the physical space of the building itself. This is the forum to which Plaintiffs seek specific access. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985). The glaring assumption is, of course, that patrons and publishers have constitutional rights with respect to what a public library will select. Just as library patrons have no right to access the library to do anything they wish, however, they have no right to access the library to view anything they wish. Likewise, a web publisher, like any other publisher, has no constitutional right to "speak" through a library's collection.

Even assuming a library opens its collection in some limited sense merely by providing Internet access, the library may constitutionally exclude certain content from its collection. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."). Just as libraries exclude pornographic materials from their physical collections, so too might they limit their Internet collections in this manner. Where a library chooses, by policy and practice, to limit the content to be included in its collection, restrictions on access to materials outside the scope of the collection are permissible so long as they are "reasonable and not an effort to suppress expression because public officials oppose the speaker's

view." Id. at 46. See also Bd. of Education, Island Trans Union Free School Dist. v. Pico, 457 U.S. 853, 871 (1982) (plurality) (school board could remove books because they "were pervasively vulgar," so long as it did not remove with the intent to deny access to disfavored ideas).

Assuming rights of some nature attach upon a public library's mere provision of Internet access, the evidence in the record demonstrates that content filters can be reasonably applied in public libraries in a manner consistent with the First Amendment. The evidence shows that restrictions on access to pornographic websites are wholly consistent with the purpose of the public library; indeed, they are in line with the traditional exclusion of such materials from library collections. Moreover, the evidence with respect to the products themselves shows that the filters perform at least reasonably well in categorizing the content the libraries wish to exclude from their digital offering. There is no evidence in this record that either the libraries or the products themselves discriminate on the basis of viewpoint. Simply put, the evidence does not support Plaintiffs' claim that regardless of circumstances, CIPA induces libraries to violate the First Amendment rights of their patrons.

The evidence shows that libraries desiring to embrace the opportunity to provide all of the content now available on the Web to their patrons, including the hardest core of pornographic content, cannot claim the mantle of tradition, or the imprimatur of the Constitution. Indeed, it would be decidedly non-traditional practice for a library to collect the sorts of hardcore pornography discussed at trial if those items were available in print. Choosing not to offer all that the Internet contains does not infringe the rights of either adult or minor patrons. By excluding pornographic websites through content filters, libraries are no more "treating adults like children" than they are when they refuse to offer *Hustler* magazine, XXX videos, and other

arguably "protected speech" as part of their collections. The mere fact that this decidedly non-traditional, "unfettered" collection is available via the Internet does not compel any particular library to offer it. Some libraries (like Fort Vancouver Regional Library) choose to treat their Internet collection as open to all and everything, and some libraries (like Tacoma Public Library) choose for very sound reasons to offer only certain content. The Constitution compels neither choice.

CIPA prefers those libraries that opt to pursue the traditional course by not offering as part of their Internet collections sites featuring pornography. Fort Vancouver Regional Library and other libraries may offer "unfettered" Internet access to their patrons; they simply cannot require the federal government to subsidize their choice to provide an unfettered forum. So long as Congress chooses rationally, it may prefer limited collections to unfettered ones. South Dakota v. Dole, 483 U.S. 203 (1987).

STATEMENT OF THE CASE

STATUTORY AND REGULATORY BACKGROUND¹

I. Section 254 of the Telecommunications Act of 1996.

U.S. telecommunications policy involves a complicated system of transferring costs (and thus income) among various groups of telecommunications customers in order to promote the highest level of telephone connectivity by individuals. This system is referred to as "universal service," and it is codified in section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Congress specified several groups as beneficiaries of the

¹ The parties have entered into stipulations concerning the nature of the programs affected by CIPA. See Joint Stipulations of the Parties, ¶¶ 115-218. In addition, Defendants have submitted proposed findings of fact with regard to the most relevant aspects of the programs. See Defendants' Proposed Findings of Fact, ¶¶ 13-40.

universal service support mechanism, including consumers in high-cost areas, low-income consumers, schools and libraries, and rural health care providers. 47 U.S.C. § 254. The extension of universal service to schools and libraries in section 254(h) is commonly referred to as the Schools and Libraries Discount, or “E-rate.”

Under the E-rate program, “[a]ll telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service . . . , provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.” 47 U.S.C. § 254(h)(1)(B). Section 254(h) was “intended to ensure that . . . elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide . . . educational services to all parts of the nation.” H.R. Conf. Rep. No. 104-458, at 144; accord In the Matter of Federal-State Joint Board on Universal Service (hereinafter “Universal Service Order”), 1997 WL 236383, 12 F.C.C.R. 8776, ¶ 424 (May 8, 1997).

Under Federal Communication Commission (“Commission”) regulations, “any provider of telecommunications services” (with certain exceptions, see 47 C.F.R. § 54.5), must contribute a portion of its revenue to the Universal Service Fund for disbursement among eligible carriers who are providing services to those groups or areas specified by Congress in section 254. The E-rate program provides a subsidy of up to \$2.25 billion annually to schools and libraries. 47 C.F.R. § 54.507(a).² The universal service program as a whole, including its E-rate component,

² Of this total \$2.25 billion amount, libraries receive only a small portion of the funding. See USAC's 2000 Annual Report (available at <http://www.sl.universalservice.org>) (indicating that in Years 1 through 3 of the E-rate program, libraries and library consortia received less than 4 percent of available E-rate discounts, and that consortia comprised of schools and libraries received 15 percent or less). The vast majority of the beneficiaries of E-rate discounts, and therefore, the vast

and the Universal Service Fund, are administered by a private corporation, the Universal Service Administrative Company ("USAC"), see 47 C.F.R. § 54.701, under the supervision of the Commission. See 47 C.F.R. § 54.702.

The Commission's regulations, at 47 C.F.R. Part 54, Subpart F ("Universal Service Support for Schools and Libraries"), prescribe the conditions under which schools and libraries receive the E-rate discount. In order to be eligible, libraries must (1) be eligible for assistance from a State library administrative agency under the Library Services and Technology Act; (2) be funded as an independent entity, completely separate from any schools; and (3) not be operating as for-profit businesses. 47 C.F.R. § 54.501(c). Discounts on eligible services for schools and libraries range from 20 percent to 90 percent, depending on the economic need and location of the school or library. See 47 C.F.R. § 54.505. The level of discount awarded to a library is generally determined according to the percentage of students eligible for the National School Lunch Program (or other federally approved alternative mechanism) in the school district in which it is located. Id.

In general, the E-rate program covers three varieties of services: telecommunication services, Internet access, and internal connections; more specifically, USAC, in consultation with the Commission, periodically issues a list which sets forth the various services that are eligible for discount and any conditions attaching to their eligibility.³ The program is designed to provide schools and libraries maximum flexibility to purchase the services or combination of services that they believe will meet their needs effectively and efficiently. Universal Service

majority of entities subject to CIPA's certification requirements, are schools (or school consortia) which are not among the plaintiffs herein.

³ The most recent version of this "Eligible Services List" is available on USAC's Website, <http://www.sl.universalservice.org>.

Order, 12 F.C.C.R. 8776, ¶ 29. With respect to Internet access, discounts are available only for "basic 'conduit' access to the Internet"; content is not funded. Id. ¶ 436; see id. ¶ 445 (E-rate program will "grant schools and libraries discounts on access to the Internet but not on separate charges for particular proprietary content or other information services").⁴

As part of the application process for discounted services under the E-rate program, eligible libraries must certify, inter alia, that "[t]he services requested will be used solely for educational purposes." 47 C.F.R. § 54.504(b)(2). Moreover, libraries must certify that "[a]ll of the necessary funding . . . has been budgeted and approved to pay for the 'non-discount' portion of requested connections as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively." Id. These certifications must be included in funding requests which are filed annually. 47 C.F.R. § 54.507(d).

II. LSTA Programs.

The Library Services and Technology Act ("LSTA") of 1996, Subchapter II of the Museum and Library Services Act, 20 U.S.C. § 9101 et seq., promotes access to learning and information resources in all types of libraries. The broad purposes of the Act are: (1) to consolidate Federal library service programs; (2) to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages; (3) to promote library services that provide all users access to information through State, regional, national and international electronic networks; (4) to provide linkages among and between

⁴ See also Universal Service Order, 12 F.C.C.R. 8776, ¶ 441 ("We do not grant schools and libraries discounts on the cost of purchasing information content . . . [but only] on the data links and associated services necessary to provide classrooms with access to those educational materials . . . Without the use of these 'information service' data links, schools and libraries would not be able to obtain access to the 'research information [and] statistics' available free of charge on the Internet. . . . [T]hese information services are essential for effective transmission service, i.e., "conduit" service; they are not elements of the content services provided by information publishers.").

libraries; and (5) to promote targeted library services to people of diverse geographic, cultural, and socioeconomic backgrounds, to individuals with disabilities, and to people with limited functional literacy or information skills. 20 U.S.C. § 9121. These purposes are accomplished through several grant programs, including National Leadership Grants, which enhance the quality of library services nationwide and provide coordination between libraries and museums; Grants to Native Americans and Native Hawaiians; and Grants to States.

Under the Grants to States program, the LSTA authorizes the Director of the Institute of Museum and Library Services (“IMLS”) to provide funds to State Library Administrative Agencies -- official agencies of the States charged by the law of the State with the extension and development of library services in that State -- according to a minimum allotment and a population-based formula set out in 20 U.S.C. § 9131.⁵ At least 96 percent of LSTA funds must be used for: (1) establishing or enhancing electronic linkages among or between libraries; (2) electronically linking libraries with educational, social, or information services; (3) assisting libraries in accessing information through electronic networks; (4) encouraging libraries in different areas, and encouraging different types of libraries, to establish consortia and share resources; or paying costs for libraries to acquire or share computer systems and telecommunications technologies; and (5) targeting library and information services to persons having difficulty using a library and to under-served urban and rural communities, including children from families with incomes below the poverty line. 20 U.S.C. § 9141(a). The other 4 percent may be used for administrative costs. 20 U.S.C. § 9132(a).

The LSTA enables each State to apportion the federal funds as appropriate to meet the needs of the State. 20 U.S.C. § 9141(b). State Library Administrative Agencies may use their

⁵ The term “library” is defined in 20 U.S.C. § 9122(2).

federal funds to support statewide initiatives and services; they may also distribute the funds through competitive subgrants or cooperative agreements to public, academic, research, school, and special libraries in their State. Each State, however, is responsible for matching the federal funds it receives. The federal share is 66 percent, with the State responsible for the remaining 34 percent. In addition, each State must achieve a certain "Maintenance of Effort," to ensure that federal funds do not replace State funds in supporting State-based programs. 20 U.S.C. § 9133.

III. The Children's Internet Protection Act.

CIPA was enacted as part of the Consolidated Appropriations Act, 2001, which consolidated and enacted several appropriations bills, including the Miscellaneous Appropriations Act, of which CIPA was a part.⁶ See Pub. L. No. 106-554, 114 Stat. 2763 et seq. CIPA addresses three distinct types of federal funding programs: aid to elementary and secondary schools pursuant to Title III of the Elementary and Secondary Education Act of 1965, see CIPA, § 1711 (amending Title 20 to add § 3601); LSTA grants to states for support of libraries, see CIPA, § 1712 (amending the Museum and Library Services Act, 20 U.S.C. § 9134); and discounts under the E-rate program, see CIPA, § 1721(a) & (b) (both amending the Communications Act of 1934, 47 U.S.C. § 254(h)). Only sections 1712 and 1721(b), which apply to libraries, are at issue in these cases.⁷

⁶ The provisions that became CIPA were considered by Congress for several terms before being enacted in 2000. Predecessor bills to CIPA, although not identical, substantially resembled the enacted version and the legislative history related to those bills, predominantly S. 97 and S. 1619, is instructive in discerning Congress's intent in enacting CIPA.

⁷ No school is a party to these proceedings and, accordingly, no party has standing to seek invalidation of either § 1711 or § 1721(a) of CIPA, which govern schools granted funding under the Elementary and Secondary Education Act of 1965, and the E-rate program, respectively. See CIPA, §§ 1711, 1712, 1721 (all providing that in the event any part of CIPA is held invalid, "the remainder . . . shall not be affected thereby").

CIPA was enacted to address Congress's concern that "[a]lthough the Internet represents tremendous potential in bringing previously unimaginable education and information opportunities to our nation's children, there are very real risks associated with the use of the Internet." S. Rep. 106-141, at 2. As Congress found, "[p]ornography, including obscene material, child pornography, and indecent material is available on the Internet. This material may be accessed directly and intentionally, or may turn up as the unintended product of a general Internet search." Id. Congress noted that "due to the aggressive tactics of commercial pornographers, children are at risk of random exposure to sexually explicit material." Id. at 3. In addition, the threat to children that is created by unrestricted Internet access includes the phenomenon of "pedophiles utilizing the Internet to lure and seduce children into illegal and abusive sexual activity." Id. This includes individuals who "stalk children through chat rooms, and by E-mail," and "highly organized, and technologically sophisticated groups of pedophiles who utilize advanced technology to trade in child pornography, and to sexually exploit and abuse children." Id.

Congress enacted CIPA to, inter alia, further the "compelling interest of the government in protecting children from exposure to sexually explicit material." S. Rep. 106-141, at 7. Congress specifically concluded that "the Internet presents a unique threat to normal sexual development in children by playing upon common elements that contribute generally to antisocial behavior in children." Id. at 3. As Congress found, "[r]esearch indicates that there are three factors that produce the best environment to stimulate antisocial behavior in children; it is the combination of anonymity, role models of behavior and arousal. Internet Web sites possess exactly those three factors." Id. Congress noted that a school or library, "by accepting Federal dollars through the Universal Service program, becomes a partner with the Federal government

in pursuing this compelling interest” in protecting children from harm caused by exposure to easily-accessible sexually explicit materials on the Internet. Id. at 7.

A. Section 1721(b) — The E-rate Program.

Section 1721(b) of CIPA imposes conditions on a library's participation in the E-rate program. A library "having one or more computers with Internet access may not receive services at discount rates" unless the library makes the certifications required by CIPA. § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(A)(i)). Each library seeking the benefit of E-rates is required to make two certifications. First, with respect to minors, the library must certify that it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are – (I) obscene; (II) child pornography; or (III) harmful to minors," and that it is "enforcing the operation of such technology protection measure during any use of such computers by minors." CIPA, § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(B)).

Second, with respect to adults, the library must certify that it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are – (I) obscene; or (II) child pornography," and that it is "enforcing the operation of such technology protection measure during any use of such computers."

Id. (codified at 47 U.S.C. § 254(h)(6)(C)). CIPA further specifies that "[a]n administrator, supervisor or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or

other lawful purpose." Id. (codified at 47 U.S.C. § 254(h)(6)(D)).⁸

To assist libraries in carrying out the conditions on E-rate discounts, Congress provided clear definitions of CIPA's terms. "Minor" means "any individual who has not attained the age of 17 years." CIPA, § 1721(c) (codified at 47 U.S.C. § 254(h)(7)). "Obscene" has the meaning given such term in section 1460 of title 18, United States Code, and "child pornography" has the meaning given such term in section 2256 of title 18, United States Code. Id. "Harmful to minors" means

any picture, image, graphic image file, or other visual depiction that – (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

Id. The term "technology protection measure" means "a specific technology that blocks or filters access to visual depictions that are obscene, . . . child pornography, . . . or harmful to minors." CIPA, § 1703(b).

CIPA specifically prohibits federal interference in local determinations regarding what Internet content is appropriate for minors:

A determination regarding what matter is appropriate for minors shall be made by the school board, local educational agency, library or other authority responsible for making the determination. No agency or instrumentality of the United States Government may — (A) establish criteria for making such determination; (B) review the determination made by the certifying [entity] . . . ; or (C) consider the criteria employed by the certifying [entity] . . . in the administration of subsection (h)(1)(B).

⁸ CIPA grants the Commission authority to issue regulations implementing the universal service-related provisions of CIPA. CIPA, § 1721(f). Commission regulations specifying the timing and the phrasing of the certifications required by CIPA were issued as part of a Commission Report and Order issued April 5, 2001, and formally issued as regulations on April 16, 2001. See 66 Fed. Reg. 19394-98 (to be codified at 47 C.F.R. § 54.520).

CIPA, § 1732 (codified at 47 U.S.C. § 254(1)(2)).⁹

Finally, Congress made clear that the categories of content libraries were encouraged to exclude from their Internet service were a floor, not a ceiling. Section 1702 (a) provides, in relevant part:

Nothing in this title or the amendments made by this title shall be construed to prohibit a . . . library from blocking access on the Internet on computers owned or operated by that . . . library to any content other than content covered by this title or the amendments made by this title.

B. Section 1712 — The LSTA Programs.¹⁰

Section 1712 of CIPA amends the Museum and Library Services Act (20 U.S.C. § 9134) to provide that no funds made available under that Act "may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet," unless such library "has in place" and is enforcing "a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions" that are "obscene" or "child pornography," and, when the computers are in use by minors, also protects against access to materials that are "harmful to minors." CIPA, § 1712 (codified at 20 U.S.C. § 9134(f)(1)(A)).

As under the E-rate program, "an administrator, supervisor or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful

⁹ This provision applies in general to a library's use of a technology protection measure. See § 1712 (codified at 20 U.S.C. § 9134(f)(1)(A)) (library must have in place a policy of Internet safety "that includes operation of a technology protection measure"); § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(A),(B), & (C) (same). CIPA thus explicitly prohibits federal intervention in all content determinations made by local libraries.

¹⁰ The certifications required of participants in LSTA programs are required only of those libraries which do not also receive discounts under the E-rate program. See CIPA, § 1712 (codified at 20 U.S.C. § 9134(f)(1)). Libraries which participate in both programs make the required certification only to the Commission under the regulation implementing CIPA for purposes of E-rate.

purposes.” Id. (codified at 20 U.S.C. § 9134(f)(3)). Section 1712 contains definitions substantially similar to those found in the provisions governing the E-rate program. See id. (codified at 20 U.S.C. § 1934(f)(7)). In addition, the statute expressly contemplates that libraries who accept the conditions may exclude content other than the illegal material identified in CIPA. See 20 U.S.C. § 9134(f)(2) (“Nothing in this subsection shall be construed to prohibit a library from limiting access to or otherwise protecting against materials other than [materials that are obscene, child pornography or, with respect to minors, harmful to minors]”).

C. Consequences Of Noncompliance and Cure.

CIPA sets forth both the consequences of non-compliance with its conditions as well as the manner in which a recipient may cure any defect in compliance. With respect to the E-rate program, CIPA provides that any library which knowingly fails to submit the required certification “shall not be eligible for services at discount rates,” and that a library which knowingly fails to ensure the use of its computers in accordance with the required certification “shall reimburse all funds and discounts received . . . for the period covered by such certification.” CIPA, § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(F)). A failure to make the required certification may be remedied “[u]pon the submittal of such certification,” at which point the library “shall be eligible for services at discount rates.” Id. A failure to ensure the use of computers in accordance with a certification may be remedied by submitting to the Commission a “certification or other appropriate evidence” that the library is ensuring such use. Id.

With respect to LSTA programs, CIPA confers discretion on the IMLS Director to enforce compliance with the funding conditions:

Whenever the Director . . . has reason to believe that any recipient of funds [under] this Act is failing to comply substantially with the requirements of this

subsection, the Director may — (1) withhold further payments to the recipient under this Act; (2) issue a complaint to compel compliance of the recipient through a cease and desist order; or (3) enter into a compliance agreement with a recipient to bring it into compliance with such requirements.

CIPA, § 1712 (codified at 20 U.S.C. § 9134(f)(5)). These authorized actions are the exclusive remedies available to the Director in the event a library fails to comply substantially with its CIPA certification in an LSTA program. “The Director shall not seek a recovery of funds from the recipient for such failure,” and when the Director determines that a “recipient of funds who is subject to a withholding of payments . . . has cured the failure providing the basis for the withholding of payments, the Director shall cease the withholding of payments to the recipient.”

Id. These provisions specifically tying continued federal funding under the E-rate and LSTA programs to compliance with CIPA's certification requirements are the only consequences authorized by the Act should a library fail to make or substantially comply with its CIPA certification.

ARGUMENT

I. CIPA IS A FACIALLY VALID EXERCISE OF CONGRESS'S SPENDING POWER.

A. Plaintiffs Bear A Heavy Burden In These Facial Challenges.

Plaintiffs in these actions challenge a particular exercise of Congress's broad spending power. U.S. Const., Art. I, § 8, cl.1. These challenges cannot be deemed to present "as applied" claims for one very simple reason: These are pre-enforcement actions challenging a statute that has yet to be applied to any library. Thus, in plain terms, Plaintiffs seek a declaration that CIPA is facially unconstitutional under the Spending Clause.

Facial invalidation of an Act of Congress "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." Nat'l Endowment for the Arts

v. Finley, 524 U.S. 569, 580 (1998) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). Acts of Congress are presumptively constitutional, Bowen v. Kendrick, 487 U.S. 589, 617 (1988), and Plaintiffs face a "heavy burden" in seeking to have CIPA declared facially unconstitutional. Rust v. Sullivan, 500 U.S. 173, 183 (1991). See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990) ("facial challenges to legislation are generally disfavored").

Indeed, the Supreme Court has described a facial challenge as "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Rust, 500 U.S. at 183 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). See also Babbitt v. Sweet Home Chapter Of Communities for Great Ore., 515 U.S. 687, 699 (1995) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 514 (1990) (same). As the Court framed the issue in Rust:

Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act *and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights*.

500 U.S. at 183 (emphasis added).¹¹ See also Legal Aid Society of Hawaii v. Legal Services Corp., 145 F.3d 1017, 1023-24 (9th Cir. 1998) (applying Rust facial validity standard to Spending Clause enactment), cert. denied, 525 U.S. 1015 (1998).

Of the four general limitations on the federal spending power, only one is at issue in these

¹¹ There is an exception to this facial validity standard in some First Amendment cases. See, e.g., Gooding v. Wilson, 405 U.S. 518, 520-23 (1972). If this were a First Amendment case, that exception might be on point. But Plaintiffs here are not challenging any particular library's application of a content filter. Plaintiffs have argued from the outset that CIPA, which Congress passed under the Spending Clause, is itself facially invalid. Rust therefore supplies the governing standard for these facial challenges.

cases.¹² Where Congress's spending power is used to fund state or local public entities, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds," Dole, 483 U.S. at 208, if Congress's power to condition the grant of federal subsidies is "used to induce the States to engage in activities that would themselves be unconstitutional." Id. at 210. Plaintiffs argue that the application and administration of a content filter necessarily results, regardless of circumstances, in a violation of the First Amendment. If, however, CIPA "contemplates a number of indisputably constitutional applications," Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 584 (1998), it must be upheld.

B. This Court Cannot Determine the Facial Validity of CIPA Without First Determining the Nature of the Forum At Issue

The fundamental flaw in Plaintiffs' argument under Dole's fourth factor is that they leap immediately, and unjustifiably, from their assertion that the physical space of a public library is a "limited public forum" to the conclusion that the exclusion of any content from the library must satisfy strict scrutiny.¹³ To even begin to determine whether a library could constitutionally operate a content filter to exclude certain content from its Internet collection, however, this Court must first (1) define the relevant forum, and (2) discern whether the library at issue has demonstrated, by its policies and practices, an intent to designate that forum as a public forum. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse[.]"). See also Christ's

¹² For a discussion of the remaining three factors set forth in Dole, Defendants respectfully refer the Court to their Memorandum in Support of Motion to Dismiss, at 17-23.

¹³ Of course, Plaintiffs do not, nor could they, argue that CIPA itself is subject to strict scrutiny. Measures enacted under the Spending Clause need only be rationally related to a legitimate public purpose. See United States v. Butler, 297 U.S. 1, 66 (1936)

Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242, 248 (3d Cir. 1998) ("A designated public forum is created because the government so intends."), cert. denied, 525 U.S. 1068 (1999). These are "inherently factual" inquiries. General Media Communications, Inc. v. Cohen, 131 F.3d 273, 279 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998).

In defining the forum, the Supreme Court has "focused on the access sought by the speaker." Cornelius, 473 U.S. at 801. The Court has applied a flexible approach to defining the relevant forum:

When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum and within the confines of the government property.

Id. (citation omitted). Thus, in Cornelius, the Legal Defense Fund challenged the constitutionality of an executive order which barred the Fund from participating in the Combined Federal Campaign charity drive. The Court rejected the government's argument that the relevant forum was the entire federal workplace, focusing instead on the charity drive itself, which the Court ultimately concluded was a nonpublic forum. Id. Similarly, in Christ's Bride Ministries, which involved the removal of certain advertisements posted in subway and commuter rail stations, the Third Circuit determined that the forum at issue was not the rail and subway stations as a whole, but rather the "advertising space" itself. 148 F.3d at 248. The court, following Cornelius, held that the forum must be defined with reference to the "access sought by the plaintiff." Id. See also Perry, supra (forum defined as school's internal mail system and teachers' mailboxes, not school building); Lehman v. City of Shaker Heights, 418 U.S. 298, 301 (1974) (advertising spaces on city buses, and not buses themselves, deemed the relevant forum).

In light of the specific analysis required under Cornelius, Plaintiffs' focus on the physical space of the library cuts far too broadly. Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242 (3d Cir. 1992), is not the proper lens through which to examine the forum issue in this case. In Kreimer, the Third Circuit simply upheld the public library's authority to determine the "optimum and safest use of its facilities." Id. at 1246. Kreimer does not go so far as to establish that the public library is a designated public forum for all expressive activity, regardless of content. After reviewing the record evidence concerning the library's intent in opening its doors to the public, the extent to which the library retained the discretion to refuse admission, and the compatibility of the library's space with expressive activity in general, the court determined that the public library building was itself a limited public forum.

The specific forum at issue in these cases is not the whole or some part of the library's physical space, but rather the library's collection of materials to be made available to the public.¹⁴ In providing the Internet, libraries do not simply offer computer terminals, phone lines, and furniture for patrons to use for whatever expressive activity they wish. Along with libraries' physical collections, the Internet delivers content to patrons. That content, like the content selected for the library's physical collection, constitutes a separate forum for expression and listening. It is the library's collection to which Plaintiffs specifically seek access. Thus, it is this particular forum that must be examined under Dole's fourth factor.

C. Public Library Collections Are Not Public Fora Open To All Forms Of Content

¹⁴ In this respect, both Plaintiffs and the court in Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F. Supp.2d 552 (E.D. Va. 1998), make the same error. The issue is not whether the library building itself is a public forum open to expressive activity, but rather whether the library has evinced an intent to permit unfettered publishing and unfettered access to whatever a publisher might send to library patrons via the library's Internet connection.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802. To determine whether the government intends to create a public forum, courts review the policies and practices relating to the forum. Id. To be sure, the physical space of the library is itself a public forum. As the evidence demonstrates, however, publishers and patrons have no right to demand the inclusion of any specific item in a library's collection. Public libraries, by policy and practice, define the scope of their collections by means of selection criteria and "collection development" principles. See generally Defendants' Proposed Findings of Fact ¶¶ 386-404 (hereinafter "DPF ----"). The discretion with regard to decisions about inclusion, exclusion, and the general scope of the information the library disseminates rests with library officials.

Indeed, the flaw in Plaintiffs' forum argument becomes apparent when one specifically considers how libraries have defined and limited their physical collection fora. The record demonstrates that the physical collections of libraries are not designated public fora for all expression, regardless of content. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."). See also Brody v. Spang, 957 F.2d 1108, 1117-18 (3d Cir. 1992) ("When examining the extent of use granted, we must be mindful that a designated public forum 'may be so designated for only limited uses or for a limited class of speakers.'") (quoting Student Coalition for Peace v. Lower Merion School District Bd. of Directors, 776 F.2d 431, 436 (3d Cir. 1985)). Of particular relevance is the overwhelming record evidence that public libraries generally avoid collecting materials that might be obscene, child pornography, or, with respect to minors, harmful to minors, and that they do so in the main by

simply refusing even to consider, much less select, pornographic magazines, XXX videos, and all of the other materials one might find in the local adult bookstore. See DPF ¶¶ 407-412; 438-42 (Tacoma); 454-55 (Greenville); 462-64 (Westerville); 472 (Fulton County); 481-83 (Tulsa); 490-93 (Plaintiff Libraries). Other than the handful of libraries that choose to select pornographic magazines, libraries have traditionally deemed such materials to lie outside the scope of their collections. See DPF ¶ 409

Just as patrons have no right to access the library's space to do anything they wish, see Kreimer, they have no right to access the library to view anything they wish. The evidence in the record demonstrates that libraries uniformly limit their collections to certain materials that serve their missions, or serve more specific goals of collection development. See DPF ¶¶ 381-85; see also, e.g., DPF ¶ 435 (Tacoma); 452 (Greenville). Although, as the record reflects, libraries make every effort to be responsive to patron requests for materials, and to select quality materials advertised by publishers and authors, what patrons are permitted to view, and publishers permitted to display, is a matter for professional staff to decide according to library selection criteria and more general policies relating to the development of their collections. Would-be speakers and would-be listeners do not define the nature or scope of the content displayed at the public library, whether that content is educational, informational, or recreational. That is so whether the content is displayed in print or some other medium.¹⁵

Similarly, a library's provision of Internet services need not, indeed should not, be an all-

¹⁵ Congress enacted CIPA with this obvious principle in mind. See S. Rep. 106-141, at 8-9 ("[P]atrons at a library do not have the right to make editorial decisions regarding the availability of certain material. It is the exclusive authority of the library to make affirmative decisions regarding what books, magazines, or other material is placed on library shelves, or otherwise made available to patrons. Libraries impose many restrictions on the use of their systems which demonstrate that the content of the library's offerings are not determined by the general public.").

or-nothing proposition. There is ample evidence before the Court that library Internet resources are scarce. See DPF ¶¶ 67 (Tacoma prohibition on chat, games, e-mail); 141-42 (Greenville prohibition on chat and time limits); 184 (preferring "research, business, or study" uses). See also DPF ¶ 427. A library could reasonably decide, by policy and practice, to provide only a portion of the content potentially available through its Internet connection. Specifically, as they do with respect to the physical collection, public libraries may constitutionally exclude pornographic and other materials that they do not believe further their missions or constitute an appropriate use of public funds. See United States Postal Service v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 129 (1981) ("the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated") (quoting Adderly v. Florida, 424 U.S. 828, 836 (1976)). So long as the restrictions these libraries adopt are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," Perry, 460 U.S. at 46, the First Amendment is not implicated. Cf. Pico, 457 U.S. at 871 (school board permitted to remove books because they "were pervasively vulgar," so long as it did not remove with the intent to deny access to disfavored ideas).

Indeed, it would be permissible for public libraries, through their policies and practices, to narrow their Internet selections still further, such that they more closely resemble a nonpublic forum. The library could choose to limit its Internet service solely to websites selected by library staff, as Westerville Public Library attempted to do with the "Library Channel." See DPF ¶ 161. Again, so long as the library's selection is reasonable and viewpoint-neutral, the Constitution does not proscribe that approach. See Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998) (holding that candidate debate sponsored by state-owned public television broadcaster was a nonpublic forum, and that exclusion of candidate was reasonable and

viewpoint-neutral); see also General Media Communications, 131 F.3d at 280 (holding that military exchange was nonpublic forum entitled to restrict access to "sexually explicit" materials because, inter alia, "the government identifies the products that it will stock for resale, selecting from a universe that is far more extensive than the shelves of an exchange can hold. It does not offer to resell the merchandise of every producer, or every 'speaker,' who seeks access to those shelves.").

Preserving a selection option for libraries is preferable to casting their choice with respect to Internet service as all-or-nothing. Selective access will "encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." Forbes, 523 U.S. at 680. The leap Plaintiffs wish to make, without so much as a nod to the appropriate forum analysis, is from the Internet's possibility of an unfettered collection forum to a purported constitutional requirement that libraries open themselves, and their collections, to all that this new medium offers for consumption. There is no right, from either the would-be speaker's or would-be listener's perspective, to an "unfettered" public library collection, whether that collection is traditional or digital. A web "publisher," like any other publisher, has no constitutional right to have its speech heard through a public library's service. Nor does any patron have a constitutional right to demand that the library provide access to all content available on the Web.

Plaintiffs try to dodge forum analysis altogether by arguing that the exclusion of pornographic and other websites cannot be likened to a selection decision because the library cannot know for certain what is being excluded from consideration, and because the library may provide some materials in its physical collection that may be excluded as a result of the operation of the filter. The first point is, of course, not unique to the exclusion of materials from an

Internet collection. Many libraries rely upon publishers' recommended booklists or approval plan profiles, for example, in selecting materials. See DPF ¶¶ 401-02; 430; 436; 453; 461; 473. These libraries cannot know for certain when using these tools which of the many thousands of items have not been reviewed by the publisher or sent by the jobber for their consideration. By contrast, the record shows that a library using a content filter can glean a host of information simply by asking the filter to generate it. A library can discover, for example, which websites are most frequently excluded, which categories account for the greatest number of filtered accesses, and the identity of every item the filter has not permitted. See DPF ¶¶ 152; 541. If, based upon that review, the library determines that the filter's profile is not operating properly, it can choose to disengage categories, select a different profile of categories, or look for a replacement vendor. In light of the many customization features the products offer, it is simply false to characterize the products as a "black box" over which the library has no control.

The observation that libraries sometimes exclude materials on the Internet that they might provide in their physical collections is of no consequence. Faced with a staggering volume of materials, some libraries have reasonably concluded that the most efficient manner in which to organize these materials is by engaging categories that track their preferences for traditional selection – by excluding websites featuring "sexual acts," for example.¹⁶ This is no less a selection decision simply because a sexual instruction manual that might appear on the library's shelves may on occasion be filtered. Libraries apply parallel selection criteria to different media,

¹⁶ Just as the filtering products offer categories of content from which to choose, there are many "categories" of content libraries may choose not to select for their physical collections. Ms. Reed testified, for example, that a library may well wish to notify the public that it is not a "clearinghouse" for materials, and that materials that "proselytize" concerning a particular religion will not be selected. Reed Test. (3/25/02), at 188-89. These categorical decisions necessarily exclude sometimes useful, and constitutionally protected, materials. They certainly do not thereby violate the First Amendment.

and they are not obligated to provide any particular subject matter in all the media in which it is available.¹⁷ See DPF ¶¶ 403-404; 471.

With regard to the unfettered and unmediated collection possibilities of the Internet, a library may well wish, as Fort Vancouver Regional Library apparently does, to treat the Internet specially, providing access to everything the Web has to offer, including the sort of pornographic materials the record demonstrates the overwhelming majority of libraries exclude from their physical collections. Libraries that choose this path will necessarily designate a very different type of forum than those which, like Tacoma Public Library, Greenville Public Library, and the Westerville and Fulton County Libraries, expressly limit by formal policies and procedures the scope of the content patrons may access through the library's Internet connection. As Perry and cases following it make clear, restrictions on access to materials that fall outside the forum need only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

D. The Record Demonstrates That Content Filters Can Be Reasonably Applied In A Public Library Setting

Defendants have put forth ample evidence demonstrating that it is possible to apply content filters in public libraries in a manner that does not offend the First Amendment. Through their Internet Use Policies and the procedures by which those policies are implemented, the

¹⁷ It is difficult to conceive of the exclusion of pornographic materials as other than a selection decision. The fact that the exclusion of pornographic materials is an express rather than implied library policy is merely testament to the unique delivery of information via the Internet. Plaintiffs' own witnesses have distanced themselves from the argument, principally relied upon by the court in Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 2 F. Supp.2d 783 (E.D. Va. 1998) ("Mainstream Loudoun I"), that the Internet is like an "encyclopedia" a library has selected, thus rendering efforts to filter akin to removal. See Morgan Test. (3/25/02), at 53. See Mainstream Loudoun I, 2 F. Supp. 2d at 793 ("In effect, by purchasing one such publication, the library has purchased them all.").

library systems in Tacoma, Greenville, Westerville, Fulton County, Tulsa City-County, and Memphis-Shelby County have demonstrated their plain intent to exclude from their provision of Internet access the display of pornographic and other websites.¹⁸ See DPF ¶¶ 66-70 (Tacoma); 135-37, 140 (Greenville); 167-70 (Westerville); 181 (Fulton County); 200 (Tulsa); 222 (Memphis). These libraries have expressly limited their Internet collections in a manner consistent with their physical collections, having determined that pornographic materials do not serve the express missions of their libraries, or add useful materials to their collections.

The evidence demonstrates that these libraries have consistently refused to purchase pornographic materials for their patrons, not because no one has asked or they lack funds or space, but simply because the content of those materials does not further their missions or collection purposes. Tacoma Public Library, for example, expressly excludes from its physical collection materials written "obviously and exclusively for sensational or pornographic purposes." DPF ¶ 438. That limitation has been carried over transposed to the library's Internet Use Policy. See DPF ¶ 70. The library's Board of Trustees has reasonably determined that neither adult nor minor patrons are entitled to have access to these visual depictions in the public library. Similarly, library officials from Greenville, Westerville, and Fulton County testified that they have never selected pornographic materials for any of their patrons, and their various Internet Use Policies maintain that tradition by expressly prohibiting use of the Internet to access or display pornographic, obscene, or other sexually explicit adult content.

"The reasonableness of the Government's restriction of access to a nonpublic forum must

¹⁸ Insofar as the libraries have engaged categories that have no bearing on the content CIPA requires libraries to "protect against access to" (i.e., the category "Personals/Dating"), these local decisions, while perhaps bearing on the nature of the forum at issue, have no bearing on whether a library can reasonably restrict access to the content relevant to the Dole inquiry.

be assessed in the light of the purpose of the forum and all the surrounding circumstances." Cornelius, 473 U.S. at 809. The record establishes that under the circumstances, these libraries reasonably chose to limit the content they would offer through the Internet. Contrary to the court's finding in Loudoun I, supra, the record in these cases confirms that Internet resources, like computer resources generally, are scarce. See supra. The record establishes that there are opportunity costs associated with library patrons using the Internet connection for games, for chat, and for accessing pornographic websites. Thus, in Fulton County, for example, a library patron who is not using a computer terminal for research, business, or study may be asked to forfeit the terminal so that another patron preparing a research paper can use it. DPF ¶ 184. In rationing terminal time, a library can reasonably determine that accessing pornographic websites is not a legitimate use of the public fisc.

The matter is not, of course, solely one of limited resources. Officials from two libraries – Greenville and Westerville – testified that they applied a content filter, in part, in response to the requirements of their state obscenity laws. DPF ¶¶ 121; 166-67, 464. Tulsa filtered the Internet from the outset in part to comply with the Oklahoma harmful to minors statute. See DPF ¶ 196. Surely it is at least reasonable to take steps to comply with state laws.¹⁹

¹⁹ Seven states have harmful-to-minors or obscenity laws that do not exempt public libraries from their requirements. See FLA. STAT. § 847.0133 (obscenity); HAW. REV. STAT. § 712-1215 (pornography); MISS. CODE ANN. § 97-5-27 (“sexually oriented” material); MO. REV. STAT. § 573.040 (“pornographic” material); N.J. STAT. ANN. § 2C:34-3(b) (obscenity); N.D. CENT. CODE § 12.1-27.1-03.1 (obscenity); OKLA. STAT. tit. 21, § 1040.76 (harmful to minors). Four states - Colorado, Minnesota, Pennsylvania, and Utah - condition libraries’ public funding on their use of filtering or on their implementation of policies to restrict access to Internet materials that may be obscene or “harmful to minors.” See COLO. REV. STAT. § 24-90-404(d); MINN. STAT. § 134.45(5a); 24 PA. CONS. STAT. § 4304(b)(2); UTAH CODE ANN. §§ 9-7-215, 9-7-216; see also 2001 Ohio H.B. 94. Seven states - Arizona, Arkansas, Maryland, Michigan, South Carolina, South Dakota, and Virginia - require public libraries to take steps to limit minors’ access of Internet material that is “harmful to minors” or obscene. Some of these states specify that public libraries may limit minors’ access through use of filters. See ARIZ. REV. STAT. § 34-502; ARK. CODE ANN. §§ 13-2-103, 13-2-

Indeed, the record demonstrates what can only be described as a compelling basis in some libraries for applying a content filter. Two library systems – Tacoma and Greenville – applied a filter under circumstances that demonstrate an acute problem with access to pornography at their libraries. See generally DPF ¶¶ 111, 116-18; 122-23, 127-28, 153. Prior to the application of the filter, users at the Greenville Public Library routinely used the Internet terminals to access hardcore and other pornography, including websites featuring the following: "Live video of a woman spreading peanut butter on her vaginal area and a dog licking it off"; "Live video of men having oral sex with boys"; and "Live video of a male ejaculating into the face of a woman." DPF ¶ 128. It is more than reasonable to take measures to "protect against access to" materials that may in fact be illegal.

Even with the filters in place, users have continued to attempt to access pornographic websites at some libraries. In the year 2000, for example, users of the Tacoma Public Library (mostly boys aged 12-15) made more than 27,000 attempts to access websites flagged by the CyberPatrol filter. See DPF ¶ 115. Users of the Greenville Public Library consistently attempt to access more than 1,000 sites each day that are categorized as either "pornography" or "sex." See DPF ¶ 153. In fact, the problem with access to pornographic content is so serious in Greenville that David Sudduth, the Chairman of the Board of Trustees, testified that he would vote in favor of discontinuing Internet service if the library was not permitted to use a content filter. DPF ¶ 157.

The evidence in the record indicates that the libraries' policies excluding pornographic

104; MD. CODE ANN., EDUC. § 23-506.1; MICH. COMP. L. § 397.606; S.C. CODE ANN. §§ 10-1-205, 16-15-305, 16-15-375; S.D. CODIFIED LAWS §§ 22-24-56 to 22-24-57; VA. CODE ANN. § 42.1-36.1; see also S.C. Op. Att’y Gen. (Apr. 25, 2000).

materials are "reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. Specifically, there is no evidence in the record that the access to websites is denied on the basis of the viewpoint of the publisher. To the contrary, each of the library officials testified that their primary, if not sole, concern in enforcing library policy is that patrons not access pornographic websites through the library's Internet connection. See, e.g., DPF ¶¶ 88; 136, 148. The Internet Use Policies of the libraries expressly state that general content categories such as "full nudity," "sexual acts," and "pornography" are to be excluded.²⁰ See DPF ¶ 70; 167.

There is also ample record evidence that the filtering products themselves are a reasonable, and viewpoint-neutral, selection tool. None of the categories enabled by any of the libraries targets websites based on their viewpoint. While the filtering products do not categorize content by legal definitions, each of the products offers categories that further the libraries' interest in restricting access to pornographic content. The libraries choose the categories, based on the definitions provided on the filtering product's homepage, and are free to change the content categories enabled for library use at any time. The record indicates that libraries have chosen categories like "sexual acts," "pornography, and "adult" to assist them in restricting access to websites that are of concern. Each of the libraries tested the products they ultimately chose prior to installation, found them to be operating acceptably, and chose the specific categories they wished to enable in light of their policies and community standards. See DPF ¶

²⁰ As the Supreme Court has repeatedly held, restrictions on "lascivious," "lewd," or "indecent" speech are not based on viewpoint. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986). The Supreme Court recently characterized a statute restricting "sexually explicit adult programming" as "content-based" as opposed to viewpoint-based. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 811 (2000).

73-75; 138, 140-42; 171. Each library retains the ability to examine what is being filtered, either by category or by individual URL, and can communicate directly with the filtering company in the event they have questions or concerns.²¹ DPF ¶¶ 145-46; 151-52. All of the products being used provide automatic updates of the site lists in the categories enabled by the libraries. See DPF ¶¶ 76; 182; 228; 514. And each of the libraries can, and does, override the filtering product in cases in which the site flagged or blocked does not violate the library's policy on Internet access. See DPF ¶¶ 83-91; 149; 173-75; 185-88; 203-09; 229-35. In sum, the evidence does not support the conclusion that a library using a content filter seeks to "avoid its constitutional obligation by contracting out its decisionmaking to a private entity." Loudoun II, 24 F. Supp.2d at 569.

The customization features available with filtering products have been used to more than reasonable effect by the specific libraries from which this Court heard testimony. At the Tacoma Public Library, patrons can gain access to the text of any URL available on the Internet. DPF ¶ 79. No site is ever blocked at the library; only certain graphic image files on sites categorized by CyberPatrol as "sexual acts" or "full nudity" are not available to patrons, and even these may be accessed where the filter has flagged a site inconsistently with the library's own policy on Internet access. DPF ¶¶ 83-91 (process for reconsideration of flagged sites). Mr. Biek handles requests for reconsideration system-wide for the Main library and nine branch locations. DPF ¶ 82. The process by which requests for reconsideration are handled can be completely anonymous (through an automatic e-mail link to Mr. Biek), and the evidence shows that

²¹ Insofar as a library has enabled a category like "tasteless/gross," the library can determine what types of websites are being filtered according to that category. If the library should determine that the category is excluding sites other than the autopsy photos and depictions of people defecating on one another, as Mr. Finnel testified, it may simply choose to dis-engage that particular category.

hundreds of patrons make requests for reconsideration each year. See DPF ¶ 112.²² Moreover, the record shows that the library is not cutting with the broadest possible swath in administering the filter. Mr. Mischo, the library's systems administrator, is able to override the CyberPatrol list at other than the root domain, and he has often done so. See DPF ¶ 90.²³

In addition, as a proactive check on the performance of the filter, Mr. Biek reviews the library's Internet intercept logs monthly, unflagging sites that do not meet the library's policy prohibition on the display of websites containing graphic depictions of full nudity or sex acts. DPF ¶¶ 93-94. Mr. Biek testified that in the more than three years in which he has been examining websites at the request of patrons for possible access to the graphic image content of the sites, he has had no difficulty whatsoever in applying the library's policy on Internet access. DPF ¶ 89. He also testified that the whole of his responsibilities for the Internet, including review of requests for reconsideration, take less than an hour each day.²⁴ DPF ¶ 89.

Mr. Biek testified that fully 94% of user attempts to access sites in the library are not affected in any way by the application of the CyberPatrol product. DPF ¶ 104. In the six percent of instances in which the filter, operating with the library's "Webfoot" browser, does prevent access to certain graphic image files, Mr. Biek's analysis of his library's usage data indicates that

²² As Mr. Biek testified, in the vast majority of cases (86% in 2001), CyberPatrol has accurately categorized these websites in conformity with the Tacoma Public Library policy on Internet use. A review of these requests indicates that patrons have indeed asked Mr. Biek to reconsider flagged websites relating to sensitive issues like sexuality, sexual health, and nudism. See DPF ¶ 112. See also Defts' Ex. 23 (copies of patron requests for reconsideration).

²³ The systems administrator at the Memphis-Shelby County Library also stated that he is able to effect overrides at more specific levels. DPF ¶ 231.

²⁴ The systems administrator for the Memphis-Shelby County library devotes only 1-2 hours each week responding to requests for reconsideration. DPF ¶ 236. Other communities, like Westerville and Fulton County, obviously devote considerably less time to administering the filter.

the filtering product accurately flags sites in accordance with the library's policy in more than 95% of cases. DPF ¶¶ 104-05, 108. His analysis further indicates that the filter is even more accurate when measured against the benchmark of CyberPatrol's own category definitions (which include textual portrayals of sex acts, for example), routinely achieving an accuracy rate of 98%. DPF ¶¶ 106, 109. In addition, Mr. Biek's "referring URL" analysis indicated that users are not accidentally accessing pornographic websites, and that CyberPatrol is especially accurate in instances where the patron uses the "go to" method of searching for pornographic content. DPF ¶¶ 110-111.

While Mr. Biek may be the most meticulous of the library witnesses when it comes to overseeing the performance of the filter used in his library, the other library witnesses also demonstrated a reasonable approach to administering the filters. All of the library officials testified concerning their process for handling requests for reconsideration. In Westerville and Fulton County, although patrons may take advantage of the libraries' anonymous e-mail process for requesting reconsideration of blocked sites, the evidence demonstrates that requests for reconsideration are quite rare.²⁵ See DPF ¶¶ 174, 187. In Greenville County, the library has recently revamped its process for requesting reconsideration of blocked sites. There are separate procedures in Greenville for permitting immediate access to sites through an "unfiltered" terminal²⁶ and obtaining a system-wide override. See DPF ¶¶ 146-47. Mr. Belk, who administers the process for systemwide overrides, testified that he makes every effort to provide

²⁵ Anonymous requests for reconsideration may also be made in the Tulsa City-County and Memphis-Shelby County libraries. See DPF ¶¶ 205, 234.

²⁶ The "unfiltered" terminals in Greenville are not actually set to access the Internet as a default, but rather are set on a children's profile. These terminals only provide Internet access once an authorized staff member turns off the children's profile. See DPF ¶ 143..

information to patrons so long as it is not within the library's narrow prohibition on access to pornographic websites. DPF 148. Like other librarians, Mr. Belk also testified that library patrons have not historically been reluctant to ask staff, including himself, very sensitive research questions. DPF 415. There is no reason to believe that they will be any more reluctant simply because the medium of delivery is different.

The evidence indicates that the filtering products being used in these libraries are accurately categorizing sites according to the product's definitions, and are thereby furthering the policies of the libraries. The results reported by Cory Finnell, Defendants' expert, concerning the on-the-ground accuracy of the filtering products in Greenville and Westerville are in line with Mr. Biek's analyses. Based upon his analysis of the data logs from Greenville and Westerville, Mr. Finnell determined that the products used in those libraries also performed accurately in the overwhelming majority of cases. Mr. Finnell testified that 85% of the sites blocked at the Westerville Public Library during a three-day period were accurately categorized by the filter. DPF ¶ 287. Similarly, the websites blocked by the N2H2 filter at Greenville during a two-week period were properly categorized more than 90% of the time. DPF ¶ 286. Mr. Finnell concluded that the products performed very well in these libraries, and had little effect at all on the typical user's access to the Internet. See DPF ¶¶ 284, 262.²⁷

Contrary to the testimony of Plaintiffs' experts – Dr. Nunberg, Mr. Hunter, and Mr. Edelman – reasonably accurate filtering is a current reality in public libraries. It may be a

²⁷ Mr. Finnell testified concerning the phenomenon of "clusters" of blocked sites at specific terminals. The evidence indicates that patrons who look for pornographic websites account for a substantial percentage of the blocked access attempts, often searching for several sites in any given user session. See DPF ¶¶ 281-82. Mr. Biek testified concerning this same phenomenon, with reference to the excerpt of an intercept log indicating that a 12-year-old patron made numerous attempts to access sites through the search terms "pink pussy." See Defts' Ex. 22A (Internet intercept log session for 12-year-old boy searching for "pink pussy").

difficult task to categorize websites, but the evidence from those libraries that choose to use content filters demonstrates that they perform better than reasonably well. Where the products make mistakes, the libraries that filter have procedures in place to permit access to blocked or flagged sites. The practices of these libraries fully justify the presumption that public officials act constitutionally and in good faith. In sum, the evidence shows the operation of a reasonable product, reasonably administered by responsible library officials.

Not all libraries choose to open their Internet collections "for indiscriminate use by the general public." Perry, 460 U.S. at 47. In restricting access to certain pornographic content, the libraries' policies and practices need not be narrowly tailored or in furtherance of a compelling government interest. Rather, they need only be "reasonable in light of the purpose which the forum at issue serves." Perry, 460 U.S. at 49. Filtering Internet content that is accurately categorized most times as "sexual acts" or "full nudity" is demonstrably reasonable in light of the libraries' purpose in providing access in the first place, a purpose that does not include provision of purely recreational sex sites the libraries would not provide in print, even if they had the funds and space to do so. The evidence does not support a conclusion under Dole's fourth factor that all libraries that filter necessarily violate the First Amendment rights of their patrons.

E. The Record Demonstrates That Filtering In Public Libraries May Satisfy Even Strict Scrutiny

Libraries that choose to offer the Internet do not thereby automatically create an open public forum for any and all expression. Indeed, some libraries, like Fulton County and Tulsa City-County, have never offered an unfettered Internet service to their patrons. See DPF ¶¶ 178, 196. Even if this Court were to conclude, contrary to the evidence of library intent, that Internet service constitutes in every circumstance a wide open forum for expression and its receipt, Plaintiffs still cannot prevail in these facial challenges. Although libraries that choose to utilize

content filters need not satisfy strict scrutiny, the evidence in this record does not support a conclusion that a library could not do so under any circumstance.²⁸

In an open public forum, content-based restrictions will be upheld only where the government establishes that the limitation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry, 460 U.S. at 45. Restricting access to the thousands of pornographic websites being accessed in libraries like Tacoma and Greenville, which contain content that might well be illegal, constitutes a compelling government interest. See Loudoun II, 24 F. Supp.2d at 565. The impact on the Greenville library environment, including the impact on minor patrons who visit the library without parental supervision, is apparent from the record. See DPF ¶¶ 133, 131. Moreover, in Tacoma, minors' exposure to pornographic websites was not at all incidental; most of the attempts to access pornographic websites were by minors themselves, in after school hours when they were unsupervised. See DPF ¶ 116-17.²⁹

As noted, the libraries in Westerville and Greenville began filtering not in response to CIPA, but in an effort to comply with the Ohio Revised Code and the Greenville obscenity statute. There can be little doubt on this record that the content filters further the libraries' interests in restricting access to this material, for which some patrons plainly have a substantial

²⁸ Indeed, counsel for the ALA Plaintiffs conceded at oral argument that it is conceivable that a library which chooses to filter could satisfy strict scrutiny. Tr. of Oral Argument, at 18 ("The library would have to justify its content regulation of this medium based on its particular circumstances, and its particular alternative remedies that it could have applied and may have already applied, and it's conceivable that a library could satisfy strict scrutiny.").

²⁹ The record in this case is thus wholly distinguishable from the record in Loudoun II, which contained evidence of only "three isolated incidents nationally, one very minor isolated incident in Virginia, no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the country[.]" 24 F. Supp.2d at 566.

appetite. The record relating even to Plaintiffs' libraries demonstrates the substantial problem with children being exposed to pornographic materials when adults take advantage of open, unrestricted Internet access. See DPF ¶¶ 238-40; 241-42; 245.

Moreover, the evidence proves that all of the so-called "less restrictive alternatives" to using content filters are ineffectual at best. Monitoring patron use by "tapping" patrons on the shoulder was nearly uniformly criticized by the library witnesses in these cases as placing the librarian in an uncomfortable, and potentially dangerous, position. The record relating to the Greenville experience with monitoring demonstrates without doubt that, for some libraries, monitoring is simply not a viable option. Staff were generally not willing to approach patrons in an effort to stop them from accessing pornographic websites. See DPF ¶ 132. Mr. Barlow similarly testified that staff at the Westerville Public Library were reluctant to enforce the library's acceptable use policies by engaging in the "tap on the shoulder" practice. DPF ¶¶ 163-64.³⁰ And there is no evidence from which to conclude that librarians will be more accurate in their determinations of what content should be prohibited by making spot judgments than the filters are in categorizing sites in accordance with library policy. See DPF ¶ 248.

The record similarly demonstrates that privacy screens and recessed furniture are not effective methods for restricting access to sites that may be illegal. DPF ¶¶ 96-97; 131; 221; 239. Of course, these methods are not designed to restrict access to anything at all, but rather to permit patrons to view anything they wish, including hardcore pornography. For this reason alone, privacy furniture is not a viable alternative for libraries, like Greenville and Westerville, who

³⁰ Beverly James, the Director of the Greenville County Library, testified that the Roanoke Public Library used a monitoring approach when she was that system's Director. Ms. James testified that Greenville's filtering policy was preferable to an intrusive monitoring policy. James Test. (3/29/02), at 13-14.

have a responsibility to comply with local laws relating to obscenity. Moreover, the record shows that this furniture does not even serve the purpose for which it is installed – it does not prevent minors and others from being subjected to pornographic content other patrons use the terminals to view. DPF ¶ 238. Indeed, the Greenville County Library tried using both privacy screens and recessed terminals, at great expense, and even this combination failed to solve the problem the library had with patron access to hardcore pornography and related behavioral effects. See DPF ¶ 131.³¹ Making filtering "optional" for adults is equally ineffectual in serving the interest of the libraries in preventing access to pornographic, and potentially illegal, content. The libraries all testified that they are not solely concerned with access to pornographic websites by minors. To the contrary, as the libraries' use policies make perfectly clear, the libraries have excluded pornographic websites from their Internet offerings for adults and minors alike, just as they refuse to provide these sorts of materials in their physical collections.

Finally, the mere existence of an Internet Use Policy, without more, obviously does not restrict access to any of the materials of concern to these libraries. One can well imagine the effect of simply having a policy in Tacoma that entreats teenage boys not to access pornographic websites through the library's Internet connection, or the effect of educating patrons in Tacoma and Greenville as to how to effectively use the Internet to avoid "unwanted" content. Access to pornography in these libraries is quite intentional, as Mr. Biek's data and the Greenville County Library incident log demonstrate.

The evidence shows that the policies these libraries have adopted have been narrowly administered to prevent access to certain pornographic content that might be illegal. In the

³¹ The record in Loudoun II did not contain any evidence that the library had tried other methods of restricting access prior to filtering. 24 F. Supp.2d at 567.

Tacoma Public Library, for example, patrons are denied access only to certain image content depicting full nudity and sexual acts, and can access any URL available through search engines. While the filtering products do both overblock and underblock according to their category definitions, the evidence demonstrates that these instances are relatively rare. A product that blocks or flags accurately in more than 90% of instances in which it denies access does not lack the requisite narrow tailoring. Moreover, as described above, Tacoma and the other libraries have procedures in place to handle requests for reconsideration of websites blocked or flagged incorrectly by the filter. The argument that patrons will sometimes be too embarrassed to ask a library official is flatly belied by the evidence regarding Tacoma's experience, which demonstrates that patrons are not at all embarrassed to invoke these procedures. See DPF ¶ 86; 112. See also Defts' Ex. 23 (patron requests for website review). Even if this Court did perceive some basis for finding that patrons might be too embarrassed to ask for assistance, even if they could do so anonymously, there is insufficient evidence in the record on which to base a conclusion that this "embarrassment factor" is constitutionally significant. See Laird v. Tatum, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

Defendants do not contend that any specific library's policy on Internet use would in fact survive strict scrutiny. It suffices in these facial challenges that, under Dole, it is not a foregone conclusion that any library that seeks to apply a content filter necessarily would fail to satisfy such scrutiny. As Defendants have consistently argued, the proper forum for resolving the infirmities of any particular library's policy are as-applied challenges, which would take into account the specific interests and policies of the library at issue. The record in these cases does not support a conclusion that CIPA induces libraries to violate the First Amendment, even if the

standard applied is a heightened one.

II. THE PRIOR RESTRAINT DOCTRINE DOES NOT APPLY

Despite Plaintiffs' efforts to cast libraries as licensors of the speech they make available to patrons, the simple fact is that libraries have always made selection decisions without reference to any "right" publishers may claim to reach patrons, or any "right" patrons may assert to have any particular item. Libraries exclude materials from their collections that may run afoul of local or state obscenity laws. The prior restraint doctrine no more applies to a library's exclusion of certain Internet content than it does to these or the other numerous selection decisions libraries make every day.

Prior restraint doctrine is generally invoked to protect the rights of speakers to use a particular facility to express their views. See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988) (noting need for clear standards in licensing schemes to protect against "suppressing disfavored speech or disliked speakers"). No publisher has a right to insist that a library select its materials for display or dissemination to patrons. Indeed, websites, like book sellers and publishers, do not "petition" the libraries for the right to be heard on their property. Like traditional publishers, websites present their materials to be considered for possible selection by the responsible library officials, who decide based on a new form of selection policy – the Internet Use Policy – whether to include the sites as part of their service. The issue is not, thus, whether the speaker will be allowed to use a forum, like a municipal facility, that has been made generally available for expressive activity. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (use of municipal theater for production of musical "*Hair*"). Libraries do not simply manage public property – they deal, as professionals, in the content of materials. Cf. General Media Communications, supra (proprietor of information

resources entitled to exclude materials outside scope of forum).

Nor do patrons have any right to insist that the library display or disseminate any particular item. In the relatively few instances in which the doctrine of prior restraint has been applied, either expressly or impliedly, to claims brought by listeners, what the Supreme Court has found most troubling is governmental interference with otherwise unfettered rights to receive information, such as the right to receive mail, or the right to privately possess material in one's home. See Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969). The collections of public libraries are not unfettered access points; public library patrons (listeners) do not have an unfettered right to access any speech they want in the library.

Insofar as Plaintiffs wish to treat the Internet as residing wholly outside the libraries' collections, the prior restraint doctrine is particularly inapposite.³² Listeners do not have an unfettered right to access information that resides outside the library's own collection, through interlibrary loan, for example. Interlibrary loan itself is entirely voluntary – no library is constitutionally required to provide the service. The fact that a library does so, and attempts to access library materials that reside in other collections, does not in any way obligate the library to do so regardless of the content that is sought. The record demonstrates that items like *Hustler* and XXX videos are not available through interlibrary loan. See DPF ¶ 479.

Assuming these and similar items were freely accessible through interlibrary loan, however, Plaintiffs' invocation of the prior restraint doctrine would presumably obligate the library to adhere to this legal doctrine in determining whether to obtain pornographic materials

³² At least certain of Plaintiffs' library witnesses view the Internet in precisely this manner, as consisting of websites residing in various collections outside the library's own. See DPF ¶ 237.

through interlibrary loan, whether for a minor or adult patron. This would mean, in effect, that even if the library had some concerns about the legality of the material being requested, the item must nevertheless be borrowed, while the library proceeds to court to obtain a judicial declaration that the item is in fact "unprotected" speech. At the least, in Plaintiffs' view, the library must wait until "notices issue," hearings are held, and adequate "judicial superintendence" is provided before a patron's request for an item can be denied. Bantam Books, 372 U.S. at 71. Some libraries have already quite sensibly rejected that approach with respect to print materials. See DPF ¶¶ 466 (WPL would not request XXX video through ILL); 484 (Tulsa library's refusal to provide pornographic material through interlibrary loan that did not meet collection policies).

It simply defies legal principle, not to mention plain common sense, to inject the prior restraint doctrine into library selection decisions in the manner Plaintiffs propose. In fact, stripped to its essence, Plaintiffs' argument is nothing more than a ruse designed to deny libraries the ability even to exclude access to hardcore pornographic websites, regardless of the manner in which they choose to attempt to enforce that policy. Whether a library chooses monitoring or filtering, prior restraint doctrine would require, absurdly, that the library permit the 12-year-old in Tacoma accessing a series of "pink pussy" websites to continue accessing those sites unless and until the judicial process, including all exhausted appeals, resulted in a determination that the site was actually illegal. Surely by the time, months or years later, that the courts have sorted out the legality of these pornographic websites, the minor patron will have moved on to one or more of the other thousands of pornographic websites available on the Internet. The example speaks for itself. Neither the prior restraint doctrine, nor the First Amendment more generally, precludes a professional librarian from telling a 12-year-old boy not to view pornographic websites at the public library.

III. PLAINTIFFS' "VAGUENESS" AND "OVERBREADTH" CLAIMS LACK MERIT

As part of their "prior restraint" argument, Plaintiffs attack the disabling provision as "vague" because it does not, in their view, provide sufficient guidance to library officials concerning what constitutes "bona fide research" or other "lawful" purposes. Plaintiffs also continue to improperly invoke the overbreadth doctrine in these facial challenges to CIPA.

A. The Evidence Shows That Libraries Can Administer CIPA's Disabling Provision

1. The Disabling Provision Is Not Unconstitutionally Vague

For the reasons stated, the prior restraint doctrine simply does not apply to the provision of Internet service in the library. Plaintiffs argue that the "bona fide research or other lawful purpose" provision cannot be administered because it is vague. That characterization is somewhat curious, since plaintiffs themselves have suggested that one of the "less restrictive alternatives" a library might adopt in lieu of filtering is an acceptable use policy for the Internet that simply prohibits certain uses. Many of these policies state simply that the use of public Internet terminals must be for lawful purposes, and include specific prohibitions on access to materials that are "obscene," "sexually explicit," or "pornographic." See DPF ¶¶ 246 (Norfolk); 250-52 (SCLS); 254 (Santa Cruz); 255 (Yonkers, member of Westchester Library Assn); 258 (member of Alaska Library Assn); 260 (members of Calif Library Assn). These policies would appear to contemplate that a "lawful" purpose is any purpose not related to accessing obscenity, child pornography, or, when the access is by minors, accessing materials that are harmful to minors. With regard to the clarity of the policies, Plaintiffs' position appears to be that "lawful purposes" is unambiguous when contained in a library policy, but hopelessly vague and standardless when Congress adopts the same language.

Libraries operate in a regulated environment. This does not mean that library officials must make legal determinations in order to enforce their policies. It does mean that libraries, like other regulated entities, must be familiar with a host of laws and regulations, including obscenity and harmful to minors statutes, and federal copyright law. In the course of providing information to patrons, libraries sometimes, but not often, must make difficult judgment calls as to what might be unlawful. See Osborne v. Ohio, 495 U.S. 103, 112-113 & n.9 (1990) (upholding statute prohibiting possession of "nude" photographs of minors against overbreadth challenge, in part because statute exempted possession by, among others, libraries, for "bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose").³³

Libraries like Greenville Public Library and Westerville Public Library, cognizant of their state obscenity statutes, concluded long before CIPA was enacted that one reliable way in which to restrict access to potentially obscene websites was to exclude pornographic websites by means of a filter. Moreover, the evidence shows that, as in the traditional environment, libraries are infrequently called upon in the digital environment to make close judgment calls in "gray areas" of content relating to sexual content. There is a patently obvious difference between the Joy of Sex, Yellow Silk, and www.afraidtoask.com, on the one hand, and *Hustler*, *Penthouse*, and www.1hotteenpussy.com, on the other. With the exception of Mr. Biek's experience with routine requests relating to obviously pornographic sites, when the libraries have been asked to mediate

³³ Indeed, many Spending Clause enactments are couched in broad terms, leaving a wide range of interpretation for funding recipients. See, e.g., Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640-642 (1999) (upholding Title IX of the Education Amendments of 1972, which prohibits "discrimination" on the basis of sex in any education program or activity receiving Federal financial assistance); Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) (upholding § 504 of the Rehabilitation Act, which mandates that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"), cert. denied, 533 U.S. 949 (2001).

access to websites, it has almost uniformly been in cases where the filter has flagged an innocuous website for some reason. The fear that librarians will be overwhelmed by agonizingly close calls is not supported in this record.

It bears emphasizing that no library, library official, or patron will suffer any criminal or civil penalties as a result of the application of the "bona fide research or other lawful purposes" provision. CIPA's disabling provision is no more vague, or subject to inconsistent and "abusive" application, than statutes that criminalize the distribution or display of obscene or harmful to minors materials. Those statutes, which necessarily involve human judgment, exercised by persons who have no legal training, have repeatedly been upheld against First Amendment challenges. See, e.g., Crawford v. Lundgren, 96 F. 3d 380, 389 (9th Cir. 1996); American Booksellers w. Webb, 919 F.2d 1493, 1506-09 (11th Cir. 1990); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389, 1395-96 (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281, 1289-91 (10th Cir. 1983) (all upholding the constitutionality of statutes restricting the sale or display of harmful to minors material).³⁴ It may be that a librarian in a particular case may refuse a request for "bona fide" research relating to pornographic websites that the library's filter has blocked. That hypothetical occurrence does not come close to the sort of demonstration that might rebut the constitutional presumption that librarians will apply the disabling provision in a non-arbitrary fashion. Bowen v. Kendrick, 487 U.S. 589, 617 (1988). Indeed, the evidence in the record uniformly demonstrates that librarians act professionally and

³⁴ If anything, the degree of vagueness that is tolerable with respect to CIPA is greater than in these criminal cases. The Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982). Assuming the loss of funding is the "penalty" associated with the administration of CIPA's disabling provision, any claim to chill is farfetched. A library that substantially complies with CIPA faces no loss of funding.

responsibly in mediating access to the Internet.

Plaintiffs' argument that the mere existence of the disabling provision will result in a massive "chilling" of speech proves too much. The argument is premised, once again, on a right that does not exist – here, the "right" to receive information immediately and anonymously at the public library. There is no absolute right to immediate, anonymous receipt of information in a public library, or in any other public space. Cf. Doe v. City of Minneapolis, 898 F.2d 612, 615 n.11 (8th Cir. 1990) ("appellants do not have a privacy right to watch the material conveyed to viewing booths [in adult bookstores] in seclusion The right to view public entertainment in the seclusion of a closed booth simply falls outside the ambit of the personal intimacies of the home, the family, marriage, parenthood, procreation and child rearing. . . . Appellants choice of viewing is publicly made. . . ."). The requirement that adult patrons must ask that filtering programs be disabled when they seek unfiltered access for "bona fide" or otherwise "lawful" purposes is no more a violation of a patron's right to "anonymous" receipt of speech than, for example, the requirement that patrons engage in a reference interview concerning their requests for items through interlibrary loan; a procedure that requires that patrons present a library card to check out a book; any procedure that requires a request from a patron for materials not maintained in the public stacks, or in libraries that, like the Library of Congress, maintain closed stacks; or the placing of all library computers near and in full view of library staff.

The fact that patrons are sometimes embarrassed to ask for materials disseminated via the Web is of no constitutional significance. Patron embarrassment undoubtedly preceded the provision of Internet access, and no doubt survives it. It is still the case that a patron unable to find the Joy of Sex on the library's shelves, for example, must ask a librarian for assistance or forego the item. If the library places The Joy of Sex behind the reference desk, for whatever

reason, it does not thereby unconstitutionally "stigmatize" the item. The parties have stipulated that reference librarians answer more than 7 million patron questions each week. See Joint Trial Stipulations ¶ 262. Surely the Court may infer that some of those questions pertain to matters that are of a "sensitive" nature. Indeed, the testimony of the librarians supports this inference. See DPF ¶ 415. The mere fact that the Internet makes it possible for patrons generally to mediate their own access to information, essentially cutting the librarian out of the process, does not mean that a librarian is constitutionally constrained from performing his or her usual professional function – to assist the patron in the event that information is needed.

Finally, even assuming the existence of the "right to anonymity" suggested by plaintiffs, any such right is qualified in the context of access to material that is harmful to minors. Courts have consistently upheld laws intended to restrict access by minors to sexually explicit material, even if such laws may require adults who desire such material to affirmatively request it or to identify themselves in some manner. See Crawford, 96 F.3d at 383 n.1 (upholding constitutionality of law regulating sale of "harmful matter to minors" in vending machines which allowed access by adults who could verify their adulthood); Information Providers' Coalition for Defense of First Amendment v. Federal Communications Comm'n, 928 F.2d 866, 872-74 (9th Cir. 1991) (upholding credit card or adult access code requirement in the "dial-a-porn" context); Upper Midwest Booksellers Ass'n, 780 F.2d at 1395 (upholding constitutionality of display restriction in part because "[a]dults are still free to request a copy of restricted material to view from a merchant").³⁵

³⁵ Moreover, any claim to anonymity is particularly weak where there is no indication that information provided in exchange for access would be publicly disclosed. See Connection Distrib. Co. v. Reno, 154 F.3d 281, 294 (6th Cir. 1998) (upholding federal statute that required individuals submitting sexually explicit photographs of themselves for publication to produce identification and requiring publishers to maintain records of such information where "[p]ublic disclosure of this

**2. CIPA Contemplates That Libraries May Disable
The Filter Entirely, And May Also Override The
Filter In Specific Cases For Both Adults And Minors**

Congress provided that with respect to LSTA funds, library officials could disable the technology protection measure for access by either adults or minors who wished to access websites for "bona fide research or other lawful purposes." CIPA, § 1712(f)(3). With respect to e-rate subsidies, however, Congress provided that a library official could only disable the technology protection measure for these purposes during use by an adult patron. CIPA, § 1721(a)(5)(D). Although the rationale for the disabling distinction is not clear, what is clear is that the distinction does not precipitate any constitutional dilemma.

Much of the debate over CIPA's disabling provision is the result of Plaintiffs' mischaracterization of its terms. The legislative history demonstrates that Congress was aware of two fundamental aspects of the filtering issue: (1) the capabilities and limitations of the available "technology protection measures," and (2) the role that library officials traditionally play as mediators of the information they choose to select and provide to their patrons. Accordingly, Congress included both a "disabling" provision in CIPA and a very narrow restriction on the sort of material a library must "protect against access to" in order to be eligible for funding. Any library administrator, at any time, may disable the technology protection measure, in its entirety, in the event that an adult patron (where e-rate subsidies are conditioned) or either an adult or minor patron (where only LSTA funds are at issue) has a "lawful" or "bona fide" research

information is neither required nor suggested by the terms of the Act"), cert. denied, 526 U.S. 1087 (1999); Fabulous Assoc., Inc. v. Pennsylvania Public Utility Comm'n, 896 F.2d 780, 788 (3d Cir. 1990) (suggested dial-a-porn regulation that required customers to identify themselves to telephone companies in order to unblock access to services is constitutionally permissible where "there is evidence that the telephone company will not disclose such information"). Indeed, Plaintiffs have repeatedly emphasized the libraries' practice of maintaining confidentiality.

purpose for seeking access to an unfiltered Internet.³⁶ The disabling provision, by its terms, does not invite an individualized determination by the library official with respect to each website requested. Rather, the provision is meant to apply where unrestricted Internet access is required for some bona fide research or other lawful purpose.³⁷ In plain terms, the disabling provision contemplates that Mr. Biek, for example, could simply turn off the filter for a particular patron who needs access to the visual depictions blocked by the library's filter in order to conduct research with respect to those sites.

Requests to disable the filter for research sessions encompassing pornographic and other sites the library has enabled its filter to block or filter are likely to be quite rare in the public library. Indeed, although the library officials were asked to entertain the hypothetical (adult or minor) "pornography researcher," there is no evidence in the record that such patrons frequent the local public library. Should that situation arise, there is evidence in the record that the library officials could, and indeed would in some cases, provide unfiltered access at a specified terminal. See DPF ¶¶ 188; 209; 233. See generally ¶ 536.

More often, as the evidence shows, a patron will seek access to a specific website that is blocked or flagged by the filter. In those circumstances, library administrators have the

³⁶ Library officials may administer the disabling provision in different ways. For example, a library could adopt a policy that requires that the patron's use during disabling be casually monitored to ensure that the patron does not go beyond the specific purpose of the disabling. Or a library may simply require some form of reasonable assurance from the patron that he will use the unfiltered terminal only for the specific research purpose he identifies. Under CIPA, these are matters of local concern and discretion.

³⁷ If the provision were not stated in the permissive (i.e., "may disable"), a librarian would be powerless to refuse a request to access hardcore pornographic websites made at the request of a patron with a demonstrable history of viewing pornography on the library's computers for his own recreation. If only LSTA funds were at issue and a minor made the same request, the librarian would similarly be unable to exercise discretion and common sense in determining whether to disable the filter.

additional capability, on their own initiative or upon request, to permit access to a particular Web site by adding it to their manual override lists. Putting aside the disabling provision, CIPA only requires that the libraries which accept funding "protect against access to" websites that are likely to be considered obscene, child pornography, or harmful to minors in their communities. See CIPA, § 1721(a)(5)(B), (C); § 1712(f)(1). Generally, the record demonstrates that libraries have chosen categories like "full nudity," "sexual acts," and "adult" to restrict access to potentially illegal materials. Any patron, including a minor, who requests access to a website that does not fall into these categories, or the sometimes narrower provisions of a library's Internet Use Policy, may be granted such access. In that event, the non-pornographic content is made available to all patrons, system-wide.

The evidence shows that these two distinct methods of providing access to websites - disabling the filter entirely where unrestricted Internet access is required for research or other lawful purposes, or overriding the filter's categorization in an effort to ensure that library policy on access to the Internet is followed - are within the capabilities of the products currently used by libraries. There is evidence in this record that librarians are capable of disabling the filter on a particular terminal, or of providing access to a terminal with the filter disabled in the event a patron needs unrestricted access. Mediating access in this manner does not in any way undermine the usual function of the community librarian; in fact, it is wholly consistent with the discretion many librarians consider to be their local responsibility and professional heritage.

In the case of overrides for particular websites, the evidence shows that both minor and adult patrons are routinely granted access to websites that do not violate the library's policy on Internet access. The Tacoma Public Library, for example, prohibits access only to "graphic depictions of full nudity and sexual acts presented solely for pornographic purposes." As Mr.

Biek testified, if a patron, whether an adult or minor, wishes to access any other content through the library's Internet connection, they are permitted to do so. See DPF ¶ 88. By policy, then, the library official's discretion is narrowly cabined, and patrons are permitted broad access to websites. Mr. Biek, for example, testified that he adheres strictly to the library's policy, unflagging anything that does not constitute a pornographic website featuring visual depictions of full nudity and sex acts, even if he himself deems the site in question to have no research or other value whatsoever. Id.

The record with respect to the other libraries similarly does not support Plaintiffs' contention that the processes used for overriding the filter lead to the censorship of the dissemination of "matters of public concern." Thornhill v. Alabama, 310 U.S. 88, 97 (1940). There is no evidence in this record that patrons, whether minors or adults, are routinely denied access to a broad swath of websites when they request reconsideration. To the contrary, the libraries in Greenville, Westerville, Fulton County, Memphis-Shelby County, and Tulsa City-County all apply their Internet Use Policies narrowly, permitting access upon request, and sometimes on their own initiative, to individual websites by means of an override where the website in question is not prohibited by the terms of their policies. Like Congress, officials at these libraries are well aware of the limitations of the filtering products, and their own professional responsibility to correct mistakes and assist patrons in finding information. The record demonstrates that far from exercising "standardless discretion," library officials utilizing content filters adhere to defined policies on Internet access set by their governing authorities.

B. The Overbreadth Doctrine Does Not Apply

Even if CIPA constituted an absolute mandate rather than a condition on federal funding, the First Amendment overbreadth doctrine would not apply. As the Supreme Court has said:

The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others.

Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). The doctrine is rooted in concerns that an overbroad statute "may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions." Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (emphasis added). See also Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980). Thus, the Court has permitted persons to "attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." New York v. Ferber, 458 U.S. 747, 769 (1982).

The overbreadth principle does not fit the doctrinal framework of these lawsuits. There is no need to resort to an "exception" for challenging a law where the speaking and listening the Plaintiffs wish to engage in is not even arguably within the proscription of the law at issue. None of the plaintiffs, either the websites or the many libraries and patrons, has even attempted to argue that their content or actions might legitimately be proscribed under CIPA, however the law is applied by any library. Nor have Plaintiffs developed any evidence, other than the "embarrassment factor" that is surely not uncommon in public facilities, that they will somehow be "chilled" by CIPA, which imposes no penalties for speech of any kind.

If by unconstitutional "overbreadth," Plaintiffs mean to argue that CIPA will result in policies that "suppress a large amount of speech adults have a constitutional right to receive and address to one another," Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997), the question once again becomes one of proper forum, specifically Plaintiffs' "right" to speak and listen through a public library collection. As Defendants have demonstrated, supra, if there is

such a "right" at all, it is the right to demand that restrictions on access to content be reasonable and viewpoint-neutral. Libraries that filter are able to satisfy that standard.

IV. CIPA DOES NOT IMPOSE AN "UNCONSTITUTIONAL CONDITION" ON LIBRARIES.

Apart from their contention that CIPA is an unconstitutional exercise of Congress's power under the Spending Clause, the library plaintiffs also allege that CIPA constitutes an "unconstitutional condition" on federal funding because it conditions the availability of a benefit – federal subsidies under the E-rate and LSTA programs – on a library recipient's relinquishment of its ability, allegedly protected by the First Amendment, to serve as a conduit for unrestricted Internet access for its patrons. The libraries, however, do not have any First Amendment rights of their own to assert. Nor would it be appropriate, under Article III or principles of prudential standing, to permit the libraries to assert the constitutional rights of their patrons for purposes of the unconstitutional conditions claims. Finally, even if some party, either named herein or not, can bring an unconstitutional conditions claim, CIPA is a valid condition on federal spending.³⁸

A. The Libraries Do Not Have First Amendment Rights

Plaintiffs' "unconstitutional condition" claims are premised on the assumption that public libraries which receive E-rate discounts and LSTA funds have some First Amendment-protected right to serve as a conduit for unrestricted Internet access. It is only, after all, if the denial of a governmental benefit constitutes an infringement on the exercise of that right, that the unconstitutional conditions doctrine is even implicated.

³⁸ A decision under the "unconstitutional conditions" line of cases would necessitate the breaking of new legal ground, including a determination that public libraries may assert First Amendment rights against the federal government, or that funding recipients that lack standing can sue on behalf of third party beneficiaries of federal funds. For these reasons, "unconstitutional conditions" represents a markedly broader path for the Court to take than simply proceeding under the standard set forth in Dole.

The assumption that public libraries have First-Amendment-protected rights is, however, in substantial doubt. Although no court has explicitly addressed the issue in the context of public libraries, more than one circuit court of appeals has determined that governmental entities generally, which presumably would include public libraries, are not protected by the First Amendment. See Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) ("[w]hen the competing speaker is the government, that speaker is not itself protected by the First Amendment"); NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990) ("the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."); Student Government Ass'n v. Board of Trustees of Univ. of Massachusetts, 868 F.2d 473, 481 (1st Cir. 1989) ("a state entity . . . itself has no First Amendment rights"). See also Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (stating in a case involving federal rights, and not state rights, that "[t]he First Amendment protects the press from governmental interference; it confers no analogous protection on the Government"); Creek v. Village of Westhaven, 80 F.3d 186, 192-93 (7th Cir. 1996) (Posner, C.J.) (canvassing case law on the issue, but declining to decide the question).

The public library Plaintiffs in these cases have yet to identify a valid source for the right they claim is unconstitutionally conditioned. The weight of authority indicates that public libraries do not have any specific speech rights under the First Amendment, and they do not in any event have a constitutional right to provide unrestricted Internet access to their patrons.

B. The Unconstitutional Conditions Claims Cannot Be Brought On Behalf of Third-Party Patrons

The unconstitutional condition claims, by definition, may be raised only by the library plaintiffs, since neither library patrons nor Web sites are directly regulated by CIPA. Defendants

are not aware of any authority for the proposition that a party other than the putative recipient of the funds at issue may assert an unconstitutional conditions claim. Indeed, the Court has clearly indicated that it is the funding recipient's rights, and only those rights, that are implicated in an unconstitutional conditions case. See, e.g., Rust v. Sullivan, 500 U.S. 173, 197 (1991) (characterizing unconstitutional conditions cases as turning on whether the statute or regulation "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program") (emphasis in original). Whether CIPA induces libraries to violate the constitutional rights of their patrons, whatever rights they may have, is a question properly examined under the fourth factor of Dole. The unconstitutional conditions claim, which asserts that the rights of the putative funding recipients themselves are violated, is appropriately brought only by the public libraries that are plaintiffs herein, or that are represented by the various library associations.

Neither principles of associational or third-party standing alter this analysis. The general prudential rule is that "[o]rdinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party." Barrows v. Jackson, 346 U.S. 249, 255 (1953). See also Singleton v. Wulff, 428 U.S. 106, 114 (1976). This rule is generally followed even where the requirements of Article III standing have been met, so that courts may "avoid deciding questions of broad social import . . . and to limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

In these cases, there is no showing that the patrons, whether members of some organizational plaintiff or patrons of a putative library recipient, have suffered any concrete, particularized "injury in fact." See Arizonans for Official English v. Arizona, 520 U.S. 43, 65-66 (1997) (associational standing); Powers v. Ohio, 499 U.S. 400, 410-11 (1991) (third-party

standing). See also Warth v. Seldin, 422 U.S. 490, 499 (1975). The record is devoid of evidence that any patron has actually been denied access to any speech as a result of CIPA. Indeed, whether a patron will ever suffer such an injury, and whether that injury can be traced to CIPA, is dependent upon a host of speculative suppositions, not the least of which is the question whether the library frequented will actually choose to accept CIPA's conditions or will forego the funding. See Loudoun I, 2 F. Supp.2d at 792 (holding that patrons who had not alleged they had attempted to access a blocked website lacked standing). See also infra (arguing that none of the individual plaintiffs who are websites or patrons has a justiciable claim).

Even if one or more patrons presently have justiciable claims, only in extraordinary circumstances have courts permitted litigants like the libraries here, who themselves lack standing, to assert the rights of third parties. The "narrow exception to the prohibition on third party standing," The Pitt News v. Fisher, 215 F.3d 354, 362 (3d Cir. 2000), does not apply here.³⁹ The Third Circuit, following Supreme Court precedent, has interpreted the exception to apply in circumstances, for example, where the challenged statute "involved substantial threats to free speech, such that third parties were forced to forego their rights entirely, or else face criminal prosecution to vindicate them." The Pitt News, 215 F.3d at 364. See Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956-57 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980).

Of course, CIPA affects only the patrons' ability to view websites through the public library, not by other means. See The Pitt News, 215 F.3d at 365 (noting existence of additional outlets for same speech affected by restriction). Moreover, apart from the non-specific

³⁹ Plainly, the libraries cannot assert the rights of websites to reach a public library audience. The libraries and websites do not have a "sufficiently close relationship" to invoke the narrow exception for third-party standing. The Pitt News, 215 F.3d at 362.

"embarrassment factor" the Court might judicially notice, there is no foundation in this record for a broad finding that patrons will be "chilled" from accessing websites at the library that may be blocked by a filter. At most, the evidence on this point is mixed, with some patrons claiming speculative embarrassment, while librarians testified that they have in fact been approached to answer highly sensitive research questions. Indeed, there is ample evidence in this record that librarians have in fact been asked by patrons to unblock websites involving nudists, sexual orientation, and sexual instruction, and that those sites have been unblocked. See Defts' Ex. 23 (Tacoma Public Library Requests for Review of Blocked Websites). The fact that library officials are able to permit this interaction to occur wholly anonymously significantly undercuts, if not eliminates, the argument that patrons will suffer a substantial abridgement of their "right to listen," even assuming they have such a right with regard to a mediated collection. In sum, the predicate for relaxing the prohibition on third-party standing in First Amendment cases – substantial chill – is wholly lacking. See The Pitt News, 215 F.3d at 364-65 (declining to apply the exception where newspaper failed to establish rights of readers and advertisers would be substantially chilled by statute).

On this pre-enforcement record, Plaintiffs simply cannot establish, as they must, that the rights of third-party patrons have been, or will be, substantially abridged by CIPA. What little evidence of chill exists is not sufficient to outweigh the prudential concerns that prohibit third-party claims.

C. CIPA Is Viewpoint-Neutral And Does Not Distort The Usual Function Of Public Libraries

Even if the Court finds that either the libraries or their patrons may raise the unconstitutional conditions claims, those claims lack merit. The doctrine of "unconstitutional conditions" prohibits the government from "deny[ing] a benefit to a person on a basis that

infringes his constitutionally protected interests--especially his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). A condition on federal funding will constitute an unconstitutional condition only if it places a condition on the recipient of a subsidy that "effectively prohibit[s] the recipient from engaging in [constitutionally] protected conduct outside the scope of the federally funded program." Rust, 500 U.S. at 197 (emphasis in original).

Plaintiffs focus on two aspects of CIPA in arguing that the statute imposes an unconstitutional condition. First, Plaintiffs assert that the E-rate and LSTA programs are designed to promote all private speech that has not been declared to be illegal, and that the application of a content filter will necessarily "distort" the "usual function" of libraries in providing free and open access to all legal content. Second, Plaintiffs point to CIPA's requirement that all computers in libraries that receive E-rate discounts for Internet access or internal connection, or that use LSTA funds to purchase computers used to access the Internet or to pay for direct costs associated with accessing the Internet,⁴⁰ must be equipped with an appropriate technology protection measure, which they assert impermissibly burdens the use of equipment which is not supported by any federal subsidies. Plaintiffs are wrong as a matter of both fact and law, and neither of these arguments is sufficient to facially invalidate CIPA as an unconstitutional condition.

Even assuming that public libraries have some First Amendment right to choose to

⁴⁰ LSTA funds are available for a variety of purposes. CIPA's conditions, however, are triggered only by those libraries which use LSTA funds to "purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet." CIPA, § 1712 (codified at 20 U.S.C. § 9134(f)(1)). Libraries which do not participate in the E-rate program, and use LSTA funds for purposes other than those specified in CIPA, are not subject to CIPA's requirements even if they offer Internet-connected computers as part of their services. CIPA's conditions do not attach to e-rate subsidies received solely for telecommunications, as opposed to internal connections and Internet access. See Defts' Ex. 106A (USAC datat).

provide their patrons with unrestricted Internet access (and with respect to any similar First Amendment right that might be asserted by those private libraries which may be eligible for E-rate or LSTA funding), CIPA's conditions are valid. The Constitution does not require that the government subsidize unfettered access to any medium. See Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001) ("Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships.").⁴¹ Indeed, Congress would be permitted disfavor the freewheeling and unfettered access to the Internet Plaintiffs desire even if it were deemed a "fundamental" right. See Regan v. Taxation With Representation of Washington, 461 U.S. 540, 549 (1983) (noting that Court has "held in several contexts that a [government's] decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"); see also Harris v. McRae, 448 U.S. 297, 315 (1980) (mere refusal to subsidize a right "places no governmental obstacle in the path" of a plaintiff seeking to exercise it); Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.").⁴² As the Rust Court noted, "subsidies are just that, subsidies . . . to avoid the force of the regulations, [a funding recipient] can simply decline the subsidy." 500 U.S. at 198

⁴¹ Indeed, in Velazquez, while the Court singled out as invidious the sweeping viewpoint-based prohibition on advocacy in a program designed to facilitate that very activity, it expressed no view on the myriad other restrictions applied to recipients of LSC funds. See 531 U.S. at 550 (Scalia, J., dissenting) (cataloguing other uses to which LSC funds cannot be put, including "encouraging . . . labor or antilabor activities," "litigation relating to the desegregation of any elementary or secondary school system," or "litigation which seeks to procure a nontherapeutic abortion").

⁴² For the same reason, although library patrons may possess a right to listen, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." See Regan, 461 U.S. at 550 (quoting Harris, 448 U.S. at 318).

n.5. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." Harris, 448 U.S. at 317 n.19.

There have been a number of challenges to Congress's spending power where, as here, conditions applicable to funding recipients were alleged to run afoul of the First Amendment. The Supreme Court has upheld conditions that expressly prohibited protected speech by a funding recipient, where the restrictions were deemed necessary "to ensure that the limits of the federal program [were] observed." Rust, 500 U.S. at 193.⁴³ See Finley, supra (allowing National Endowment for the Arts grant funds to take "decency" of work into account); Rust, supra (upholding a prohibition on the discussion of abortion with the patients of doctors employed by federally funded family planning clinics); Regan, supra (upholding the denial of tax exempt status to nonprofit organization engaged in substantial lobbying activities).

In Velazquez, the Court invalidated a condition prohibiting legal service attorneys receiving federal funds under the Legal Services Corporation Act from representing clients in any effort to amend or otherwise challenge existing welfare laws. The Court regarded the condition at issue as a sweeping viewpoint-based restriction that "distort[ed]" the usual functioning of the LSC program by prohibiting "speech necessary to the proper functioning" of the program. 531 U.S. at 544. In the Court's view, the condition on receipt of the subsidy suppressed "vital theories and ideas," and was "aimed at the suppression of ideas thought inimical to the Government's own interest." Id. at 549. See also FCC v. League of Women Voters of Calif., 468 U.S. 364 (1984) (invalidating statute forbidding noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting to "engage

⁴³ Thus, for example, while Congress could not directly prohibit health-care providers from advising their patients about abortion, no unconstitutionality attached to its decision to limit grants made in Title X projects for use only in non-abortion related activities. See generally Rust, supra.

in editorializing”). The restrictions in Velazquez were found to be uniquely objectionable, since they were "designed to insulate the Government's interpretation of the Constitution from judicial challenge," thus potentially depriving the judiciary itself of the power to hear constitutional challenges in certain cases. Velazquez, 531 U.S. at 548.

The concerns in Velazquez are wholly absent here. CIPA cannot in any sense be characterized as a viewpoint-based restriction on speech. Nor does it affect the judicial power, or implicate the constitutional separation of powers, in any way. Rather, like prior federal funding conditions upheld in Rust and Regan, CIPA falls within the long-established principle that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." Rust, 500 U.S. at 194. Plaintiffs continue to misinterpret or simply ignore the fundamental purpose of the E-rate program. The plain language of the statute creating the E-rate program, which applies only to schools and libraries, explicitly requires telecommunication services providers to provide discounted services "for educational purposes" only to those schools and libraries which make a bona fide request for them. 47 U.S.C. § 254(h)(1)(B). Moreover, the regulations implementing the E-rate program include a specific restriction to that effect: the regulations require every library seeking to receive an E-rate discount to certify "under oath that . . . [t]he services requested will be used solely for educational purposes." 47 C.F.R. § 54.504(b)(2)(ii) (emphases added). Neither the E-rate nor LSTA programs are designed to encourage or provide access to any and all content one might provide through a connection to the Internet. The programs at issue here are neither aimed at providing unfettered access to private speech, nor with disseminating any particular governmental message. They are meant to provide useful information for schools and libraries via the Internet so that those institutions can serve their respective missions.

The salient points are: (1) the funding programs at issue have limits; (2) they are not intended to be a "subsidy for private speech" of whatever content, including content that plainly approaches, if not crosses, the line for legality; and (3) CIPA is entirely consistent with the purposes of the programs. Conditioning funding for Internet access on efforts to "protect against access to" illegal materials can hardly be deemed inconsistent with the provision of Internet access to "educational purposes." Indeed, the "educational purpose" limitation fundamentally distinguishes this case from Velazquez, where the Court expressly contrasted the breadth of the Legal Services program with the funding condition at issue there. See 531 U.S. at 548 ("arguments by indigent clients that a welfare statute is unlawful or unconstitutional cannot be expressed in this Government-funded program for petitioning the courts, even though the program was created for litigation involving welfare benefits, and even though the ordinary course of litigation involves the expression of theories and postulates on both, or multiple, sides of an issue."). Thus, as in Rust, "[t]his is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside the project's scope." 500 U.S. at 194.

Similarly, there is overwhelming evidence in this record that by requiring libraries to "protect against access to" illegal materials available on the Web, Congress has not in any way distorted the "usual function" of public libraries. See generally DPF ¶¶ 429-33. Obviously, as all of the experts on librarianship and the numerous librarians themselves agree, libraries usually take steps to avoid the acquisition and dissemination of illegal materials. See DPF ¶ 410; 464. The manner in which they do that in the digital environment differs in certain obvious respects from the manner in which they do so in the traditional environment. The evidence shows that because libraries, simply by virtue of connecting to the Internet, receive and disseminate

unbidden materials, they can most effectively "protect against access to" obscene and other illegal materials by excluding categories of content like "sexual acts." The record further demonstrates that it has never been the "usual" or "traditional" function of public libraries to provide these sorts of materials to their patrons. See DPF ¶¶ 407-408, 411. This content is simply not "inherent in the nature of the medium." Velazquez, 531 U.S. at 543. The simple truth is that professional librarians historically have not selected hardcore and other pornography for their patrons. Where the filters exclude access to non-pornographic websites, the evidence shows that librarians provide access on request to materials within the accepted uses set forth in library policies.

Plaintiffs also assail the fact that CIPA conditions funding on the application of a technology protection measure on all library computers.⁴⁴ It is well settled that Congress, when exercising its broad power under the Spending Clause to dictate how federal subsidies are spent, see supra, may provide, "in order to ensure the integrity of the federally funded program," Rust, 500 U.S. at 198, that federal subsidies are not to be used to facilitate particular activities that are also supported by non-federal funds, even if the activities involved are fully protected by the First Amendment when engaged in without federal support.

Funding conditions which reflect the government's strong interests in preventing direct – or indirect – subsidies to activities that Congress has chosen not to fund have been repeatedly upheld. In Rust, for example, the Supreme Court held that regulations requiring physical separation of funded activities from non-funded activities furthered the government's interest in

⁴⁴ Plaintiffs do not contend that the filtering of staff terminals implicates any First Amendment rights. See Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000) (upholding Virginia statute restricting state employees from accessing sexually explicit materials on computers owned or leased by Commonwealth, except in connection with university-approved research project), cert. denied, 531 U.S. 1070 (2001).

preventing federal funds from being spent on prohibited activities. See 500 U.S. at 198.

Similarly, in Regan, the Court warned that an organization which set up an affiliate to engage in activities for which federal funds could not be used "would, of course, have to ensure that the [federally-funded] organization did not subsidize the [non-federally-funded affiliate] organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." 461 U.S. at 544; cf. League of Women Voters, 468 U.S. at 400 (noting that statute prohibiting use of federal funds to editorialize by public broadcasting stations "would plainly be valid" if it had allowed stations to create separate non-federally funded affiliates to engage in the editorializing that federal funds would not support).

CIPA's requirement that libraries receiving E-rate discounts, or using LSTA funds for the purposes specified in the Act, must certify that they have implemented appropriate technology protection measures on all computers located in the facility is nothing more than an effort to ensure the sort of physical separation between funded activities and non-funded activities that was explicitly recognized to be constitutionally valid in Rust, Regan, and League of Women Voters. In the unlikely event that all but a few terminals through which a library provides Internet access are funded with federal funds, Congress is entitled to require that the library provide its unfettered access in a separate facility or branch location.⁴⁵ As the record shows, "unfettered" access provided in the same location would likely be visible to patrons who are otherwise unable to access pornographic websites on federally funded terminals.

Particularly with respect to the E-rate program, which supports discounts for basic "conduit" or access connections to the Internet, it would be unusual indeed for a library to be in

⁴⁵ The agencies charged with enforcement of CIPA have not had occasion to determine the manner in which CIPA would apply in circumstances in which access to the Internet is funded with both federal and non-federal funds in the same facility.

the position of having separately-funded connections to the Internet in the same facility as those which are federally-funded. In any event, nothing in CIPA prevents a library or library system from creating or designating a separate set of facilities or branches which could offer unrestricted Internet access to patrons, but would maintain its funding separately from that of an affiliated library or branch which is federally funded.⁴⁶

CIPA does not "effectively prohibit[] the recipient [of federal funds] from engaging in the protected conduct outside the scope of the federally funded program." Rust, 500 U.S. at 197. As a result, it cannot be invalidated as imposing an unconstitutional condition on federal funding recipients. Libraries can either accept the federal funding which subsidizes their connections to the Internet along with the conditions that attach to the receipt of such funding, or they can decline to participate in the subsidy programs. See Autery v. United States, 992 F.2d 1523, 1527 n.7 (11th Cir. 1993) (noting that "those who seek federal financial assistance, whether it be states, non-profit organizations, or individuals, have a choice whether to participate in a federal program. But once that decision to participate is made, the grant recipient is bound by any mandatory rules imposed by federal law"), cert. denied, 511 U.S. 1081 (1994). The simple fact that CIPA requires libraries to make such a choice does not render the statutory conditions

⁴⁶ Not all libraries participate in the E-rate or LSTA funding programs. Thus, it may be that different branches of a library system or neighboring libraries may establish different policies. Libraries unaffected by CIPA's conditions may continue to provide unrestricted access to the Internet in affiliated facilities separate from those subsidized by federal funds. Even if it had been established that creating affiliated entities for the provision of unfettered Internet access would be difficult or even impracticable, that would in no way distinguish these circumstances from the establishment of wholly separate family planning clinics required by the regulations at issue in Rust, the affiliated lobbying organizations endorsed by the Court in Regan, or the possibility of establishing separate broadcast stations that could engage in the editorializing that was prohibited by the funding condition at issue in League of Women Voters. See id. at 400 (stating that statute would "plainly be valid" if it allowed separate affiliates to be created). Mere inconvenience does not establish an unconstitutional condition.

unconstitutional. See Rust, 500 U.S. at 199 n.5 ("We have never held that the Government violates the First Amendment simply by offering that choice," i.e., between "accepting Title X funds – subject to the Government's conditions . . . – or declining the subsidy and financing their own unsubsidized program"). Similarly, the fact that any particular library may be unable, without federal funding, to provide Internet access to its patrons is of no constitutional significance.⁴⁷ Any library that desires to provide unrestricted Internet access for purposes that go beyond those intended to be served by the E-rate or LSTA programs is free to choose not to participate in the federal subsidy program.⁴⁸

V. CIPA's REQUIREMENTS AS TO ADULTS ARE SEVERABLE FROM THOSE PERTAINING TO MINORS, AND ARE CONSTITUTIONAL AS TO MINORS

Congress expressly provided for separate certifications in CIPA with respect to minors and adults. See 47 U.S.C. § 254(h)(6)(C)-(D); 20 U.S.C. § 9134(f)(1)(B); 47 U.S.C. § 254(h)(6)(B); 20 U.S.C. § 9134(f)(1)(A). Congress provided for the severability of the provisions relating to adults from those pertaining to minors with respect to the LSTA funds at issue. See 20 U.S.C. § 9134(f)(6). As enacted, the E-rate provisions subject to CIPA also contained a separability provision. See § 1721(e). Although the Act as codified does not contain this provision, the matter of separability is, of course, one of legislative intent. "Unless it is evident that the legislature would not have enacted those provisions which are within its power,

⁴⁷ The federal subsidies made available under the E-rate and LSTA programs are not the exclusive sources of funds for libraries. Indeed, both programs specifically contemplate that libraries have access to other sources of funding. See, e.g., 47 C.F.R. § 54.504(b)(2).

⁴⁸ As Senator McCain, a primary sponsors of CIPA, succinctly explained: "Schools and libraries, in subscribing to the E-rate program, assume the responsibility for providing a front line protection policy for children who utilize their computers to access the Internet. If they do not want this responsibility, the answer is simple. Do not take the subsidy." S. Hrg. 106-603, at 2.

independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210 (1932). See also Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999). The primary purpose of CIPA was the protection of children. Plainly, Congress intended that the provisions with respect to minors should remain, even if the Court determines that the provisions as to adults are invalid.

Defendants contend that CIPA's provisions as to both minors and adults should be upheld, regardless of the level of scrutiny the Court applies. In any event, the general legal analysis with respect to minors is precisely the same as for adults. CIPA no more operates as a prior restraint on speech as to minors than it does as to adult patrons. The forum analysis is unchanged as well. If minors have a right to view particular materials within the library's collection, their right is *doctrinally* indistinguishable from the rights of adult patrons. See Cornelius, *supra*; Perry, *supra*. CIPA satisfies this standard, whether applied to minors or adults. In fact, given the governmental interest in protecting children from pornographic websites, restrictions as to minors are, if anything, more reasonable than those applied to adult patrons. Thus, the nature of the governmental interest is the principal doctrinal difference that may arise, particularly in the event that heightened scrutiny is applied to libraries' use of a content filter. A library's interest in protecting minors from materials that are illegal as to them should be deemed compelling. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968).⁴⁹

Apart from this limited doctrinal difference, however, the analysis as to minors turns principally on the nature and scope of materials that may constitutionally be denied to minors.

⁴⁹ The same is true with respect to Congress' own interest in enacting CIPA. In other words, should the Court determine that some intermediate or heightened scrutiny applies to CIPA itself, the government's interest in protecting minors should be deemed important or compelling.

The evidence in this record demonstrates that libraries generally enable content categories relating to full nudity, "adult" content, sexual acts, and pornography. Most of this content, while arguably protected as to adults, would be unprotected as to minors. See Ginsberg, 390 U.S. at 634 (upholding harmful-to-minors statute covering "'girlie' picture magazines").⁵⁰ The record supports a finding that the filtering products, as applied in libraries, accurately categorize these websites in the vast majority of cases. Insofar as the filters deny access to materials that are not deemed harmful to minors in a specific library community, minors as well as adults can ask that the filter be disabled for "bona fide research or other lawful purposes" (if only LSTA funds are at issue), or manually unblocked throughout the library system. For the reasons stated, supra, whether the standard is reasonableness or some form of heightened scrutiny, the record demonstrates that CIPA's restrictions as to minors are constitutional.

VI. THE PATRON AND WEBSITE PLAINTIFFS DO NOT HAVE JUSTICIABLE CLAIMS

Finally, as Defendants have maintained from the filing of the Complaints in these cases, no individual patron or website named as a Plaintiff has a presently justiciable claim.⁵¹ As the

⁵⁰ CIPA provides that a "minor" is "any individual who has not attained the age of 17 years." 47 U.S.C. § 254(h)(7). In determining value in the context of a "harmful to minors" regulation, courts have applied a standard which asks whether material has value for older minors; if it does, it is considered to have value for the class of minors as a whole. See American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th Cir. 1990) ("Pope teaches that if any reasonable minor, including a seventeen-year old, would find serious value, the material is not harmful to minors"), cert. denied, 500 U.S. 942 (1991), cert. denied, 500 U.S. 942 (1991); American Booksellers Ass'n v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989) ("if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack value for the entire class of juveniles taken as a whole"), cert. denied, 494 U.S. 1056 (1990).

⁵¹ "Patron Plaintiffs" named in these actions are: Elizabeth Hrenda, C. Donald Weinberg, Mark D. Brown, Sherron Dixon, James Geringer, Marnique Overby, Emmalyn Rood, William J. Rosenbaum, Carolyn C. Williams, and Quiana Williams. "Website Plaintiffs" are: AfraidToAsk.com, Inc., The Alan Guttmacher Institute, Ethan Interactive, Inc., The Naturist Action Committee, Wayne L. Parker, Planned Parenthood Federation of America, Inc., PlanetOut

trial testimony of Ms. Rood, Mr. Brown, and Dr. Bertman demonstrated, these individual Plaintiffs' claims are based upon wholly speculative and hypothetical injuries, and are not justiciable. These claims are in the nature of requests for advisory opinions concerning the future effect of the application of content filters at libraries which Plaintiffs themselves cannot say with any certainty will receive federal subsidies for Internet access. Nor do Plaintiffs have any knowledge concerning how these libraries will seek to comply with CIPA's funding conditions, in the event that they receive funds.

These challenges are the quintessential example of claims of insufficient ripeness to merit judicial consideration.⁵² "The basic rationale of the ripeness requirement is '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)). The doctrine "requires an evaluation of the fitness of the challenged issue for review and the hardship to the parties of withholding judicial consideration." CEC Energy Co., Inc. v. Public Service Comm'n of Virgin Islands, 891 F.2d 1107, 1109 (3d Cir. 1989). Ripeness is "peculiarly a question of timing," Regional Rail Reorg. Act Cases, 419 U.S. 102, 140 (1974), and courts "are particularly vigilant to ensure that cases are ripe when constitutional questions are at issue." Artway, 81 F.3d at 1249.

The issues raised by the individual Plaintiffs who are either patrons or websites are not fit for review under these standards. "The principal consideration is whether the record is factually

Corporation, Jeffrey Pollock, and Safersex.org.

⁵² The jurisdictional defect might also be deemed one of standing. Ripeness coincides in this case with the "injury in fact" prong of the standing requirement. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The patron plaintiffs have failed to demonstrate the existence of a concrete injury or controversy. Whether viewed through the lens of ripeness or standing, these claims are not justiciable.

adequate to enable the court to make the necessary legal determinations." Id. There is not one concrete scenario for the Court to examine with respect to these claims. Even after trial has been concluded, this Court lacks the barest of facts necessary to entertain Plaintiffs' claims. None of the Plaintiffs can establish that any right to free speech has yet been implicated, much less abridged, as a result of CIPA's application. That is not at all surprising, since no library has yet been required to choose whether to comply with CIPA's conditions.

In this hypothetical context, plaintiffs' allegations lack the requisite concreteness. Indeed, the patrons' claims are entirely speculative. Plaintiff Mark D. Brown asserted in the Complaint that he "feels certain" that he will be denied access to "many web sites that contain important information." MCPL Compl. ¶ 187. That allegation was not sufficient to state a ripe claim then, and his testimony at trial added no further element of concreteness to it. Plaintiff Emmalyn Rood alleged at the outset that she "believes" that the technology protection measure ultimately chosen by her library will prevent access to certain unidentified Web sites. Id. at ¶ 200. Her testimony likewise failed to provide anything other than more speculation that this would be the case. The same can be said for the remaining patron Plaintiffs, all of whom provide nothing more than speculation concerning CIPA's effect on their access to websites at their respective public libraries.⁵³ See DPF ¶¶ 543-552.

⁵³ Plaintiffs assert that CIPA's disabling provision will deter patrons from accessing constitutionally protected information, thus "chilling" exercise of their First Amendment rights. Courts sometimes find pre-enforcement claims justiciable when the challenged statute allegedly "chills" speech protected by the First Amendment. That is true, however, only where courts are satisfied that there is sufficient factual information in the record to demonstrate a significant likelihood of "chill." See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 300 (1979) (claim unripe "[e]ven though the challenged statute is sure to work the injury alleged"); see also Laird, supra, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). The patron plaintiffs do not, of course, make any allegation of present harm. Nor are they at all specific as to their claims of future harm. Obviously, the effect of the filtering products will depend, in large

The claims of the Web publishers suffer from similar defects. Like Dr. Bertman, the website Plaintiffs allege that one or more of the existing filtering technologies blocks, or likely will block, their content. They purport to have a "reasonable fear" that their sites will be blocked at some point by some library, and that future content on their sites may also be subject to blocking. Operating in the same factual vacuum as the patron Plaintiffs, these websites contend, without reference to a single concrete instance, that patrons will be inhibited by disabling procedures not yet adopted or implemented from accessing the sites' content, and that the sites themselves may "self-censor" in order to reach patrons in libraries. See DPF ¶¶ 553-562. These are "but snippets compared to a developed record." Artway, 81 F.3d at 1250.

Courts do not decide "constitutional questions in a vacuum." W.E.B. Dubois Clubs of America v. Clark, 389 U.S. 309, 312 (1967) (per curiam). Plaintiffs' allegations are still merely that. Their complaints provide this Court no basis upon which to do more than speculate about possible harms that might or might not occur assuming a library decides to accept the federal subsidy and agrees to comply with CIPA, occurrences that are by no means certain given the testimony of representatives from the Plaintiff libraries. Courts have taken a dim view of such hypothesized injuries. See United Public Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89-90 (1947) ("A hypothetical injury is not enough"); see also Artway, 81 F.3d at 1250 (holding unripe a challenge to notification procedures under Megan's Law because "we cannot make complex and important determinations in a factual vacuum").

Plaintiffs will not suffer any hardship should this Court withhold judicial consideration of their First Amendment claims. "A substantial contingency is the classic impediment to a preenforcement challenge." Artway, 81 F.3d at 1248. Here there are several. Depending upon a

measure, on how they are administered in the various libraries.

host of factors, including the technology protection measure chosen and the extent, and character, of any particular library's administration of the products or other features of the adopted Internet safety policy, the hypothetical First Amendment violations alleged by plaintiffs may never occur. Nor is this a case in which the threat of criminal prosecution, or even civil enforcement, hangs over Plaintiffs. In the event of a real controversy concerning denial of access to specific information, Plaintiffs ultimately may have their day in the appropriate court.⁵⁴

CONCLUSION

As Defendants have argued from the outset, CIPA is a valid exercise of Congress' power under the Spending Clause. The record, as summarized in Defendants' Proposed Findings of Fact, demonstrates that Congress has not induced any library to violate the constitutional rights of others, nor violated any library's constitutional rights. Plaintiffs' facial challenges to CIPA should be rejected.

Respectfully submitted,

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⁵⁴ It may be easier, and cheaper, from plaintiffs' perspective, to mount a single legal challenge to all of the technology protection measures currently available for installation and operation at the libraries. Adjudicating plaintiffs' speech rights in a vacuum, as they propose, however, is not an efficient means from the Court's perspective of adjudicating potential First Amendment claims, which depend on the development of a record containing specific facts. See Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 735 (1998) ("The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – postimplementation litigation.").

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CERTIFICATE OF SERVICE

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