

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 4**

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| KATHLEEN R., <i>et al.</i>, |) | |
| |) | No. A086349 |
| Plaintiff and Appellant, |) | |
| |) | Alameda County Superior Court |
| vs. |) | |
| |) | Case No. V-015266-4 |
| CITY OF LIVERMORE, |) | |
| |) | (Hon. George C. Hernandez, Jr.) |
| Defendant and Respondent. |) | |

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN
CALIFORNIA, PEOPLE FOR THE AMERICAN WAY AND
FREEDOM TO READ FOUNDATION IN SUPPORT OF DEFENDANT-
RESPONDENT CITY OF LIVERMORE**

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INTRODUCTION

Plaintiff and appellant has filed a lawsuit to require the City of Livermore to ensure that no one uses the City's library computers to obtain obscene materials over the Internet and to ensure that no minor ever views harmful matter on the Internet. In other words, plaintiff is demanding that librarians assume the role of Internet censor, determining which websites patrons may access and which they may not. That is a role forbidden by the First Amendment. This court need not reach the important First Amendment issues that would be raised were this suit to go forward, however. As the trial court correctly determined, plaintiff's unprecedented complaint fails to state a cause of action under either state or federal law.

This case is before the court because plaintiff's son went to the Livermore Public Library without first telling his mother and, once there, downloaded some sexually explicit pictures from the Internet using the library's computers. Comp. ¶ 7-10 (Jt. App. 0002). He then went to a relative's home and, again without letting any adult know what he was doing, printed out the pictures. Id. ¶ 12. Apparently, the boy repeated these actions on a number of occasions. Id. ¶ 14. Plaintiff now seeks to hold the Livermore Public Library responsible for her son's conduct.

Plaintiff's original complaint was based on three state law causes of action. It sought an injunction that would prohibit the Livermore Public Library "from maintaining any computer system on which it allows people to access . . . obscene material or on which it allows minors to access . . . sexual material harmful to minors." Complaint, Prayer for Relief ¶ 2; see also id. ¶¶ 1, 3 (Jt. App. 0001-0002). The trial court sustained the City of Livermore's demurrer, holding that Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), bars plaintiff's claims.

Plaintiff then filed an amended complaint, contending that the library's decision to permit uncensored access to the Internet violates the Due Process Clause of the federal constitution. At its core, the complaint asserts that the Due Process Clause permits parents to abdicate their responsibility for supervising their children and, instead, shifts that responsibility to whatever publicly maintained facility a minor may choose to visit. The Prayer for Relief seeks an injunction prohibiting the City of Livermore "from maintaining library premises at which children have the ability to access . . . sexual and/or other material harmful to . . . minors." Amended Complaint at 3 (Jt. App. 0111). The trial court again sustained the City's demurrer, this time dismissing the action with prejudice. This appeal followed.

Amici file this brief not only to address the specific issues of the preemptive effect of Section 230 of the Communications Decency Act and the failure of the complaint to raise a cognizable claim of a denial of substantive due process, but to address the broader First Amendment concerns that must inform the court's analysis of these specific issues. As will be shown below, the relevant authorities overwhelmingly establish that Section 230(c)(1) bars plaintiff's state law claims. Similarly, plaintiff's claim that the Due Process Clause compels the library to censor Internet access in order to "protect" its patrons would have to be rejected, even in the absence of the serious First Amendment implications of such a holding. But the First Amendment is far from absent here. It permeates every aspect of the case, and requires that the dismissal of this lawsuit be affirmed. Plaintiff's requested injunction, although it purports to deal only with issues of obscenity and harmful matter, in fact would have a profound impact on the availability of protected material on the Internet, an impact inconsistent with First Amendment principles and with the mission of the library, itself.

In generations past, the public library has served as a storehouse of knowledge for the community, young and old alike. It is an institution dedicated to the promotion of freewheeling inquiry. Board of Education, Island Trees Union Free Sch. District v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, dissenting); Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 561 n.10 (E.D. Va. 1998) (Loudoun II). Today, it continues in that time-honored role by making Internet access

available to the entire community, regardless of an individual's age or economic resources.

This lawsuit threatens that mission in the most fundamental way. As the Seventh Circuit has observed: "Libraries are not in the business of purveying or exhibiting pornographic materials. They are, however, frequent targets of private citizens concerned, sometimes in an ignorant and narrow-minded way, with the exposure of their children to immoral influences. Mindless censorship, flavored with hysteria, of textbooks and of reading lists, of school libraries and of public libraries, is an old story . . . but one with plenty of contemporary vitality." *Kucharek v. Hanaway*, 902 F.2d 513, 520 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991). This lawsuit, is but another example of that old story, this time with the Internet as the main character.

THE INTERNET AND RESTRICTIONS ON ACCESS

The Internet, and in particular the World Wide Web to which the Internet provides access, is in many respects the equivalent of a global library, the content of which is "as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Any person with access to the Internet has at his or her fingertips a profusion of information, opinion, and ideas so great as to literally defy description. As of early 1998 there were at least 320 million pages of material available on the World Wide Web. Steve Lawrence & C. Lee Giles, "Searching the World Wide Web," *Science Magazine*, April 3, 1998. New material is added at a phenomenally rapid rate. Indeed, it has been estimated that the number of pages on the web doubled every three to six months between 1993 and 1996. R. Polk Wagener, *Filters and the First Amendment*, 83 *Minn. L. Rev.* 755, 762 n.19 (1999), citing Matthew K. Gray, *Internet Statistics: Growth and Usage of the Web and the Internet*, available at www.mit.edu/people/mkgray/net/web-growth-summary.html.

Not surprisingly, not all of the information, opinion, ideas, or other content available on the Internet is viewed with universal favor. The very diversity that is the great strength of this amazing new medium is, at the same time, a source of concern for those who are uncomfortable with such freewheeling eclecticism. What must be remembered, however, is that material on the Internet, whatever its nature, does not come unbidden to the screen of the unsuspecting user. The Internet user must actively look for the information he or she hopes to find. "Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.'" *Reno v. ACLU*, 521 U.S. at 854 (quoting lower court opinion). That means that those who access sexually explicit material on the Internet do so because they want to, not through error or accident. Because "[a]lmost all sexually explicit images are preceded by warnings of its content . . . the 'odds are slim' that a user would enter a sexually explicit site by accident." *Id.*

Nevertheless, there are those, such as the plaintiff in this case, who seek to control the Internet use of others. Indeed, the plaintiff here is insisting not that she be permitted to control the Internet access of her son, something that it is already within her power to do, but that the government control the Internet access of all library patrons at the Livermore public library. Thus she seeks an injunction prohibiting the library "from maintaining any computer system on which it allows people to access . . . obscene

material or on which it allows minors to access . . . sexual material harmful to minors." [1] Complaint, Prayer for Relief ¶ 2; see also id. ¶¶ 1, 3. (Jt. App. 0005-0006) In order to understand the constitutional concerns raised by this requested relief, it is helpful first to consider how the library might attempt to comply with such an injunction. From a practical point of view, given the sheer volume of material on the Internet, the only solution is a technological one: the use of blocking software.

Blocking software, sometimes also referred to as filtering software, is designed to screen out or "block" particular categories of unwanted content that would otherwise be available over the World Wide Web. See *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* (visited Oct. 6, 1999) <<http://www.aclu.org/issues/cyber/box.htm>> and sources cited therein [hereinafter *Censorship in a Box*]. In addition to blocking out sexually explicit material, such software may also block out websites based on a variety of other criteria such as language, violence, or advocacy of controversial opinion. This latter category often includes not only "hate" sites but sites such as those discussing drug policy or those created for the gay and lesbian community. Id.

While the use of blocking software appears, at first blush, to be a simple and effective solution to screening out obscenity or harmful matter, it is neither. First, the sheer volume of material on the World Wide Web, coupled with the rapid rate at which new material is added every day, makes it impossible for blocking technology to ensure that all forbidden sites are blocked. Wagener, *supra*, at 762. The problem is compounded by the fact that, unlike books or newspapers whose content is static, once printed, websites frequently change their content. Accordingly, constant re-review would be required. In short, blocking software would not weed out all prohibited material, thus leaving the library vulnerable to contempt charges for failing to comply with the injunction plaintiff seeks.

More fundamentally, however, the use of government mandated blocking software is untenable because it consistently denies access to material on the web that is protected by the First Amendment—even when the software purports to eliminate only unprotected material. As one commentator has noted, blocking software is "wildly overbroad and inaccurate." Wagener, *supra*, at 762. [2] For example, in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (Loudoun II), a case in which the court held that the library's use of mandatory blocking software violated the First Amendment, the software in question purportedly blocked only sites displaying child pornography, obscene material, and material deemed harmful to juveniles. Id. at 556. Among the sites actually blocked, however, were sites for The Safer Sex Page, the Books for Gay and Lesbian Teens/Youth page, the Renaissance Transgender Association page, the site for the Maryland affiliate of the American Association of University Women, The Ethical Spectacle, and Rob Morse's column for the San Francisco Examiner—sites that the library conceded fell outside the forbidden categories. Id. at 556 n.2, 558, 559.

Similarly, Utah's public schools use a blocking program known as Smartfilter. The version they use is intended to block sites on sex, gambling, criminal skills, hate speech, and drugs. A study of the sites blocked by that software over a one month period revealed

that the software had blocked access to the Declaration of Independence, the United States Constitution, the Bible, the Book of Mormon, the Koran, and a wide variety of literature taught in most public schools today. See Michael Sims et al, Censored Internet Access in Utah Public Schools and Libraries, (The Censorware Project 1999) (visited Oct. 6, 1999) <<http://censorware.org/reports/utah/main/shtml>>. A third popular blocking program, Cyber Patrol, has, at various times, blocked access to websites for Planned Parenthood, Envirolink (an environmental website), the AIDS Authority, the MIT Project on Mathematics and Computation, the University of Arizona website, and the website for the U.S. Army Corps of Engineers Construction Engineering Research Laboratories. Wagener, *supra*, at 762 n.18; see also, *Censorship in a Box*, Appendix I.

The use of software to block access to material that is legally obscene or harmful to minors is further complicated by the fact that the software would be called upon to make the most sensitive of legal judgments. First, these determinations require the application of contemporary statewide standards specific to California. See Penal Code §§ 311, 313. We know of the existence of no such customized software.

There is an even greater difficulty, however, in using software to make these determinations. As discussed in greater detail in the Argument section of this brief, it is axiomatic that only judges and juries are empowered to declare expressive materials obscene or harmful matter, thereby denying others the right to read or view them. See *Freedman v. Maryland*, 380 U.S. 51 (1965); *Loudoun II*, 24 F. Supp. 2d. at 568. The use of such software is therefore an unconstitutional prior restraint. See pp. 32-36, *infra*.

ARGUMENT

I. PLAINTIFF'S STATE LAW CLAIMS ARE BARRED BY SECTION 230(c)(1) OF THE COMMUNICATIONS DECENCY ACT[3]

A. Section 230(c)(1) of the Communications Decency Act Prohibits Imposing Liability on Libraries Based On Material Transmitted Over the Internet by Others.

Relying on taxpayer, public nuisance, and premises liability theories, plaintiff seeks an injunction and a declaration that the City of Livermore "is legally liable for all future damage to plaintiff's children caused by the children accessing . . . sexual and other material harmful to minors on any library computer connected to the Internet or World Wide Web." Complaint, Prayer for Relief, ¶¶ 2, 3 (Jt. App. 0006) (emphasis added).

The defect in plaintiff's state law theories is that she seeks to impose liability based on the fact that the library provides its patrons with uncensored access to the Internet. The immunity provisions of the Communications Decency Act flatly prohibit imposing liability on a library for providing access to material that was transmitted over the Internet by third parties. 47 U.S.C. § 230(c)(1).

Section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* The term "interactive computer service" specifically includes the access to the Internet provided by public libraries. 47 U.S.C. § 230(e)(2).[4] Section

230(d)(3) prohibits any state law cause of action that would be inconsistent with the immunity granted by Section 230.[5] Taken together, Sections 230(c)(1) and 230(d)(3), "[b]y their plain language, . . . create[] a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (emphasis added); accord, *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Doe v. America Online*, 718 So. 2d 385 (Fla. App. 1998), review granted, 729 So. 2d 390 (Fla. 1999) (state law negligence action alleging AOL knew or should have known third party was using its service to market and distribute child pornography barred by Section 230); see 1 Robert D. Sack, *Sack on Defamation* § 7.3.1 (3d ed. 1999); cf. *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (recognizing immunity conferred by Section 230) (dictum); compare, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998) (Loudoun I).

The Fourth Circuit's thoughtful and thorough reasoning in *Zeran* governs the outcome here. In *Zeran*, an anonymous person posted advertisements on an AOL bulletin board indicating that plaintiff was selling T-shirts and other items with tasteless slogans about the bombing of the Oklahoma City federal building. 129 F.3d at 329. Although plaintiff notified AOL of the postings, AOL was slow to respond and took no action to prevent the posting of additional, similar messages. *Id.* Plaintiff brought a negligence action against AOL seeking to hold it liable for the harm done to him by the unidentified person responsible for the postings. *Id.* at 330. At issue was whether Section 230(c)(1) barred *Zeran's* action. *Id.*

Zeran argued that Section 230(c)(1) applies only to the strict liability imposed on publishers in defamation actions, not to the liability of a distributor who, like AOL, knows that a particular unlawful message is being transmitted over the private network that it controls. *Id.* at 331. The Fourth Circuit disagreed. *Id.* at 332. It held that Section 230(c)(1) preempts state law actions even where the service provider has knowledge of the content of the material in question. *Id.*; accord, *Blumenthal*, *supra*; *Doe*, *supra*.

That ruling is based squarely on the purposes of Section 230, which "was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Id.* at 330. While Congress hoped to encourage some private regulation of the Internet, at the same time it recognized that permitting service providers to be held liable based on the speech of third parties would lead service providers to eliminate any controversial expression that might subject them to liability:

The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers [or librarians] to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 331.

Indeed, it is precisely such a restrictive effect that the injunction plaintiff seeks would impose here. Plaintiff asks the court to prohibit the library, on pain of being held in contempt, from allowing patrons to use the Internet so long as it would be possible for them to obtain access to obscenity or harmful matter. As discussed above, see pp. 5-6, no blocking software can guarantee that all obscene or harmful matter will be blocked. Thus the library's only choice would seem to be to provide Internet access only to that small number of sites that the library could, itself, prescreen, a result wholly at odds with Congress' intent in enacting Section 230.

B. Section 230(c)(1) Applies to Plaintiff's State Law Claims Here.

Plaintiff mistakenly relies on the court's decision in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783 (Loudoun I) in arguing that Section 230(c)(1) is inapplicable here. That ruling does not support plaintiff's position for two, independent reasons. First, Loudoun was a federal constitutional challenge to the library's decision to install blocking software. It was not a lawsuit asserting state law claims. Second, the defendants in Loudoun based their immunity argument on subsection (c)(2) of Section 230, not on subsection (c)(1), the provision at issue here. Those two subsections have very different language and serve very different purposes.

In Loudoun, a group of library patrons brought a constitutional challenge to a library board's decision to install blocking software on all of the library's Internet terminals.^[6] In its motion to dismiss, the library contended that the suit was barred by Section 230(c)(2) of the Communications Decency Act.^[7]

Although the court rejected that claim, its ruling is not relevant here. Loudoun was a federal constitutional challenge, not a suit grounded in state law, like this one. Plainly Congress could not authorize governmental agencies to violate the constitution by providing immunity from suit. *Aguilar v. Avis Rent-A-Car Systems, Inc.*, 21 Cal. 4th 121, 150 (1999) (Werdegar, J., concurring) ("Congress cannot, by legislation, change the scope of one's First Amendment rights); see, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Congressional attempt to redefine scope of Free Exercise Clause). Moreover, as the Loudoun I court pointed out, "[Section] 230 was enacted to minimize state regulation of Internet speech by encouraging private content providers to self-regulate against offensive material; § 230 was not enacted to insulate government regulation of Internet speech from judicial review." 2 F. Supp. 2d at 790 (emphasis added).

Plaintiff nevertheless relies on Loudoun I in asserting, first, that Section 230(c)(1) applies only to private entities, and second, that it does not apply to her state law claims, which seek only injunctive and declaratory relief. She is wrong on both counts.

1. The Immunity Conferred by Section 230(c)(1) Is Not Limited to Private Entities.

Plaintiff's claim that Section 230(c)(1) applies only to private entities is wholly at odds with the statute itself, which specifically includes both libraries and educational

institutions within the definition of the term "interactive computer service." See § 230(e)(2), supra, n. 4. Given the large number of governmental institutions that fall into the categories "libraries" and "educational institutions", it is difficult to take plaintiff's argument seriously.

Nor does anything in the court's language in Loudoun I support plaintiff's contention that Section 230(c)(1) applies only to private entities. First, as noted above, the Loudoun I court was construing subsection (c)(2), not (c)(1). Moreover, the Loudoun I court held only that Section 230(c)(2) does not immunize government regulation of the Internet from judicial scrutiny in a case raising a constitutional challenge to government-imposed mandatory use of filtering software. Given that the purpose of Section 230 is to minimize government regulation of the Internet, see § 230(b)(2), it would have been more than ironic for the Loudoun I court to hold that that same section shields such government regulation from constitutional review. The Loudoun I court did not have before it, and therefore did not have occasion to address, the question of the applicability of Section 230(c)(1) to a lawsuit attacking a library's decision not to censor the Internet.

2. The Loudoun I Court's Decision Supports the Conclusion That Section 230(c)(1) Is Not Limited to Tort-Based Claims.

In construing Section 230(c)(2), Judge Brinkema, in Loudoun I, concluded that the immunity from suit conferred by subsection (c)(2) is limited to tort-based civil liability.[8] 2 F. Supp. 2d at 790. Nothing in the court's decision, however, indicates that she believed that subsection (c)(1) is similarly limited. To the contrary, Judge Brinkema, in her subsequent opinion in Loudoun II, cited the Fourth Circuit's ruling in Zeran, a subsection (c)(1) case, as authority for the proposition that the library board would be immune from criminal prosecution should its patrons be able to access illegal pornography on library Internet terminals. 24 F. Supp. 2d 565 n.15. Quite plainly, then, Judge Brinkema did not view subsection (c)(1) as limited to tort-based claims.

The conclusion that subsection (c)(1) bars plaintiff's state law claims is born out both by its own language and by the language of other provisions within Section 230. Unlike subsection (c)(2), which speaks in terms of "be[ing] held liable", subsection (c)(1) is written broadly: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Subsection (d)(3), which specifies the circumstances under which Section 230 preempts state law claims, confirms that the immunity it confers is not limited to tort claims. Subsection (d)(3) provides: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3) (emphasis added); see Zeran, 129 F.3d at 330 ("By its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service.") (emphasis added). Congress could hardly have spoken more clearly.

C. The Exception for the Enforcement of Federal Obscenity Laws Has No Applicability Here.

Plaintiff's argument that her lawsuit may go forward because of the "obscenity" exception to Section 230 is refuted both by the language of Section 230(d)(1) and by the case law interpreting Section 230. First, Section 230(d)(1), upon which plaintiff relies, refers only to federal criminal statutes. Congress could have, but chose not to, include a similar provision with respect to state obscenity laws. Section 230(d)(1) does not save plaintiff's state law claims.

Second, at least three different courts have recognized that Section 230(c)(1) not only shields Internet service providers from liability for defamatory material originating with third parties, but shields them from liability for unprotected sexually explicit speech transmitted by third parties as well. *Zeran*, 129 F.3d at 330-31; *Blumenthal*, 992 F. Supp. at 49, 52; *Doe v. America Online*, 718 So. 2d 385. In *Doe v. America Online*, for example, the court held that Section 230(c)(1) barred a negligence suit in which plaintiff claimed that AOL aided and abetted a third party in violating Florida's child pornography statute—a theory strikingly similar to plaintiff's theory here. 718 So. 2d. at 389. Likewise, the *Zeran* and *Blumenthal* courts explicitly recognized that Section 230 applies to obscenity. *Zeran*, 129 F.3d at 330-31; *Blumenthal*, 992 F. Supp. at 49, 52. As the *Blumenthal* court stated:

Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.

Id. at 49.

Section 230 represents a balancing of interests by Congress which this court may not undo by permitting plaintiff's lawsuit to go forward. While Congress clearly wanted to encourage the Internet industry to police itself and intended "'to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, . . . ' [it] made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on [those] that serve as intermediaries for other parties' potentially injurious messages." *Zeran v. America Online, Inc.*, 129 F.3d at 330-331 (emphasis added) (quoting 47 U.S.C. § 230(b)(5)); see also *Blumenthal*, 992 F. Supp. at 52.

D. Holding That Section 230 Bars This Lawsuit Will Not Lead To the Far-Fetched Results Posited By Plaintiff.

Plaintiff suggests an extreme interpretation of Section 230 in order to defeat the immunity that Congress legitimately intended to confer in cases such as this one. Thus, she argues that applying Section 230 to this lawsuit would, by logical extension, prevent the prosecution of a library "user" who willfully uses the Internet to exhibit harmful matter to a minor. If plaintiff were correct, Section 230 immunity would extend not only to library patrons but to any person who, as a "user" of a commercial Internet service

provider such as AOL, uses the Internet to access and distribute or exhibit obscenity or child pornography.

We think it quite unlikely that a court would find that Section 230 applies in either situation. But this court need not decide those issues on this appeal. By holding that Section 230 applies to the libraries that Congress specifically singled out for protection, this court does not prejudice plaintiff's hypothetical cases.

II. PLAINTIFF'S COMPLAINT DOES NOT ALLEGE A SECTION 1983 SUBSTANTIVE DUE PROCESS VIOLATION

Plaintiff's substantive due process claim is based on the premise that the Constitution permits parents to abdicate their responsibility for supervising their children and, instead, shifts that responsibility to whatever publicly maintained facility a minor may choose to visit. Even in an ordinary case, courts hesitate to impose on government agencies a substantive due process duty to protect from risks voluntarily encountered or harm inflicted by third parties. This is so even when a government entity may fairly be said to have contributed to the grievous harm suffered by a plaintiff. See, *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). This, however, is no ordinary case. It is a case in which a parent seeks to cast a public library in the role of censor—a role forbidden by the First Amendment.

The Board of Trustees of the Livermore Public Library has adopted a policy on Internet use that informs patrons that material available over the Internet may be controversial, that the library does not supervise or monitor the Internet use of minors, and that parents are responsible for doing so. This policy enables each family to be sure that its children use the Internet in a manner that is consistent with its own values without imposing those values on others. By no stretch of the imagination can a policy that so carefully balances both the concerns of parents and the requirements of the First Amendment be said to violate the Due Process Clause of the Constitution.

A. In Order To State a Claim Under Section 1983, Plaintiff Must Allege the Violation of a Constitutional Right.

In reviewing a Section 1983 cause of action against the government, the court must first determine whether the facts allege a constitutional violation. *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). Here, plaintiff alleges that allowing library patrons unrestricted access to the Internet violates principles of substantive due process.

Unlike a procedural due process claim, which rests on the assertion that the state has deprived an individual of life, liberty, or property without first following procedures to ensure that the decision is fair, the substantive component of the Due Process Clause bars certain government decisions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *County of Sacramento v. Lewis*, 523 U.S. 833, 140 L. Ed. 2d 1043, 1053 (1998). The Clause is "intended to secure the individual from the arbitrary exercise of the powers of government," serving "to prevent governmental power from being used for purposes of oppression." *Daniels*, 474

U.S. at 331(internal citations omitted); accord, Lewis, 140 L. Ed. 2d at 1057 (due process guarantee protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective).

The Supreme Court has established an extremely high standard for making out a substantive due process claim. In particular the Court has cautioned that the Due Process Clause

is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 195 (1989).

Moreover, when dealing with a claimed deprivation of substantive due process, it is of critical importance that the interest allegedly invaded be carefully described. Collins, 503 U.S. at 125 (court "must focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her . . . of that right."); see also Washington v. Glucksberg, 521 U.S. 702, 721 (1997). It is only when that claimed interest is accurately understood that the court can determine whether a substantive due process violation has been alleged.

B. Plaintiff Has Failed to Allege the Deprivation of a Constitutionally Protected Liberty Interest

Plaintiff alleges that the City of Livermore violated her right to substantive due process by failing to prevent her son from using the Internet to obtain material that she claims is either obscene or harmful to minors. In other words, plaintiff contends that the Constitution imposes on the library the affirmative duty to monitor and control the Internet use of minors. That is an astounding assertion indeed. The Due Process Clause does not authorize a parent to require that the State supervise her child so that she may be relieved of the obligation to do so.

Plaintiff's claim that the Constitution requires the Livermore library to maintain a safe environment for its patrons must be rejected in light of the Supreme Court's decision in Collins v. City of Harker Heights, 503 U.S. 115. In Collins the Supreme Court unanimously held that, at least in the absence of allegations that the City had compelled its employee to undertake his dangerous endeavor, the City's failure "to provide . . . employees with minimal levels of safety and security in the workplace" does not state a claim for a denial of substantive due process. Id. at 126-27; see also id. at 128; DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. at 200; [9]Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 531-34 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996).

Plaintiff's allegations here are markedly similar to those held to be insufficient in Brown v. Hot, Sexy and Safer Productions, Inc., supra. In Brown, plaintiffs claimed that their

children's compelled attendance at an indecent AIDS awareness assembly violated their substantive due process right to direct the upbringing of their children. 68 F.3d at 532-34. Alternatively, they alleged that the school's actions violated the children's right to be protected from exposure to offensive speech. *Id.* at 534.[10] The court found no basis for either claim. It flatly rejected the notion that the Due Process Clause confers a fundamental right to be protected from offensive speech. *Id.* at 534. Nor did the court find that the right to rear one's children "encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Id.* at 533.

Like the plaintiffs in *Brown*, Kathleen R. seeks to impose her values on the manner in which Internet access is governed at the Livermore public library. Kathleen R. was not compelled to send her son to the library. If she did not believe he should have unrestricted access to the Internet, it was up to her to see that he did not go to the library unsupervised. Having failed to exercise proper supervision over her son, she may not demand that the library assume the obligation she failed to fulfill.

Plaintiff's allegations that the library knows that students go to the library to work on school assignments, Amended Comp. ¶ 39 (Jt. App. 0112), that the library advertises itself as a place where children are welcome and puts on special programs for them, *id.* ¶ 40, or that it invites children to use the resources of the library, including its computers, *id.*, do not change this result. See *Carlton v. Cleburne County*, 93 F.3d 505.

In *Carlton* plaintiffs were injured when a county-owned bridge collapsed. The Eighth Circuit held that neither the county's knowledge that the bridge was dangerous, nor its actions in offering the bridge as a tourist attraction, were sufficient to state a substantive due process claim in the absence of allegations of some affirmative act by government officials in putting the plaintiffs on the bridge. *Id.* at 509. Nor did the county "create the danger" that the bridge would collapse by failing to maintain the bridge and thereby failing to counteract the effect of the natural rusting processes that were responsible for the collapse.[11]

The much more serious and concrete allegations of responsibility for plaintiffs' injury held insufficient in *Carlton* stand in sharp contrast to the allegations of the complaint here. Plaintiff, herself, acknowledges that the library has explicitly warned its patrons in its Access to Electronic Information, Services and Networks Policy that "Library patrons use the Internet at their own risk." Amended Comp. ¶ 44 (Jt. App. 0112). That policy makes it abundantly clear that the Internet contains controversial content, that the library is not responsible for and does not monitor that content, and that it is up to parents to supervise the Internet use of their children. Comp. Ex. B (Jt. App. 0023); compare *DeShaney*, 489 U.S. at 197 (holding no substantive due process violation even though county had "specifically proclaimed, by word and by deed, its intention to protect [plaintiff]" from abuse by his father).

The Livermore library was neither responsible for the content available on the Internet nor for Brandon P's actions in going to the library and using the Internet without his mother's supervision. The amended complaint fails to allege the deprivation of an interest protected by the Constitution.

C. The Library's Internet Open Access Policy Does Not Violate the Substantive Component of the Due Process Clause.

1. Plaintiff Has Not Been Deprived of a Fundamental Right.

Both legislative and executive action may be challenged on substantive due process grounds. See *County of Sacramento v. Lewis*, 140 L. Ed. 2d at 1057. Absent the infringement of a fundamental right, a legislative enactment will be upheld so long as it is rationally related to a legitimate governmental purpose. See *Martinez v. California*, 444 U.S. 277, 282-83 (1980). With respect to executive actions, "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" *Lewis*, 140 L. Ed. 2d at 1057 (quoting *Collins*, 503 U.S. at 129). Put another way, the government's action must "shock the conscience." *Id.*

Recognizing that she cannot make a convincing argument that the library's actions here are anything but reasonable, plaintiff has taken a different tack. She argues that the library's Internet access policy, as a legislative enactment, infringes a "fundamental" right and hence can only be upheld if it is shown to further a compelling interest.[12] The so-called fundamental right that is infringed is the right to avoid the supposed psychological injury allegedly resulting from the library's failure to ensure that minors do not access harmful matter.

Plaintiff cites no case law to support her contention that the compelling interest test applies simply because she claims that the library's policy resulted in psychological harm to her son. As the Supreme Court explained in *Lewis*, 140 L. Ed. 2d at 1056-57, the core concept of substantive due process is the protection against arbitrary government action—even where the plaintiff alleges an injury resulting in death. The fact that "the criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue", 140 L. Ed. 2d at 1057, does not change the fact that the basic standard is arbitrariness in the constitutional sense. *Id.* This is so both in executive action cases involving loss of life, see, e.g., *Lewis*, *supra*; *Collins*, *supra*, and in challenges to legislative policies held to be responsible for loss of life. See *Martinez v. California*, 444 U.S. 277 (1980).

In this respect, the *Martinez* case is directly on point. The case arose out of a far more egregious and tangible harm than that alleged here—the torture and murder of a 15-year-old girl by a recently paroled sex offender. Plaintiff's state law claims were nevertheless barred by a California statute granting absolute immunity to parole officials for injuries resulting from parole-release decisions. Plaintiff claimed that the immunity statute was responsible for parole officials' carelessness in releasing the sex offender, consequently leading to the deprivation of a fundamental right. 444 U.S. at 282 n.6. The Supreme Court disagreed:

A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it

may set in motion a chain of events that ultimately leads to the random death of an innocent by-stander.

Id. at 282. Accordingly, the Court employed traditional rational basis review and concluded that the statute "rationally furthers a policy that reasonable lawmakers may favor." Id. at 283; see also id. at 282 (statute will be upheld unless wholly arbitrary or irrational). That is the standard that applies here.

2. The Library's Open Access Policy Responsibly Accommodates Both the First Amendment Interests of Patrons and the Concerns of Families

The Livermore public library's open access policy is anything but arbitrary. That policy, whether applied to books on the shelves or to Internet access, represents the considered judgment of the library's policy makers that "freedom of speech and expression are central to the successful maintenance of a free society" and that these interests, which are of constitutional dimension, are best served when "all members of the community have free and equal access to the entire range of library resources, regardless of content, approach, format or amount of detail." Access to Electronic Information Services and Networks Policy (Purpose), Ex. B to Comp. (Jt. App. 0023). The library's Board of Trustees has determined that "[t]hese rights extend to all users of the public library including minors. Access to information is a fundamental right and helps guarantee an informed citizenry." Id. With respect to the provision of Internet access, the library has concluded that the Internet provides it with an "unprecedented opportunity" to fulfill its mission, and notes the growing importance of electronic resources "to students, workers and ordinary citizens." Id.

At the same time, the library's policy recognizes that the Internet may contain materials of a controversial nature, informs its patrons of that fact, and informs them that the library neither monitors nor has control over the information available on the Internet. Id. (Internet Access). The policy goes on to note that it is not technically feasible to prevent users "from accessing materials, messages or graphics that might be considered offensive to a user or inappropriate to minors" Id. "Library patrons use the Internet at their own risk." Id.

Finally, the library's governing board has addressed the question of who should assume responsibility for supervising the Internet use of minors. The policy explicitly informs patrons that the library does not provide monitoring or supervision of minors' Internet use. The policy goes further, stating that it is the responsibility of parents to supervise their children's Internet use so that the material their children access is consistent with their own family's values. Id. (Responsibility of Users).

The library's decision to provide an environment that encourages intellectual growth and development free from the constraints of censorship can hardly be described as unrelated to legitimate governmental objectives. On the contrary, it serves to further core constitutional principles of freedom of expression. Nor can one quarrel with the library's conclusion that the obligation "to monitor and supervise children's use of the Internet in selecting material that is consistent with personal and family values" is most appropriately that of the parent, not the government. Parents hold wildly varying views

about what is appropriate for their children, and what is not, at any given age. By leaving it to parents to supervise the Internet use of their children, the library has chosen a policy that allows for that diversity of viewpoint, rather than imposing the one-size-fits-all approach that plaintiff demands here. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1029, 1032 (9th Cir. 1998) (Plaintiff's claim that school district's refusal to remove allegedly racist novels from curriculum fails to state race discrimination claim under Equal Protection Clause where requested injunction would restrict First Amendment rights of students).

In the end, it was up to the policy-makers at the library to weigh the competing considerations at play here, including the risk that some parents might fail to supervise their children and that one of those children might abuse the trust placed in him by his parent. Whatever may be the pros and cons of the library's decision to adopt an open access policy, one thing is certain: That decision cannot be said to have been "an abuse of executive power so clearly unjustified by any legitimate objective of [government] as to be barred by the fourteenth Amendment." Lewis, 140 L. Ed. 2d at 1054; *Martinez*, 444 U.S. at 283 ("[w]hether one agrees or disagrees" with such a policy, "one cannot deny that it rationally furthers a policy reasonable lawmakers may favor."). The library's decision may not be second-guessed by an irate parent or by this Court.

3. Restricting the Internet Access of Library Patrons Raises Serious Constitutional Concerns.

In stark contrast to plaintiff's unpersuasive claim of a right to compel the library to restrict Internet access are the First Amendment rights of library patrons that would be violated if Internet access were, in fact, restricted. Plaintiff seeks an injunction that would require the library to ensure that all persons are denied Internet access to obscene material and that all minors are denied Internet to access to harmful matter. Thus the requested relief would affect the Internet access of adults and minors alike.

In *Reno v. ACLU*, 521 U.S. 844, the Supreme Court held that the Internet—like the books and newspapers that one also finds in a library—is entitled to the very highest level of First Amendment protection. See *id.* at 868, 870. That First Amendment protection applies not just to the right to communicate information but to the right to receive it as well. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976). This principle, of course, applies with equal force in the library setting. See *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866 (1982); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992); *Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library (Loudoun II)*, 24 F. Supp. 2d at 560 (E.D. Va. 1998).

While the Court's decision in *Reno* does not mean that obscenity and harmful matter may not be regulated, it does mean that obscenity or harmful matter may not be prohibited in a manner that broadly denies access to protected speech or that unnecessarily chills the acquisition or availability of protected expression. Accord *Smith v. California*, 361 U.S. 147 (1959). Following a long line of Supreme Court authority, *Reno* makes clear that protected expression may not be blindly sacrificed in the name of regulating obscenity or harmful matter. "The interest in encouraging freedom of

expression . . . outweighs any theoretical but unproven benefit of censorship." 521 U.S. at 885.

As demonstrated above, the use of mandatory filtering software to block access to unprotected expression invariably blocks access to protected expression as well, including expression that is protected for minors. See pp. 6-7, *supra*.; see also *Loudoun II*, 24 F. Supp. 2d 552 (holding that mandatory use of filtering software violated First Amendment by blocking protected material). Plaintiff's suggestion that the court order the library to deny Internet access altogether unless a minor has obtained prior parental consent, App. Br. at 17 n.2, is similarly problematic. Such a policy would deny minors access to all expression on the Internet, regardless of whether it is harmful.[13]

It is by now beyond cavil that minors, as well as adults, have First Amendment rights. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Indeed, the Supreme Court has, on numerous occasions, recognized that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 211, 212-13 (1975); *Board of Education, Island Trees Union Free Sch. District v. Pico*, 457 U.S. 853, 866 (1982) (plurality opinion) (students' First Amendment right of access to information violated when schools remove books from library in content-based manner); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968) (ordinance prohibiting the showing of films classified as "not suitable for young persons" to those under 16 and prohibiting those under 16 from viewing such films unconstitutionally vague); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelling students to salute flag violates First Amendment); see also *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (recognizing First Amendment rights of students); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50, 56-57 (N.D. Ga. 1981) (statute that prohibited sale to minors of materials outside the definition of material that is harmful to minors violated minors' First Amendment rights); *ACLU v. Johnson*, 4 F. Supp 2d 1029, 1033 (D. New Mex. 1998), appeal docketed, (provision prohibiting communication of indecent materials to minors over the Internet violates First Amendment rights of minors by denying access to material that as to them is protected by the First Amendment).

California courts have also recognized the First Amendment rights of minors. See, e.g., *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302, 1310 (1995); *McCarthy v. Fletcher*, 207 Cal. App. 3d 130 (1989); see also, 79 Ops. Cal. Atty. Gen. 58 (1996) (requiring parental permission before allowing students to speak to the media on school premises would constitute an impermissible prior restraint). The fact that the government may deny minors commercial access to that limited range of material falling within the definition of harmful matter does not mean that it can adopt a policy that, in the name of denying minors access to such material, also denies them access to a broad range of protected material as well. See *Erznoznick*, *supra*; *Interstate Circuit*, *supra*; *McCauliffe*, *supra*; *Johnson*, *supra*; see also, *Reno v. ACLU*, 521 U.S. at 875, (interest in denying access to unprotected speech does not justify wholesale denial of access to protected speech); *Smith v. California*, 361 U.S. 147 (same).[14]

D. Maintaining an Open Access Policy For Internet Use Does Not Constitute the Sort of Egregious Conduct Required to Give Rise to a Substantive Due Process Claim.

In its recent decision in *County of Sacramento v. Lewis*, 523 U.S. 833, the Supreme Court reaffirmed its earlier holdings that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 1059. To avoid placing improper limitations on the ability of government entities to carry out their functions, "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 1057. Success on such a claim "requires [a showing of] an extraordinary departure from established norms." *Dunn v. Fairfield Community High School Dist. No. 225*, 158 F.3d 962, 966 (7th Cir. 1998).

Even before its decision in *Lewis*, the Supreme Court made clear that allegations such as those in the amended complaint here are plainly insufficient to allege arbitrary action by the government in a constitutional sense. See *Collins v. City of Harker Heights*, 503 U.S. at 115. In rejecting plaintiff's claim in *Collins* that the city had a constitutional obligation to provide a safe working environment for her husband, the Supreme Court noted: "Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based on a rational decision-making process that takes account of competing social, political, and economic forces." 503 U.S. at 128. The city's conduct was therefore not conscience-shocking in constitutional terms. *Id.*

This Court need look no further than the First Circuit's decision in *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, to dispose of this case. Like the allegations in that case that minor teenagers were compelled to attend an indecent AIDS awareness assembly without prior parental permission, the allegations here fail to meet the required standard of conscience shocking behavior. *Id.* at 552

III. THE INJUNCTION PLAINTIFF SEEKS IS AN UNLAWFUL PRIOR RESTRAINT PROHIBITED BY THE FIRST AMENDMENT.

Plaintiff seeks an injunction prohibiting the Livermore Public Library "from maintaining library premises at which children have the ability to access . . . obscene, sexual, and/or other material harmful to Brandon P. and other minors." Amended Comp. at 3 (Jt. App. 0113) (emphasis added); see also Comp., Prayer for Relief (Jt. App. 0005-0006). This is an extraordinary request. First, the proposed injunction applies to all facets of the library's collection, not just to its provision of Internet services. Thus librarians would be required to monitor and supervise the reading of minors in the library at all times.

Moreover, the proposed injunction is not limited to material that is alleged to be obscene or harmful matter. Rather, it would apply to any material, regardless of its content, if that material is "harmful to Brandon P. and other minors." This undefined, standardless prohibition plainly trespasses on the First Amendment rights of both minors and adults. See Part II.C.3, *infra*. It includes a vast array of material that some would consider inappropriate for minors either because of its political content (e.g., hate speech, speech advocating the reform of drug laws, speech on the topic of abortion), its depiction of

violence, its depiction of what some might consider immoral conduct (e.g., novels portraying adulterous relationships or the relationship of a gay or lesbian couple), or any number of other topics deemed "harmful" for the consideration of minors. Plainly a court may not issue such an injunction.

Even an injunction limited to obscenity or harmful matter, as those terms are defined by the Penal Code, would still be impermissible. "[P]ermanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). As such, they come before the court bearing a heavy presumption against their constitutional validity. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n. 13 (1980) (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

The rule that injunctions prohibiting speech are unlawful prior restraints finds its origin in the Supreme Court's decision in *Near v. Minnesota ex rel. Osborn*, 283 U.S. 697 (1931). In *Near*, a newspaper publisher was found to have violated the state's public nuisance statute by publishing defamatory material. *Id.* at 704. In accordance with the statute, the court therefore enjoined the publisher from producing any future "malicious, scandalous or defamatory" publication. *Id.* at 706. Thus like the injunction plaintiff seeks here, "*Near* ... involved a true restraint on future speech—a permanent injunction." *Alexander v. United States*, 509 U.S. at 550. Such injunctions are prohibited by the First Amendment. *Near*, 283 U.S. 697; cf. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (invalidating injunction enjoining exhibition of films without providing procedures for determining that they were obscene). They are likewise prohibited by article I, section 2 of the California Constitution. *Wilson v. Superior Court*, 13 Cal. 3d 652 (1975).

The vice in the injunction invalidated in *Near*, like the vice in the injunction plaintiff would have the court impose in this case, is that it enjoins the dissemination of expressive materials before there has been a judicial determination that those materials are unprotected by the First Amendment. *Alexander v. United States*, 509 U.S. at 551. While the state may punish those who are found to have violated its obscenity laws, courts may not enter a general injunction enjoining the violation of those laws. *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 59, cert. denied sub nom *Van de Kamp v. Projection Room Theater*, 429 U.S. 922 (1976). In this sense, the United States Supreme Court has "interpreted the First Amendment as providing greater protection from prior restraints [in the form of injunctions] than from subsequent punishments [under the criminal laws]." *Alexander v. United States*, 509 U.S. at 553.

The California Supreme Court's decision in *Busch* is dispositive here. In *Busch*, law enforcement officers brought a civil action under the state's public nuisance statute to enjoin the exhibition of obscene books and films. 17 Cal. 3d at 47. In holding that the lower court erred in sustaining defendants' demurrers, the court ruled that plaintiffs' complaints stated proper causes of action to enjoin the exhibition and sale of specific materials once they had been adjudged obscene. *Id.* at 58; see *Aguilar v. Avis Rent-A-Car Systems, Inc.*, 21 Cal. 4th 121 (1999). However, the court soundly rejected the notion that a finding that the bookstores had exhibited or sold some obscene materials would justify a broad injunction closing down the bookstores or generally prohibiting the sale of obscene materials:

While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.

Busch, 17 Cal. 3d at 59 (emphasis added); see also *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d at 568-70 (mandatory use of filters constitutes unconstitutional prior restraint because of absence of sufficient standards for determining which sites may be blocked and absence of adequate procedural safeguards, including absence of provision for prompt judicial review of blocking decisions).

The amended complaint here is based on the theory that if plaintiff can prove that the websites her son accessed at the library constitute obscene or harmful matter, she is entitled to the sort of broad injunction condemned in *Busch*: an injunction prohibiting the library from allowing access to any obscene or harmful matter without obtaining a prior adjudication that those materials, whether in printed or electronic format, in fact violate the state's obscenity and harmful matter statutes. As such, the complaint ignores the teachings of *Busch*.^[15]

CONCLUSION

For the foregoing reasons, the judgment of the trial court must be affirmed.

Dated: October 18, 1999

Respectfully submitted,

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FOOTNOTES

[1] We assume that plaintiff's reference to "sexual material harmful to minors" is a reference to "harmful matter" as that term is defined in Penal Code Section 313. Access to material falling outside that definition is, of course, constitutionally protected both as to adults and minors.

[2] Wagener's comments refer to the deficiencies in "database" filtering systems, i.e., systems that, either through the use of key words or through the use of other technology combined at some level with human review, create a database of prohibited sites. See *id.* at 777. Another approach to blocking software is the use of a rating system where either those who produce website content label their own material according to some sort of rating system or the rating is done by some third party. *Id.* at 761-762. Such systems raise their own practical and constitutional concerns. See generally, *id.* For present purposes, suffice it to say that the vast majority of material currently available on the web is unrated, making this an impractical approach. *Id.*

[3] In *Reno v. ACLU*, 521 U.S. 844, the Supreme Court struck down two provisions of the Communications Decency Act: (1) the prohibition on transmission of any indecent communication over the Internet to a person under the age of 18, 47 U.S.C. § 223(a), and (2) the prohibition on the transmission or display over the Internet of any "patently offensive" communication in a manner that is available to a minor. 47 U.S.C. §223(d). The Court held that both of these provisions violated the First Amendment by reducing communication over the Internet to only that which is fit for children. 521 U.S. at 875-76. The immunity provisions of the Communications Decency Act relied on here were not challenged in *Reno* and remain in full force and effect.

[4] Thus 47 U.S.C. § 230(e)(2) provides:

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(emphasis added).

[5] Section 230(d)(3) provides:

State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(emphasis added).

[6] The court ultimately held that the mandatory use of filters violated the plaintiffs' First Amendment rights. *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (Loudoun II).

[7] Section 230(c)(2) provides:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

[8] Plaintiff's attempt at artful pleading cannot change the fact that her state law causes of action are, essentially, tort-based. See *Zeran*, 129 F.3d at 332. Significantly, plaintiff's prayer for relief on her second and third causes of action includes a request for a declaration that "the City of Livermore is legally liable for all future damage to plaintiff's children caused by the children accessing, acquiring, displaying, and/or printing sexual and other material harmful to minors on any library computer connected to the Internet or World Wide Web." *Comp.*, Prayer for Relief ¶¶ 2,3 (Jt. App. 0006).

[9] In *DeShaney*, Joshua DeShaney was temporarily removed from his father's custody after the Department of Social Services received complaints that he was being physically abused by his father. After investigating the matter, the Department returned Joshua to his father. During the next six months, Joshua's social worker noticed suspicious injuries and the Department was notified by a hospital emergency room that it believed Joshua had again been physically abused. The Department took no action. A few months later, Joshua's father again beat him, this time inflicting permanent and severe brain damage. Joshua and his mother sued the Department of Social Services claiming that it had deprived him of his liberty without due process of law by promising to protect Joshua but failing to come to his aid when it knew or should have known that his father was continuing to abuse him. The Supreme Court rejected Joshua's claim, holding that the state had no constitutionally imposed duty to protect him from his father's abuse. If the extreme facts in *DeShaney* did not give rise to a constitutional violation, it is impossible that plaintiff's allegations here can be construed to do so.

[10] Rather than couching their claims in terms of a liberty interest to be free from the psychological injury inflicted by the speech, the Brown plaintiffs asserted a privacy right to be free from offensive speech. While plaintiff's due process theory here is technically different from plaintiffs' theories in Brown, the First Circuit's analysis nevertheless is compelling.

[11] The Carlton court also found it important that nothing that the county did placed these particular plaintiffs in a position of danger any greater than that to which members of the general public were exposed. *Id.*; see also *Martinez v. California*, 444 U.S. 277, 285 (1980) ("the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger" from the release of the prisoner who killed her).

[12] As shown below, that policy does further a compelling interest: the preservation of the First Amendment rights of library patrons of all ages.

[13] It is the long-established policy of the American Library Association that "A person's right to use a library should not be denied or abridged because of . . . age . . ." Library Bill of Rights, ¶ 5, (visited Oct. 6, 1999) <<http://www.ala.org/work/freedom/lbr.html>>.

[14] That is not to say, however, that either parents or librarians are without resources in guiding children in the proper use of the Internet. Teaching parents and children how to use the Internet in order to find the material they seek, imposing time limits on how long any particular individual is permitted to use an Internet terminal before yielding it to another user, installing privacy screens to minimize the chance that passersby may see unwanted material, and providing links to websites that are particularly appropriate for children, are all ways to encourage an atmosphere that is respectful of the rights of all library patrons. See *Censorship in a Box*, supra. The American Library Association, for example provides a website with links to over 700 websites that are particularly appropriate for young people. See 700 + Great Sites: Amazing, Spectacular, Mysterious, Colorful Websites for Kids and the Adults Who Care About Them, available at <http://www.ala.org/parentspage/greatsites/amazing.html>. In this regard, amici also note the important distinction between government mandated imposition of blocking software to restrict the public from receiving otherwise available materials on the Internet and the voluntary use of filtering or other Internet user-based tools. While the former is clearly unconstitutional, as the court held in *Loudoun I* and *Loudoun II*, the ability of Internet users to make voluntary and informed choices about whether or not to use available blocking software, based on their own values and circumstances, does not violate the constitution and provides yet another way for Internet users to address their particular concerns about Internet content.

[15] Plaintiff suggested in the trial court that an injunction limiting the library's provision of materials to its patrons would not implicate the First Amendment because the proposed injunction would affect only the actions of the library. The First Amendment, however, protects both the right to disseminate expression and the right to receive it. See *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. at 866-67; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). The undeniable effect of the proposed injunction here would be to deny library

patrons access to presumptively protected material. Thus, the injunction "would tend to restrict the public's access to forms of the printed [and electronic] word which the State could not constitutionally suppress directly. The [library's] self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being [the result of a court-ordered injunction.]" *Smith v. California*, 361 U.S. 147, 154 (1959).