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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ALAMEDA**

<p>KATHLEEN R.,</p> <p>Plaintiff,</p> <p>v.</p> <p>CITY OF LIVERMORE, et al.</p> <p>Defendants.</p> <hr style="width: 30%; margin-left: 0;"/>	<p>) CASE NO.: V-015266-4</p> <p>)</p> <p>) MEMORANDUM OF</p> <p>POINTS</p> <p>) AND AUTHORITIES IN</p> <p>SUPPORT</p> <p>) OF DEMURRER OF CITY</p> <p>OF</p> <p>) LIVERMORE TO</p> <p>COMPLAINT</p> <p>) FOR INJUNCTIVE RELIEF</p> <p>)</p> <p>) Date: October 21, 1998</p> <p>) Time: 2:00 p.m.</p> <p>) Dept.: 50</p>
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
I. INTRODUCTION	1
II. BACKGROUND	2
A. State Law Relating to Municipal Libraries	2
B. The Livermore Public Library	3
III. ARGUMENT	4
A. The Complaint Does Not State Facts Sufficient to State a Cause of Action Because all Causes of Action Contained in it are Preempted by Section 230 of the Federal Communications Decency Act (47 U.S.C.A. § 230).	4
1. Section 230 Applies Equally to All Causes of Action Regardless of the Relief Requested.	5

2. The Library is a Provider of an Interactive Computer Service.	5
3. The Causes of Action Contained in the Complaint Treat the Library as a Publisher or Speaker of Obscene or Harmful Information.	6
B. Plaintiff's Requests for Declaratory Relief Do not State Facts Sufficient to State Causes of Action Because They are Barred by the California Tort Claims Act (Gov. Code § 810 <i>et seq.</i>).	8
C. The First Cause of Action for Waste of Public Funds Does Not State Facts Sufficient to State a Cause of Action Because Plaintiff Lacks Standing Under Code of Civil Procedure Section 526a.	9
D. The Second Cause of Action for Public Nuisance Does Not State Facts Sufficient to State a Cause of Action Because Plaintiff Lacks Standing Under Civil Code Section 3493.	10
E. The Third Cause of Action for Premises Liability Does Not State Facts Sufficient to State a Cause of Action Because Providing Unfettered Internet Access Does Not Constitute a Dangerous Condition of Property Under the California Tort Claims Act (Gov. Code § 810 <i>et seq.</i>).	13
III. CONCLUSION	15

TABLE OF AUTHORITIES

	<u>Page(s)</u>
UNITED STATES CONSTITUTION	
Article VI, Clause 2	4
FEDERAL CASES	
<i>Blumenthal v. Drudge</i> (D.D.C. 1998) 992 F.Supp. 44	4
<i>English v. General Electric Co.</i> (1990) 496 U.S. 72, 110 S.Ct. 2270, 11 L.Ed.2d 65	4
<i>Mainstream Loudoun v. Board of Trustees of the Loudoun County Library</i> (E.D.Va. 1998) ___ F.Supp. ___ (1998 WL 164330)	1
<i>Reno v. American Civil Liberties Union</i> (1997) ___ U.S. ___, 117, 5 Ct. 2329, 138 L.Ed.2d 847	4,10
<i>Zeran v. America Online, Inc.</i> (4th Cir. 1997) 129 F.3d 327	4,6,7
FEDERAL STATUTES	
47 U.S.C.A. section 223	4,6
47 U.S.C.A. section 230	4,6
STATE CASES	
<i>Baiza v. Southgate Recreation and Park District</i> (1976) 59 Cal.App.3d 669	8
<i>Baker v. Burbank-Glendale-Pasadena Airport Authority</i> (1985) 39 Cal.3d 862	8
<i>Baldwin v. Zoradi</i> (1981) 123 Cal.App.3d 275	15

<i>Chase v. State</i> (1977) 67 Cal.App.3d 808	8
<i>Cornelius v. Los Angeles County Metropolitan Transportation Authority</i> (1996) 49 Cal.App.4th 1761	9,10
<i>Dujardin v. Ventura County General Hospital</i> (1977) 69 Cal.App.3d 350	8
<i>Friends of H Street v. City of Sacramento</i> (1993) 20 Cal.App.4th 152	12,13
<i>Hayes v. State of California</i> (1974) 11 Cal.3d 469	14
<i>Koll-Irvine Center Property Owners Association v. County of Orange</i> (1994) 24 Cal.App.4th 1036	11
<i>Lompoc Unified School District v. Superior Court</i> (1993) 20 Cal.App.4th 1688	14
<i>Minsky v. City of Los Angeles</i> (1974) 11 Cal.3d 113	8
<i>Myers v. English</i> (1858) 9 Cal. 341	13
<i>Shell Oil Co. v. Richter</i> (1942) 52 Cal.App.2d 164	5
<i>State v. Superior Court (Young)</i> (1995) 32 Cal.App.4th 325	14
<i>Venuto v. Owens-Corning Fiberglas Corporation</i> (1971) 22 Cal.App.3d 116	11
<i>Wheeler v. Gregg</i> (1949) 90 Cal.App.2d 348	12

STATE STATUTES

Civil Code

section 3479	11
section 3480	11
section 3481	11
section 3482	12
section 3493	10,11

Code of Civil Procedure

section 430.10	1
section 526(a)(6)	15
section 526a	9,10

Education Code

sections 18900 et seq.	2
section 18910	2
section 18919	2,12
section 18922	2
section 18960	2

Government Code

section 810	8,13
section 815(a)	8,14
section 830	14
section 835	14
section 835.2	14
section 905	8
section 905.2	8
section 945.4	8
section 1060	8
section 54950	3

Penal Code

section 311	2
-------------	---

LEGISLATIVE BILLS

Assembly Bill No. 2350 (1997-1998 Regular Session)	2
--	---

DOCUMENTS OF THE CITY OF LIVERMORE

Agenda and Minutes for the February 27, 1997 Regular Meeting of the Board of Trustees of the Livermore Public Library (RJN, Exhibit F.)	3
Articles of Incorporation of the Livermore Free Library (RJN, Exhibit C.)	3
Bylaws for the Board of Trustees of the Livermore Public Library (RJN, Exhibit E.)	3
City of Livermore Ordinance No. 42 (RJN, Exhibit D.)	3
Livermore Public Library Access to Electronic Information Services and Networks Policy (RJN, Exhibit G.)	3

MISCELLANEOUS

Prosser on Torts (3d ed.)	11
Witkin California Procedure (4th ed. 1997)	5,13

I. INTRODUCTION

The [Complaint filed by Kathleen R.](#) ("Plaintiff") requests injunctive relief against the City of Livermore ("City") ". . . preventing it or its agents, servants, and employees from spending any public funds on the acquisition, use, and/or maintenance of any computer system connected to the Internet or World Wide Web for which it allows any person to access, display, and/or print obscene material or for which it allows minors to access, display, and/or print sexual material harmful to minors." (Complaint, pp. 5-6.) The Complaint also requests declaratory relief ". . . stating 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." (*Id.* at p.6.) These requests are based on causes of action alleging that the City is wasting public funds, creating a public nuisance and fostering potential damages claims by allowing minors to have unlimited access to the Internet.

The City has filed a Demurrer because the causes of action contained in the Complaint do not state facts sufficient to state a cause of action. (Code of Civ. Proc., § 430.10, subd. (e).) The City's Demurrer does not concentrate on whether it is constitutional for a public library to provide limited or unlimited Internet access.¹ The City's Demurrer also does not concentrate on whether it is sound public policy for a public library to provide limited or unlimited Internet access. Instead, the City's Demurrer only focuses on the procedural defects in the Complaint. These defects are numerous and incurable.

¹ In one recent case, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* (E.D.Va. 1998) ___ F.Supp. ___, (1998 WL 164330)), the court did address the constitutionality of a county library policy that required site-blocking software be installed on the library's computers. In that case, the court held that the library board could not adopt and enforce content-based restrictions on access to constitutionally protected Internet speech absent a compelling state interest and means narrowly drawn to achieve that end. (*Id.* at p. 12.) Unlike the *Loudoun* court, the Court in this case need not wade into the area of constitutional law in order to consider the procedural issues raised by the City's Demurrer.

Not only are the causes of action contained in the Complaint preempted by the federal Communications Decency Act, they also ignore basic requirements of state law. Plaintiff lacks standing to allege a waste of public funds or a public nuisance. Additionally, Plaintiff's request for declaratory relief and cause of action for "premises liability" are barred by the California Tort Claims Act.

While the Complaint, and the sexually explicit pictures contained in it, may be sufficient to make a social statement, they are not sufficient to state a legal cause of action. The Complaint should be dismissed without leave to amend.

II. BACKGROUND

A. State Law Relating to Municipal Libraries

The organization and operation of municipal libraries is governed by Education Code section 18900 *et seq.* These sections provide that the legislative body of a city may, by ordinance, establish a public library. (*Id.* at § 18900.) Public libraries must be managed by a five member library board (*id.* at §18910), which ". . . may make and enforce all rules, regulations, and bylaws necessary for the administration, government, and protection of the libraries under its management, and all the property belonging thereto." (*Id.* at § 18919.) Any person who violates any library rule, regulation or bylaw may be fined or excluded from the library. (*Id.* at § 18960.) Library boards may also purchase all necessary books, journals, publications and other materials. (*Id.* at § 18922.)

During the 1997-98 legislative session, a bill was introduced that would have added a new section to the Education Code to read:

Every public library that provides public access to the Internet shall purchase, install, and maintain computer software for use on at least half of the computers available for public use, or in the case of library that has only one computer, for use on that computer that prohibits access to obscene matter, as defined in Section 311 of the Penal Code, on the Internet.

(Assem. Bill No. 2350 (1997-1998 Reg. Sess.) (RJN, Exhibit B.)²
This bill was never enacted.

2 Concurrently with this Memorandum, the City has filed a Request for Judicial Notice ("RJN") and an Appendix of Authorities Cited.

B. The Livermore Public Library

Although a free library has existed in the City since 1896 (RJN, Exhibit C), the Livermore Public Library (the "Library") was established, pursuant to the above described state legislative grant of authority, in 1901 (RJN, Exhibit D). The Library Board of Trustees (the "Library Board") has adopted bylaws and conducts regular meetings which are noticed and open to the public pursuant to the Ralph M. Brown Act (Gov. Code, § 54950 *et seq.*). (RJN, Exhibit E.)

At a noticed public meeting on February 27, 1997 (RJN, Exhibit F), the Library Board unanimously adopted a policy governing the use of Internet access at the Library entitled the "Access to Electronic Information, Services and Networks Policy" (the "Library's Internet Policy"). (RJN, Exhibit G.) The Library's Internet Policy ". . . recognizes that freedom of speech and expression are central to the successful maintenance of a free society . . ." and provides that "Internet access is available for all users of the Livermore Public Library" including minors. At the same time, the Library's Internet Policy states the following:

The Library's Internet access is intended as an information resource. The Internet allows users to connect to networks of resources outside the library. The Internet is a global entity with a highly diverse user population. The Internet has no federal, state or local control of its users or content. The Internet and its available resources may contain materials of a controversial nature. The Livermore Public Library does not monitor and has no control over the information accessed through the Internet and cannot be held responsible for its content. Users are cautioned that accuracy, completeness and currency of information found on the Internet varies widely. Library patrons use the Internet at their own risk. Preventing users from accessing all systems, networks and services which may or do contain materials, messages or graphics that might be considered offensive to a user or inappropriate to minors is not technically feasible. . . .

Individuals must accept responsibility for determining what is appropriate. The Library recognizes and supports Federal laws dealing with the access to information. It upholds and affirms the right of each individual to have access to constitutionally protected materials and also affirms the right and responsibility of parents to determine and monitor

their children's use of library materials and resources. Parents and guardians are encouraged to work closely with their children. Parents are expected to monitor and supervise children's use of the Internet in selecting material that is consistent with personal and family values. The Livermore Public Library does not provide this monitoring or supervision.

The Library's Internet Policy also contains a list of unacceptable uses, which include "[u]sing resources for other than educational, informational and recreational purposes" and "[u]sing resources for unauthorized, illegal or unethical purposes." (*Id.*)

III. ARGUMENT

A. The Complaint Does Not State Facts Sufficient to State a Cause of Action Because all Causes of Action Contained in it are Preempted by Section 230 of the Federal Communications Decency Act (47 U.S.C.A. § 230).

The Communications Decency Act of 1996 (the "Act"), part of the Telecommunications Act of 1996, was signed into law and became effective on February 8, 1996. The Act represents an initial federal effort to define the appropriate scope of federal regulation of the Internet. [Section 230](#) of the Act preempts any state law cause of action that would make an Internet service provider liable for information originating with a third-party. ([47 U.S.C. § 230](#); see [Zeran v. America Online, Inc. \(4th Cir. 1997\)](#) 129 F.3d 327, certiorari denied June 22, 1998, ___ U.S. ___ (Mem), 1998 WL 111522; and [Blumenthal v. Drudge \(D.D.C. 1998\)](#) 992 F.Supp. 44.)³

3 In 1997, the United States Supreme Court invalidated two parts of the Act as being unconstitutional (47 U.S.C. § 223(d) and a portion of 47 U.S.C.A. § 223(a)). (*Reno v. American Civil Liberties Union* (1997) ___ U.S. ___, 117 S.Ct. 2329, 138 L.Ed.2d 874.) Section 230 was not at issue in *Reno*, and remains valid.

Federal preemption of state law under the Supremacy Clause (U.S. Const., art. VI, cl. 2) can occur in three circumstances : (1) where ". . . Congress has made its intent known through explicit statutory language . . ."; (2) where Congress ". . . regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."; and (3) where state law ". . . actually conflicts with federal law." (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65.)

By the plain language of Section 230, the type of preemption intended by Congress in the section is actual or direct conflict preemption. Subdivision (d) (3) of Section 230 provides, in relevant part, that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Subdivision (c) (1) of Section 230 provides that "[n]o 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." Read together, these two subdivisions preempt all causes of action contained in the Complaint - - all causes of action contained in the complaint treat the provider of an interactive computer service as a publisher or speaker of obscene or harmful information.

1. Section 230 Applies Equally to All Causes of Action Regardless of the Relief Requested.

Subdivision (d) (3) of Section 230 extends the scope of preemption to both "liability" and "causes of action" that may be stated under state law. Therefore, it makes no difference in this case that Plaintiff is requesting equitable relief in the form of an injunction rather than damages,⁴ because Plaintiff's requests for injunctive relief are all based on causes of action. The distinction between causes of action and injunctive relief is an important one: while a cause of action consists of the tort or other wrongful act pleaded in the Complaint, an injunction is an equitable remedy available to a person aggrieved by the torts or other wrongful acts. (See 5 Witkin Cal. Proc. (4th ed. 1997) Pleading, § 781, p. 238; § 778, p. 235.) "Injunctive relief is a remedy and not, in itself, a cause of action, and *a cause of action must exist before injunctive relief may be granted* [citation]. (Emphasis added.)" (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168.)

4 Although declaratory relief is an action, classified as equitable by reason of the type of relief offered (see 5 Witkin Cal. Proc. (4th ed. 1997) Pleading, § 806, p. 262), Plaintiff's request for declaratory relief in this case is for damages (see discussion *infra* at pp. 7-8).

2. The Library is a Provider of an Interactive Computer Service.

The allegations in this case relate to a public library. Under Section 230, a public library can be a provider of an "interactive computer service." Subdivision (e) (2) of Section 230 defines the term "interactive computer service " to mean ". . . 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.)" Here, the Library clearly falls within this definition.

3. The Causes of Action Contained in the Complaint Treat the Library as a Publisher or Speaker of Obscene or Harmful Information.

Because the causes of action contained in the Complaint allege that the City is committing a tortious or wrongful act by distributing, or maintaining computers and services which distribute, obscene and harmful material, they treat the Library as a ". . . publisher or speaker of . . . information provided by another information content provider." (47 U.S.C.A. § 230, subd. (C) (1).) The causes of action therefore are preempted by Section 230.

In *Zeran v. America Online, Inc.*, *supra*, 129 F.3d 327, the court squarely addressed the preemptive scope of Section 230. In that case, the plaintiff filed suit against a commercial interactive computer service provider alleging that the provider unreasonably and negligently delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. Holding that the plaintiff's claims were barred by Section 230, the *Zeran* court concluded that "[b]y its plain language, § 230 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." (*Id.* at p. 330.)

The court, relying on the express language of Section 230, went on to point out the Congressional purpose in establishing this statutory immunity:

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized Internet and interactive computer services as offering ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’ *Id.* § 230 (a) (3). It also found that the Internet and interactive computer services ‘have flourished, to the benefit of all Americans, with a minimum of government regulation.’ *Id.* § 230 (a) (4) (emphasis added). Congress further stated that it is ‘the policy of the United States . . . to reserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.’ *Id.* § 230 (b) (2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States ‘to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.’ *Id.* § 230 (b) (5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

(*Id.* at pp.330-331.)

The plaintiff in *Zeran* attempted to avoid the preemptive scope of Section 230 by arguing that the section did not apply to "distributors" of offensive material, but only to "publishers" of such material. (*Id.* at pp. 331-334.) The court unequivocally disagreed, finding that legally "distributor" and "publisher" liability were indistinguishable, and that to hold otherwise would be contrary to the clear intent of Congress in enacting Section 230. (*Id.*)

All causes of action contained in the Complaint attempt to make the City liable for material that originates with a third-party. Immunity from this type of liability is exactly what Congress had in mind when it enacted Section 230.

B. Plaintiff’s Requests for Declaratory Relief Do not State Facts Sufficient to State Causes of Action Because They are Barred by the California Tort Claims Act (Gov. Code § 810 *et seq.*).

Plaintiff’s second and third causes of action request declaratory relief “. . . stating that the City of Livermore is legally liable for all future damage to plaintiff’s children caused by her 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." (Complaint, pp. 4-5.)

This request for prospective damages is precluded by the California Tort Claims Act (the "Tort Claims Act") (Gov. Code, § 810 *et seq.*). The Tort Claims Act makes government tort liability dependant on statute. (*Id.* at § 815(a) ["[e]xcept as otherwise provided by statute, [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."].) Under the Tort Claims Act, an action for "money or damages" may not be maintained against the City unless a written claim has first been timely presented to the City and rejected in whole or in part. (*Id.* at §§ 905, 905.2, 945.4.) Compliance with this procedure must be alleged by Plaintiff to state a cause of action; failure to do so is subject to demurrer. (See *Dujardin v. Ventura County General Hospital* (1977) 69 Cal.App.3d 350, 355; *Chase v. State* (1977) 67 Cal.App.3d 808, 812.) Here, the Complaint fails to properly allege compliance with the claims-filing procedures of the Tort Claims Act.⁵

5 Ordinarily, requests for declaratory relief are not affected by the Tort Claims Act and the Act's claims-filing requirements because such requests are usually brought to obtain specific *nonmonetary relief*. (See *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 121.) However, in this case, Plaintiff's request for declaratory relief does not simply ask for a declaration of "rights and duties" as provided for in Government Code section 1060; instead, it asks the Court to impose prospective *monetary damages*. (See *Baiza v. Southgate Recreation and Park District* (1976) 59 Cal.App.3d 669, 673.)

Furthermore, recovery under the Tort Claims Act is limited to actual injury suffered *before* the commencement of the suit. Prospective damages cannot be recovered. (See *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 869.)

C. The First Cause of Action for Waste of Public Funds Does Not State Facts Sufficient to State a Cause of Action Because Plaintiff Lacks Standing Under Code of Civil Procedure Section 526a.

Plaintiff's first cause of action alleges that "[u]sing public funds to access, display, and/or prints [sic] matter harmful to minors at the request of or for the use of a minor is a waste of public funds." (Complaint, p. 4.)

This cause of action is based on Code of Civil Procedure section 526a, which provides in relevant part that:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either *by a citizen resident therein*, or by a corporation, *who is assessed for and is liable to pay, or within one year before the commencement of the action, has paid, a tax therein*. (Emphasis added.)

The explicit language of section 526a and case law make it clear that, in order to properly allege standing under the section, Plaintiff must allege that she: (a) is a resident of the City; and (b) has been assessed for and is liable to pay, or, within one year before the commencement of the action, has paid property taxes on real property located in the City. (*Cornelius v. Los Angeles County Metropolitan Transportation Authority* (1996) 49 Cal.App.4th 1761, 1774.) Plaintiff only alleges that she is a "taxpayer." (Complaint, p. 2, line 1.) This is not sufficient to state a cause of action under section 526a.

In *Cornelius, supra*, 49 Cal.App.4th 1761, the court conclusively set forth the requirement that a plaintiff must allege the payment of *property taxes* in order to have standing under Code of Civil Procedure section 526a. There, the plaintiff argued that he established sufficient standing as a taxpayer under section 526a because he paid state income taxes as well as gasoline taxes and sales taxes when he was in Los Angeles County. (*Id.* at p. 1774.) The court disagreed, recognizing that gasoline and sales taxes are generally construed to be taxes on the retailer, not the consumer. (*Id.* at pp. 1777-1778.) As for the defendant's state income tax argument, the court aptly stated that it did not believe that ". . . it would be sound public policy to permit the haphazard initiation of lawsuits against local public agencies based only on the payment of state income taxes." (*Id.* at pp. 1778-1779.) In *Cornelius*, the court found as a matter of law that the defendant had no standing under section 526a. (*Id.* at p.1780.)

Notwithstanding the failure to meet the minimum prerequisites of section 526a, this cause of action is subject to demurrer for another very simple reason: if anyone is wasting public funds, as alleged in the Complaint, it is Plaintiff's son - - not the City. As was pointed out by the United States Supreme Court in *Reno, supra*, ___ U.S. ___, 117 S.Ct. 2329, 138 L.Ed.2d 874, it is the *user* of the Internet who decides what to read or view, not the *provider* of the computer or the service:

Though such [sexually explicit] material is widely available, users seldom encounter such content accidentally. 'A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content.' For that reason, the 'odds are slim' that a user would enter a sexually explicit site by accident. 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. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.'

(Fns. omitted.) (*Id.* at 117 S.Ct. 2336.)

By bringing this lawsuit, Plaintiff continues the waste of public funds her son started.

D. The Second Cause of Action for Public Nuisance Does Not State Facts Sufficient to State a Cause of Action Because Plaintiff Lacks Standing Under Civil Code Section 3493.

Plaintiff's second cause of action alleges that "[a]llowing minors to use the computers to access, acquire, display, and/or print sexual and other material harmful to minors is a public nuisance." (Complaint, p. 4.)

Under the facts alleged, Plaintiff has no standing to sue for a public nuisance.⁶ The California Supreme Court recently provided a rather exhaustive discussion of public nuisance law in *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1102, 60 Cal.Rptr.2d 277. Civil Code section 3493 specifically provides that "[a] private person may maintain an action for public nuisance, if it is specially injurious to himself, but not otherwise." In applying section 3493 to a particular case, the first thing that must be determined is whether the public nuisance alleged is also a private nuisance to the plaintiff:

6 Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." Civil Code sections 3480 and 3481 divide the class of nuisances into public and private. A public nuisance "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) A private nuisance is defined as every nuisance not included in the definition of public nuisance. (Civ. Code, § 3481)

The difference becomes important in view of the fundamental principle that a private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependant upon a disturbance of rights in land but upon an interference with the rights of the community at large. (Prosser on Torts (3d ed.) at p. 594.) Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different *in kind* from that suffered by the general public. [Citations.] Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public. [Citations.] Where, on the other hand, the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public and he 'does not lose his rights as a land-owner merely because others suffer damage of the same kind, or even of the same degree, . . . ' [Citations.]

(*Venuto v. Owens-Corning Fiberglas Corporation* (1971) 22 Cal.App.3d 116,124.)

Plaintiff has not properly alleged a private nuisance because she has not alleged any interference with the use and enjoyment of her property. In fact, there are no allegations in the Complaint that Plaintiff owns property, much less property within or adjacent to the City. Absent such an allegation, Plaintiff cannot claim that providing unfettered Internet access to minors is a private nuisance to her. (See *Id.* At pp. 124-125; *Koll-Irvine Center Property Owners Association v.*

County of Orange (1994) 24 Cal.App.4th 1036, 1041; *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 160.)

Nor has Plaintiff alleged that she has suffered damages different in kind from the general public. The Library is open to the public and Internet access is available to all users of the Library. To the extent that Plaintiff is alleging that the Library's Internet Policy is harmful, it is harmful not only to Plaintiff and her son, but to the community in general. There can be no special damages alleged here, and therefore no cause of action stated.

Even if Plaintiff had standing to bring a public nuisance action, such action would be precluded by Civil Code section 3482, which bars an action for nuisance against a public entity where the alleged wrongful acts are expressly authorized by statute. The Library's Internet Policy, having been adopted by the Library Board within the scope of authority conferred upon it by the Legislature (Ed. Code, § 18919), has the same force within the City as a statute passed by the Legislature has throughout the state. (*Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 370.)

The application of Civil Code section 3482 was discussed in some detail in *Friends of H Street v. City of Sacramento*, *supra*, 20 Cal.App.4th 152. In that case, the plaintiffs sought injunctive relief against the city to reduce traffic speed on their street on the ground that the condition of the street constituted a public nuisance. (*Id.* at pp. 156-159.) The court held that the trial court properly sustained the City's demurrer without leave to amend on the basis that the complaint was barred by Civil Code section 3482. This holding was based on the court's finding that:

The Vehicle Code and Streets and Highways Code authorize the City to regulate traffic within its jurisdictions, and, in its discretion, expend funds to generally manage and control its streets. [Citations.] Although the relevant statutes do not expressly authorize the City to operate its streets in a manner which generates traffic, noise, fumes, litter, and headlight glare . . . such loss of peace and quiet is a fact of urban life which must be endured by all who live in the vicinity of freeways, highways, and city streets.

(*Id.* at p. 163.)

The court in *Friends of H Street* also refused to remedy the City's alleged inaction in solving the traffic problem through injunctive relief based on separation of powers principles, citing *Myers v. English* (1858) 9 Cal. 341:

'It is within the legitimate power of the judiciary, to declare the *action* of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of *non-action*. The Legislature being the creative element in the system, its action cannot be quickened by the other departments. [citations.]'

(*Friends of H Street v. City of Sacramento*, *supra*, 20 Cal.App.4th at p. 165.)

7 It is important to keep in mind that Plaintiff is not asking for a mandatory injunction, requiring the City to take

Here, Plaintiff is not asking the court to declare the Library's Internet Policy unconstitutional. Rather, in effect, Plaintiff is asking the court to enjoin the Library from providing Internet access altogether because she is dissatisfied with the inaction of the Legislature and the Library Board.⁷ The Library's Internet Policy is within the authority conferred upon the Library Board by the Legislature. The Library Board has been given the authority to declare public policy and has done so. This policy is not unconstitutional and may not be judicially amended.

affirmative action to install filtering devices on its computers. Instead, she is asking for a prohibitory injunction, preventing the City ". . . from maintaining any computer system on which it allows people to access, acquire, display, and/or print sexual material harmful to minors." (Complaint, p.6.) (For a general description of the differences between mandatory and prohibitory injunctions, see 6 Witkin Cal. Proc. (4th ed. 1997) Provisional Remedies, §§ 280-285, pp. 222-227.) Because the Internet is not like cable television, where a subscriber can choose not to pay for certain channels, granting Plaintiff's request for injunctive relief would, in essence, require the Library to discontinue providing Internet service altogether.

E. The Third Cause of Action for Premises Liability Does Not State Facts Sufficient to State a Cause of Action Because Providing Unfettered Internet Access Does Not Constitute a Dangerous Condition of Property Under the California Tort Claims Act (Gov. Code § 810 *et seq.*).

Plaintiff's third cause of action alleges that the library premises are unsafe for children and requests injunctive relief to prevent a multiplicity of damage suits. (Complaint, p. 5.)

As stated above, the Tort Claims Act makes government tort liability dependent on statute. (See discussion, *ante*, at pp. 7-8; Gov. Code § 815, subd. (a).) What Plaintiff terms "premises liability" is referred to in the Tort Claims Act as liability for a dangerous condition of public property, the limitations of which are set forth in Government Code section 835:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

- (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
- (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

The term "dangerous condition" is defined in subdivision (a) of section 830 of the Government Code as ". . . a condition of property that creates a substantial (as distinguished from a minor,

trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

To the extent Plaintiff is arguing that providing unfettered Internet access to minors is a dangerous condition of public property because it increases the possibility that minors will be exposed to obscene and harmful material posted on the Internet by third-parties, her argument is precluded by the Tort Claims Act. It is settled law that a public entity cannot be held liable for a dangerous condition of public property based on third-party conduct alone, whether that conduct is criminal or merely negligent. (See *Hayes v. State of California* (1974) 11 Cal.3d 469, 472.) Instead, in order for liability to be imposed, the third-party conduct must be coupled with a *physical defect* of the property. (*Id.*, see also *State v. Superior Court* (Young) (1995) 32 Cal.App.4th 325, 327-328 [Holding that demurrer should have been sustained without leave to amend because a public entity was not liable for injuries to a plaintiff who was thrown from her horse when a bicyclist came speeding down the same state park trail.]; *Lompoc Unified School District v. Superior Court* (1993) 20 Cal.App.4th 1688, 1696-1697 [Existence of football field, unscreened from passing motorists, does not constitute a dangerous condition merely because a motorist's attention may be drawn to the activity on the premises.]; *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 291-294 [Lack of supervision of school dormitory where alcoholic beverages were consumed is not dangerous condition of public property.]

Plaintiff has not, and cannot, allege that the Library's computers are physically defective. The Tort Claims Act precludes any suit for damages. Therefore, injunctive relief is not necessary, or available, to prevent a multiplicity of lawsuits. (See Code of Civ. Proc., § 526, subd. (a) (6).)

III. CONCLUSION

Both federal and state law require that the Complaint in this case be dismissed without leave to amend. On the federal level, Congress has made a clear policy choice to immunize the City and other Internet service providers from lawsuits such as this. On the state level, the Legislature and the courts have established basic requirements for bringing taxpayer, public nuisance and tort related lawsuits against a city. Plaintiff's Complaint ignores these controlling laws.

Date:

Respectfully submitted,

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