



Library Services, have violated Plaintiffs' First Amendment rights by adopting and implementing the [Loudoun County Public Library Internet Policy](#). Under that policy, a copy of which is attached as Exhibit 1 to the Timmerman Declaration,<sup>2/</sup> library patrons are permitted to use library facilities to access the World Wide Web over the Internet.<sup>3/</sup> Access to the Web is provided through computer terminals on which the Library Edition of the X-Stop filtering system has been installed. (Compl. ¶ 88) Library patrons cannot obtain material from websites that have been blocked.<sup>4/</sup> Patrons can request that a particular block be removed and the library staff will decide whether the request should be granted.<sup>5/</sup> The Loudoun Library's use of the filtering/request system is, according to the allegations in the Complaint, designed to "limit access to materials that are 'pornographic' or 'harmful to minors'" and to avoid the potential creation of a hostile workplace environment that could precipitate claims against the library under Title VII of the Civil Rights Act of 1964. (Compl. ¶¶ 1, 80; *see also* Ex. 1 to the Timmerman Declaration).

Defendants raise three distinct issues in this Motion: 1) whether the First Amendment limits in any way the decisions of a public library to make information available to patrons; 2) whether, even if the First Amendment would preclude use of Internet filtering software, a cause of action is stated in light of the absolute immunity from civil liability provided by 47 U.S.C. § 230(c)(2)(A); and 3) whether any of the Plaintiffs have standing to pursue this litigation.

### **FACTUAL AND LEGAL OVERVIEW**

We contend that the proper analogy to the traditional library environment that should be considered is to view the Internet as a inter-library loan system. Thousands of websites function essentially as separate libraries. Any individual who "surfs" the Internet using a Loudoun Library Internet terminal is, in essence, a patron of a vast electronic library. However, unlike traditional inter-library loans where physical books are stored on shelves in physical libraries and exchanged through a process of requests communicated from a patron through library staff, the Internet inter-library loan system at issue here works in an entirely electronic environment.<sup>6/</sup> In the virtual system, thousands of Internet servers around the world ("websites") are linked electronically to form "a vast library including millions of readily available and indexed publications." *Reno*, 117 S. Ct. at 2335. Each of the websites houses virtual publications in the form of digital files stored on that site's server. Patrons at any of millions of terminals ("browsers") can search the Internet equivalent of the card catalogue using computer applications known as search engines. By entering selected words and phrases descriptive of the desired content, the "library patron" will be given a list of electronic publications. Each of those publications is identified by a Uniform Resource Locator ("URL"). When a patron desires to retrieve a particular publication, the patron simply enters the URL into the selection box on the browser, hits the <ENTER> key and the browser sends the electronic equivalent of an inter-library loan request to the website that houses the requested publication. That website in turn responds by sending a digital copy of the publication back over the Internet to the patron's browser. Unlike traditional libraries, the original publication can be "loaned" to an unlimited number of patrons simultaneously. Also, unlike the traditional interlibrary loan system where the requesting library is a mere conduit for obtaining the requested information, the Loudoun library

becomes involved in the patron's viewing of the requested materials because those materials are displayed on one of the Library's computer terminal in plain view in the public library.

Using this analogy to the traditional library system illustrates why the Plaintiffs have failed to state a claim for relief. To our knowledge no court has ever held that libraries are **required** by the First Amendment to fulfill a patron's request to obtain a pornographic film or any other information -- through an interlibrary loan. To our knowledge no court has ever decreed that a librarian's exercise of discretion on whether to forward an interlibrary loan request is constrained in any way by the First Amendment. In this case the Plaintiffs seek to obtain such relief and assert such a right, but in the context of the world of electronic rather than physical publications. They complain about an electronic filtering system that the Loudoun County Library Board has installed on each of the several browsers located in the public libraries owned and operated by the County. (Compl. ¶¶ 3, 46-55) The filtering system acts to prevent requests for information from certain pre-designated websites from being sent to those sites. The filter works by comparing the URL entered by the patron with a list of blocked URLs. If there is a match, the Library's terminal will not send the request to the outside website.<sup>7/</sup> The blocking software thus operates in the same manner as a decision by a librarian not to forward a patron's inter-library loan request to another library.

The Plaintiffs admit, as they must, that "[s]exually oriented material is available on the Internet, ranging from the modestly titillating to very explicit material." (Compl. ¶ 39) The Supreme Court was more accurate when Justice Stevens noted that the material on the Internet "extends from the modestly titillating to the hardest-core." *Reno*, 117 S.Ct. at 2336. Plaintiffs also admit that when the Loudoun County Library Board decided to use the filter, it did so in order "to limit access to materials that are 'pornographic' or 'harmful to minors.'" (Compl. ¶ 1) The Plaintiffs necessarily recognize that without the use of filtering software, library patrons could retrieve obscene materials from outside websites and view it on the computer screens in the public areas of the Loudoun libraries. Plaintiffs must also recognize that such retrieved materials include much that is plainly not protected by the First Amendment.

The essence of this Complaint is a claim that the Constitution guarantees citizens a right to have public libraries provide access to anything that is on the Internet, including obscenity, child pornography and indecent materials. In making this claim Plaintiffs seek to create, not to enforce, a constitutional right. While the Supreme Court has recognized a constitutional right to view obscenity in the privacy of one's own home,<sup>8/</sup> there is no constitutional right to view obscenity in a public library. The Plaintiffs' claim to such a right is not only unprecedented, it is shocking, for they claim a right not only to view such materials in a public place, they also claim that the library should install "privacy screens" so that other patrons and the library staff cannot see what they are viewing. (Compl. ¶¶ 15, 65, 85)<sup>9/</sup> In essence they claim a constitutional right to have publicly financed peep shows in the Loudoun Library. To state such a claim is to refute it. The First Amendment guarantees no such right.

Moreover, Mainstream Loudoun has not alleged actual harm to its own activities, and the association lacks standing to bring suit on its own behalf. Mainstream Loudoun also lacks standing to bring suit on behalf of its members, because its members have suffered no "imminent

or actual harm" and the participation of its members is required by this suit. Finally, the individual Plaintiffs lack standing to bring suit because none has ever requested that the library staff unblock a particular Internet site and none can now assert that they have been denied access to "constitutionally protected information."

**I. The Plaintiffs' First Amendment claim is not only unsupported by precedent, it is contradicted by the 1982 decision of the Supreme Court in [Board of Education v. Pico](#)**

Defendants submit that while the claim presented in this Complaint may initially appear to raise a difficult issue of constitutional law, it is actually an issue that can be resolved simply and summarily. As noted earlier, there is no case that sustains the right here claimed. As far as we have been able to ascertain, no such claim has ever previously been presented to a court. There are, however, two decisions which provide some guidance for the Court in responding to the Plaintiff's request for judicial supervision of the Loudoun County Library Board's decision on what information on the Internet it will make available to its patrons.

Defendants recognize that the Internet is a medium of expression that is entitled to the protections of the same First Amendment that applies to books, movies, tape recordings and other modes of speech. The Supreme Court has acknowledged the communicative importance of the Internet in [Reno v. ACLU](#), \_\_\_ U.S. \_\_\_, 117 S.Ct. 2329 (1997). We accept that the Internet is entitled to robust judicial protection, both for publishers and readers. That protection does not, however, lead to a constitutional right of access through a public facility. The Supreme Court noted in [Reno](#) that filtering software could be used to block access to obscene and pornographic material. *Id.* at 2336. While holding that certain provisions of the Communications Decency Act, 47 U. S. C. § 223, were unconstitutional, the Court did not question the legality or wisdom of the provisions in that Act that encourage and protect entities that take good faith steps, such as filtering, to preclude access to obscene and pornographic material. *See* 47 U.S.C. §§ 223(e)(5)<sup>10</sup>, 230(c)(2)(A).<sup>11</sup> Nothing in the [Reno](#) decision suggests that a decision by a library to use filtering software is unconstitutional.

The earlier decision of the Supreme Court in [Board of Education v. Pico](#), 457 U.S. 853 (1982) is the only decision binding on this Court that adjudicates an individual's right of access to library materials. That decision supports the Defendants, not the Plaintiffs.

The facts in [Pico](#) were simple. The decision, however, is not. In that case the Board of Education of a New York school district had ordered certain books removed from school libraries because, in the Board's opinion, the books were "anti-American, anti-Christian, anti-[Semitic], and just plain filthy." *Id.* at 857. Several students challenged the decision. The trial court granted summary judgment in favor of the Board of Education. The Court of Appeals reversed and remanded for a trial. A sharply divided Supreme Court affirmed without rendering a majority decision. Three Justices joined Justice Brennan's opinion that concluded that the First

Amendment applied<sup>12/</sup>, three joined Chief Justice Berger's opinion that rejected any application of the First Amendment<sup>13/</sup>, and Justice White joined in the affirmance without expressing any opinion on the constitutional issue.<sup>14/</sup> Of the nine Justices who decided that case, three remain on the Court today. Two of those three joined the opinion that expressly rejected the thesis that the First Amendment applied to such issues, emphatically rejecting the "view that a school board's decision concerning what books are to be in the school library is subject to federal-court review." *Pico, supra*, at 885. In language equally applicable here, those Justices noted that if the First Amendment were deemed applicable to decisions on what materials a library should offer, the Supreme "Court would come perilously close to becoming a 'super censor' of school board library decisions. *Id.*



The difference of opinion in *Pico* does not suggest that this Complaint states a claim. The four Justices who concluded that the First Amendment did apply to the library decision in that case qualified their opinion in two significant ways. Justice Brennan repeatedly noted that the action under review in that case was the **removal** of a book from the library shelves. He pointedly stated that the complainants there had "not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged [was] the removal from school libraries of books originally placed there by the school authorities, or without objection from them." *Pico, supra*, at 862. Justice Brennan unmistakably intimated by repeatedly invoking this distinction that his opinion should not be read as imposing any First Amendment limitation's on a library's decision to acquire materials.

That distinction shows that in this case the analysis of the Brennan opinion supports the Loudoun County Library Board and not the Plaintiffs. It is beyond factual or legal debate that the effect of the URL filter is to preclude the acquisition of blocked materials, not to cause the remove material from the library accessions. The blocking software prevents the patron's request from ever being transmitted to the outside website and thus results in the information never being available to the patron; it does not block the transmission of any material from that site or remove information that has previously been available to patrons. The blocked information remains in the storage of the outside server and is never sent to, much less received by, the Loudoun County library. The process is, as noted earlier, essentially identical to a library decision not to send an inter-library loan request to another library; it is not a removal decision.

A second fact relied upon by Justice Brennan also illustrates why the Loudoun decision is beyond constitutional challenge. The Brennan opinion recognized that libraries enjoyed substantially unfettered discretion in deciding what books to remove and that the First Amendment only required that "discretion may not be exercised in a narrowly partisan or political manner." *Id.* at 870. The opinion went on to note that there would be no First Amendment violation if the removal decision had been based on a belief that the books "were pervasively vulgar." *Id.* at 871. That qualification as applied here sustains the Loudoun policy.

As noted in the Complaint, the Library Board's vote to deploy the filtering software was based on the majority's intention "to limit access to materials that are 'pornographic' or 'harmful to minors'" and to avoid creation of a hostile workplace environment. ([Compl.](#) ¶ 1, Ex. 1 to Timmerman Declaration)

It is significant that Justice Brennan did not say that a removal decision was proper if it was based on a belief that the removed book was obscene, but he instead used the term "pervasively vulgar." The First Amendment does not permit suppression of vulgarity, even when pervasive, but only of obscenity. Justice Brennan's choice of language necessarily means that, even in the view of those Justices who would apply the First Amendment, libraries have a broader discretion to remove offensive materials from libraries than the state does to sanction or suppress those materials.

The Plaintiffs may rest their arguments on the "right of access" aspects of prior First Amendment cases. If that argument is advanced, it will be important for the Court to note that the right of access cases involve a "willing provider" and a "willing recipient" without the involvement of an unwilling facilitator. Defendants submit that no prior judicial decision has compelled a party  whether a state agency or a private entity  to serve as an unwilling conduit of information, whether protected by the First Amendment or not. The Internet is, and will undoubtedly remain, a vast storehouse of information. Under the protections affirmed by the Supreme Court in the [Reno](#) decision, Americans who wish to surf the Internet with unhindered access have the right to do, at least when they are using their own terminals or those of another party that has decided to permit unfiltered browsing. But that constitutional right does not go so far as to compel a public institution to be an unwilling party to the transmission of information.

Defendants recognize that the process of deciding whether to block or unblock a particular website is necessarily a content-based decision. But that is the essence of the librarian's function in deciding what materials to acquire and how to make those materials available to patrons. It is true that the issues of *Hustler* are presumptively protected by the First Amendment. It is also true that only a handful of public libraries subscribe to *Hustler* and place issues in their reading rooms. Until the filing of this Complaint, no plaintiff had, to our knowledge, contended that the First Amendment required a library to obtain such material, even for "consenting adults."<sup>15/</sup>

Because the First Amendment does not limit in any way the information a library chooses to provide to patrons, the Complaint fails to state a claim and should be dismissed without leave to amend.

**II. Even if the First Amendment precluded filtering, the Defendants are absolutely immune under the "Good Samaritan" provision of the 1996 Communications Decency Act, 47 U.S.C. § 230(c)(2)(A)**

Even if the First Amendment prohibited use of filtering, the Complaint fails to state a claim for relief under federal law. In 1996 Congress enacted the Communications Decency Act as part of the Telecommunications Reform Act. *See generally, Reno, supra.* One section of that law was specifically intended to deal with the liability issue raised by this Complaint. Section 509 of the Telecommunications Act, now codified as section 230 of Title 47, included a provision that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily undertaken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or

otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(a). The definition of a "interactive computer service" in that section specifically includes "a service or system that provides access to the Internet [that is] offered by libraries . . . ." 47 U.S.C. § 230(e)(2). Those two provisions fit this case precisely and provide for an absolute immunity for all defendants from the asserted cause of action.

While the Complaint sounds in Constitutional terms, it purports to state a merely statutory cause of action. Section 1983 is a federal statute creating a federal civil cause of action for violation of constitutional rights under color of state law. As such it has no higher status in our legal scheme than any other statute, despite the legal and societal importance of the rights it protects. As a mere statute it is, of course, subject to modification by subsequent congressional action. Indeed Congress could, if it so chose, repeal § 1983 in its entirety. Section 230 of Title 47 is a subsequent congressional action that effectively amends § 1983 to add an absolute immunity defense for libraries that deploy Internet filtering software.

It is plain that Congress intended the Good Samaritan provision of the Communications Decency Act to provide immunity from claims asserted under § 1983. Section 230 includes a detailed section on its "effect on other laws." Subsection (d) of § 230 provides that the Good Samaritan provision will not have an effect on: 1) federal criminal laws; 2) intellectual property laws; 3) state laws that are not inconsistent with § 230; and 4) the Electronic Communications Privacy Act, classified primarily to chapter 121 of Title 18 of the United States Code. By expressly referencing specific federal laws in three paragraphs of that subsection, Congress necessarily and explicitly intended the Good Samaritan provision to apply to **all other** federal laws, including 42 U.S.C. § 1983.

Congress intended to protect libraries that act as the Loudoun County Library here acted. That intent is not only clearly expressed in unambiguous statutory language, it is reinforced by the statute's statement of policy "to remove disincentives for the development and utilization of blocking and filtering technologies . . . ." 47 U.S.C. § 230(b)(4). Because of the clear statutory immunity, this Complaint fails to state a cause of action.<sup>16/</sup>

### **III. Because no individual has actually been denied access to Internet material because of the Loudoun County filtering system, all Plaintiffs lack standing**

The Complaint recognizes that in addition to installing the X-Stop filtering software on all Internet browsers in the libraries, the Loudoun County Library Board allows its patrons to request that blocks of any particular site be removed. ([Compl.](#) ¶ 129) Although the Complaint on initial reading seems to state that one or more of the individual Plaintiffs have actually been precluded from viewing Internet materials they wanted to retrieve, many of the allegations deal generically with the X-Stop software and not actual denials of access in the Loudoun County libraries. Most significantly, there is no allegation that any of the Plaintiffs ♦ or anyone else for that matter ♦ has ever submitted a request to remove a block and had the request denied. For that reason the Plaintiffs lack standing to pursue this litigation.

#### *A. Mainstream Loudoun's associational standing*

An association may allege standing under either of two distinct theories: (1) "the association 'may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy,'" or (2) "the association may have standing as the representative of its members who have been harmed." *Maryland Highways Contractors v. State of Maryland*, 933 F.2d 1246, 1250 (4th Cir.), cert. denied, 502 U.S. 939 (1991) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

*B. Mainstream Loudoun lacks standing to sue on its own behalf*

In the 145 paragraphs of the Complaint, Mainstream Loudoun devotes just one sentence to suggest that it may have standing to seek relief from injury to itself. Specifically, the Complaint states: "Mainstream Loudoun and its members have been harmed and continue to be harmed by Defendants' Policy that blocks their access to valuable information that would otherwise be available to them, and that imposes privacy, stigma and other burdens on their ability to access desired information." ([Compl.](#) at ¶ 13) Neither this allegation nor the remainder of the Complaint support that Mainstream Loudoun has standing to sue on its own behalf.

In order for an association to have standing to sue on its own behalf, it must allege "a concrete and demonstrable injury to [its] activities." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Stated differently, "[a]n association has no standing to sue if it has suffered no direct economic injury as a consequence of the conduct about which it complains." *NAACP Labor Committee v. Laborers' International Union of North America*, 902 F. Supp. 688, 698 (W.D.Va. 1993) (citing *Maryland Highways Contractors*, 933 F.2d at 1250). Here, Mainstream Loudoun has not alleged that "it has suffered any direct economic injury to itself as a consequence of defendants' conduct" or that "defendants' actions have inflicted a concrete and demonstrable injury to Mainstream Loudoun's activities." Mainstream Loudoun has not alleged that it lost members as a result of defendants' conduct, that it received less dues as a result of defendants' conduct, or that any of its activities have been adversely affected by defendants' conduct. Thus, Mainstream Loudoun may not sue on its own behalf. *See, e.g., Maryland Highways*, 933 F.2d at 1250-51 (holding that, where association "failed to put forth any evidence that it was injured economically" by the defendants' conduct, association lacked standing to sue on its own behalf); *NAACP Labor Committee v. Laborers' International Union of North America*, 902 F. Supp. at 698 (holding that, where Complaint did not allege direct economic injury to association's activities, association lacked standing to sue in its own right).

Although Mainstream Loudoun maintains that it has been "harmed" by the Internet Policy, the association does not allege that it has ever visited a Loudoun County public library or that it has even been denied access to information at a public library Internet terminal. Instead, the only basis for the allegation that Mainstream Loudoun has been "harmed" is that it dislikes the Loudoun County Public Library Internet Policy because the Policy "blocks their access to valuable information that would otherwise be available to them, and . . . imposes privacy, stigma and other burdens on their ability to access desired information." However, courts have consistently held that the standing requirement of a "concrete and demonstrable injury to an association's activities" is not satisfied even if "the association's broad purposes have been violated" by the alleged illegal conduct. *Maryland Highways Contractors*, 933 F.2d at 1250; *see also Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982) ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy"); and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,

40 (1976) ("an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Article III"). Despite Mainstream Loudoun's abstract concern with the Internet Policy, a "setback to the association's social interests" does not establish standing. *Havens Realty Corp.*, 455 U.S. at 378,

Because the Complaint does not allege that Mainstream Loudoun has suffered "concrete and demonstrable" economic injury to its own activities and because "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy," Mainstream Loudoun lacks standing to sue on its own behalf.

*C. Mainstream Loudoun lacks standing to sue on behalf of its members.*

An association has standing to sue on behalf of its members when: "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of the individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Maryland Highways Contractors v. State of Maryland*, 933 F.2d at 1250. Mainstream Loudoun has not satisfied prongs one and three of this three-part test, and, on either basis, the association lacks standing to sue on behalf of its members.

*1. Mainstream Loudoun lacks standing to bring suit on members' behalf because its members would lack standing to sue in their own right.*

In order for Mainstream Loudoun to have standing to sue on behalf of its members, it must have sufficiently alleged that its members would have standing in their own right to challenge the Internet Policy. Under the individual-standing requirement, an association must have alleged that its members "personally ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." [\*Valley Forge College v. Americans United\*](#), 454 U.S. at 488. Likewise, the association must have alleged that its members have suffered an "injury in fact" which is "concrete and particularized" and "not conjectural or hypothetical." Although Mainstream Loudoun thoroughly criticizes "Defendants' Internet Policy," the Complaint fails to support that the association's members have suffered any "imminent or actual harm" as a result of the Internet Policy.

The Complaint alleges that Defendants have violated the First Amendment rights of Mainstream Loudoun members and the individual Plaintiffs by, *inter alia*, the following conduct: requiring that patrons sign a statement concerning Internet policy and sexual harassment before using the Internet ([Compl.](#) at ¶ 106-107); requiring that patrons present their library cards and a second piece of identification before using the Internet ([Compl.](#) at ¶ 108); requiring that minors can only use the Internet if a parent signs a consent form ([Compl.](#) at ¶ 110); recording the names of

patrons on a log maintained by library staff ([Compl.](#) at ¶ 111); placing computer terminals at locations near the library staff where the terminals "are fully visible to onlookers" ([Compl.](#) at ¶¶ 113-116); using a software system on the computer terminals which blocks websites containing non-pornographic information ([Compl.](#) at ¶ 119); using a software system that prevents searches based on certain "foul words" ([Compl.](#) at ¶¶ 120-127); and by making available an "inadequate" "Request to Review Blocked Site" form<sup>17/</sup> to be completed by patrons who believe that a website has been improperly blocked in order that the library committee may decide to unblock the site ([Compl.](#) at ¶¶ 128-130). Based on these and other allegations, Mainstream Loudoun contends that Defendants' Internet Policy "blocks a substantial amount of speech that is not obscene or otherwise constitutionally proscribable and that adults have a right to receive." ([Compl.](#) at ¶ 134).

Despite the breadth of the allegations regarding Defendants' Internet Policy, Mainstream Loudoun does not allege that any of its members have personally experienced the application of any part of this Policy. Although Mainstream Loudoun states that Defendants' Internet Policy is unduly intrusive, Mainstream Loudoun does not allege that any member has ever visited the library to use the Internet since the Internet Policy has been in effect. Although Mainstream Loudoun states that the Internet Policy blocks "speech that is not obscene or otherwise constitutionally proscribable," Mainstream Loudoun does not allege that any member has ever been denied access to information at a library Internet terminal. Although Mainstream Loudoun states that the "Request to Review Blocked Site" procedures are inadequate, Mainstream Loudoun does not allege that its members have ever: been denied access to certain websites; completed a "Request to Review Blocked Site" form to request that the websites be made available; and/or then been advised that the websites would not be made available.

Until such time as a member actually attempts to access a library Internet terminal, is denied access to a website, completes a "Request to Review Blocked Site" form, and has the Request denied, it cannot be argued that "Defendants' Policy . . . blocks [the members'] access to valuable information that would otherwise be available to them." Aside from this unsupported assertion, Mainstream Loudoun does not allege that any members has ever personally experienced any application of the Policy or that any member has "personally suffered some actual or threatened injury as a result of the defendants' conduct." *Valley Forge College v. Americans United*, 454 U.S. at 488. Because Mainstream Loudoun's members would lack standing in their own right to challenge the Internet Policy, Mainstream Loudoun lacks standing to bring suit on their behalf. *See, e.g., Maryland Highways Contractors v. State of Maryland*, 933 F.2d at 1250 (4th Cir. 1991) (holding that association lacked standing to sue on behalf of its members where members had not suffered a sufficient "injury in fact").<sup>18/</sup>

*2. Mainstream Loudoun lacks standing to bring suit on members' behalf because the claim and relief requested require their participation*

In order for Mainstream Loudoun to have standing to sue on behalf of its members, it also must have sufficiently alleged that the claims or relief requested do not require the members' participation. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Maryland Highways Contractors v. State of Maryland*, 933 F.2d 1246, 1250 (4th Cir. 1991). An

association fails to meet this standing requirement "when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests." *Maryland Highways Contractors v. State of Maryland*, 933 F.2d at 1252. Mainstream Loudoun's very purpose and beliefs evidence that its members must participate in this lawsuit in order to protect their own interests and that the association lacks standing to bring suit on their behalf.

As described in the Complaint, Mainstream Loudoun is a "non-profit, grassroots membership organization . . . that is dedicated to ensuring a free and open society that preserves religious and personal freedom as established by the U. S. Constitution." ([Compl.](#) at ¶ 12) At the Mainstream Loudoun Website, specifically referenced in the Complaint, Mainstream Loudoun emphasizes its belief that "people who are religious, moral and pro-family can honestly differ on political and social issues" and stresses its devotion to "promoting tolerance and rational discourse" concerning such issues.<sup>19/</sup> See Mainstream Loudoun homepage, attached as Exhibit B. In a section titled "Others who share the concerns of Mainstream Loudoun," the association further describes that: "We reflect countless races, religions and lifestyles, and we often differ on questions of morality and behavior. The only way so diverse a nation can survive is by all of us practicing a high degree of tolerance." *Id.* Mainstream Loudoun also explains that "it is composed of a wide cross-section of people including parents, clergy, students, teachers, librarians, business leaders, physicians, public policy officials, political leaders, and citizen activists." *Id.* Finally, Mainstream Loudoun repeatedly directs the reader to "Membership Form Links" encouraging interested individuals to become Mainstream Loudoun members. *Id.*

That Mainstream Loudoun is founded on "promoting tolerance" for differing beliefs, that its membership "can honestly differ on political and social issues," and that it explains "we often differ on questions of morality and behavior" plainly suggests that its members disagree on many issues including the wisdom of this litigation. In *Maryland Highways Contractors v. State of Maryland*, 933 F.2d 1246, 1252-53 (4th Cir.), *cert. denied*, 502 U.S. 939 (1991), the Fourth Circuit considered whether an association comprised of members with diverse interests may bring suit on the members' behalf. Relying on an Eighth Circuit opinion, the Fourth Circuit described a situation equally present here:

[T]he claim asserted requires the participation of the individual members of the association. The association is clearly not in a position to speak for its members on the question of [the litigation]. Their status and interests are too diverse and the possibilities of conflict are too obvious to make the association an appropriate vehicle to litigate the claims of its members. Some members . . . stand to benefit . . . and still others will be hurt.

*Associated General Contractors of North Dakota v. Otter Tail Power*, 611 F.2d 684, 691 (8th Cir. 1979) (quoted in *Maryland Highways Contractors*, 933 F.2d at 1252). Upon finding that some members of the association would benefit from the cause of action while other members

would be hurt, the Fourth Circuit held that "there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests." *Maryland Highways Contractors*, 933 F.2d at 1253.<sup>20</sup>

Although it could have stopped here, the Fourth Circuit then continued its analysis by relying on another opinion, stating:

It is entirely conceivable in this case . . . that many members of [the association] would oppose this litigation on ideological grounds. . . . Indeed, at oral argument, counsel for [the association] conceded that the decision to sue is made by the association's Board of Directors rather than by the members as a whole.

*Mountain States Legal Foundation v. Dole*, 655 F. Supp. 1424, 1431 (D. Utah 1987) (quoted in *Maryland Highways Contractors*, 933 F.2d at 1253). The Fourth Circuit explained that "similarly, in the present case, the decision to litigate this case was made by the Board of the Association" and "the Board took the unusual position of not telling the members of its decision to litigate until after the suit had already been filed." *Maryland Highways Contractors*, 933 F.2d at 1253. Because the association's decision to litigate on members' behalf was made without full membership participation, the Fourth Circuit reiterated that there was an "actual conflict of interest and the potential for conflict in this case" and that the association lacked standing. *Id.*

Like the divergent interests of the association described in *Maryland Highways Contractors*, Mainstream Loudoun is admittedly comprised of individuals with diverse political, social, and moral beliefs. Indeed, it would be surprising if the association did not include persons who believe that: a public library should be able to request identification before allowing a patron to access the Internet; a public library should be allowed to restrict Internet access to child pornography and obscene materials at its computer terminals; or parental permission should be received before allowing minors to have unrestricted or restricted Internet access at the public library. Because such beliefs would conflict with those advocated in Mainstream Loudoun's attempted cause of action, some members of the association would benefit from the cause of action while other members would be hurt. Here, as in *Maryland Highways Contractors*, "the possibilities of conflict are too obvious to make the association an appropriate vehicle to litigate the claims of its members." *Maryland Highways Contractors*, 933 F.2d at 1252. Despite that Mainstream Loudoun has brought suit on behalf of this admittedly diverse membership, the association has failed to sufficiently allege that it is "in a position to speak for its members on the question of this litigation." *Id.* Mainstream Loudoun has not alleged that the decision to litigate was made by the membership as a whole. Mainstream Loudoun has not alleged that the decision to litigate was presented for a membership vote. Mainstream Loudoun not even alleged that its membership was informed of the decision to litigate prior to the suit being filed. Absent such allegations, Mainstream Loudoun cannot contend that it is vindicating the shared interest of all of its members or that its members would not be required to "join the suit individually in order to protect their own interests." *Id.*

Because Mainstream Loudoun has failed to establish that "neither the claim nor the relief requested require the participation of individual members," the association lacks standing to

bring suit on its members' behalf. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 343.<sup>21/</sup>

*D. The individual Plaintiffs lack standing to bring suit*

In the Complaint, Plaintiffs boldly contend that "they have been and will be denied access to a substantial amount of otherwise available, constitutionally protected information" and "that they have been burdened and inhibited significantly in their use of the Internet" by Defendants' Policy. (Compl. at ¶ 14) However, of the eleven individual Plaintiffs, seven apparently have not even attempted to access the Internet at the Loudoun County Library since the software system has been installed. (Compl. at ¶¶ at 15, 17, 18, 21, 22, 24, and 25)<sup>22/</sup> These seven Plaintiffs cannot contend that they have suffered any "concrete injury in fact" by being denied access to "constitutionally protected information" when they have not even attempted searches for such information at the library's Internet terminals.

The four individual Plaintiffs who may have actually accessed the Internet at the library since the Internet access terminals were installed<sup>23/</sup>, assert they have "already been harmed by not being able to access a number of desired sites that contain constitutionally protected information" as a result of the Internet Policy. (Compl. at ¶¶ at 2, 4, 5, and 8) However, none of these Plaintiffs have ever attempted to exercise the Internet Policy's "Request to Review Blocked Site" procedure to request that the websites be unblocked. Moreover, had these Plaintiffs submitted Requests to unblock websites that would not come within the categories specified in the Library Policy, the Requests would have been granted.<sup>24/</sup> Thus, until such a Request is denied, Plaintiffs cannot credibly argue that they are being "harmed by not being able to access sites that contain constitutionally protected information." See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222-23 (1974) ("to permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse in the judicial process").

Finally, six of the eleven individual Plaintiffs also contend that they are harmed because the Internet Policy violates some vague parental right to allow one's child or grandchild unrestricted Internet access at the public library.<sup>25/</sup> (Compl. at ¶¶ 3, 5, 7, 10 and 11) However, none of the Plaintiffs' children or grandchildren has apparently attempted to use the Internet at the library since the software system has been installed. Again, until Plaintiffs' children actually attempt to use the Internet at the library, it cannot be argued that any of their children have been denied access to particular websites or to "constitutionally protected" information. See *Maryland Highways Contractors v. State of Maryland*, 933 F.2d at 1250 (4th Cir. 1991) ("individual must be able to demonstrate that he or she suffers from a 'distinct and palpable injury' that is likely to be redressed if the requested relief is granted"). Moreover, while the Constitution does protect a parent's right to make certain decisions about their children within the home<sup>26/</sup>, that right does not extend to a right to compel a public library to allow the child to view pornographic materials or materials that are harmful to children under state law.<sup>27/</sup>

#### **IV. Conclusion**

For the foregoing reasons, Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss this cause for the Plaintiffs' failure to state a claim upon which relief

can be granted.

Respectfully  
submitted,

BOARD OF  
TRUSTEES OF THE  
LOUDOUN  
COUNTY  
LIBRARY, *et al.*

By: \_\_\_\_\_

\_\_\_\_\_  
Kenneth C. Bass, III  
(VSB #1021)  
Damon W.D. Wright  
(VSB #40319)

VENABLE,  
BAETJER AND  
HOWARD, LLP  
2010 Corporate  
Ridge, Suite 400  
McLean, Virginia  
22012  
(703) 760-1600  
(202) 962-4800

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1. The two decisions are [\*Board of Education v. Pico\*](#), 457 U.S. 853 (1982), and [\*Reno v. ACLU\*](#), \_\_\_ U.S. \_\_\_, 117 S.Ct. 2329 (1997), both of which are discussed and analyzed below.
2. Because the Complaint specifically refers to the written policy, it is appropriate for the Court to consider the entire policy in deciding this Motion. Such consideration would not require the Court to treat this as a Rule 56 Summary Judgment Motion. *See Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054; *Gasner v. Dinwiddie*, 162 F.R.D. 280, 282 (E.D.Va. 1995).

3. The Loudoun County library system does not provide access to the numerous "newsgroups" available through USENET, to "chat rooms" available using Internet Relay Chat (IRC) or to email. The absence of such access is not challenged by the Plaintiffs.
  
4. The Complaint erroneously states in paragraph 8 that the Loudoun system blocks access to the websites of the Society of Friends (<http://web.archive.org/web/19980514222331/http://www.quaker.org/>), the American Association of University Women (<http://web.archive.org/web/19980514222331/http://www.aauw.org/>), the Yale University biology graduate program (<http://web.archive.org/web/19980514222331/http://www.biology.yale.edu/graduateprogram.html>) and the AIDS quilt Web site (<http://web.archive.org/web/19980514222331/http://www.aidsquilt.org/aidsinfo>). The Loudoun system does not block access to any of those sites. *See* Timmerman Declaration ¶ 4.
  
5. To the extent the Complaint states or implies that requests for removal of blocks are passed on to the software vendor who makes the actual decision on whether to retain the block, the Complaint is in error. *See* Timmerman Declaration ¶¶ 7-8.
  
6. The Internet has become so widely used that the Court can take judicial notice of the description in the text. To the extent that any formal evidence is needed, the description relied upon by the Supreme Court in the *Reno* case is equally applicable here. Indeed Plaintiffs draw on the description in that decision on repeated occasions in their complaint.
  
7. The Complaint claims that the Loudoun County Library also uses "foul word" filters that prevent patrons from entering certain words, thus preventing them from learning of the existence of websites. ([Compl.](#) ¶ 120) That contention is incorrect. As stated in the attached Declaration of Cindy Timmerman, the Loudoun County Library System does not use any language filters and utilizes only the URL blocking feature of the X-Stop software. That factual aspect is, however, irrelevant to the disposition of this Motion.
  
8. [Stanley v. Georgia](#), 394 U.S. 557 (1969).

9. No legal basis for this claim to privacy screens is stated. The Complaint in this regard reads more like a policy brief than a legal complaint.

10. That section provides that:

(5) It is a defense to a prosecution [for permitting access to prohibited information] that a person

"(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

"(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

11. *See* section II, *infra*.

12. Justice Brennan authored that opinion and he was joined by Justices Marshall and Stevens in whole and by Justice Blackmun in part. That opinion is customarily referred to in the literature as the "plurality opinion." It in fact is not a plurality opinion. There were four votes for the proposition that the First Amendment applied, at least to some degree, four votes for the proposition that it did not, and one vote for a remand to develop the facts and avoid expressing an opinion on the merits. Moreover, Justice Blackmun did not join all of Justice Brennan's opinion and therefore the opinion authored by the Chief Justice Berger and joined in its entirety by three other Justices would be more appropriately described as the plurality opinion.

13. Chief Justice Burger authored that opinion and he was joined by Justices Powell, Rehnquist and O'Connor.

14. Justice White wrote separately, joining in the judgment that the case should proceed to trial, but expressly stating that he believed sound "judicial administration [required the Court] to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." *Pico, supra*, at 884 (White, J. concurring) (quoting *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

15. The fact that *Hustler* is normally provided on a subscription basis is not a critical distinction. If the publisher offered copies to libraries at no cost, we doubt that any court would compel a public library to accept copies and provide them to patrons. *Cf. General Media Communications, Inc. v. Cohen*, 1997 U.S. App. LEXIS 33869, 1997 WL 732329 (2d. Cir. 1997) (a military post is not required by the Constitution to stock non-obscene sexually explicit materials in the post exchange).
  
16. The relief Plaintiffs seek cannot be decreed without declaring that statute unconstitutional. There is no precedent for considering this immunity provision unconstitutional. To the contrary, the Fourth Circuit recently applied a companion provision of § 230 to uphold this Court's dismissal of a civil suit in [\*Zeran v. America Online, Inc.\*](#), 129 F.3d 327 (4th Cir. 1997).
  
17. A copy of that form is attached as Exhibit 2 to the Timmerman Declaration.
  
18. Defendants further submit that, since the software system has been installed, the Loudoun County Public Library Staff has unblocked all websites for which patrons have completed "Request to Review Blocked Site" forms. *See* Timmerman Declaration ¶ 8. Thus, at the present time, no individual can allege that the Defendants have denied them access to "speech that is not obscene or otherwise constitutionally proscribable."
  
19. Because the Complaint explains that "Mainstream Loudoun publishes a Web page located at <http://web.archive.org/web/19980514222331/http://www.loudoun.net/mainstream/>," (Compl. ¶ at 13) consideration of this information would not require the Court to test this as a Rule 56 Summary Judgment Motion. *See Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054; *Gasner v. Dinwiddie*, 162 F.R.D. 280, 282 (E.D.Va. 1995).
  
20. A similar requirement for associational standing is imposed by Rule 23.2 of the Federal Rules of Civil Procedure. Under Rule 23.2, members of an unincorporated association may bring suit as representative parties of the association "only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members." *See Tunstall v. Brotherhood of Locomotive F. and E.*, 148 F.2d 403,

404 (4th Cir. 1945); *Murray v. Sevier*, 156 F.R.D. 235, 241 (D. Kan. 1994); *Resolution Trust Corp. v. Deloitte & Touche*, 822 F. Supp. 1512, 1515 (D. Colo. 1993).

21. For the same reason, Mainstream Loudoun members could not bring suit as representative parties of the association because the members could not "fairly and adequately protect the interests of the association and its members." *See supra*, footnote 20.
  
22. The seven plaintiffs are Ms. Coughlin, Curley, Hines, Kern-Levine and Adams and Messrs. Clay and Smith.
  
23. Those four plaintiffs are Messrs. Taylor, Kropat, and White and Ms. DuChateau. ([Compl.](#) ¶¶ 16, 19, 20, and 23)
  
24. *See supra*, footnote 18.
  
25. Those six plaintiffs are Ms. Curley, Kern-Levine and Adams and Messrs. Kropat, Clay and Smith. ([Compl.](#) ¶¶ 17, 19, 21, 22, 24 and 25)
  
26. [Pierce v. Society of Sisters](#), 268 U.S. 510, 535 (1925).
  
27. The Plaintiffs' attack on the use of filtering software as an intrusion into parental rights is somewhat ironic. Previous commentary on filtering software has emphasized that it functions to enable parents to control what their children access over the Internet. Thus most observers have seen filters a tool that enhances, rather than erodes, parental authority.