

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

MAINSTREAM LOUDOUN, et. al.,  
Plaintiffs,  
v.

BOARD OF TRUSTEES OF THE LOUDOUN COUNTY LIBRARY  
Defendant

THE SAFER SEX PAGE, et. al.,  
Plaintiff-Intervenors  
v.

BOARD OF TRUSTEES OF THE LOUDOUN COUNTY LIBRARY  
Defendant  
Civ. Action No. 97-2049-A

PLAINTIFFS' MEMORANDUM IN SUPPORT  
OF THEIR MOTION FOR SUMMARY JUDGMENT

Robert Corn-Revere  
Ronald J. Wiltsie (VSB #30389)  
Mary Ellen Callahan  
HOGAN & HARTSON L.L.P.  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5600

Elliot M. Mincberg  
Lawrence S. Ottinger  
PEOPLE FOR THE AMERICAN WAY FOUNDATION  
2000 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 467-4999

Counsel for Plaintiffs

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Footnotes

1 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Unlike Justice Potter Stewart, who said he could not intelligibly define obscenity but that "I know it when I see it,"<sup>1</sup> the Board of Trustees of the Loudoun County Public Library claims it knows what is obscene without even having to look at it. Defendant's "Policy on Internet Sexual Harassment" ("the Policy") requires the use of filtering software at all times on all public Internet access terminals that blocks information on the Internet based on decisions made by a private software company in California. Officials in Loudoun County do not know which websites are censored in advance, nor are they informed of the reasons a particular website is blocked. As a result, many sites have been blocked that are not even arguably "pornographic" or even sexually oriented. In addition, the Policy by its terms employs a one-size-fits-all approach, barring access by adults to any information deemed "Harmful to Juveniles." Defendant's Internet Policy violates library patrons' rights under the First and Fourteenth Amendments to the United States Constitution by subjecting Internet information to a prior restraint, by reducing adult access to information to less than what is fit for children, by imposing overly broad and vague restrictions on speech, by vesting library staff with unbridled discretion to enforce the Policy, and by failing to serve a compelling government interest by the least restrictive means.

#### I. Background

2 Douglas Henderson, the Library Director for Loudoun County, was designated to testify on behalf of the Board pursuant to Rule 30(b)(6), Fed. R. Civ. P. John Czaplewski currently is chairman of the Board.

At its October 20, 1997 public meeting, the Board of Trustees of the Loudoun County Public Library ("the Board") voted 5-4 to adopt its Policy on Internet Sexual Harassment. Ex. 1, the Policy; Ex. 2, D. Henderson Dep. at 329-330. Ex. 3, J. Czaplewski Dep. at 18-19.2 The Policy asserts that allowing Library patrons unrestricted access to the Internet could create a sexually hostile environment in violation of Title VII of the Civil Rights Act of 1964. Ex. 1, General ¶ 1. In November 1997, Mr. Henderson, the Library Director, implemented the policy by installing X-Stop filtering software on all public Internet access terminals in the Loudoun County public libraries. He also developed a list of Internet Procedures to govern usage of public Internet terminals. The Internet Procedures include an "unblocking policy" that permits patrons to object to the blocking of access to particular websites. Ex. 4.

3 This Court dismissed claims against the individual Board members who voted for the Policy and against the Library Director. The Court also held that certain individual plaintiffs lacked standing.

Mainstream Loudoun and a number of individual plaintiffs filed the instant case on December 22, 1997, alleging that the Policy violates the First and Fourteenth Amendment rights of library patrons. Plaintiff-Intervenors filed their complaint on February 5, 1998, alleging that access to their websites had been blocked by filtering software in the Loudoun County public libraries. On February 2, 1998, Defendant filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, alleging that plaintiffs lacked standing to assert a claim, that the claims were barred by statute and by principles of immunity, and that the complaint failed to state a constitutional claim. On April 7,

1998, this Court, while granting defendant's motion in part,<sup>3</sup> rejected the argument that plaintiffs had failed to state a First Amendment claim, holding that the Policy can be sustained only if it can survive strict constitutional scrutiny. *Mainstream Loudoun v. Board of Trustees*, 2 F. Supp.2d 783, 795 (E.D. Va. 1998).

## II. Statement of Undisputed Material Facts

Where, as here, the record reflects no genuine disputes of material fact, the Court should decide the instant motion based on the law. *Cray Communications v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 392 (4th Cir. 1994). Under settled First Amendment principles, including principles already articulated by this Court in this case, summary judgment invalidating and enjoining the Policy should be granted. *Mainstream Loudoun*, 2 F. Supp.2d at 795; see also *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998). Pursuant to Local Rule 56(B), the material facts about which there is no genuine issue are listed below.

### A. Generally, Library Policies in Loudoun County Seek to Protect Patrons From Censorship and From Breaches of Confidentiality

The Library's policy entitled "Freedom for Ideas -- Freedom From Censorship" states that the First Amendment "guarantees to the American people that all ideas can be promulgated and are available to all who seek them." Ex. 5. That policy further states, in relevant part: (1) "It is in the public interest to maintain a library collection in various media, offering the widest possible diversity of views and expressions. The selection and development of the Library collection is not to be diminished because minors might have access to materials with controversial content;" (2) "Materials shall not be excluded from the collection because of the nature of the information or views presented therein, nor the political orientation of their content. Furthermore, materials shall not be excluded because of the moral, religious or political beliefs of their writer, publisher or film maker, nor does their inclusion in the collection imply endorsement of all the ideas presented therein;" (3) "[T]he rights and responsibilities of parents or legal guardians will neither be abridged nor assumed by the library system;" and (4) "Censorship of ideas will be rejected and opposed by the library system." Id.

The Library's "Policy on Collection Development" states that it is "[t]he goal of Loudoun Public Libraries . . . to provide the citizens of Loudoun County with a range of materials in a variety of print and non-print formats to meet their informational, cultural, educational, and recreational needs and interests." Ex. 6. The collection policy adds that "[i]ndividual use of library materials is a private and personal matter. All citizens are free to reject for themselves materials of which they may disapprove; no citizen may restrict the freedom of use and access for others." Id. The policy adds that "[r]esponsibility for the reading, listening, and viewing of library materials by children rests with their parents or legal guardians and not with the library staff. Selection of library materials is not inhibited by the possibility that materials may come into the possession of children." Id. The Library's "Policy on Confidentiality" provides that "[c]onfidentiality of all patrons' library use will be maintained." Ex. 7.

### B. The Loudoun County Policy on Internet Sexual Harassment

## Governs Patrons' Access to Information on Library Internet Terminals

. In sharp contrast to the policies on Freedom From Censorship, Collection Development, and Confidentiality described above, the Policy on Internet Sexual Harassment restricts access to information in the Loudoun County libraries. The Policy provides that Internet filtering software designed to block access to specific types of sites on the Internet "will be installed on all computers." Ex. 1, Internet Services, ¶2. The Policy does not allow an adult patron to access the Internet without blocking software under any circumstances. Id. Even with the blocking software, library users under age 18 must obtain written parental permission before using the library Internet terminals. Ex. 1, Children, ¶ 2.

The Policy also states that the Library's computers will be placed "in close proximity to, and in full view of, library staff" so that staff can monitor use of the Internet by Library patrons. Ex. 1, Internet Services, ¶ 3. It provides that library patrons who seek to access information prohibited by the Policy will be told by library staff that they are in violation and, if they continue, will be told to leave the library. Ex. 1, Internet Services, ¶ 4. If such patrons do not leave, the Policy states that the police may be called to remove them from the premises. Id. Violators are subject to prosecution for trespass, a criminal offense in Virginia. Id. See Va. Code § 18.2-119 (Class 1 misdemeanor). The Library Director has alerted local law enforcement agencies that they may be called to the library to remove patrons who violate the Internet Policy. Ex. 2, D. Henderson Dep. at 435-437; Ex. 8, letters from Library Director to local police authorities. The Internet Procedures, adopted by the Library Director pursuant to the Policy, states that "the police will be called" on patrons who persist in violating the Policy. Ex. 4; see Ex. 2 at 436.

The Policy purports to bar access to "child pornography and obscene material (hard core pornography)" and "material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." Ex. 1, Internet Services, ¶ 2. It states that allowing Library patrons unrestricted access to the Internet could create a sexually hostile environment in violation of Title VII of the Civil Rights Act of 1964. Ex. 1, General, ¶ 1. The Policy does not define the terms "child pornography," "obscene material," "hard core pornography," "material Harmful to Juveniles," or "soft core pornography;" nor does it describe what material would necessarily violate Title VII. Ex. 2, D. Henderson Dep. at 332-344, 547; Ex. 3, J. Czaplewski Dep. at 32-36; Ex. 9, E. Keller Dep. at 102-105.

Patrons, regardless of their age, "will not be permitted" to access any material considered to violate the Policy, including information considered "Harmful to Juveniles" but legal as to adults. Ex. 1, Internet Services, ¶ 4. The Policy, as "adopted and implemented by the defendant uses the same standards and procedures for adults as for non-adults." Answer, ¶ 1(c). Under the Policy, the Library Director has no discretion to unblock a website considered to violate the Virginia Harmful to Juveniles law, even if an adult patron requests access to the site. Ex. 10, Def's. Resp. to Pls. First Req. for Admis. No. 35 ("[I]f the Library Director considers a particular website to violate . . . Va. Code § 18.2-390, et. seq. the website should be blocked under the policy for adult as well as juvenile patrons."). The Policy requires patrons who wish to use Internet terminals to sign a statement concerning the Internet Policy and sexual harassment. Ex. 1, Policy at MLF 007530. The Internet Policy and consent form that library patrons must sign repeats

the term "pornography" nine times. Ex. 1; Ex. 11, Consent Form. The names of library patrons who use Internet access terminals are recorded on a log by library staff. Ex. 9, E. Keller Dep. at 163-165. This log is "a public document." Answer, ¶ 15(c).

The Board adopted the Policy without developing a record of findings that access to sexually explicit materials posed a significant problem in public libraries. See Ex. 12, Def's. Answer to Pls. Interrog. No. 17 (stating that record will be developed by defendant's expert witnesses). But see Ex. 13, D. Burt Dep. at 255 (defendant's expert received no responses from a request for accounts of sexual harassment sent to an estimated 10,000 librarians); Ex. 14, D. Hughes Dep. at 201-204 (defendant's other expert describes defendant's framing of Policy as a sexual harassment policy as "quite clever" because she had never previously considered such an approach). Correspondence between the Library Director and 16 other Virginia and area public libraries did not result in a single report of any significant problems associated with Internet access, and none of the libraries contacted had policies that require the use of filtering software on public Internet access terminals. Ex. 2 at 145-225; Ex. 15, Internet Policies, Letters from Other Virginia Public Libraries; Answer, ¶ 13(c).

### C. The Policy Does Not Apply a Legal Standard to Govern its Enforcement

Although the Policy states that the filtering software will "to the extent technically feasible" block "child pornography and obscene material (hard core pornography)" and "material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)," the methods used to enforce the policy do not require any findings regarding the legal status of a particular website before or even after it is blocked. Defendant admits that the Policy is implemented without prior judicial determinations regarding the contents of any specific website. Ex. 10, Def's. Resp. to Pls. First Req. for Admis. No. 31. Nor is Defendant aware of any judicial rulings regarding websites that have been found to violate Virginia obscenity, Harmful to Juveniles, or child pornography laws, or to violate the community standards of Loudoun County. *Id.*, Nos. 20, 22, 24, 26, 28, 30.

Blocking software itself is incapable of applying a legal test. Defendant admits that "with the limits of current technology it is not possible to design software that filters only material that is outside the protection of the First Amendment." Answer, ¶ 14(h); see also Ex. 10, Def's. Resp. to Pls. First Req. for Admis. Nos. 3-7 (no Internet filtering software is available that, without user modification, blocks access only to obscenity, child pornography, material considered harmful to juveniles, or material considered in violation of Title VII). As defendant's counsel stipulated, "[t]o the best of my knowledge, in the annals of artificial intelligence today and in my lifetime, I don't expect a program of being able to be admitted to the Bar of these United States as a substitute for a lawyer. Or a judge." Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 160.

4 Michael Bradshaw was, at the time of the installation of X-Stop in Loudoun County and at the time of his depositions, the Chief Executive Officer of Log-On Data Corp., the manufacturer of X-Stop.

In determining which websites to block, filtering software relies on individual decisions of employees of the company that makes the software. Ex. 16 at 49-51; Ex. 17, M. Bradshaw

Dep. (May 27, 1998) at 10-13.4 Such decisions do not involve the application of a legal test, but depend on subjective criteria selected by the software company. Ex. 16 at 51-53. Defendant states that such decisions are based on the "reasonable beliefs of specific individuals within their personal understanding of applicable law". Ex. 10, Def's. Resp. to Pls. First Req. for Admis. No. 18.

5 Cindy Timmerman is the Loudoun County Library employee charged with evaluating all requests to unblock a world wide web site. Elizabeth Keller is the employee who evaluated the X-Stop software for the Library.

Members of the Library staff responsible for enforcing the policy do not attempt to apply a legal test in evaluating websites. None of the responsible staff members are lawyers. Ex. 2, D. Henderson Dep. at 332; Ex. 12, Def's. Answer to Pls. Interrog. No. 5. There are no written guidelines that determine how staff members are to apply the Policy or evaluate a particular website. Ex. 12, No. 3 ("there is no information beyond the Policy itself that constitutes the 'criteria' used for unblocking specific sites"); see also Ex. 2 at 378-381; 405; Ex. 9, E, Keller Dep. at 103-105; Ex. 18, C. Timmerman Dep. at 94-95.5 Enforcement of the Policy is based on the "reasonable judgment" of library staff members. Ex. 10, Def's Resp. to Pls. First Req. for Admis. No. 32.

#### D. The Filtering Software Selected to Implement the Policy Employs a Confidential List of Blocked Sites That is Not Disclosed to Defendant

In late November 1997, the Library Director selected blocking software called X-Stop, a product created and sold by Log-On Data Corporation ("Log-On"), to implement the Policy. Ex. 2, D. Henderson Dep. at 15. The list of blocked sites developed by Log-On to implement X-Stop blocking software is proprietary and is a trade secret of Log-On. Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 12-13; Ex. 17, M. Bradshaw Dep. (May 27, 1998) at 61. The company claims to use an automated method, called the MudCrawler, to select "suspect" websites for possible inclusion on the list of blocked websites. This automated process and the criteria it employs also are treated by the company as trade secrets. Ex. 16 at 101-102. Log-On Data claims that X-Stop blocks access to tens of thousands of websites in its Librarian edition, while defendant's expert estimates that the stop list currently contains up to 80,000 websites, Ex. 13, D. Burt Dep. at 221-222.

The list of websites blocked by X-Stop has never been disclosed to the defendant. Ex. 2 at 439-495; Ex. 16 at 12-14. In fact, Log-On has rejected requests by the library staff for a list of blocked websites in the X-Stop database. Ex. 18, C. Timmerman Dep. at 91. The Library staff discovers which websites are blocked generally when access to a particular site is attempted by a patron or staff member and denied by the blocking software. Ex. 10, Def's. Resp. to Pls. First Req. for Admis. No. 11; Ex 18 at 91.

Log-On claims to add new websites to its blocked list and makes these updates available to its customers each weekday. These updates generally add 300 to 500 newly blocked websites to the X-Stop database. Ex. 16 at 49, 116, 135, 189; Ex. 17 at 9. The public Internet terminals in the Loudoun County libraries include this automatic update feature to download the most recent library of blocked websites available from Log-On. Ex. 9, E. Keller Dep. at 121-122; Ex. 10, Def's. Resp. to Pls. First Req. for Admis. No. 12. The defendant does not know which websites are added to the list of blocked websites in

each automatic download unless such sites are discovered during individual Internet browsing sessions. Ex. 10, No. 13; Ex. 18 at 91.

At least one version of X-Stop that has been used in the Loudoun County library includes a "foul word" filter that precludes Internet searches of terms considered to be inappropriate. Ex. 19, Kropat First Decl. ¶ 6; Ex. 20, Decl. of C. Timmerman, n.1. When this feature is activated, the software prevents searches for such books as "Bastard Out of Carolina" or "The Owl and the Pussycat." Id.; Ex. 9, E. Keller Dep. at 35-36. The "foul word" filter precludes such searches on generally available search engines such as Alta Vista and on search engines provided by online booksellers, such as Amazon.com. Ex. 9 at 33-35. The "foul word" filter was active for a time in the Loudoun County libraries, but subsequently was deactivated by the library staff. Ex. 20, n.1; Ex. 9 at 33-34; Ex. 19 at ¶ 6. The Policy does not require the installation of any particular filtering software. Selection of the filter and its configuration is within the discretion of the Library Director and the Board, and can be changed at any time without notice to the public. Ex. 3, J. Czaplewski Dep. at 19-21.

#### E. The Use of Filtering Software Results in Both Overblocking and Underblocking of Information on the Internet

When defendant adopted the Policy at the October 20, 1997 Board meeting, then-Chairman John Nicholas acknowledged that some "pornographic" material would evade the filter and that some constitutionally protected material would be blocked. Ex. 21, Oct. 20, 1997 Board meeting transcript; see Ex. 2, D. Henderson Dep. at 343-345; 554. The Policy acknowledges that "blocking software may not be completely effective" and the consent forms patrons must sign state that "the software may not be 100% effective and might be bypassed." Ex. 1, the Policy, Children, ¶ 1; Ex. 11, Consent Form.

The Library's experience with X-Stop confirms that X-Stop blocks websites that are not pornographic and fails to block other websites that are sexually explicit. When it evaluated X-Stop for use under the Policy, the Library staff counted how many websites were blocked in searches conducted in response to a list of questions, and how many of the blocked sites contained "protected speech." Ex. 2 at 484-489; Ex. 9, E. Keller Dep. at 44-45; 129-131. Of the 97 websites found to be blocked in this test, 65 sites -- 67 percent of the total -- were considered to constitute protected speech. Id. Blocked sites included websites for the Society of Friends, the Center for Reproductive Law and Policy, the AIDS Educational Research Trust, Lambda Literary Awards, Sex Education and Safe Sex, a New York Times editorial, Daschund information, Community United Against Violence, the National Journal of Sexual Orientation Law, the American Association of University Women, the Heritage Foundation, the Safer Sex Page, the Index to Censorship, AIDS Quilt Information and others. Ex. 22, Library's List of Protected Sites Blocked by X-Stop; see Ex. 9 at 129-131; Ex. 18, C. Timmerman Dep. at 26-29. James Burton, a member of the County Board of Supervisors and ex-officio member of the Library Board, conducted his own investigation on December 1, 1997, and found that blocked sites included websites for the Society of Friends, the American Association of University Women and portions of a site entitled "AOL Sucks." Ex. 23, J. Burton Dep. at 49-50; Ex. 24, J. Burton's List of Protected Sites Blocked by X-Stop. Burton sent a November 20, 1997 memo to the Board of Supervisors reporting that "[d]uring the staff evaluation, the X-STOP software blocked

57 sites that had nothing to do with pornography; sites that contained speech protected by the First Amendment." Ex. 25, Burton Memo.

In addition to websites discovered during the evaluation of X-Stop, defendant admits that its library staff members have discovered instances after the Policy was implemented in which the filtering software blocked protected speech. Ex. 10, Def's. Resp. to Pls. First Req. for Admis. Nos. 14- 16 Ex. 18 at 74-76. Examples of such sites include websites for the American Association of University Women ([www.aauw.org](http://www.aauw.org)), the Yale Graduate Biology Program ([www.biology.yale.edu/graduateprogram.html](http://www.biology.yale.edu/graduateprogram.html)); a beanie babies web page ([www.a-romantic.com/beanie/header~1](http://www.a-romantic.com/beanie/header~1)); and tax forms for the State of Kentucky ([www.state.ky.us/agencies/revenue/revhome.htm](http://www.state.ky.us/agencies/revenue/revhome.htm)). Ex. 2 at 512-528; Ex. 18 at 92-94. Defendant does not seek to find or attempt to correct inappropriate blocks except through the staff-created "unblocking policy." Since its initial test of the software, the library staff has conducted no regular or systematic search to determine if X-Stop blocks websites that contain protected speech. Ex. 2 at 368-371; Ex. 9 at 83-91; 120-121. Generally, the library becomes aware of inappropriate blocks by happenstance, such as through patron requests, press accounts revealing censored websites, or occasional discoveries by the staff. Ex. 2 at 368-369; Ex. 18 at 74-76. Apart from these circumstances, a principal way in which the Board has become aware of overly broad filtering has been the filing of this suit. Ex. 2 at 368-369; Ex. 18 at 74-76; Ex. 26, Timmerman Memo to Staff.

Library patrons, including plaintiffs, have also had access to information that cannot be described as "pornographic" blocked by X-Stop in the Loudoun County Public Library. In November and December 1997, and in January 1998, plaintiff Loren Kropat was denied access to over 100 websites fitting this description, including the American Association of Women ([www.aauw.org](http://www.aauw.org)); Information on HIV and AIDS ([www.aidsquilt.org/aidsinfo](http://www.aidsquilt.org/aidsinfo)); The Heritage Foundation ([www.heritage.org](http://www.heritage.org)) and the Safe Sex Web site ([www.safesex.org](http://www.safesex.org)). Ex. 19, Kropat First Decl. at ¶ 5. Mr. Kropat had a similar experience in July and September 1998 when he found such websites as Eyeland Opticians ([www.venusx.com](http://www.venusx.com)); Let's Have an Affair Catering ([tor-pwl.netcom.ca/~prk.n.to/index.html](http://tor-pwl.netcom.ca/~prk.n.to/index.html)); and the history of Sex Culture in Ancient China ([www.beijingnow.com/chun](http://www.beijingnow.com/chun)) were blocked by X-Stop in the Purcellville Library. Ex. 27, Kropat Second Decl. ¶ 6. On Nov. 29, 1997, plaintiff Mary DuChateau was denied access in the Sterling branch to such websites as the AAUW and others containing information on lesbian mothers and family planning in Germany. Ex. 28, DuChateau Decl. ¶¶ 4-5. Similarly, on December 2, 1997, plaintiff John White was denied access to a number of websites, including Social Support for Young Gays, Lesbians and Bisexuals ([www.youth.org.ssyglb](http://www.youth.org.ssyglb)); a website dedicated to Elsa Dorfman, portrait artist ([swissnet.ai.mit.edu/elsa](http://swissnet.ai.mit.edu/elsa)), and the Ethical Spectacle ([www.spectacle.org/freespeech](http://www.spectacle.org/freespeech)) in the Rust Library in Leesburg. Ex. 29, White Decl. ¶ 6; see also Ex.30, Decl. H. Taylor; Ex. 31, Decl. K. Kern-Levine; Ex. 32, Decl. J. Coughlin; Ex. 33, Decl. A. Curley. In addition, other local residents have reported instances of having access to protected speech blocked. In March 1998, Heather Petkovic was denied access by X-Stop to a website hosted by MotherNet, a social service agency for teenage mothers, as well as to the Quaker home page. Ex. 34, H. Petkovic Decl. at ¶¶ 7-10.

Evaluations by expert witnesses on both sides of this case confirm that X-Stop blocks information that is not "pornographic." Plaintiff's expert witness, after testing X-Stop

found that a variety of websites, including sites related to safe sex, non-explicit gay lifestyle sites and even a commercial site for gay-themed jewelry were blocked. Ex. 35, K. Schneider Expert Report at ¶ 14 (listing examples). Defendant's expert witness, David Burt, conducted his own review of X-Stop and three other software filters. He found that X-Stop blocked non-pornographic but sexually-oriented sites in 8 percent of the websites he tested. Ex. 13, D. Burt Dep. at 223-225. This finding does not account for differences of opinion between the experts about which sites should be blocked. For example, defendant's expert testified that a site with descriptions of gay-themed jewelry was appropriately blocked. Id. at 260-261. Between October 1997 and early Spring 1998, defendant's expert found the problems with X-Stop to be sufficiently serious that he withdrew his endorsement of the software. Id. at 239-244.

Experience under the Policy also confirms that X-Stop fails to block the type of information that the Board presumably intended to restrict. Patrons have found that the filter does not prevent access to sexually explicit websites. Similarly, evaluations of X-Stop by expert witnesses in this case confirm that X-Stop fails to block such information. See Ex. 35, K. Schneider Expert Report at ¶ 14 (giving examples of sites that X-Stop does not block). Defendant's expert found in his analysis that X-Stop failed to block what he called sites "likely to be found obscene" 16 percent of the time. Ex. 13 at 226-227. Mr. Burt has stated that he was able to disprove X-Stop's claim of complete effectiveness in 15 minutes, Ex. 36, Burt e-mail withdrawing his support of X-Stop, and currently agrees that X-Stop cannot prevent any knowledgeable Internet user from accessing "pornographic" sites. Ex. 13 at 197-198. He stated that the only way to determine whether filtering software is causing over- and underblocking of websites is to conduct on-going, periodic tests, id. at 172, something the defendant does not do. Ex. 2, D. Henderson Dep. at 368-369.

Although not mandated by the Policy, the Library Director adopted an "unblocking policy" because he found that that filtering software results in overblocking. Ex. 2 at 554-557; Ex. 9, E. Keller Dep. at 75-77. A patron who objects to a blocking decision by X-Stop must fill out a form with his or her name, library bar code number and telephone number. The patron also must state a specific reason for the objection. Ex. 37, Request to Review Blocked Site Form. The Internet Procedures state that the request will be considered by the library staff. Ex. 4, ¶ 13. If the staff agrees with the patron, the request will be forwarded to Log-On to have the website removed from the blocked site list. Id. If a site is removed from the X-Stop blocked site list, it is removed for all libraries in the United States that use the same edition of X-Stop. Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 126-127. The library experienced a series of technical problems with X-Stop that affected its ability to unblock inappropriately blocked websites. Ex. 18, C. Timmerman Dep. at 51-57; 79-83. In certain instances, the library has manually unblocked websites because the X-Stop update feature was malfunctioning. Ex. 26, C. Timmerman Memo re: unblocking; Ex. 38, Emails with X-Stop.

Approximately 13 unblocking requests have been submitted to the library staff. They included websites such as the AAUW ([www.aauw.org](http://www.aauw.org)), a website which provides Kentucky tax forms ([www.state.ky.us/agencies/revenue/revhomehtm](http://www.state.ky.us/agencies/revenue/revhomehtm)); a website on real estate ([www.newhomesLoudoun.com](http://www.newhomesLoudoun.com)); a website listing musical groups and music albums ([www.iuma.com](http://www.iuma.com)); and a site on Beanie Babies ([www.a-romantic.com/beanie](http://www.a-romantic.com/beanie)

/header~1); Ex. 39, Unblocking Request Forms. Some plaintiffs have declined to submit unblocking request forms because they were intimidated by the procedure. Ex. 19, Kropat First Decl. ¶ 7; Ex. 27, L. Kropat Second Decl. ¶ 8. Other library patrons have attempted to gain access to websites pursuant to the unblocking policy. Henry Taylor submitted a request to unblock the website of the Yale University Graduate School of Biology on December 6, 1997. Ex. 30, ¶ 3. The request was forwarded to Log-On on December 9 and 15, and access to the site was finally provided on December 23. Ex. 40, Chart of Patron Requests to Unblock Sites. Plaintiff Mary DuChateau submitted a request to unblock the website of the American Association of University Women on November 29, 1997. Ex. 28 at ¶ 8. That website had been identified by defendant as blocked by X-Stop more than a month prior to her request when it tested the software in October 1997. Ex. 9, E. Keller Dep. at 29-31; Ex. 18, C. Timmerman Dep. at 26-29; Ex. 22, Library List of Internet Sites Blocked by X-Stop. According to the defendant, access to the AAUW website was allowed as of December 2, 1997. Ex. 40. However, Ms. DuChateau was never informed of the disposition of her request. Ex. 27 Decl. ¶ 8. This is confirmed by the testimony of Ms. Timmerman that the Library never informs a patron whether their request for unblocking has been granted or denied. Ex. 18 at 93.

#### F. Defendant Declined to Implement Less Restrictive Measures Than the Policy on Internet Sexual Harassment

Various less restrictive measures have been employed with respect to Internet access in other libraries. Ex. 15, Internet Policies of Other Libraries. Such measures include acceptable use policies, Internet education, computer location and positioning, privacy screens, screen savers, and time limits on use. Another alternative is simply to enforce existing criminal laws against those web publishers that actually violate criminal laws. Ex. 14, D. Hughes Dep. at 119. The Library Director had information on the effectiveness of other measures, such as privacy screens, but this information was not included in the Board's deliberations when the Policy was adopted. Ex. 2, D. Henderson Dep. at 196-200; See, e.g., Ex. 15 (Letter from Tom Hehman, Bedford Public Library).

At various times during consideration of the Internet policy, plaintiff suggested that the Board adopt less restrictive alternatives. In letters to the Board dated July 17 and September 3, 1997, plaintiff Mainstream Loudoun proposed an Internet policy that would have made filtering optional for adults and would have required minors to obtain written parental permission before being allowed to use library computers for Internet access without filtering software. Ex. 41. These proposals were not adopted by the Board. Ex. 2 at 106-107. In addition, the Board adopted, but never implemented, a less restrictive Internet policy in July 1997. Ex. 42. It was replaced by the current Policy.

### III. The Loudoun County Internet Policy is Unconstitutional

#### A. The Policy Fails to Meet Strict First Amendment Scrutiny

6 Mainstream Loudoun, 2 F. Supp.2d at 795 (quoting Board of Educ. v. Pico, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting)).

7 Kreimer, 958 F.2d at 1251; American Council of the Blind v. Boorstin, 644 F. Supp. 811 (D.D.C. 1986) (discontinuation of Braille edition of Playboy by the Library of Congress

violated First Amendment); see also *Pratt v. Independent Sch. Dist.*, 670 F.2d 771 (8th Cir. 1982); *Case v. Unified School Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

8 This Court found that the "nature of the Internet" is such that "[b]y purchasing Internet access, each Loudoun library has made all Internet publications [on the World Wide Web] instantly accessible to its patrons." It determined further that no physical space or cost considerations exist in providing access to all publications on the World Wide Web as they do in a library's collection of books and other non-electronic materials, and that "a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available." *Mainstream Loudoun*, 2 F. Supp.2d at 793-795.

9 *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994); *Denver Area Educ. Communications Consortium v. FCC*, 518 U.S. 727, 766 (1996) (plurality op.) ("[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it"); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 73 (1983).

10 *Reno*, 117 S. Ct. at 2351; see, e.g., *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 69 (2d Cir. 1997) (striking down local law restricting the dissemination of "indecent crime material to minors" that was based on the government's "experience, knowledge and common sense").

11 Ex. 2, D. Henderson Dep. at 145-225; see Ex. 15, Internet access policies of 16 local and Virginia libraries.

12 Ex. 2 at 196-200; see Ex.15 at MLF 707 (letter from Tom Hehman, Director, Bedford Public Library System to Douglas Henderson, Sept. 9, 1997, with attachments indicating one complaint in 16 months of allowing public Internet access). Because the patron who raised the complaint in the Bedford Library never bothered to formally bring the matter to the library's attention there is no way to determine whether the images that prompted the complaint could be considered "illegal." Ex. 2 at 197-198.

13 Ex. 2, at 199; Ex. 15 at MLF 707 (letter from Tom Hehman); see also, Ex. 43, K. Schneider Second Report ¶¶ 37-38. Similarly, the Board made no factual findings of any real problems with respect to sexual harassment and unblocked Internet access, and even Defendant's counsel acknowledged in open court that there is essentially no problem in this area. Ex. 2 at 206; Tr. of Hrg on Mot. to Dismiss at 47.

Public libraries "are places of freewheeling and independent inquiry"<sup>6</sup> and "the quintessential locus of the receipt of information." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992). As such, decisions by governmental authorities to restrict information in public libraries based on its content are governed by traditional First and Fourteenth Amendment principles.<sup>7</sup> The Supreme Court, in connection with restrictions on libraries, has emphasized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Pico*, 457 U.S. at 866 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)); see also *Smith v. California*, 361 U.S. 147, 150 (1959) ("the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms").

This Court has already recognized the applicability of these familiar principles to the Board's restrictions on Internet access in this case, warranting summary judgment for the plaintiffs.<sup>8</sup> In rejecting defendants' motion to dismiss, this Court found that "there is 'no

basis for qualifying the level of First Amendment scrutiny' that must be applied to a public library's decision to restrict access to Internet publications," and that the Board's Policy must satisfy strict First Amendment scrutiny. *Mainstream Loudoun*, 2 F. Supp.2d at 795 (quoting *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997)). Accordingly, as this Court has ruled, it is the Board's obligation in this case to demonstrate that the Policy is necessary to serve a compelling governmental interest and that it is the least restrictive means of achieving the Board's stated objectives. *Id.* Defendant also must prove that the Policy "will in fact alleviate these [purported] harms in a direct and material way."<sup>9</sup> Here, the Board cannot make any of the required showings.

## 1. The Board Has Not Demonstrated a Compelling Need to Censor the Internet

The Board has asserted that the Policy is necessary to prevent library patrons from viewing materials that might be considered illegal for adults or minors and to prevent sexual harassment of library staff and patrons because of possible exposure to such materials. See Answer, ¶¶ 1, 9, 10. However, the government is barred from restricting speech based upon an "'undifferentiated fear or apprehension of disturbance, arising from such expression.'" *Pico*, 457 U.S. at 866 (quoting *Tinker v. Des Moines Sch. Indep. Community Dist.*, 393 U.S. 503, 508 (1969)). To fulfill its constitutional obligations, the Board must do more than simply describe a compelling interest that it aspires to serve. E.g., *Johnson v. County of Los Angeles Fire Dept.*, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994) ("simply alleging the need to avoid sexual harassment is not enough[;] . . . the defendants must show that the threat of disruption is actual, material and substantial") (internal quotation omitted). The fact that the government's asserted interests may be important "in the abstract" does not mean that the policy under review "will in fact advance those interests," *Turner Broad. Sys.*, 512 U.S. at 622, 664, and "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."<sup>10</sup>

Here, the Board never sought to find out whether such a restrictive Internet policy was needed to deal with the possibility of accessing "illegal" materials on the World Wide Web. Indeed, the only investigation of the experiences of other Virginia libraries conducted by the Library Director found that other libraries that offered Internet access had not had any significant problems with access to pornography, and that those libraries had not found it necessary to adopt restrictive policies like the one here.<sup>11</sup> One out of sixteen libraries surveyed reported a single complaint about material reportedly being accessed,<sup>12</sup> but that library informed Mr. Henderson that it solved the problem completely through the installation of "privacy screens" to prevent inadvertent viewing of Internet terminals by passersby.<sup>13</sup> Defendant never took into account this information collected by its Library Director. Quite to the contrary, the Internet policy grew increasingly more restrictive prior to its adoption on October 20, 1997, despite the fact that the Board failed to obtain any evidence of a real, as opposed to conjectural, threat of such problems in public libraries.

## 2. The Policy Does Not Use the Least Restrictive Means of Achieving the Board's Stated Objectives

Where, as here, the Policy is subject to strict scrutiny, it is defendant's burden to prove that the measure is the least restrictive means of serving its stated interests. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). As the Supreme Court stressed in *Reno*, the governmental interest in preventing access by children to sexually explicit materials "does not justify an unnecessarily broad suppression of speech addressed to adults." 117 S. Ct. at 2346. Additionally, the existence of content-neutral alternatives "undercut[s] significantly" any defense of a content-based restriction. *Boos v. Barry*, 485 U.S. 312, 329 (1988); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (choosing a more constitutionally suspect route when less restrictive avenues are available casts "considerable doubt" on the government's justifications for the statute).

14 Ex. 41, Ltrs. from Mainstream Loudoun to J. Nicholas dated 17 July 1997 and September 3 1997. Mainstream Loudoun urged then-Board Chairman Nicholas to consider providing filtering as an option for patrons to request, rather than forcing patrons to request unfiltered access which is akin to "looking up certain materials and handing them out only on request". *Id.* Mainstream Loudoun's optional filtering policy would have enabled adults to make the decision whether or not they wanted or needed whatever "protection" the blocking software might afford them knowing that it also would block valuable material. It also would have permitted parents and legal guardians to decide whether to permit their children to use such software taking into account family values, the overblocking and underblocking limitations of the software, and the maturity level of their children.

15 As the Supreme Court found in striking down the Communications Decency Act in *Reno*, the nature of the Internet is such that users affirmatively decide whether or not to visit a particular site and seldom will encounter even sexually explicit material by accident. 117 S. Ct. at 2336.

In this case, the Policy and its implementation clearly fail to meet this standard. With respect to the Board's two purported interests in preventing access to "illegal" speech or causing sexual harassment, the Policy is both over and underinclusive, see *infra* pp. 17-25, and may actually undermine these interests. See *infra* pp. 24-25. In addition, the Board failed to consider or rejected many less restrictive alternatives to achieve these interests, such as using privacy screens to shield passersby and positioning the Internet terminals in a manner that would minimize inadvertent display of Internet materials. Moreover, the Board chose to implement the most restrictive, rather than available less restrictive measures to cope with the anticipated problems of Internet access. To the extent defendant expected problems to arise from the bad conduct of patrons, existing policies in the Loudoun libraries already were sufficient to meet such concerns. Ex. 2, D. Henderson Dep. at 325-327. Defendant ignored the optional filtering proposal submitted to the Library Board by plaintiff Mainstream Loudoun prior to the Policy's enactment.<sup>14</sup> Other less restrictive alternatives ignored or rejected by defendant that would have achieved its stated concern of preventing harm to Internet users who might access the "harmful" Internet materials include acceptable use policies, go-lists or "white lists", educational approaches that would inform library patrons about the information on the Internet and would teach patrons how to use and search the Internet to find useful information and to avoid unwanted information.<sup>15</sup> Even defendant's own July Internet policy, which at least would have provided an option for adult users to be free of mandatory Internet filters, would have been less restrictive than the policy adopted by defendants.

## B. The Policy Imposes an Unconstitutional Prior Restraint on Speech

16 Not only is the library completely ignorant of which sites are on the list, Log-On Data will not even disclose the criteria used to select websites for exclusion. Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 101-102.

17 Ex. 27, L. Kropat Second Decl. at ¶ 4; Ex. 34, H. Petkovic Decl. at ¶ 10.

18 Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 37-38, 197-199; Ex. 18, C. Timmerman Dep. at 35-38. Ex. 2, D. Henderson Dep. at 554-557.

19 Ex. 9, E. Keller Dep. at 115 (no instructions or criteria of what is to be blocked under the policy). The "unblocking policy" was added by staff as an afterthought and is not required by the terms of the Policy. Ex. 2, D. Henderson Dep. at 554.

20 *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (any regulation must "conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line"). Any proposed restraint prior to judicial review can be imposed only for a specified brief period; expedited judicial review must be available; and the censor bears the burden of proof in court. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 996 (4th Cir. 1995) (en banc); see *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

21 E.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (scandalous and indecent publication); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (obscene musical production in municipal auditorium); *Blount v. Rizzi*, 400 U.S. 410 (1971) (obscene materials in the U.S. mail); *Vance*, 445 U.S. at 319-320 (obscene films); *Freedman v. Maryland*, 380 U.S. 51 (1965) (film); *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (seizure of items from adult book store); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (licensing of adult bookstore); 11126 Baltimore Blvd., Inc., 58 F.3d at 996 (same); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984) (informal suppression of *Hustler* magazine).

22 *Roaden v. Kentucky*, 413 U.S. 496, 504, 505 (1973). See *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211 (1964) ("[i]t is no answer to say that obscene books are contraband"); *Marcus v. Search Warrant*, 367 U.S. at 731-732 (seizure of allegedly obscene materials cannot be based on the conclusory assertions of a single official without scrutiny by a judge).

It is "deeply etched in our law" that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980).

Nevertheless, the Loudoun County Policy censors first, and asks questions later -- if at all. The X-Stop software installed on the library Internet access terminals blocks tens of thousands of websites on the World Wide Web. Ex. 13, D. Burt Dep. at 221-222

(estimating 80,000 sites). The library does not know which websites are denied to library patrons, because the master blocking list is proprietary to Log-On Data Corp.<sup>16</sup> Ex. 2, D. Henderson Dep. at 493-495; Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 493-495. Even if the library could gain access to the list at any given time, approximately 300 to 500 new blocked sites are added to the list each day, and there is no way for librarians in Loudoun County to determine what websites have been added to the "delete" list. Ex. 16 at 135.

Indeed, even sites that defendant has attempted to unblock have reappeared on the blocked site list.<sup>17</sup>

None of the blocked sites are submitted to any kind of legal test or due process before access is cut off to library patrons. Although the Log On Data Corp. at one time claimed that X-Stop blocked only material that is obscene under *Miller v. California*, 413 U.S. 15 (1973), it has since given up this pretense and now frankly admits that its blocking criteria are "not even close" to a legal standard.<sup>18</sup> As the defendant's expert witness on filtering software wrote when he revoked his endorsement of X-Stop, "software technicians" cannot apply "a legal standard". Ex. 13 at 229-230, Ex. 35, D. Burt e-mail dated Oct. 23, 1997. Defendant conducts no independent review of the blocked sites to determine whether any are inappropriately censored, Ex. 2 at 368-371; Ex. 9, E. Keller Dep. at 90-91; Ex. 18, C. Timmerman Dep. at 91, and for those few websites brought to defendant's attention, the library staff has unbounded discretion regarding the process to be accorded, the amount of time to take to make a decision, and ultimately, whether or not to unblock a website.<sup>19</sup> This is the very essence of a prior restraint.

It is no answer to suggest that the Policy, at least in some of its applications, purports to regulate "illegal" speech. Under the First and Fourteenth Amendments, the Board "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."<sup>20</sup> Even allegations that material constitutes child pornography are insufficient to overcome the requirement of "essential procedural safeguard[s]," such as a prior adversarial hearing. *Video Software Dealers Ass'n v. City of Oklahoma City*, 6 F. Supp.2d 1292 (W.D. Okla. 1997) (enjoining seizure of film "The Tin Drum" from the Oklahoma County Metropolitan Library, local video stores and from an individual's home). In this regard, it is bedrock law that the government cannot censor speech on the assumption it is obscene and only subsequently permit its distribution.<sup>21</sup> There are no decisions to the contrary, and the Supreme Court has described any process that leaves decisions to prevent speech to the "whim" of government officials as a "constitutional impossibility."<sup>22</sup>

The procedure used in Loudoun County is even more infirm than the one invalidated in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). In that case, a police officer based his decision to seize allegedly obscene films based on their titles, perusal of the billboard in front of the theatre, and on his personal observation of the films. Here, the decision to block websites is based on their URLs, their descriptions, and by a quick look at their contents. See Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 49-51. Although in substance the process is much the same, the review in *Lee Art Theatre* at least was conducted by a police officer who was trained to enforce the law in that jurisdiction. Under the Loudoun County Policy the review is conducted by unknown employees of a California software company, and the list of suppressed publications is not even made known to library officials. Ex. 2, D. Henderson Dep. at 493-495; Ex. 16 at 11-15; Such a process cannot possibly be constitutional.

### C. Automating Censorship by Mandating the Use of Inherently Imprecise Filtering Software is Plainly Unconstitutional

The use of filtering software to implement the Policy magnifies its constitutional defects in various ways. Filters are inherently imprecise and therefore block websites that contain protected speech while failing to block other websites that arguably are

"pornographic." Far worse from constitutional perspective is the fact that defendant cedes control over the process to a private software firm that hides the results of its wholesale blacklist from the citizens of Loudoun County. There simply is no precedent to support such a haphazard and standardless process.

23 Ex. 23, J. Burton Dep. at 42-50; Ex. 21, Transcript of Oct. 20, 1997 Board Meeting (statements of Board Members John Nicholas and Richard Black).

24 Ex. 2, D. Henderson Dep. at 546-547, 554; Ex. 9, E. Keller Dep. at 44-45; 129-131.

25 Ex. 13, D. Burt Dep. at 223-225 (estimating that 8 percent of sites containing protected speech were blocked by X-Stop in his test).

26 Ex. 20, C. Timmerman Decl. ¶ 6; Defs'. Reply to Pls. Opp'n to Mot. to Dismiss at 4 n.4 ("filtering software is only an initial screen used by the Library as a tool to attain the ends set out in the Policy itself").

27 Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 39, 197-198 ("We never really applied any legal thing to the word 'obscene.' It was just another word like 'pornography.'"), 159-161 (X-Stop cannot apply the standards of the Virginia Harmful to Juveniles law or Title VII of the Civil Rights Act).

28 Mr. Burt found that CyberPatrol blocked websites containing protected speech 40 percent of the time, I-Gear blocked protected sites 42 percent of the time and Surfwatch blocked protected sites 54 percent of the time, yet he testified that such overblocking was acceptable in his opinion. Ex. 13, D. Burt Dep. at 203-227. His estimates are far too low, however, since he also testified that it was acceptable to block non-pornographic websites if they were linked to what he believed to be "pornographic" websites. Id. at 265-266.

29 See *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 218 n.8 (3d Cir. 1988) ("According to [plaintiff] the denial of the zoning exemption was based solely on the fact that some of [plaintiff's] movies were X-rated[,] however "[if] a restriction based on obscenity is to be imposed, it must be preceded by an examination of the content of that material."); see also *Brown v. Pornography Comm'n*, 620 F. Supp 1199, 1217 (E.D. Pa. 1985) ("The assignment of an X-rating to a particular videocassette by the Motion Picture Association of America does not necessarily mean that it is obscene when measured by the Miller standard"); *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983) ("it is well-established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status"); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970) ("the judgment as to what is protected or unprotected expression with regard to minors is not even exercised by the City of Kenosha. Rather, the judgment is reached by the Motion Picture Association using standards and procedures, if any, known only to them and unknown to both the defendants and this court").

All parties agree that the X-Stop filtering software blocks protected speech in the Loudoun County libraries. Board members,<sup>23</sup> the library staff,<sup>24</sup> and even defendant's expert witness<sup>25</sup> agree that X-Stop blocks a significant number of websites that have "nothing to do with pornography." Ex. 23, J. Burton Dep. at 42-43. The Library's own evaluation of the X-Stop software found 67% of the blocked websites that they checked to constitute "protected speech" including websites for the Society of Friends, the American Association of University Women, the Heritage Foundation, and a beanie babies web page. Ex. 22, Library's List of Blocked Sites. The experience of plaintiffs and others who patronize the library further confirms the significant amount of overblocking from the use of filtering software. Ex. 19, L. Kropat Decl. ¶ 5; Ex. 27, L. Kropat Second

Decl. ¶¶ 4, 6; Ex. 31, K. Kern-Levine Decl. ¶ 3; Ex. 29, J. White Decl. ¶ 6; Ex. 32, J. Coughlin Decl. ¶ 7; Ex. 28, M. DuChateau Decl. ¶¶ 4-5; Ex. 30, H. Taylor Decl. ¶¶ 3-4; Ex. 33, A. Curley Decl. ¶ 4; Ex. 34, H. Petkovic Decl. ¶¶ 9-10.

The Policy acknowledges that filtering software is far from precise, but defendant claims that it is good enough to use as an "initial screen" and that X-Stop is better than other products on the market. Defendant's faith in Log-On Data Corp. notwithstanding, the Policy's constitutional flaws transcend X-Stop's imperfections or any other product's relative demerits. X-Stop may well be, as defendant puts it, "a tool of administrative convenience"<sup>26</sup> for restricting speech, but it inherently fails to provide the "sensitive tools" for separating protected from unprotected speech that the Constitution requires. *Speiser v. Randall*, 357 U.S. 513, 525 (1957). As the CEO of Log-On Data Corporation frankly acknowledged, X-Stop does not even "come close" to implementing the Miller test or any other judicial standard.<sup>27</sup> Even the Board's expert witness found evidence of significant overblocking by X-Stop of material that he considered to be protected speech, and more egregious overblocking by other software products.<sup>28</sup> The most charitable thing that can be said about such software is that its performance is erratic.

Whether or not the defendant considers X-Stop to be the "best" product is immaterial where, as here, it merely implements the censorship decisions of a private company and does not even inform defendant which websites are blocked. In this regard, it is well established that local governments cannot constitutionally adopt and enforce private ratings systems to restrict speech. In *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970), for example, the Fourth Circuit held that the First Amendment was violated where a sheriff undertook censorship activity on the belief that "obscene movies are without constitutional protection" and that he could determine whether a film was obscene in the first instance by "reliance upon ratings of the motion picture industry." As the district court framed the issue, a local authority cannot restrict speech based on ratings "devised in Hollywood or New York for material which [he] had never seen". *Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232, 1236 (W.D.N.C. 1969) (emphasis in original).<sup>29</sup>

This is precisely the situation here. Defendant has granted to a private software company the ability to determine which Internet sites are presumptively "legal" for public access in the Loudoun County libraries. The decision to block websites is determined in the first instance by privately-developed criteria that are not disclosed to defendant, and it is implemented by employees with no legal training, and who are primarily computer programmers and technicians. Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 33-36, 51; see id. at 68-69 (describing use of "in-house" criteria similar to the MPAA film ratings system). Cf., Ex. 13, D. Burt Dep. at 229-230; Ex. 36, D. Burt e-mail dated Oct. 23, 1997 ("[o]bscenity is a legal standard that must be administered by a judge, not a software technician"); Ex. 24, Memo from Jim Burton, dated Nov. 20, 1997 (blocking software is controlled by "unnamed individuals with unknown political, social, cultural, and moral beliefs in a company in California"). For the same reasons as articulated by the Fourth Circuit in *Huskey*, defendant's reliance on a private scheme of censorship is invalid.

D. On its Face the Policy Imposes Overly Broad Restrictions on Access to Information

## 1. The Policy Impermissibly Reduces Adult Internet Access to Less Than What is Fit for Children

In addition to the constitutional defects described above, the Policy is plainly unconstitutional as a matter of law because it precludes adults' access to protected speech. The Policy requires that every public Internet access terminal installed in the Loudoun County Library system utilize filtering software designed to "block material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)". Ex. 1, Policy, Internet Services ¶ 2(b). Patrons, regardless of their age, "will not be permitted" to access any material considered to violate this prohibition, and if they do so are subject to being interrupted by library staff, ejected from the library and threatened with criminal punishment. Id. ¶ 4. The Board has admitted that "the policy adopted and implemented by the defendant uses the same standards and procedures for adults as for non-adults." Answer ¶ 1(c); see also Ex. 10, Def's. Resp. to Pls. First Req. for Admis. No. 35 ("[i]f the Library Director considers a particular website to violate . . . Va. Code § 18.2-390, et. seq. the website should be blocked under the policy for adult as well as juvenile patrons").

30 117 S. Ct. at 2346; see *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 758; *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Bolger*, 463 U.S. at 73.

31 *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 389 (1988) (citations omitted); *Commonwealth v. American Booksellers Ass'n, Inc.*, 372 S.E.2d 618, 622-623 (Va. 1988); see also *American Booksellers v. Webb*, 919 F.2d 1493, 1495 n.1 (11th Cir. 1990) (ban on display of sexually explicit books "implicates not only the right of adults to have access to material protected by the First Amendment, but also the interests of authors, publishers, booksellers, and others").

On its face, the Policy censors speech protected by the First Amendment. For more than four decades it has been the law of the land that the government may not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Reno*, the Supreme Court recently reaffirmed the long line of Court precedent holding that the goal of protecting children cannot justify suppression of constitutionally protected speech for adults by striking down restrictions on "indecent" and "patently offensive" material on the Internet.<sup>30</sup> "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," and this is so "regardless of the strength of the government's interest" in protecting children. *Bolger*, 463 U.S. at 74-75. Contrary to this settled law,<sup>31</sup> defendant's Policy purports to restrict Internet access by adults and children alike based on the Virginia "Harm to Juveniles" statute. As this court noted in denying defendant's motion to dismiss, "[t]he plaintiffs in this case are adults rather than children" who "are entitled to receive categories of speech . . . which may be inappropriate for children." *Mainstream Loudoun*, 2 F. Supp.2d at 795. Accordingly, the Policy is plainly unconstitutional.

## 2. The Policy's Purpose to Block Websites Characterized as "Sexual Harassment" Restricts Protected Speech

32 995 F. Supp. at 640; see *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993). Numerous courts have reached similar conclusions in

cases far more related to a context of employment discrimination than the Policy here, which focuses on material displayed by patrons rather than library supervisors or other employees. See *Mauro v. Arpaio*, 147 F.3d 1137 (9th Cir. 1998) (restriction on sexually explicit materials to prevent sexual harassment is overbroad); *Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (en banc); *Cohen v. San Bernadino Valley College*, 92 F.3d 968, 971-972 (9th Cir. 1996), cert. denied, 117 S. Ct. 1290 (1997); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-597 (5th Cir. 1995) ("when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 326 (7th Cir. 1985) (ordinance outlawing "pornography" on claim that it represents "subordination of women" invalidated on First Amendment grounds), aff'd, 475 U.S. 1001 (1986); *Johnson v. County of Los Angeles Fire Dept.*, 865 F. Supp. at 1438 (sexual harassment policy banning Playboy magazine in the workplace "poses a particularly severe restriction on plaintiff's First Amendment rights"); *Silva v. University of N.H.*, 888 F. Supp. 293, 314 (D. N.H. 1994) (university sexual harassment policy found to violate First Amendment); *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) ("Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment").

The Policy is also unconstitutional because it seeks to ban from library Internet access terminals any information that would purportedly violate Title VII of the Civil Rights Act. This restriction, to whatever extent it can be understood and implemented, is not narrowly tailored because it is both over and underinclusive. Just as the law invalidated in *Urofsky v. Allen*, 995 F. Supp. 634, 640 (E.D. Va. 1998) (Brinkema, J.) was found to be underinclusive to the extent it did not reach "material which is blatantly hostile and derogatory toward women, but lacks sexually explicit content," the Loudoun County policy does not seek to block websites unless they are characterized as "pornography" no matter how hostile or derogatory they may be. See Ex. 2, D. Henderson Dep. at 335-340. And, like the invalid law in *Urofsky*, the Loudoun Policy "imposes restrictions on speech beyond what is necessary to prevent sexual harassment or a sexually hostile work environment."<sup>32</sup> As the Library Director testified, Loudoun County has ample ability to cope with actual sexual harassment when it occurs in the library without any need for censorship. Ex. 2 at 325-327.

Ironically, as this Court recognized, the Policy itself may create a "hostile work environment" (as that concept is employed in the Policy) because it requires Internet terminals to be placed "in full view" of library staff and requires library staff members to monitor Internet usage to identify and stop patrons from using "prohibited" materials, and to rule on unblocking requests. See Tr. of Hearing on Mot. to Dismiss, Feb. 27, 1998 at 45-46. Moreover, library staff members were required to devote hundreds of hours to testing blocking software, and all have access to unfiltered Internet terminals. Ex. 9, E. Keller Dep. at 99-101; Ex. 18, C. Timmerman Dep. at 102. If defendant were genuinely concerned about what it describes as the overwhelming presence of "pornography" online, the Board would not have had staff test the software and would not permit unfiltered terminals at all. See Tr. of Hrg on Mot. to Dismiss at 47. The Board's inconsistent position, coupled with its failure to compile any record regarding "sexual harassment" reveals that this aspect of the Policy is a mere pretext for censorship and utterly fails to advance the Board's asserted interest in preventing sexual harassment. See Ex. 44, Memo from J. Burton to Board of Supervisors, Oct. 22, 1997.

## E. The Policy is Vague and Vests Unbridled and Arbitrary Discretion on the Library Staff to Restrict Speech in Violation of the First Amendment

### 1. The Policy Lacks Substantive and Procedural Standards

33 *Reno*, 117 S. Ct. at 2343-44; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961); see *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) ("general test of vagueness applies with particular force in review of laws dealing with speech"); *Southeastern Promotions, Ltd.*, 420 U.S. at 553 (condemning denial of access to a municipal theater where "the exercise of such authority was not bounded by precise and clear standards"); *Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676, 688 (1968) (local film classification system with vague standard condemned as creating "a roving commission")(internal quotation omitted).

34 See *Reno*, 117 S. Ct. at 2345; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (facial challenge to government's unbridled discretion to regulate adult businesses); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

The Policy also is unconstitutional because it employs vague, undefined terms to restrict access to websites and it gives the library staff unbounded discretion to enforce its mandates. Although it refers to certain legal concepts (e.g., obscenity, child pornography) and "applicable Virginia statutes and legal precedents" regarding material deemed Harmful to Juveniles, Ex. 1, Internet Services, ¶ 2, the Policy is also riddled with vague and undefined terms, such as "mere pornography," "soft core pornography," "hard core pornography," and material that will cause "sexual harassment." *Id.* Defendant admits that the library staff is provided no guidance, other than the bare terms of the Policy, as to the meaning of these terms. Ex. 12, Def's. Answer to Pls. First Interrog. No. 3 ("there is no information beyond the Policy itself that constitutes the 'criteria' used for unblocking specific sites"); Ex. 2, D. Henderson Dep. at 368-371, 376-381; Ex. 23, J. Burton Dep. at 16-18. It is not surprising, therefore, that both Board members and library staff members have stated that they do not understand the Policy's scope, and that its terms are "very subjective." Ex. 2 at 332-344, 547; Ex. 3, J. Czaplowski Dep. at 33-36; Ex. 9, E. Keller Dep. at 102-105; 109-115; Ex. 18, C. Timmerman Dep. at 89-91; Ex. 23 at 17-19. On its face and as implemented, the Policy violates the basic First Amendment requirement that restrictions on speech be well-defined and unambiguous.<sup>33</sup> Indeed, the most stringent review for vagueness applies to regulations that restrict speech in advance -- as does this Policy.

The absence of any clear guidance highlights a central vice of a vague policy -- the possibility of discriminatory enforcement.<sup>34</sup> As the late Justice William O. Douglas warned, "[h]ighly subjective inquiries such as this do not lend themselves to a workable or predictable rule of law" and provide a vehicle "for the suppression of any unpopular tract." *Kois v. Wisconsin*, 408 U.S. 229, 232-33 (1972) (Douglas, J., concurring). The Loudoun County Internet Policy "places unbridled discretion in the hands of state administrators" to decide the acceptability of accessing what the administrators characterize as sexually explicit material, and to do so in "the absence of clear criteria." *Urofsky*, 995 F. Supp. at 641-642. As this Court found in *Urofsky*, "such grants of

unfettered discretion can be expected to invite arbitrary enforcement and to chill the free exercise of speech rights." *Id.* Indeed, such effects may be the very purpose of a vague enactment. In this regard, the Internet Policy provides a ready mechanism for such suppression by putting patrons on notice that they must use Internet terminals under the watchful eyes of library staff members and subjecting them to the undefined terms of the Policy. The evident vagueness of these terms coupled with the threat to call the police on "violators" guarantees that patrons will "steer far wider of the unlawful zone", *Speiser v. Randall*, 357 U.S. 513, 526 (1958) and restrict their expression "to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. at 360, 372 (1964).

## 2. The Policy is Designed to Inhibit Library Patrons' Internet Usage

35 Patrons are put on notice by the repetitive warnings about Internet content and the strict sign-up procedures. Ex. 11, Consent Form. Violators are subject to prosecution for trespass, a criminal offense in Virginia. See Va. Code § 18.2-119 (Class 1 misdemeanor). Criminal enforcement of a speech restriction "poses greater First Amendment concerns than those implicated by ... civil regulation." *Reno*, 117 S. Ct. at 2345. The purpose and effect of the Policy is to inhibit library patrons' usage of the Internet access terminals by creating an atmosphere of surveillance. In sharp contrast to the library's overall policies designed to protect freedom of expression and patron confidentiality, see Exs. 5, 6 and 7, the Internet Policy puts patrons on notice that their usage of the Internet will be monitored, and that they could be arrested if they try to access the "wrong" websites.<sup>35</sup> The Library Director has even been in contact with Loudoun County police authorities, alerting them that they may be called upon to enforce the Policy. Ex. 2, D. Henderson Dep. at 435-437; Ex. 8, letters to police. In implementing the Policy, the Library Director has testified that his understanding is that the Policy is intended to "discourage" library patrons from accessing disfavored sites, although which sites are covered by the Policy is impossible to say. Ex. 2 at 344-346; 581-582. Speaking of the Policy from the users' perspective, Mr. Henderson said that library patrons "would feel that they're being watched." *Id.* at 582. Moreover, defendant's expert has conceded that patrons likely would never visit sensitive but legal sites out of fear and embarrassment in a situation where library staff were looking over the patron's shoulder, and might feel intimidated. Ex. 13 at 279.

36 Ex. 34, H. Petkovic Decl. at ¶¶ 4, 6 ("Personally, I felt as if I was being treated as a five-year-old child"); see also Ex. 32, J. Coughlin Decl. at ¶ 4; Ex. 27, L. Kropat Second Decl. at ¶ 7; Ex. 33, A. Curley Decl. at ¶ 6.

37 Ironically, defendant has taken the position in this litigation that "[l]ibrary patrons have a right of privacy as to the materials they read that is protected by the Ninth Amendment." Def's. Opp'n. to Mot. to Compel at 2.

Not surprisingly, library patrons have had the same perceptions about the Policy. According to Heather Petkovic, whose access to both the MotherNet and Society of Friends websites was blocked in March, 1998, "[u]nlike my experiences in other libraries, the Loudoun County Internet Policy made me feel that I was a suspect of some kind, and that my choice of websites would be actively monitored."<sup>36</sup> Ms. Petkovic added that "[b]ecause any website I accessed would be 'shared' with any patrons or staff members who cared to look, I would never attempt to obtain any sensitive or private information such as health-related issues on the library Internet terminals." Ex. 34, ¶ 6. Mainstream

Loudoun member Judy Coughlin, who has been diagnosed with breast cancer, had the same reaction to the Policy's intrusive procedures. Ex. 31, ¶ 6. The Policy was designed to send a message that Big Brother is watching what users read on the library Internet terminals, and that those who risk violating its vague terms will be dealt with harshly.<sup>37</sup> That message has been sent and received.

#### F. The Unblocking Policy Reinforces the Policy's Chilling Effect

Acknowledging that filtering software blocks access to speech that is protected by the Constitution, the Library Director concluded that it was a "no brainer" that there should be an "unblocking policy," by which library patrons may request that particular URLs may be unblocked. Ex. 2, D. Henderson Dep. at 554. Defendant claims that the filtering software is merely an initial screen, and that access to all constitutionally protected sites is ultimately assured through the unblocking procedure. Answer, ¶ 10(c); Ex. 20, C. Timmerman Decl. ¶ 6. However, as a matter of law, this Court has already recognized that the unblocking procedure "does not in any way undercut plaintiffs' First Amendment claim." *Mainstream Loudoun*, 2 F. Supp. 2d at 797. If anything, the record reveals that the unblocking procedure magnifies the Policy's constitutional defects.

38 Ex. 2 at 368-371; Ex. 9, E. Keller Dep. at 83-91; 120-121. The term "inappropriate blocks" must be used advisedly. Defendant has no way of knowing whether any of the sites blocked by X-Stop necessarily meet the terms of the Policy. Additionally, those responsible for administering the Policy have consistently described it to be "very subjective" and difficult to understand, Ex. 2 at 332-344; 597; Ex. 9 at 102-105; Ex. 18, C. Timmerman Dep. at 89-90, and "there is no information beyond the Policy itself that constitutes the 'criteria' used for unblocking specific sites." Ex. 12, Def's. Answer to Pls. First Interrog. No. 3.

The list of X-Stop's blocked sites is a trade secret that is not disclosed even to the defendant. Ex. 16, M. Bradshaw Dep. (Feb. 2, 1998) at 11-15; see Ex. 2 at 493-495. Even though defendant on its own found dozens of blocked websites that could not even remotely be classified as "pornography" the only time it conducted a systematic review, it has no ongoing method for finding and removing inappropriate blocks.<sup>38</sup> Other than the "unblocking policy," defendant generally discovers inappropriately blocked sites when it reads about them in the press, Ex. 2 at 368-371, or when it gets sued. *id.* see Ex. 18, C. Timmerman Dep. at 74-75; Ex. 45, Def's. Answer to Pl.-Intervenors' Second Interrog. (admitting the need to unblock websites of certain plaintiff-intervenors). Yet even if it had some system to identify such sites, it would immediately be overwhelmed by the hundreds of newly blocked sites added each day to the database. Moreover, defendant has no way of knowing whether a site that has once been unblocked will reappear on the blocked list. In fact, such re-blocking has occurred in the Loudoun County libraries. Ex. 18 at 66, 74, 78; see, Ex. 34, H. Petkovic Decl. ¶¶ 10-11 (Quaker website found blocked again in March 1998); Ex. 27, L. Kropat Second Decl. ¶ 4.

In practice, the unblocking policy does not meet patrons' need for access to information. After access to the AAUW website was blocked by X-Stop, plaintiff Mary DuChateau asked if the library staff could unblock the obviously non-pornographic site but was told she must follow the established procedure. She filled out an unblocking request form, including her telephone number and library bar code number, but was never notified of

the library's decision. Ex. 28 at ¶ 8. The Policy does not permit immediate unblocking, no matter how absurd the denial of access, and patrons do not always have the time to await the library's decision. Heather Petkovic was denied access to the websites of MotherNet and the Society of Friends as she attempted to conduct research before a job interview. Ex. 34 at ¶¶ 8-11. Upon asking for assistance, she was simply told "you aren't allowed to access that website," and because of the shortness of time before the interview, the unblocking policy would have provided "no help" to her. Id. at ¶¶ 11-12.

Yet even if the unblocking policy worked perfectly it does not cure the Policy's basic constitutional infirmities. The applicable law in this regard is quite clear: "[t]he guarantee of freedom of speech afforded by the First Amendment is abridged whenever the government makes enjoyment of protected speech contingent upon obtaining permission from government officials to engage in its exercise under circumstances that permit government officials unfettered discretion to grant or deny the permission." 11126 Baltimore Blvd., Inc., 58 F.3d at 996 . The unblocking policy is plainly defective under this standard. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990). Thus, far from curing the Policy's defects, this Court has already found that the unblocking procedure itself has significant constitutional problems in that it forces adult library patrons to petition the government for access to protected speech. *Mainstream Loudoun*, 2 F. Supp.2d at 797. Indeed, the Court found that "the Loudoun County unblocking policy appears more chilling than the restriction at issue in *Lamont*, because it grants library staff standardless discretion to refuse access to protected speech." Id.; see *Urofsky*, 995 F. Supp. at 641-642.

## Conclusion

Without demonstrating a compelling interest or seriously considering less restrictive alternatives, defendant asks this Court to approve an Internet access Policy characterized by overly broad and vague restrictions on speech. The Board would dispense with the most fundamental First Amendment doctrines against prior restraint, excessive administrative discretion, and overbreadth out of an undifferentiated fear that Internet access will cause problems and an uninformed conviction that nothing less than censorship will suffice to combat the supposed harms. But as novelist Virginia Woolf wrote almost seven decades ago, "[t]o admit authorities into our libraries and let them tell us how to read, what to read, what value to place upon what we read, is to destroy the spirit of freedom which is the breath of those sanctuaries." Virginia Woolf, "How Should One Read a Book?" *The Common Reader* (2d series 1932). For the foregoing reasons, plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,

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Robert Corn-Revere  
Ronald J. Wiltsie (VSB #30389)  
Mary Ellen Callahan  
HOGAN & HARTSON L.L.P.

555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5600

Elliot M. Mincberg  
Lawrence S. Ottinger  
PEOPLE FOR THE AMERICAN WAY FOUNDATION  
2000 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 467-4999

Counsel for Plaintiffs

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