

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

MAINSTREAM LOUDOUN, <u>et al.</u>)	
)	
Plaintiffs)	
v.)	Case No. CA-97-2049-A
)	
BOARD OF TRUSTEES OF THE)	
LOUDOUN COUNTY LIBRARY, <u>et al.</u>)	
)	
Defendants.)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, Board of Trustees of the Loudoun County Library ("Loudoun County"), through counsel, moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for the entry of summary judgment, on the grounds that there is no genuine issue of material fact in dispute and the Defendant is entitled to judgment as a matter of law.

INTRODUCTORY STATEMENT

Intervenor-Plaintiffs are speakers on the Internet who invoke the First Amendment in an effort to control the decisions of a public library concerning which Internet publications will be made a part of its resource collection. Specifically, the Intervenor-Plaintiffs have brought suit under 42 U.S.C. § 1983 requesting that this Court enjoin and declare invalid the Loudoun County Internet Policy. While these plaintiffs were granted permission to intervene by this Court on February 24, 1998, that prior decision did not address the issues presented by the Intervenor's separate Complaint.

By this motion, Loudoun County challenges the standing of the Intervenor-Plaintiffs to pursue this litigation. The Motion also addresses First Amendment and statutory immunity arguments similar to the arguments raised in Defendant's Motion to Dismiss the original Complaint (filed by Mainstream Loudoun and various library patrons) and rejected in this Court's April 7 Memorandum Opinion. Counsel recognizes that the April Opinion and Order might be considered the "law of the case," but the arguments raised in that earlier Motion are also proper for presentation at this time, after discovery has concluded, in the context of summary judgment proceedings.^{1/} Accordingly, while this memorandum will primarily address the Intervenor-Plaintiffs' lack of standing, it will also address the merits of both the original Complaint and the Intervenor's Complaint.

STATEMENT OF UNCONTESTED FACTS

The Loudoun County Library Internet Policy is intended to impede patrons' Internet access to material that constitutes "child pornography and obscene material (hard core pornography)" and "material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." Intervenor-Plaintiffs' Complaint at ¶ 4; see *also* copy of Policy (attached as Exhibit A). Material on the Internet that meets those legal definitions is not protected by the First Amendment. Under the Policy, library patrons may use library computer terminals, equipped with the Library Edition of the X-Stop filtering system, to access the World Wide Web over the Internet. Comp. at ¶ 5. The filtering software operates to prevent patrons from accessing certain web sites that have previously been viewed by humans and that may contain obscene or pornographic materials. However, if a patron is denied access to a particular web site that the patron believes was improperly blocked, the patron may request access to the site by submitting a completed "Request to Unblock Website" form to the library staff. See Defendant's Answers to Plaintiffs' First Interrogatories No.10 (attached as Exhibit B). Since the Policy was implemented, all patron requests have been approved by library staff. See Defendant's Answers to Plaintiffs' First Interrogatories No.8.

The Intervenor-Plaintiffs are various individuals and entities that have been solicited by the American Civil Liberties Union for purposes of this litigation. The Intervenor-Plaintiffs are: The Safer Sex Page, a web site containing safe sex information (Filkins Deposition Transcript attached as Exhibit C); Banned Books Online, a web site offering full-texts of banned books (Ockerbloom Deposition Transcript attached as Exhibit D); the American Association of University Women Maryland, a group dedicated to women's issues (Hapchuk Deposition Transcript attached as Exhibit E); Rob Morse, a San Francisco Examiner columnist (Morse Deposition Transcript attached as Exhibit F); Books for Gay and Lesbian Teens/Youth Page, a web site listing books of interest to gay and lesbian youth (Meyers Deposition Transcript attached as Exhibit G); Sergio Arau, an artist (Arau Deposition Transcript attached as Exhibit H); Renaissance Transgender Association, a corporation which serves transgendered individuals (Gardner Deposition Transcript attached as Exhibit I); and The Ethical Spectacle, a corporation that explores legal, political, and ethical issues (Wallace Deposition Transcript attached as Exhibit J).

Comp. at ¶¶ 17-24. According to the Complaint, the Internet Policy and use of filtering software violates the First Amendment "because it restricts intervenors . . . from communicating constitutionally protected speech to patrons in the Loudoun County Library." Comp. at ¶ 163.^{2/}

It is plain that these "Internet speakers" lack standing to bring this constitutional challenge. Specifically, none of the Internet materials published by or on behalf of the Intervenor-Plaintiffs contains or has ever contained any material that would even be considered a candidate for blocking under the Internet Policy. See Defendant's Answers to Plaintiffs' First Interrogatories No. 10; see also Defendant's Answers to Plaintiff-Intervenors' Second Interrogatories (attached as Exhibit K). Thus, while the Intervenor-Plaintiffs contend that they have been injured by the Policy, five of the eight Intervenor-Plaintiffs have never had their materials blocked by the Policy at any time. *Id.* With regard to the three other Intervenor-Plaintiffs, their web site materials were inadvertently blocked prior to the plaintiffs' February 24th intervention into this case. *Id.* On February 6, 1998, after reviewing these three web sites and recognizing that the sites did not meet the Library's blocking criteria, the Library had the inadvertent blocks removed. *Id.*

Moreover, five of the Intervenor-Plaintiffs lack standing for additional, separate reasons. The Safer Sex Page, Banned Books Online, and Books for Gay and Lesbian Teens/Youth Page are sole personal creations of three individuals and exist as merely virtual and not legal (or incorporated) entities. See Filkins Dep. at p.6, l. 16 - p.9, l. 19; Meyers Dep. at p.4, l. 20 - p.5., l. 4, p.29, ll. 11-15; and Ockerbloom Dep. at p.,21, ll. 14-19. Absent any kind of legal status, web pages are not jural persons with capacity to sue or be sued. Not only is "Banned Books Online" not a jural entity, but the Complaint also contains no allegation that access to that webpage has ever been blocked by the Loudoun Library system. Comp. at ¶¶ 110-112.

Intervenor-Plaintiff Sergio Arau also lacks standing because there is no admissible evidence in the record that any of his material has ever been published over the Internet. Arau Dep. at p.17, l. 20 - p.18, l. 12, p.62, l. 15 - p.63, l. 16. Finally, Intervenor-Plaintiff Robert Morse lacks standing because, as a columnist for the San Francisco Examiner, all of the intellectual property rights to his columns have been assigned to the newspaper. Morse Dep. at p.5, l. 19 - p.6, l. 2 Morse Dep. at p.6, ll. 3-20. Because Mr. Morse has no legal interest in the publication of his columns on the Internet, he cannot complain about any "alleged" blocking of those columns.

The Intervenor-Plaintiffs themselves have testified that they do not now, nor do they ever intend to, publish pornographic material over the Internet.^{3/} Since this Policy was implemented, five Intervenor-Plaintiffs have suffered no impediment in "communicating constitutionally protected speech to patrons in the Loudoun County Library." Since February 6th, the other three Intervenor-Plaintiffs have suffered no impediment in "communicating constitutionally protected speech" to these patrons. Because the Intervenor-Plaintiffs have either not suffered injury or are not now suffering injury, they lack standing to bring suit.

This motion for summary judgment should be granted for any one of three reasons: (1) none of the Intervenor-Plaintiffs has standing to pursue this litigation; (2) the First Amendment does not limit the decisions of a public library regarding whether to provide certain information within its resource collection; and (3) a public library is entitled to absolute immunity from civil liability for its use of Internet filtering software under the clear and unambiguous provisions of 47 U.S.C. § 230(c)(2)(a).

I. None of the Intervenor-Plaintiffs Has Standing.

Because the Intervenor-Plaintiffs have suffered no "concrete injury in fact" or no longer suffer any "injury that could be redressed if the requested relief is granted," the Intervenor-Plaintiffs cannot meet their burden of establishing an actual case or controversy under Article III of the U.S. Constitution. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A. None of the Websites authored by the Intervenor-Plaintiffs is blocked by the Library Policy and there is no reason to believe that any of their Websites would ever be blocked.

None of the materials published by or on behalf of any of the Intervenor-Plaintiffs has been blocked in the Loudoun County Library System at any time since their intervention. See Defendant's Answers to Plaintiffs' First Interrogatories No. 10; Defendant's Answers to Plaintiff-Intervenors' Second Interrogatories. None of those materials contains or has ever contained any material that would even be considered a candidate for blocking under the Defendant's Internet Policy. *Id.* There is no reason to believe that any of the material that will be published on the WorldWideWeb in the future by any of these parties will contain material that could be considered a candidate for blocking under the Internet Policy. *Id.* None of the Intervenor-Plaintiffs ever complained to the Loudoun County Library about any alleged blocking of their material.^{4/}

On February 2, 1998, an employee of the ACLU visited a branch of the Loudoun Library and allegedly attempted to retrieve webpages associated with the Intervenor-Plaintiffs.^{5/} Aside from that inadmissible deposition testimony, there is no evidence that any of the sites belonging to five of the Intervenors were blocked by the Defendant. None of the Intervenor-Plaintiffs has any personal knowledge of any blocking of their WorldWideWeb material by the Defendant.^{6/}

On February 6, 1998, the Director of Library Services and a Library staff member, using a terminal with the same filter as that used in the Library branches, attempted to access each of the Intervenor-Plaintiffs' web sites, as those sites were identified on the ACLU web site. See Defendant's Answer to Plaintiff-Intervenors' Second Interrogatory. Only the web sites for the Safer Sex Page, Books for Gay and Lesbians Teens Youth Page, and the Renaissance Transgender Association were blocked. *Id.* Upon reviewing the three blocked sites, it was readily determined that the sites should not have been blocked under the Library's Internet Policy. Accordingly a memo was sent to all branches directing them to ensure that the improper blocks were removed. *Id.*

There is no evidence that any of the WorldWideWeb sites associated with the Intervenor-Plaintiffs has ever been blocked in any of the Loudoun Library branches since February 6, 1998 -- more than two weeks before the plaintiffs intervened in this case. Moreover, each of the Intervenors testified at deposition that none of the Intervenor-Plaintiffs no publishes, or ever intends to publish, pornographic material on the WorldWideWeb.⁷¹ There is no reason whatsoever to doubt that testimony. The Defendant has absolutely no reason to expect that any of these web sites will ever be candidates for blocking under the Internet Policy. By manually including the URLs for these sites in the X-Stop list of sites that should not be blocked, the Defendant has ensured that no future automatic updates of the blocked site list by X-Stop will result in re-blocking of these sites. See Defendant's Answer to Plaintiff-Intervenors' Second Interrogatory.

In order to meet the standing requirements of Article III, the Intervenor-Plaintiffs must allege "a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Thus, a case must be dismissed if the plaintiff cannot establish that he "personally would benefit in a tangible way from the court's intervention." *Steel Company v. Citizens for a Better Environment*, ___ U.S. ___, 118 S.Ct. 1003, 1017 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)); see *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 45-46 (1976) (plaintiff must establish "redressability" a "likelihood that the requested relief will redress the alleged injury"). Given the absence of any blocking of the Intervenor-Plaintiffs' web sites at the time of plaintiffs' intervention, the absence of any blocking of their web sites since their intervention, and the absence of any reasonable belief that any of their sites will be blocked in the future, none of the Intervenor-Plaintiffs has suffered any injury or has any foreseeable injury by any implementation of the Internet Policy. Because the Intervenor-Plaintiffs have suffered no "concrete injury in fact" or no longer suffer any "injury that could be redressed if the requested relief is granted," all of the Intervenor-Plaintiffs lack standing to bring suit. 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").

B. The three "Homepage" Plaintiffs lack standing because they are non-jural entities.

Three of the Intervenor-Plaintiffs are not jural persons and hence cannot be a party to any litigation because they lack any legal capacity to sue or be sued. See Fed.R.Civ.P. 17(b) and Advisory Comm. Notes (addressing capacity of individuals, corporations, partnerships, and unincorporated associations to sue or be sued). Specifically, neither the Safer Sex Page, the Banned Books Online page or the Books for Gay and Lesbian Teens/Youth are published by any legal entity. Each web site is the personal creation of individuals.^{8/} All three entities appear in this litigation in the form of a named web site "owned and operated by" a named individual. Comp. at ¶¶ 17-18, 21. None of these three individuals is, nor have they sought to become, a party to this litigation.^{9/} Without status as a legal entity, the three webpages lack standing to sue or be sued. See, e.g., *Darby v. Pasadena Police Department*, 939 F.2d 311, 313 (5th Cir. 1991) (city police department is not a separate legal entity or jural entity capable of being sued); *Anderson v. Hall*, 755 F.Supp. 2, 4 (D.D.C. 1991) ("partnerships have no legal existence in the District of Columbia, and are not jural entities capable of suing or being sued").

These three webpages stand in a distinctly different status from that occupied by The Ethical Spectacle, another Intervenor. That party has a separate legal status as a New York for-profit corporation.^{10/} Like the Intervenor AAUW and The Renaissance Transgender Association, both of which are incorporated entities, The Ethical Spectacle is a jural entity with capacity to sue and be sued.

Because the Safer Sex Page, the Banned Books Online page or the Books for Gay and Lesbian Teens/Youth are not jural persons, the webpages lack standing and must be dismissed from this litigation.

C. Intervenor "Banned Books Online" lacks standing because there is no allegation or evidence that access to that webpage has ever been blocked by the Defendant.

Not only is "Banned Books Online" not a jural entity, the Complaint contains no allegation, and there is no evidence to suggest, that access to that webpage has ever been blocked by the Loudoun Library system. Comp. at ¶¶ 110-112. "Banned Books Online" is a webpage that contains some text authored by John Ockerbloom and numerous links to other webpages that contain material authored by others. Ockerbloom Dep. at p.27, l. 21 - p.28, l. 4. With the possible exception of one of those links, none of the links point to any material that is hosted on the server that hosts the "Banned Books Online" webpage. Ockerbloom Dep. at p.28, l. 5 - p.29, l. 10. Mr. Ockerbloom does not have an ownership interest in any of the information contained in any of the webpages that are pointed to or "linked to" from the "Banned Books Online" webpage.

It is undisputed that access to the "Banned Books Online" webpage has never been blocked by the Loudoun Library. All that is alleged with respect to this plaintiff is that access to another webpage that is pointed to on his webpage was at one time blocked. Ockerbloom Dep. at p.54, ll. 11 - 20; Sehgal Dep. at p.76, ll. 2 - 21. That other webpage, [<http://ecstasy.org/e4x/>] contains the text of a book about the drug "ecstasy".

Mr. Ockerbloom does not claim any ownership interest in the material on that separate web site. Ockerbloom Dep. at p.53, ll. 5 -8. The "E for Ecstasy" webpage is not located on the server that serves the "Banned Books Online" webpage. Ockerbloom Dep. at p. 53 ll. 9-13.

In short, none of the material on the "Banned Books Online" web site has ever been blocked by the Defendant. Neither the web site itself or Mr. Ockerbloom have standing to complain about any temporary blocking of the "E for Ecstasy" web site since that site is not owned by nor a part of the "Banned Books Online" web site.

D. Intervenor Sergio Arau lacks standing because none of his material is published on the WorldWideWeb.

Intervenor-Plaintiff Sergio Arau was asked at his deposition to specify the web sites where any of his works had been published. Arau Dep. at p.17, l. 20 -p.18, l. 12; Arau Dep. at p.62, l. 15 - p.63, l. 16. He was not able to provide any such site. *Id.* The URL listed on the ACLU's web site^{11/} and claimed to be the one blocked by the Defendant [http://www.sfgate.com/foundry/arautext.html] does not exist^{12/} and, as far as any evidence that has been produced, has never existed since weeks before the Intervenor's Proposed Complaint was filed.^{13/}

Because Mr. Arau does not have any works published on the WorldWideWeb and has not had any such materials published at any time since before his intervention, he lacks standing to litigate any aspect of the Defendant's Internet Policy.

E. Intervenor Robert Morse lacks standing because he has no protectable interest in any of his columns published on the WorldWideWeb.

Intervenor Robert Morse is a writer employed as a columnist by the *San Francisco Examiner*. As such all intellectual property rights in the columns he writes have been assigned to the newspaper.^{14/} His columns are published on the WorldWideWeb by the newspaper. He does not own, operate or control in any way any web site on which his material appears.^{15/} He has no right to require publication of any of those columns on any web site. Since Mr. Morse has no legal interest in the publication of any of his materials on the WorldWideWeb, he lacks standing to complain (incorrectly) about any alleged blocking of those columns.^{16/}

F. This Court must dismiss the Intervenor-Plaintiffs' claims for failure to establish standing.

None of the Intervenor-Plaintiffs can establish that their alleged harm is "concrete and actual or imminent" rather than "conjectural or hypothetical." See *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Thus, a declaration of the Loudoun County Internet Policy's

invalidity or an injunction against its future enforcement would not benefit the Intervenor-Plaintiffs, because their web sites are not blocked and the policy cannot be said to affect them. In the context of standing to pursue constitutional adjudication, the U.S. Supreme Court has recently emphasized that "we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312, 2318 (1997). Although the Defendant submits that First Amendment jurisprudence and 47 U.S.C. § 230(c)(2)(A) compel judgment in the Library's favor, this Court must dismiss the Intervenor-Plaintiffs' Complaint for failure to establish standing.

II. The Intervenor-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*.

To our knowledge no court has ever held that libraries are **required** by the First Amendment to fulfill a publisher's request to provide a pornographic film – or any other information -- within its resource collection. In this case, the Intervenor-Plaintiffs seek to obtain such relief and assert such a right, but in the context of the world of electronic rather than physical publications.

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). The Defendant accepts that the Internet is entitled to robust judicial protection, both for publishers and readers. However, that protection does not lead to a constitutional right to compel publication at a public facility. Nor does it extend to a right to view obscene material that is outside the protections of the First Amendment.

In *Reno*, the Supreme Court noted 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 constitutionality 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, pornographic, or objectionable material. See 47 U.S.C. §§ 223(e)(5),^{17/} 230(c)(2)(A).^{18/} 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 addresses the First Amendment in the context of a library's acquisition or removal of materials. That decision supports the Defendant, 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 divided Supreme Court affirmed without rendering a majority decision.

Three Justices joined Justice Brennan's opinion that concluded that the First Amendment applied,^{19/} three joined Chief Justice Burger's opinion that rejected any application of the First Amendment,^{20/} and Justice White joined in the affirmance without expressing any opinion on the constitutional issue.^{21/} 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.

On this point, the words of Chief Justice Burger (joined by Justices Powell, Rehnquist, and O'Connor) apply equally today.

[T]he right to receive information and ideas, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government. The plurality cites James Madison to emphasize the importance of having an informed citizenry. *Ibid*. We all agree with Madison, of course, that knowledge is necessary for effective government. Madison's view, however, does not establish a right to have particular books retained on the school library shelves if the school board decides that they are inappropriate or irrelevant to the school's mission . . . The government does not "contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), by choosing not to retain certain books on the school library shelf; it simply chooses not to be the conduit for that particular information. In short, even assuming the desirability of the policy expressed by the plurality, **there is not a hint in the First Amendment, or in any holding of this court, of a "right" to have the government provide continuing access to certain books.**

457 U.S. at 888-89 (emphasis added). Chief Justice Burger continued, "[w]hatever role the government might play as a conduit of information, schools ought not be made the slavish courier of the material of third parties." *Id.* at 889. Thus, four justices of the divided Court emphasized that the First Amendment cannot be deemed to apply to decisions on what materials a library should provide. *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.

Because the Burger opinion supported that the First Amendment does not require that a public library be made "the slavish courier of the material of third parties," this analysis supports the Board and not the Intervenor-Plaintiffs. Because the Brennan opinion supported that the First Amendment does not impose any First Amendment limitations on a library's acquisition decisions, this analysis supports the Board and not the Intervenor-Plaintiffs. The Intervenor-Plaintiffs are not seeking to enforce a right under the constitution; rather they are trying to create a right.

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. Comp. at ¶ 4.

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. Defendant submits 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.

Defendant recognizes that the process of deciding whether to block or unblock a particular web site 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."^{22/}

Because the First Amendment does not require that a library provide certain materials within its resource collection, the Defendant is entitled to judgment as a matter of law.

III. The Defendant is absolutely immune under the "Good Samaritan" provision of the 1996 Communications Decency Act, 47 U.S.C. § 230(c)(2)(A)

The Complaint also fails to state a claim for relief because current federal law authorizes and protects the good faith use of filtering software to prevent acquisition, exhibition and distribution of material determined to be objectionable by a provider of any "interactive computer service." 47 U.S.C. § 230(c)(2)(A). In 1996, Congress enacted the Communications Decency Act in part to eliminate the "threat of litigation element" that could deter libraries, schools, or businesses from using filtering software to screen, possibly constitutionally protected but objectionable, materials available over the Internet. See *generally, Reno, supra*. Section 230(c)(2)(A) expressly states:

[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) (emphasis added). The federal definition of an "interactive computer service" specifically includes any service or system offered by libraries or educational institutions that provides Internet access. 47 U.S.C. § 230(e)(2). Thus, 47 U.S.C. § 230(c)(2)(A) prohibits the maintenance of any federal law suit against an interactive computer service provider for good faith filtering software usage. Section 230(c)(2)(A) was specifically intended to deal with the type of liability issue raised by this Complaint, and this federal law provides the Defendant with absolute immunity from this Complaint.

With Section 230(c)(2)(A), Congress implicitly recognized already existing "discretionary powers" vested in those in those who have the responsibility to shape resource collection policy for a library, education institution, or business. Thus, consistent with the analyses of *Pico*, Congress appreciated the substantial difference between a citizen's use of his or her private, individually-owned computer and an individual's use of a computer owned by a library, school, or business. See Joint Explanatory Statement of the Committee of Conference, Report for P.L. 104-104, Title V- Obscenity and Violence,

1996 U.S.C.C.A.N. Leg. Hist. 200-11. As the National Law Center for Children and Families has explained:

A library, educational institution, or business may elect to selectively acquire or limit access to material on the Internet, in the same manner as they are permitted to selectively acquire, remove, or limit access to any other type of "print material." For example, a library, educational institution, or business is not required to subscribe to Hustler Magazine in order to obtain Time Magazine, and is not required to secure prior court approval before it elects "not to subscribe to" the magazine. . . . On the same basis (applying the same First Amendment standards applicable to any other print medium, under § 230(c)(2)) an ICS provider is entitled to employ filtering software to prevent the acquisition, exhibition, and distribution of material to which it does not wish to subscribe (because it is objectionable as not falling within the parameters of its "selection policy"), and to restrict access to or availability of material it deems objectionable under the standard set forth in § 230(c)(2), in the exercise of the discretion granted it under federal and state law.

Nat'l Law Center, Memorandum of Law on 47 U.S.C. § 230(c)(2) ("Protection of Good Samaritan Blocking and Screening of Offensive Material") at 8.

Because the Intervenor-Plaintiffs cannot distinguish the absolute immunity provision of 47 U.S.C. § 230(c)(2)(A) from applying to their cause of action, the relief Intervenor-Plaintiffs seek cannot be decreed without declaring that statute unconstitutional. See Comp. at ¶ 162 ("If [47 U.S.C. § 230(c)(2)(a)] were interpreted to apply to this case, it would be unconstitutional"). There is no precedent for considering this immunity provision unconstitutional. To the contrary, the Fourth Circuit has applied a companion provision of section 230 to uphold this Court's dismissal of a civil suit in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

Moreover, while the Complaint sounds in constitutional terms, it merely states a 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, and it is subject to modification by subsequent congressional action. Indeed, Congress could, if it so chooses, repeal section 1983 in its entirety. As a subsequent congressional action, Section 230 effectively amends section 1983 to specifically preempt any federal law which would impose civil liability for interactive computer service providers. ^{23/}

Notwithstanding the above, in this Court's April 7, 1998, opinion denying Defendants' Motion to Dismiss, this Court rejected the Defendant's statutory immunity argument.

That rejection, we respectfully submit, rested on a fundamental misreading of the statute. The Court's opinion rested heavily on an analysis of the legislative history, purpose and prior judicial treatment of an entirely separate immunity provision -- § 230(c)(1) -- from that addressed here. Section 230(c)(1) immunizes Internet service providers, such as America Online or Prodigy, from defamation suits based on materials disseminated over the Internet through the facilities of that provider.^{24/} However, the Defendant has always relied on the immunity clearly set forth in section 230(c)(2)(A), a different provision altogether. This Court has previously recognized this distinction, explaining:

Section 230(c) creates two distinct forms of immunity. Subsection (c)(1) . . . immunizes interactive computer service providers and users from defamation liability premised on theories similar to that proposed in *Stratton-Oakmont* and, indeed, in this case On the other hand, subsection (c)(2) precludes holding an interactive computer service provider or user liable on account of (i) actions taken in good faith to restrict access to material that the provider or user deems objectionable, and (ii) actions taken to provide others with the technical means to restrict access to objectionable material.

Zeran v. America Online, Inc., 958 F. Supp. 1124, 1135, n. 22 (E.D.Va. 1997) (Ellis, J.). Thus, while section 230(c)(1) was intended to provide Internet providers with tort immunity, section 230(c)(2)(A) was founded on an entirely different congressional policy. As this Court has explained:

Congress' clear objective in passing § 230 of the CDA was to encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted either by the interactive computer service provider itself or by the families and schools receiving information via the Internet.

Id. at 1134.

The immunity for good faith use of Internet filtering software is found in a separate section than the immunity from defamation liability, and it is fundamentally wrong to impute to Congress the same goal in those two different provisions. It is equally wrong to rely on precedent involving the section 230(c)(1) immunity provision, such as the decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), to construe an

entirely different immunity provision applying to: a library's "restrict[ing] access . . . to material that [it] considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Failure to recognize and effectuate this immunity is plainly inconsistent with congressional policy.

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). Congress intended that libraries, and other interactive computer service providers, would be able to use filtering software without the consequence of litigation.

Because of Congress' enactment that interactive computer service providers who undertake in good faith to use filtering software are immune from civil liability, the Defendant is entitled to judgment as a matter of law.

IV. Conclusion

For the foregoing reasons, Defendant moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for the entry of summary judgment against the Intervenor-Plaintiffs, on the grounds that there is no genuine issue of material fact in dispute and Loudoun County is entitled to judgment as a matter of law.

Respectfully submitted,

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

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Footnotes

^{1/} As a technical matter, Defendant's original Motion was filed both as a Motion to Dismiss for Failure to State a Claim and, in the alternative, a

Motion for Summary Judgment. Materials other than the Complaint were submitted. The Court's Opinion neither cited nor relied on any of the non-Complaint materials. The Court thus appears not to have treated the motion as one for summary judgment. This motion, in our view, is thus properly presented as a Motion for Summary Judgment as to both the Original Complaint and the Intervenor's Complaint with respect to the First Amendment and CDA immunity issues.

^{2/} The Original Complaint makes similar allegations. See Mainstream Loudoun Complaint at ¶¶ 1, 134.

^{3/} Arau. Dep. at p.53, l. 16 - p.56, l. 1; Filkins Dep. at p.37, ll. 10-15; Gardner Dep. at p.6, ll. 1-11, p.15, l. 16 - p.18, l. 9; Hapchuk Dep. at p.28, l. 9 - p.29, l. 4; Morse Dep. at p.24, ll. 1-20; Wallace Dep. at p.52, ll. 8-16.

^{4/} The depositions establish that all but one of the Intervenor-Plaintiffs did not seek legal counsel but was initially contacted by the ACLU which requested that they become a plaintiff in this litigation. The Intervenor-Plaintiffs bear no risk from this litigation since they will pay no fees, no expenses, nor any fees that might be awarded to the Defendant. All fees and expenses of the Intervenor Plaintiffs are the sole responsibility of the ACLU. In any context other than not-for-profit constitutional litigation, such facts would constitute illegal barratry under Va. Code § 18.2-452. *But see In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

^{5/} Sehgal Dep. tr., *passim*. That deposition testimony will not be admissible at trial since Ms. Sehgal is a law school graduate who functions as a paralegal for Intervenor's counsel of record and cannot testify on a factual matter in dispute.

^{6/} Each Intervenor-Plaintiff was asked if they had any knowledge, other than information furnished to them by their counsel, about any blocking of access to their web sites by the Loudoun Library System. Each responded that they had no other information to support any allegation that access to their material had been blocked by the Defendant. Arau Dep. at p.62, ll. 7-14; Filkins Dep. at p.38, l. 6 - p.45, l. 6; Gardner Dep. at p.9, ll. 3-10; Hapchuk Dep. at p.29, l. 18 - p.34, l. 12; Meyers Dep. at p.16, l. 17 - p.17, l. 19., at p. 35, ll. 1-17; Morse Dep. at p.11, l. 3 - p.13, l. 17; Ockerbloom Dep. at p.55, ll. 3-12; Wallace Dep. at p.39, l. 17 - p.40, l. 17.

^{7/} Arau. Dep. at p.53, l. 16 - p.56, l. 1; Filkins Dep. at p.37, ll. 10-15; Gardner Dep. at p.6, ll. 1-11, p.15, l. 16 - p.18, l. 9; Hapchuk Dep. at p.28, l. 9 - p.29, l. 4; Morse Dep. at p.24, ll. 1-20; Wallace Dep. at p.52, ll. 8-16.

^{8/} Christopher Filkins appeared at deposition as the designated witness for Intervenor-Plaintiff Safersex.org. He testified that while he was "in the process of creating a non-profit organization to handle the legal and financial aspects of the page," there is presently no corporation or group functioning as an unincorporated association that owns or controls his webpage. Filkins Dep. at p.6, l. 16 - p.9, l. 19. Jeremy Meyers appeared as the designated witness for Intervenor-Plaintiff "Books for Gay and Lesbian Teens/Youth." He testified that he was the "webmaster," author and compiler of that webpage and that the webpage was not affiliated with any legal entity. Meyers Dep. at p.4, l. 20 - p.5, l. 4, p.29, ll. 11-15. John Ockerbloom appeared as the witness for Intervenor-Plaintiff "Banned Books on Line." He is the "editor", author and "webmaster" of the webpage. Ockerbloom Dep. at p.21, ll. 14-19. There is no legal entity associated with the webpage other than Mr. Ockerbloom himself. *Id.* at p. 32, l. 11 - p.33, l. 5.

^{9/} Intervenor's counsel has been aware of this problem for many weeks and has known for an equal time that the Defendant would move to dismiss the "webpage" Intervenor on this ground. Despite that awareness, Intervenor's counsel has not moved to substitute the individuals for the webpages.

^{10/} Comp. at ¶ 24; Wallace Dep. at p.19, l. 14 - p.20, l. 17

^{11/} <http://www.aclu.org/news/n040798a.html>

^{12/} Efforts to retrieve that page have consistently produced a "404 error" which is a standard WorldWideWeb response received when the requested URL does not point to any material that is actually on the Web.

^{13/} Counsel for the Intervenor-Plaintiffs have submitted proposed exhibits that purport to be printouts of webpages dated in January, 1998, that contained works authored by Sergio Arau. Defendant has objected to the receipt in evidence of those exhibits. Even if accepted, however, they do not establish that Mr. Arau has had any of his works available on any WorldWideWeb site at any time after weeks before he sought to intervene.

^{14/} Morse Dep. at p.6, ll. 3-20.

^{15/} Morse Dep. at p.5, l. 19 - p.6, l. 2.

^{16/} In fact access to his columns has not been blocked by the Loudoun Library system. The URL published by the ACLU as the one allegedly blocked [<http://www.sfgate.com/columnists/morse/>] was not blocked when it was browsed by the Library staff on February 6, 1998, and there is no evidence that it has been blocked at any time since then. At all times since

Mr. Morse' intervention that URL has pointed to a webpage that has been accessible in the Loudoun Libraries, although efforts to utilize the search engine on that webpage have consistently been unsuccessful because the search facility operated at that web site did not function. That failure was in no way attributable to the Defendant.

^{17/} 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.

^{18/} See section III, *infra*.

^{19/} 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." In fact, it 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 Burger and joined in its entirety by three other Justices would be more appropriately described as the plurality opinion.

^{20/} Chief Justice Burger authored that opinion and he was joined by Justices Powell, Rehnquist and O'Connor.

^{22/} 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)).

^{23/} 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).

^{24/} It is plain that Congress intended the Good Samaritan provision of the Communications Decency Act to provide immunity from claims asserted under section 1983. Section 230 includes a detailed section on its "effect on other laws." Subsection (d) of section 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 section 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.

^{25/} This inapplicable provision, 47 U.S.C. § 230(c)(1), provides "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."