

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MAINSTREAM LOUDOUN, et al.)
)
 Plaintiffs)
)
 v.) Case No. CA-97-2049-A
)
 BOARD OF TRUSTEES OF THE)
 LOUDOUN COUNTY LIBRARY)
)
 Defendant.)

**DEFENDANT’S BRIEF IN OPPOSITION
TO PLAINTIFF/INTERVENORS’
MOTION FOR SUMMARY JUDGMENT**

Introductory Statement

The importance of the novel issues presented in this case transcends the interests of the parties before the Court. Across the country, library boards and directors are torn between the uncompromising "no filtering" position of the American Library Association and the equally uncompromising "no pornography" position of patrons, parents and public bodies. The libraries are caught squarely in the middle. If they consider using a pornography filter they are threatened with litigation by the ACLU or local citizens groups.^{1/} If they decide not to use a filter, they face litigation from parents who claim the absence of filtering exposes their children to pornography under the sponsorship of the state. *Kathleen R. v. City of Livermore*, Superior Court of California (Case No. V-015266-4).^{2/} Regardless of their decision, it seems that public libraries that decide to provide Internet access to their patrons must prepare to allocate a part of their Internet budgets to defending litigation.

Because the issues here are truly national and cannot be resolved with finality by any single trial court, it is particularly important that the process followed in this case develops a record and a decision that is full and complete. Such a process is necessary both to provide clear guidance to the Loudoun Library and the numerous other libraries that are monitoring this proceeding and to insure that the appellate courts that review this proceeding will have a full and complete record

on which to base their independent determination on the controlling legal issues of first impression.

This public interest in development of a complete record and comprehensive decision, coupled with the more traditional position that issues of material fact are genuinely in dispute, fully justifies denying the Plaintiffs' and Intervenors' Motions for Summary Judgment and allowing the case to proceed through a full evidentiary hearing before issuing a declaratory judgment on whether a public library can or cannot filter illegal pornography out of the Internet access channel provided to patrons.

I. Statement of Facts

The Briefs filed by the Plaintiffs and Intervenors are, not surprisingly, biased in their view of the relevant facts. While this case began as an effort to obtain a ruling that no filtering whatsoever could be utilized by public libraries (*See* ¶¶ 132-44 of Plaintiffs' Complaint, ¶¶ 163-70 of Intervenors' Complaint) the pending Motions instead focus almost entirely on whether public libraries can use the same filtering policy for adults as for children. That focus distorts the true issues presented in this case and facilitates the Plaintiffs/Intervenors' consistent efforts to close their eyes to – and divert the Court's attention from – the serious public problem caused by the vast amount of illegal obscenity and child pornography available on the Internet. Instead of presenting a balanced view of what is actually published in cyberspace, the Plaintiffs/Intervenors rely on voluminous exhibits of WorldWideWeb material that quite plainly is outside the scope of the Loudoun Internet filtering policy and is simply not material that is the subject of any dispute – much less a reason for a § 1983 lawsuit. By presenting such a one-sided perspective, the other side has in fact created a fundamental dispute of material fact – what is the true nature of the material available on the Internet today? Defendant will attempt in this brief to present a more rounded view, firmly believing that the central significance of this issue is an over-riding reason that a trial on the merits is required to ensure a proper trial and appellate disposition of this case.

It is important that the Court not resolve this case by focusing exclusively on the single standard for adults and children issue that is the central theme of both opposing briefs. The core issue in this case is whether a public library can or cannot filter obscene materials on its public Internet terminals and, if so, under what criteria and procedures. That broad question is the one the Plaintiffs, the Intervenors and the Library Board seek to resolve through this litigation. The parties have expended significant resources in litigating that broad issue. The adult/children aspect is only a sub-issue of a much broader and more significant unresolved constitutional issue. While we recognize that courts often decide cases on the narrowest possible grounds, any final judgment in this litigation that addressed only the issue of whether a public library can use the same guidelines for blocking access on terminals used by adults as it does on terminal used by children would leave all parties before this Court, as well as the numerous other entities looking for judicial guidance from this proceeding, at sea as to far more significant open issues.

A. Facts Genuinely In Dispute

There are several factual matters that are genuinely in dispute based on the evidence produced and the positions taken by the parties. The existence of any of these disputes precludes summary judgment.

1. Whether Unfiltered Access to the Internet Would Allow Loudoun Library Patrons to Access and Display Illegal Pornography

The Defendant contends that unfiltered access to the Internet would allow library patrons to view, display and print material that is plainly obscene and outside the protection of the First Amendment. Defendant contends that such viewing and display would violate one or more state or federal criminal statutes. The Plaintiffs/Intervenors disagree. At an early stage of the discovery process, Defendant requested the other side to admit that: "Access to the Internet at Loudoun County libraries using Web browsers that do not utilize filtering software would permit access to material that is obscene, as that term is defined in applicable law"; "Access to the Internet at Loudoun County libraries using Web browsers that do not utilize filtering software would permit access to material that is unlawful under Va. Code § 18-2-390." *See* Plaintiffs' and Intervenors' Responses to Defendant's First Request for Admissions at ¶¶ 1-2 (attached as Exhibits 1 and 2). Both the Plaintiffs and the Intervenors refused to admit – and continue to refuse to stipulate – that the material available on the WorldWideWeb includes illegal, unprotected obscenity. They will acknowledge that "sexually explicit" material is available, but they persist in refusing to differentiate between protected material that is sexually explicit and that which is unlawful.

The Loudoun Library Internet Policy is plain and unambiguous. On its face it states that filtering software shall be used to block material **only** if it constitutes:

1. child pornography or obscene material
2. material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents

Pl. Ex. 1.

The parties disagree as a factual matter as to whether any material on the Internet is obscene and, if so, in what volumes. One of Defendant's experts, Donna Rice Hughes, stated in her expert report that the material available on the Web includes a substantial amount of material that is not protected by the First Amendment. Hughes Rep. at 3 (attached as Exhibit 3). She stated that some of the highest traffic in cyberspace is to pornographic sites and that "adult" entertainment on the Internet is the third largest sector of sales, surpassed only by computer products and travel. *Id.*

Ms. Hughes further stated that three categories of unlawful pornography are accessible on the World Wide Web by any person with unrestricted Internet access:

OBSCENITY: Obscenity is graphic material that is obsessed with sex and/or sexual violence, which is prurient, patently offensive, and lacking in serious value. It is often referred to as "hard-core" pornography and includes close-ups of graphic sex acts, penetration clearly visible, group sex, bestiality, torture, incest and excretory functions. . . .

CHILD PORNOGRAPHY: Child pornography is material that visually depicts children (real as well as computer-generated) under the age of 18 engaged in actual or simulated sexual activity, including lewd exhibition of the genitals. . . .

MATERIAL HARMFUL TO MINORS: Material harmful to minors represents nudity or sex that has prurient appeal for minors, is offensive and unsuitable for minors, and lacks serious value for minors. Harmful to minors material is often referred to as soft-core pornography.

Hughes Rep. at 2-3. The Plaintiffs/Intervenors dispute the validity of those statements.

In the course of their duties to review Internet material, the Loudoun Library staff have found many instances where material that falls within these categories exists on the WorldWideWeb and could be accessed Library patrons in the absence of filtering. Some of the sites that fall within the prohibited categories are:^{3/}

[URLs omitted from Website version]

See 9/16/98 Declaration of Douglas Henderson at ¶¶ 12-14 (attached as Exhibit 15). The Loudoun filters presently block access to each of these sites. A few of the sites have been determined by the Library staff to contain material that is "harmful to minors" under Virginia law. *See, e.g.,* **[URLs omitted from Website version]**; *See* Henderson Dec. at ¶¶ 12-14. Access to other sites in the list is blocked because the library staff has determined they contain material that is beyond any doubt obscene under state and federal law. *See, e.g.,* **[URLs omitted from Website version]**; *see* Henderson Dec. at ¶ 12. One of the sites expressly claims to contain child pornography and uses "push" technology to cause a continuing series of new and different pornographic sites to appear automatically without user-intervention.^{4/} *See* **[URLs omitted from Website version]**; *see* Henderson Dec. at ¶ 14. In each case the Library staff has specifically viewed those sites and made a specific determination of which category of the Loudoun Library Internet Policy requires that access be blocked. *See* Henderson Dec. at ¶¶ 12-14.

The proper factual and legal classification of these and other exemplary sites is, we submit, highly material to the decision in this case. The Loudoun Library bases its policy, in substantial part, on its right – indeed its duty – to filter illegal pornography and thereby avoid facilitating felonious conduct. The validity of the staff's decisions regarding blocking of these and other sites is highly material.

As noted, the Plaintiffs/Intervenors have consistently refused to stipulate that these sites, or any other sites, publish unprotected obscene materials. But they have gone even further to create a disputed material fact. With respect to at least one of the websites specifically reviewed and intentionally blocked by the Loudoun staff and not by X-Stop, Intervenors' principal fact witness testified during her deposition that the site was not obscene. A printout of that site is included in the sealed exhibits.^{5/} Defendant submits that the printout is plainly obscene, but the conflicting testimony of the Intervenors' witness raises a genuine factual issue.

Defendant submits that if a library patron accesses and displays an obscene graphic image on a Library terminal, that act itself would violate Va. Code § 18.2-374(3) because it would constitute "exhibit[ion]" of an obscene item. It would also violate Va. Code § 18.2-377 by "caus[ing] to be exposed . . . in . . . any building" an obscene item. Accessing child pornography in a Virginia library would be a violation of Va. Code § 18.2-374.1.B.3 because the library patron would "knowingly take part in or participate[] in the . . . reproduction of sexually explicit visual material by any means, including but not limited to a computer-generated reproduction [where] the subject [is] a person less than eighteen years of age." Displaying a single screen of child pornography would violate 18 U.S.C. § 2252. Displaying five or more screens of obscene material would be a violation by the patron of 18 U.S.C. § 1465, while display of even one obscene screen, if it came from an out-of-state website, would constitute a federal felony on behalf of the website producer. *See United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (prosecution for distribution of obscene materials from California BBS to a computer terminal in Tennessee); *United States v. Matthews*, ___ F. Supp. 2d ___, 1998 WL 384588 (D. Md. 1998) (prosecution of journalist for receiving and transmitting child pornography over the Internet). The Plaintiffs and the Intervenors have refused to stipulate that unfiltered access to the Internet could result in violations of these statutes, continuing to insist that it is impossible to determine whether any of the websites blocked in the Loudoun Library are in fact obscene. We believe that is a central factual matter that must be resolved through the trial process.

Defendant submits that a decision in this case based on abstract conceptual notions of obscenity would be a decision based on a factually inadequate record. The seriousness of the problem posed by the unique nature of the Internet cannot be understood without actual exposure to the raw, hard-core obscenity that exists in large amounts on the WorldWideWeb and is easily accessible. The printouts submitted with this Brief give a small sample of the scope of the problem and the significant public interest that is served by blocking access to this material in a public library. It will take a full trial, however, for the Court to develop a trial and appellate record sufficient to weigh the interests asserted in this case.

2. Whether the Filtering System Implemented by the Loudoun Libraries Delegates Filtering Decisions to a Third Party

The Plaintiffs/Intervenors contend that the use of the X-Stop filtering software in the Loudoun Libraries constitutes an unlawful delegation of a public function to private parties. Pl. Br. at 6-8, 20-22; Int. Br. at 9-10. That factual assertion raises another material issue in dispute.

Plaintiff/Intervenors focus their attention entirely on the software used as part of the filtering process in the Loudoun Library. Defendant submits that the process cannot be understood or

judged so narrowly. As the evidence at trial will show, no website is added to the X-Stop blocked site list until it is first reviewed and evaluated by a human being. *See* Deposition of Michael S. Bradshaw at p. 19, l. 9 - p. 20, l. 15 (attached as Exhibit 16). Once the Loudoun Library staff becomes aware of a question about blocked site, it reviews that site to determine whether it should be blocked under the criteria in the Loudoun Library Internet Policy – not the X-Stop criteria. *See* Defendant's Answers to Plaintiffs' First Interrogatories at Answer 13 (attached as Exhibit 17); Defendant's Answers to Plaintiff-Intervenor's Second Set of Interrogatories (attached as Exhibit 18). The Loudoun Policy was not developed by third parties, but by the Library Board itself. Under this procedure the Library staff has reviewed more than 172 websites. *See* Henderson Dec. at ¶ 10-11. Only 13 of those reviews were in response to formal requests to unblock a site. *See* Henderson Dec. ¶ 10.

A full review of the implementation of the filtering policy will show that the only decision that matters is the one made by the library staff. The X-Stop program is but a stage in the filtering process. The decisions made by the software vendor may constitute an initial, preliminary step in that process, but as a factual matter the decision is made locally, not remotely, by Loudoun Library staff members.

3. Whether the Filtering System Implemented by the Loudoun Libraries is the Most Effective System Available for Blocking Access to Illegal Pornography With Minimal Overblocking

The Plaintiffs/Intervenors contend that the filtering system used by the Loudoun Library system is not the "least restrictive means" of dealing with the problem of obscenity on the Internet. Pl. Br. at 16-17; Int. Br. at 28-30. The Defendant does not agree that this test is applicable,^{6/} but any decision on this issue necessarily requires prior resolution of a genuinely disputed fact – whether the Loudoun filtering system is or is not the "least restrictive means" available.^{7/}

Each of the alternatives proposed by the Plaintiffs/Intervenors fails entirely to meet the desired – and lawful – goal of preventing, to the extent technically possible, patron access to illegal materials. None of their proposed alternatives **prevents** access. They would instead deal with the problem after it has occurred through means such as prosecution or eviction. The Defendant properly decided to seek a prospective solution and prevent the problem rather than rely on a retrospective punishment or – worse yet – promulgation of an "acceptable use" policy that is effectively ignored in practice.

If this Court accepts the validity of the opposing legal analysis, it will then need to decide whether the X-Stop Librarian Edition selected by the Library staff, coupled with additional staff reviews, is or is not the least restrictive means available to minimize access to illegal materials. The evidence on that factual issue is genuinely in dispute.

Plaintiffs/Intervenors start from the position espoused by their expert, Michael Welles. Mr. Welles submitted a report concluding that, as a purely theoretical matter, it was impossible to use current technology to search the WorldWideWeb to find websites that were suitable candidates for blocking, regardless of the criteria used for blocking. Welles Rep. at ¶ 60. He based his conclusion on certain Internet engineering assumptions to which he applied a purely

mathematical function to reach a purely theoretical conclusion. Wells Rep. at ¶¶ 25, 28-33, 36-37, 50. There are two genuinely disputed aspects concerning Mr. Welles' conclusion. First of all, it rests on flawed factual assumptions. He reached his ultimate conclusion by taking as a base the number of "hosts" that could be assigned if every one of the 4,294,967,296 IP address were used. Then he assumed that any search engine looking for suspect websites would have to search each of 65,536 "ports" on each host. Welles Rep. at ¶ 35-36. Using that combined assumed universe of sites to be searched, he determined that it was impossible with today's technology to search those sites electronically to find suspect sites for blocking. Welles Rep. at ¶¶ 37, 60. The factual flaw in his calculations is that a very large segment of the theoretical 4 billion IP addresses is not available for assignment to host computers and is reserved. Moreover, the WorldWideWeb sites that are relevant to this litigation use only one, or perhaps two of the 65,356 "port" addresses.^{8/} Mr. Welles admitted in his deposition that his assumptions were flawed in that respect. Deposition of Michael Welles at pp. 72-85 (attached as Exhibit 19).

A more significant genuinely disputed fact is that Mr. Welles' theory is directly contradicted by Mr. Bradshaw's facts. Mr. Bradshaw, former CEO of LogOn Data, testified at his deposition that his company uses a proprietary array of high speed computers, called the "Mudcrawler," to visit Internet sites looking for suspect sites that should be included in the X-Stop blocking lists. Bradshaw Dep. at p. 17, ll. 10-17; see X-Stop Materials (attached as Exhibit 20). The "Mudcrawler," according to X-Stop's published materials, visits Internet sites "at the rate of 2,757,000 per hour." Bradshaw Dep. at p. 17, ll. 15-17. According to Mr. Welles visiting sites at this rate is not possible; according to Mr. Bradshaw they do it. This factual dispute requires resolution in the trial process.

Beyond the issue of compiling a list of blocked sites, the parties genuinely dispute whether X-Stop is the most effective filtering software available. The Defendant's expert, David Burt, performed the only known comparison of X-Stop and other filtering software to see which program was the most effective at blocking a sample of obscene sites while not blocking a sample of sexually-explicit non-obscene sites. Expert Report of David Burt at 20-23 (attached as Exhibit 21). Mr. Burt concluded that X-Stop was by far the superior product. While it did not block as many of the obscene sites as did some other programs, it was by far the best filter when it came to not blocking non-obscene sites. Burt Rep. at 23. ("I have spent a lot of time evaluating filters, and what I found most striking about X-Stop Librarian II is the large amount of sexually explicit material that the viewer was allowed to see"). Mr. Burt tested each of the four filtering programs for effectiveness in filtering sites in the "likely to be found obscene" category while not filtering sites in the four non-obscene categories. The results of his study are shown in the following table:

	CyberPatrol	IGEAR	Surfwatch	X-Stop
Effectiveness at Blocking Obscene Sites	94%	80%	98%	86%
Effectiveness at NOT Blocking Non-Obscene	60%	58%	46%	92%

Burt Rep. at 21-23.

Mr. Burt's comparative study is fully consistent with, and supported by, the pre-litigation evaluation of filtering software undertaken by the Loudoun Library staff. Using the methodology

developed by Plaintiffs' expert, Ms. Karen Schneider, the Library staff evaluated several different filtering programs. Of all the programs evaluated, only X-Stop enabled the librarians to find answers to all of the Schneider test questions using WorldWideWeb resources. *See Henderson Dep.* at p. 466, l. 21-470, l.6, p. 474, l. 16 - 482, l. 20; *See Henderson Dec.* at ¶ 4-7.

Plaintiffs/Intervenors do not accept the validity of Mr. Burt's study. Defendant does not accept the validity of Mr. Welles' theoretical conclusion. Plaintiffs/Intervenors stress the fact that X-Stop inappropriately blocked some sites during the Library staff's testing. Defendant stresses that X-Stop was found to have the lowest level of overblocking of all software tested. These disputes lie at the heart of any determination of whether X-Stop, coupled with staff reviews of questionable sites, is or is not the "least restrictive means" available for achieving the legitimate goal of preventing access to illegal obscenity.

4. Whether Sites Plaintiffs Allege Were Improperly Blocked by the Loudoun Library System Were In Fact Blocked at any Time Relevant to the Decision in this Case

Plaintiffs, to some extent, and the Intervenors, to a greater extent, claim that the filtering system deployed in the Loudoun Library system erroneously blocks numerous specific sites. *Pl. Br.* at 9-10; *Int. Br.* at 10-11. That factual claim is genuinely disputed. This Court has already determined that uncertainty about "the Internet sites blocked by X-Stop" is a material factual dispute precluding summary judgment. *Mainstream Loudoun v. Board of Trustees of Loudoun*, 2 F.Supp. 2d 783, 797 (E.D.Va. 1998).

As stated in the Depositions of the Library staff and in the attached declarations, when the Loudoun Library staff evaluated LogOn Data Corporation's Librarian Edition, it was still very much a "product in development." *See 9/16/98 Declaration of Cindy Timmerman* at 3 (attached as Exhibit 22); *See Henderson Dep.* at p. 491, l. 8 - p. 492, l. 15. The version that was tested by the Library staff, as well as the version that was initially installed in the library branches, was subject to certain operational failures. That version used a default installation routine that loaded the "foul word" blocker as well as the "URL-specific" site blocker. That program feature in fact resulted in at least one erroneous instance of activating the "foul word" blocker in several branches despite the fact that the Internet Policy requires that only the URL-specific blocking mechanism be used. *See Timmerman Dec.* at ¶ 4.

The Library Staff also experienced instances in the early days of using X-Stop where some "glitch" caused the downloading of the wrong list of blocked sites. The X-Stop Librarian Edition includes only "obscenity, bestiality, and child pornography" categories. X-Stop also distributes blocking libraries that include sites described by LogOn Data as "alternative journals", that is "sites for non-mainstream periodicals, information on self-awareness, spiritual healing arts, holistic living, junk culture, fringe media, art perspectives, etc." *See X-Stop Materials* (attached as Exhibit 19).

The sites included on those other X-Stop lists are plainly outside the scope of the Loudoun Library Internet Policy and should not be blocked. However, when the LogOn Data servers

malfunctioned in nearly 1998, some of the Loudoun Library branches were, for a brief period, using the wrong blocking list. *See* Timmerman Dec. at ¶ 6.

These early problems with the X-Stop software were all resolved by April 19, 1998 when the current version of the Librarian II software was installed in all branches. *See* Timmerman Dec. at ¶¶ 5-7. The significance of this fact is that many of the sites that the Plaintiffs/Intervenors claim were improperly blocked were in fact either never blocked except during the pre-deployment evaluation stage, or were blocked only during the "roll-out" period before the current software was installed.

There is another significant areas of dispute regarding the alleged "overblocking." The Intervenors' sole witness on the actual operation of the Loudoun Library filtering system is, we believe, disqualified from testifying in this litigation, at least on this issue. That witness, Cassidy Sehgal, is a staff lawyer hired by the ACLU who is working closely with counsel of record as part of the litigation team. Sehgal Dec. at ¶ 1. Ms. Sehgal is not simply performing clerical tasks. During her deposition, Intervenor's counsel invoked the attorney work-product privilege to preclude testimony about certain aspects of Ms. Sehgal's report on her activities in the Loudoun Library. Sehgal Dep. at p. 12, l. 4 - p. 13, l. 20, p. 38, ll. 8-18 (attached as Exhibit 23).

Ms. Sehgal is subject to the same ethical preclusions on testifying as a fact witness that would prevent counsel-of-record from testifying on a disputed material fact. *See Spivey v. United States*, 912 F.2d 80, 84 (4th Cir. 1990) (excluding affidavit of plaintiff's counsel from evidence because "it is elementary that counsel may not participate as an advocate and as a witness"); *see also Personalized Mass Media Corp. v. Weather Channel, Inc.*, 899 F. Supp. 239, 242 (E.D.Va. 1995) (explaining rationale for advocate witness rule); Virginia Disciplinary Rule 5-101(B) and 5-102 and Legal Ethics Opinion Nos. 1539 and 1709.

Our objection is more than formal. The reliability of Ms. Sehgal's reports on which specific websites were or were not blocked is questionable. She is quite obviously not an unbiased observer. Her reports on blocking are contradicted by other evidence of record. She has stated under oath that she found that 8 specific websites were blocked in the Sterling branch on February 2, 1998. Sehgal Dec. at ¶¶ 10-42. Yet when those same sites were visited by the Library staff on February 6, 1998, 5 of them were not blocked. *See* Defendant's Answers to Plaintiff-Intervenors' Second Interrogatories. An even more glaring inconsistency appeared when she allegedly undertook a subsequent investigation in the Purcellville library branch on July 15, 1998. In her July 16, 1998 deposition she disclosed for the first time that she had attempted to access 19 sites and found that they were blocked. During that deposition she endeavored to re-create the results of her investigation the previous day using another terminal with the same blocking software configuration. Sehgal Dep. at 117-136. She was unable to re-create what she had allegedly found the day before. Of the 19 sites she claimed were blocked, she found that 8 of those sites were not blocked when she used the same methodology during her deposition.² Sehgal Dec. at ¶¶ 71-72.

Because Ms. Sehgal is a lawyer working as part of the team that serves as counsel for the Intervenors, and because her testimony concerns a genuinely disputed material fact, she cannot

appear as a witness in this proceeding and her declaration and deposition testimony should not be considered in ruling on the motions.

5. Whether the Loudoun Internet Policy Is or Is Not Consistent with Their Own, and Generally Accepted, Library Acquisition Standards

Plaintiffs/Intervenors contend that the adoption of the Internet Policy is inconsistent with the Loudoun Library's pre-existing policies on acquiring material and making it available to patrons. Pl. Br. at 2-3. That factual assertion is genuinely in dispute. On its face the Internet Policy states that:

2. Historically, the library has not selected mere pornography for book, magazine, or video collections. It will not do so through the Internet.

Pl. Ex. 1. Blocking of illegal, obscene materials is therefore entirely consistent with Loudoun's pre-existing policy.

The Internet Policy is not only consistent with Loudoun's own acquisition policies, it is consistent with the acquisitions policy of the American Library Association. As acknowledged by Plaintiffs' own expert, Section 53.1.11 of the American Library Association Policy Manual explicitly provides that library patrons should have access to "all materials **legally** obtainable." Schneider Report, Pl. Ex. 35, at 5, ¶17 (emphasis added). Obscene material is, by definition, not "legally obtainable" information and precluding access to obscene material on the Internet is thus fully consistent with the ALA's acquisition policy.

The fact of the matter is that public libraries do not acquire pornographic material as part of their collections. Defendant's expert witness, a librarian with extensive experience in the filtering debate, reported that "pornography of the hard-core, adult bookstore variety **does not exist in any public library in the United States.**" Burt Rept., at 5. Mr. Burt supported that conclusion with extensive empirical evidence. *Id.* at 5 - 7. But it is precisely this hard-core, adult bookstore pornography and illegal obscenity that would appear on the Library terminals if the filters were removed. *See* Def. Sealed Exhibits 4 - 14.

6. Whether Loudoun Residents Have Alternative Unfiltered Access to the WorldWide Web

Plaintiffs/Intervenors claim that the Loudoun Library is the only means of Internet access available to some Loudoun residents. Pl. Comp. at ¶ 29; Int. Br. at 5. That assertion is contradicted by the fact that Loudoun residents have access to all of the branches of the Fairfax County Library System, including the Reston branch that is less than 6 miles from the Sterling Branch, and the Fairfax Library offers unfiltered access to the Internet. *See* Henderson Dec. at ¶ 19.

The September 2, 1998, declaration of Mr. Kropat provides further evidence of the fact that no library patron has been denied access to Internet materials they wished to see. It is plain that Mr. Kropat is not genuinely interested in obtaining access to Internet material, but is instead engaged in litigation games. His declaration was neither signed nor filed until well after the end of discovery. Despite the fact that he claims to have experienced blocks of websites in the Loudoun library on July 25, 1998, and September 2, 1998, (2nd Kropat Dec. at ¶¶ 4-6), he never filed a request to unblock any of those sites. He claims that he would feel "intimidated" (2nd Kropat Dec. at ¶ 8; 1st Kropat Dec. at ¶ 7) to go through that completely private procedure, despite the obvious lack of any intimidation in publicly filing his declaration. Significantly, he states that he was able, without apparent difficulty, to access the allegedly blocked websites on another unfiltered computer to which he had access. *See* 2nd Kropat Dec. at ¶ 7. Plainly he has not been deprived of access to any Internet materials by the Loudoun Policy.^{10/}

7. Whether Unfiltered Access to the Internet Would or Would Not Cause Problems in the Loudoun Library

Plaintiffs/Intervenors chastise the Library Board for not determining in advance of adopting the Internet Policy whether unfiltered access to the Internet would create problems in the Loudoun Library branches. Pl. Br. at 5; Int. Br. at 24. That argument is, quite frankly, ridiculous. It is equivalent to suggesting that before inoculating against anthrax, you should determine whether uninoculated exposure causes death. The fact of the matter is that a moderate dose of common sense and reality will convince any reasonable person that if a library offers unfiltered access to the Internet some library patrons will access obscene materials, either intentionally or inadvertently.

Beyond common sense, the record developed during discovery shows that unfiltered Internet access in public libraries has indeed resulted in problems in those libraries. For example, the Bedford, Virginia public library responded to Mr. Henderson's inquiry and reported that "on August 5, 1997, Mrs. Judy Brunk visited the Central Library and observed a boy using a public access Internet terminal viewing what she described as pornographic pictures." *See* Pl. Ex. 15. In a letter to the editor (forwarded to Mr. Henderson), Mrs. Brunk explained:

I observed a very young male sitting at the Internet computer. . . looking at some of the most vulgar, filthy, disgusting pornographic pictures you could imagine. I was shocked not by the Internet. . . but the fact that he was doing this in the "public library". . . . [W]e cannot say anything about what people do in their own homes, but I feel that we as tax payers, should be able to say what should be available to our children in the "public library."

Id.

David Burt, a librarian who maintains a website on library filtering issues that is listed by the ACLU as one of the authoritative resources on this issue, detailed in his "expert report the serious behavior problems in some public libraries" that have resulted from unfiltered Internet

access. *See* Burt Rep., at 14 - 15 (attached as Exhibit 20). He specifically reported on the experience in the Los Angeles County Central Library where the Internet terminals are regularly used to access digitized photos of sex acts and online photos of naked women and where an 18-year-old college student routinely cruises the Internet for pornography. *Id.* at 14. He also reported the experience in Orange County, Florida, where patrons would view hard-core pornography for hours on end, leading that library to install filters on previously unfiltered terminals. *Id.* According to his report, the Austin, Texas, library also changed their policy and installed filters after unfiltered access resulted in patrons creating "an open conduit for the distribution of child pornography." *Id.* at 14-15. As he stated, "[a] library that installs unfiltered Internet access, with privacy booths and screens, and does not monitor patron behavior can easily be transformed into, quite literally, an adult bookstore peep show gallery." *Id.* at 15.

Apparently the Plaintiffs/Intervenors dispute the validity of this evidence and genuinely contend that unfiltered access to the Internet in the Loudoun Libraries could not result in similar behavioral problems. That dispute concerns a very material issue as to the constitutionality of the Policy under the modes of analysis urged by the opposition.

B. Facts Not Genuinely In Dispute

In addition to the Non-Disputed Facts set out in Defendant's Brief In Support of Motion for Summary Judgment, there are other non-disputed facts that form the basis for our argument that the Loudoun Internet Policy is constitutional.

When this Court declined to dismiss the Plaintiffs' Complaint, it held that one of the unresolved material facts that precluded summary judgment at that time was the Library Board's "justification for the [Internet] Policy." *Mainstream Loudoun*, 2 F.Supp. 2d at 797. When this litigation began, it seems that the Plaintiffs and, perhaps, the Intervenors believed that the Internet Policy was adopted in furtherance of some "viewpoint" held by a majority of the Library Board that favored "conservative" social values and disfavored "liberal" values. We believe that after the discovery has concluded, there is no dispute that the sole justification for the Internet Policy is the justification stated in the policy itself: 1) minimizing access to illegal pornography; and 2) avoidance of creation of a sexually hostile environment in the library branches that would result from patron access to illegal pornography.

The record of deliberations and decisions by the Library Board shows that the adoption of the challenged policy occurred on October 20, 1997, in a public meeting. The fifth vote in favor of the Policy was cast by Spencer Ault, an attorney. Mr. Ault explained the reasons for his vote plainly and unambiguously:

Throughout this process, I many times have tried to examine all the issues, to come down to what I believe was an appropriate policy for this board to present. And my views has [sic] changed throughout the process. Initially, I, when this process started, I was against a filter on the Internet. As I heard the arguments, reviewed case law, reviewed statutes, obscenity laws, articles, heard arguments, I have changed my view so that, a month ago, I hadn't asked for a policy that provided a filter at all times. Because all speech is not protected. Obscene speech

is not protected, and there are other forms of unlawful speech as well. Mr. Black has stated another form of unlawful speech. Also harmful to minors material as well is covered by obscenity laws under 18.2 of Code of Virginia

I believe the Internet is a very valuable resource and should be present in our libraries. I believe that it would be irresponsible for us not to provide a filter on the Internet, so I do support a filter on the Internet.

Pl. Ex. 21 at 3.

Based on all the discovery, it has also become clear that the Library staff implements the Internet policy with a complete absence of "viewpoint" discrimination and an unquestionably reasonable and proper reliance on legal standards to decide what sites should be blocked or unblocked. *See* Henderson Dec. at ¶¶ 11-14, 16. Since the Policy has been implemented, the staff has had occasion to review at least 172 specific sites. *Id.* at ¶ 11. Some of those sites are ones that others have suggested should be blocked under the Policy, but that the Library staff, in consultation with counsel, has determined contain sexually-explicit, but not illegal, material and are therefore not blocked.

Although the Internet Policy states that "Internet computers will be installed in close proximity to, and in full view of, library staff," in four of the six branches the public-access Internet terminals are installed in a manner that precludes the staff from observing the terminal screens from their workstations. Henderson Dec. at 20; *see also* Def. Proposed Trial Ex. 10, Videotape of Library branches.

II. Public Libraries Have a Duty, Not Just a Right, to Filter Internet Pornography to Avoid Facilitating Felonies and Creating an Unacceptable and Hostile Environment

We submit that a review of the sealed exhibits, coupled with a dose of judgment and common-sense, will lead any lawyer or judge to conclude that there is illegal, unprotected obscenity and child pornography on the Internet and that unfiltered access to the WorldWideWeb would permit Loudoun library patrons to access and display that illegal material. Well-publicized proceedings in the Washington metropolitan area as well as other locations across the nation prove that access to illegal obscenity on the Web is not a theoretical problem, but a real one that has caused a significant re-allocation of law enforcement resources. Indeed, as recently publicized, there is an international task force charged with investigating and prosecuting Internet child pornography rings.

As a public agency it is especially important for the Loudoun Library not only to act lawfully, but to avoid actions which will facilitate unlawful actions of its patrons. No reasonable person would suggest that a library has a responsibility to provide not only information on drugs, but the means for patrons to make drugs in the library. Yet that is precisely what the proponents of "no filters" in essence urge. The position advanced here by the Plaintiffs/Intervenors is an assertion that the Library is compelled by the First Amendment to give its patrons all the tools they need in order that they might commit felonies in a public place using public facilities. That position, we

submit, defies logic, common sense and any reasonable interpretation of the core concepts of the Constitution and the Rule of Law.

After his lengthy involvement in the development of the Loudoun Internet Policy, Mr. Ault concluded that "it would be irresponsible for [libraries] not to provide a filter on the Internet." So too it would be irresponsible for the judiciary to order the Loudoun Library to facilitate felonies and remove the filters.

The Loudoun Library also has a duty to avoid creating an environment that would be unlawful in any employment context.^{11/} See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000. Employers have a duty to "exercise[] reasonable care to prevent and correct promptly any sexually harassing behavior." *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S. Ct. 2365 (1998). It is well established that allowing displays of pornography can form the basis for liability under that law. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("posting of pornographic pictures in common areas" can create sexually hostile work environment). *Harley v. McCoach*, 928 F. Supp. 533 (E.D.Pa. 1996) (open display of pornographic magazines). Public, as well as private, entities are covered by Title VII. *Jordan v. Clark*, 847 F.2d 1368 (9th Cir. 1988) (US Fish & Wildlife Service); *Johnson v. County of L.A. Fire Dept.*, 865 F. Supp. 1430 (C.D. Cal. 1994) (local fire department). Entities have been held liable for inappropriate actions by non-employees. *Menchaca v. Rose Records*, 1995 WL 151847 (N.D. Ill. 1995) (non-employee actions); *Crist v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (operator of residential facility could be held responsible for actions of residents). In short, it does not matter that the displays of pornography in an unfiltered library environment would be caused by patrons, what is relevant is that federal law mandates that all entities avoid creating sexually hostile environments. It is beyond debate that display in a library of the illegal pornography that Loudoun filters would create a sexually hostile environment. "There is no doubt that the prevention of sexual harassment is a compelling government interest." *Johnson v. County of L.A. Fire Dept.*, *supra*, at 1439. The First Amendment does not compel a public library to create, or facilitate the creation of, a sexually hostile environment.^{12/}

III. The First Amendment Does Not Preclude the Filtering System Used in the Loudoun Library

Defendant briefed its position that the First Amendment does not preclude use of Internet filters in a public library as part of its Motion to Dismiss and its Motion for Summary Judgment. This Brief will supplement those arguments and respond to the counter-arguments advanced by the Plaintiffs/Intervenors.

A. Libraries, Like the Postal Service, Can Refuse to Transport Obscene Materials

Plaintiffs/Intervenors point this Court to First Amendment precedents concerning the use of the mails and urge that the unblocking procedure used in the Loudoun Library is unconstitutional. See Pl. Br. at 28-30; Int. Br. at 19-20. In the early stages of this proceedings, before discovery and full briefing of all First Amendment issues, this Court accepted that argument. Defendant submits that the Court should re-consider that conclusion at this stage of the litigation.

While analogies to the Postal Service are not complete, there is some legitimacy in considering practices in that communications channel in this context. Both the Postal Service and public libraries act as conduits for information. Both are government agencies. It is well established that the Postal Service can refuse to carry obscene mail. Section 1461 of Title 18 of the United States Code specifically provides that "[e]very obscene, lewd, lascivious, indecent or filthy article . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered by any letter carrier." That statute has been held constitutional by the Supreme Court. *Roth v. United States*, 354 U.S. 476 (1957). Prosecutions for violating that statute are not uncommon even today.

If the Postal Service – a government nationwide monopoly – can refuse to carry obscene material, then certainly a local library can refuse to disseminate obscene material, whether in print or on the Internet.^{13/} This conclusion is particularly appropriate in light of the fact that closing the mails to obscene material represents a government refusal to allow a unique and irreplaceable government asset be used by citizens. As noted above, closing the Loudoun Library Internet terminals to obscenity leaves the citizens of Loudoun free to access that material through other resources, including government resources in an adjoining county.

B. The Applicable First Amendment Standard

Defendant contends that the decision of a public library to not provide access to Internet materials – regardless of the content of those materials – is not a decision that implicates the First Amendment at all. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." This case like the situation in *National Endowment for the Arts v. Finley*, ___ U.S. ___, 118 S. Ct. 2168 (1998), does not involve any government action to suppress or prevent anyone from speaking or receiving any speech. All that the Policy does is to restrict use of government resources for transmission of certain speech through a specific channel. As such, this case easily fits Justice Scalia's observation in *Finley* that denial of public resources to support or provide an outlet for speech is not by any means an *abridgment* of that speech. *Id.* at 2182-85 (concurring opinion). No speaker whose website is blocked by the Loudoun Internet Policy is precluded from publishing their speech in any form, using any medium. No patron of the Loudoun Libraries is precluded from having access to that speech through other Internet facilities.

Because the Loudoun Library filtering system does not **prevent** any communications, but merely closes one specific channel of Internet communication, it is not a restraint on speech and thus falls outside the scope of the First Amendment. Assuming, however, that this Court may adhere to the position adopted in its April 7, 1998 opinion and decide that the First Amendment does apply, Defendant submits that the "strict scrutiny" standard espoused by the Plaintiffs/Intervenors is not the applicable standard.^{14/}

1. Courts Are Not Authorized by the First Amendment to Supervise Library Acquisition Decisions

We believe that a principal reason behind the deeply divided decision of the Supreme Court in *Pico* was the result of an awareness by the Justices that the decision in that case presented the

Court with the first occasion to decide whether the First Amendment applied to library acquisition decisions. As noted in the expert report of David Burt, (Burt Rep. at 3 - 5) and as agreed to by Karen Schneider, Plaintiffs' Expert, the essence of sound librarianship with respect to acquisition and de-selection decisions is **content-based discrimination**.^{15/} Librarians necessarily choose to allocate their limited resources to materials they deem most appropriate for the patrons they serve. The process inherently requires public officials to make choices of what to offer based entirely on the content of those materials.

The essence of librarianship is, in short, flatly inconsistent with one of the basic tenets of traditional First Amendment jurisprudence which is that content-based government decisions regarding speech are suspect.^{16/} If the Courts accept the Plaintiffs/Intervenors arguments, the judiciary will inevitably be drawn – for the first time – into a morass of superintending the thousands of public libraries across the Nation. Given the heightened awareness of the issue of library acquisitions that this case has spawned, it would not be possible to limit any decision applying the First Amendment in this case to the narrow issue of Internet filtering. Application of the First Amendment here will be an open invitation to further federal litigation on any public library acquisition or de-selection decision that any patron, author or publisher disagrees with. The judiciary should not accept that dangerous invitation to drastically expand their role and fundamentally alter the allocation of responsibility by making the federal judiciary the Supreme Librarian for the nation.

2. Even if the First Amendment Were Applicable, Judicial Review Would Proceed Using the "Reasonableness" Standard, Not the "Strict Scrutiny" Standard

Both the Plaintiffs and the Intervenors cite and rely on the decision of the Third Circuit in *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992). Their reliance rests on the wrong aspects of that decision. At issue in *Kreimer* were library regulations governing what patrons could and could not do in the library. *Id.* at 1246. Those regulations were challenged as violating a patron's right under the First Amendment to access information. *Id.* The challenge was rejected. In the course of deciding the case, the Third Circuit engaged in an extensive examination of the First Amendment standard that applies to libraries. Rejecting the "strict scrutiny" standard the Plaintiffs/Intervenors urge here, the Third Circuit held that public libraries were not traditional public fora subject to the "strict scrutiny" test, but instead were "limited purpose" facilities whose rules and regulations would be evaluated using a "reasonableness" test. *Id.* at 1261-62.^{17/}

The Third Circuit's analysis is sound and firmly rooted in Supreme Court First Amendment precedent. For purposes of the First Amendment, the Supreme Court has recognized three distinct categories of government property: (i) traditional public fora, (ii) designated public fora and (iii) non-public fora. *See Perry Educ. Assn v. Perry Local Educators' Assn*, 460 U.S. 37 (1983). "Traditional" public fora, include those places which "by long tradition or by government fiat have been devoted to assembly and debate." *Id.* at 45. They include "streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions." *Id.* at 45 (internal quotation marks and citations omitted). Computers are devices of very recent origin. They are manifestly not in the category of traditional public fora.^{18/}

A "designated" public forum "consists of public property which the State has opened for use by *the public* as a place for expressive activity." *Id.* at 45 (emphasis added). Moreover, in order to be a designated public forum, the property must be open to "*indiscriminate* use by the general public." *Id.* at 47 (emphasis added). Thus, the U.S. Supreme Court has explained, "[t]he mere fact that an instrumentality is used for the communication of ideas does not make a public forum Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Perry*, 460 U.S. at 49, n.9 (internal quotation marks and citations omitted). Loudoun County has never opened its library for indiscriminate use by the public at large for every communication purposes. See *Kreimer, supra*, at 1256 ("[o]bviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in any other conduct that would disrupt the quiet and peaceful library environment").

A "non-public forum" (sometimes called a "non-forum") consists of "publicly-owned facilities that have been dedicated for either communicative or non-communicative purposes, but that have never have been designated for indiscriminate expressive activity by the general public." *Smolla And Nimmer On Freedom Of Speech* § 8:8. Libraries fall into this category and are subject to the broad authority that government may exercise over such property.

In both traditional fora and designated fora, content-based regulations of citizen speech are subject to strict scrutiny. They will survive challenge only if "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). By contrast, in a non-public forum, the strict scrutiny standard does not apply. Instead, "the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner." *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2nd Cir. 1991). "[G]overnment imposed restrictions of speech in [non-public fora] will be upheld so long as reasonable and viewpoint neutral." *Lee*, 505 U.S. at 694. (Kennedy, J. concurring). As *Smolla and Nimmer* have pointed out:

The government "may reserve the forum for its intended purposes *communicative or otherwise*, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials opposed the speaker's view. Entire classes of speech thus may be excluded from a non-forum. Those classes may be identified by content, as long as the exclusion is reasonable in light of the purpose of the forum and there is no discrimination upon viewpoints *within a class*."

Smolla And Nimmer § 8:8 (quoting *Perry*, 460 U.S. at 47) (emphasis by *Smolla and Nimmer*).

The communications that are the subject of the Policy's restrictions are those having sexually explicit content. This restriction is manifestly the sort of content-based regulation that is

permissible under First Amendment jurisprudence. It has nothing to do with point of view.^{19/} See generally NOW Amicus Brief at 14-16.

C. The Loudoun Filtering System Meets Both the "Reasonableness" and the "Least Restrictive Means" Tests

Defendant submits that the filtering system implemented in the Loudoun Library system is patently reasonable, but we expect the Plaintiffs/Intervenors will disagree. We also submit that the Loudoun system is the least restrictive means of precluding access to illegal pornography. We already know that the Plaintiffs/Intervenors disagree on that issue.

The decision on whether the Loudoun filtering system is or is not reasonable – or is or is not the least restrictive means – is inherently a fact-bound issue of constitutional fact. The Supreme Court has frequently noted "the crucial role which the particular facts play in **every** first amendment analysis." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 540 (1986) (emphasis added) (quoting from *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 541-42 (3d Cir. 1984)). Defendant has summarized the facts which we believe support a conclusion that the filtering system developed and implemented by the Defendant is the least restrictive means. See pp. 14 - 16, *supra*. Many of the "pure facts" on which Defendant's argument rests are, we believe genuinely undisputed. Other pure facts, such as the validity of the comparative efficiency study undertaken by Mr. Burt (Burt Rep. at 20-23) are apparently disputed. Beyond those disputed "pure facts," ultimate constitutional facts are plainly disputed. In these circumstances, a trial on the merits is plainly necessary.

The Plaintiffs are plainly wrong in arguing that the Library Board "has not demonstrated a compelling need to censor the Internet." Pl. Br. at 14. There is no doubt that the interests sought to be protected here are compelling. Six sitting Justices have already held that the "interest of protecting children [from seeing patently offensive sex-related material on TV] is compelling." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996) (Opinion of Breyer, J., joined by JJ. Stevens, O'Connor and Souter; stating that the view is shared by JJ. Kennedy and Thomas). Likewise, "[t]here is no doubt that the prevention of sexual harassment is a compelling government interest." *Johnson*, 865 F. Supp. at 1439.

IV. The Loudoun Library Filtering Process is Not a Prior Restraint and is Not Unconstitutional Because it Lacks Prior Judicial Review

Plaintiffs and the Intervenors argue that the Loudoun Internet Filtering Process is an unconstitutional prior restraint, in part because there is no judicial review of webpages before they are blocked. Pl. Br. at 17-20; Int. Br. at 14-19. Reliance on that doctrine in this case is entirely misplaced.

The classic prior restraint cases are all cases in which a government body tries to prevent, or license, speech before it can be uttered within the jurisdiction of that government. Thus cases cited by the opposition such as *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968) and *Video Software Dealers Ass'n v. City of Oklahoma City*, 6 F. Supp. 2d 1292 (W.D. Okla. 1997), involved efforts of a state or local government, using its police power, to suppress absolutely

certain utterances and to seize all copies of the publication in that jurisdiction. Similarly in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the federal government sought to prohibit absolutely the publication of the **Pentagon Papers** by two newspapers. *CBS Inc. v. Davis*, 510 U.S. 1315 (1994), involved an injunction against a television network prohibiting absolutely the broadcasting of news footage. In each of these cases the effort of the government involved was to suppress and prevent speech, in its entirety, by either seizing the publication itself, enjoining the publication, or prosecuting the speaker. No such absolute suppression is presented here. Each of the websites blocked in the Loudoun Libraries remains "alive and well," publishing its pornography 7-days a week, 24-hours a day and being viewed by any willing viewer who has access to an unfiltered web browser in or outside Loudoun County.

The jurisprudence of prior restraint and prior judicial review developed in a different context where the government seeks to suppress and abridge speech. In this case a local governing body seeks only to avoid the transmission of patently unlawful speech through a single public channel. Loudoun residents can view the blocked materials in Loudoun in their homes, offices or indeed in any other location -- public or private -- that offers unfiltered access. Given the absence of silencing of the blocked websites, the underlying reason for the prior restraint doctrine disappears.

Defendant submits that application of the prior restraint doctrine in this case would be improper. The use of filtering software in a public library is more properly viewed under the "adult zoning" line of authority embodied in decisions such as *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). There, as here, the government did not say, "No, never" to pornographic speech, it just said, "Not here ever." Internet pornography filtering does not preclude Internet pornographic speech, it simply says that the speaker and the listener, like the adult moviehouse and patron, must take their business elsewhere and cannot engage in the speech activities in a zone set aside for other activities. A library, no less than a buffer within 1,000 feet of a residential neighborhood, can constitutionally be declared a "no porn zone." Enforcement of such zoning, either by administrative denial of zoning permits or installation of Internet filtering software, is simply not an unconstitutional prior restraint.

V. Because This Case Raises Novel First Amendment Issues of National Importance That Will Be Placed Before Appellate Tribunals, This Court has a Duty to Develop a Full Factual Record In an Evidentiary Trial

The task before this Court is not only novel, it is challenging and of national significance. A decision on the constitutionality of Internet filtering in public libraries is obviously an issue that will eventually be decided at the appellate level, regardless of the final judgment in this Court. That reality, coupled with the inherent nature of fact-intensive First Amendment litigation, is a sufficient reason – in and of itself – to defer resolution of the legal issues until after a full evidentiary trial.

Defendants submits, for the reasons already discussed, that there are material issues of fact that preclude summary judgment, even if the Court accepts the legal analysis urged by the Plaintiffs/Intervenors. The existence of those disputed material facts is, of course, sufficient to

require denial of the Plaintiffs/Intervenors Motions. But even if this Court both accepts the opposition's legal analysis **and** finds there is no dispute as to the material facts needed to render a summary judgment, we submit that this is a case where proper considerations of judicial efficiency require an evidentiary trial on the merits.

A review of recent appellate decisions in the First Amendment arena indicates that appellate tribunals quite often disagree with the decisions of trial and intermediate appellate courts. Not infrequently review at the appellate level leaves the court unable to decide the legal issues because the factual record has been prematurely truncated through summary procedures. The result is a highly inefficient remand for further development of the record, a process that unnecessarily consumes public and private resources and prolongs the legal uncertainty that ill serves the public interest in such cases.

An example of this problem was present when the Supreme Court rendered its decision in *Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622 (1994). The issue in that case was the constitutionality of the FCC's "must carry" regulations for cable TV. The case had been decided by a three-judge district court, but when it reached the Supreme Court, the Justices concluded that the evidentiary record had not been sufficiently developed to permit an informed judicial decision. *Id.* at 626-627. Remand for development of further facts was ordered.

This case presents just such a possibility of procedural problems. All parties, counsel – and the Court – recognize that reasonable lawyers and judges can – and will – disagree on the correct decision in this litigation. One's view of the law in this area are, we believe, highly influenced by one's view of the facts. The possibility of a factual miscue in the compressed environment of a summary judgment proceeding in this case is high, especially under the traditional accelerated procedures of this Court. It is probable that one or more appellate jurists will disagree with the legal conclusion reached here, regardless of what those conclusions are. It is virtually certain that other judges could disagree as to the relevant, material facts that form the predicate for their legal conclusions.

As this Court cogently noted at the February 20th oral argument on Defendant's Motion to Dismiss, there is a public interest in minimizing the costs of this litigation. While certain costs are inevitably necessary to present an proper factual and legal record, the parties – and the judiciary – should not be burdened with the additional inefficiencies of a remand for further factual findings.

An evidentiary trial of this case in this Court would, in our view, require no more than 3 or 4 days at the outside. Given the investment of resources during discovery, the national importance of the issues and the virtual certainty that differing jurists will reach differing opinions on the novel issues raised, we submit that it is imperative to hold an evidentiary trial before issuing a final judgment on the constitutional issues. Such a proceeding is the only way to minimize, if not eliminate, the risk of having to do it all over again after appellate review.

Conclusion

For the reasons stated in this Brief, in the Brief of the *Amici Curiae* and in Defendant's Brief in Support of their own Motion for Summary Judgment, the Plaintiff/Intervenors Motions for Summary Judgment should be denied and the matter set for a trial on the merits.

Respectfully submitted,

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Footnotes

^{1/}As noted in our Brief in Support of our Motion to Dismiss the original Complaint, the ACLU has successfully forced a California library to abandon plans for use of a pornography filter by threatening litigation. In this case such a threat from Mainstream Loudoun became a reality.

^{2/}It is interesting that People For the American Way and the ACLU have filed an amicus brief in that case asserting that the library's decision is immunized from litigation by § 230 of the Communications Decency Act while at the same time taking the position before this Court that § 230 does not provide litigation immunity for the Loudoun Library. *See* <http://www.aclu.org/cart/Kathleenrvslivermore.html>.

^{3/}The Defendant is filing under seal color prints of some, but not all, of the pages on the sites listed. *See* website prints, filed under seal as Exhibits 4-14. While we believe it is unnecessary for purposes of deciding the summary judgment motions to have the Court look at all of the webpages pointed to by the parties, we believe it is, unfortunately, necessary for the Court to look at a few of the pages that exemplify the illegal obscenity that would be accessible if the Loudoun filters were not in place. We do not, however, believe it is appropriate to make the prints of those pages part of the public record.

^{4/}Indeed in some cases it is necessary to turn the computer off to stop the flow of unrequested material. *See* Henderson Dec. at ¶ 14.

^{5/}The Intervenor's only witness on sites allegedly blocked by the Loudoun Library testified that a number of sites, including specifically the <http://www.paranoia.com/~goat> site, were not sexually explicit, pornographic, or otherwise proper for blocking under the Loudoun Policy. Deposition of Cassidy Sehgal at pp. 106, 116-18. As explained subsequently, Defendant believes Ms. Sehgal cannot testify in this case since she is a lawyer employed by the ACLU and working as such with counsel of record on this case. *See* pp. 18-20, *infra*.

^{6/}See pp. 31-33, *infra*; See also NOW Amicus Brief at 30-36.

^{7/}Although a conclusion on "least restrictive means" involves a legal conclusion, it rests on purely factual findings and comparisons of alternatives. As such it is an issue of "constitutional fact" not appropriate for summary disposition. See *Z.J. Gifts v. City of Aurora*, 136 F.3d 683, 684 (10th Cir. 1998) (describing that review of "constitutional facts" requires "examination of the record in its entirety"). As emphasized by the U.S. Supreme Court:

[Where] the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated. . . . the rule is we 'examine for ourselves the statements in issue and the circumstances under which they are made to see whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

New York Times v. Sullivan, 376 U.S. 254, 285 (1964) (citations omitted); see also *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (emphasizing importance of "examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression").

^{8/}Port 80 is used for "normal" web servers. Port 443 is used for "secure" web servers. Other ports are reserved for other network protocols or for non-standard assignment. See generally, *D. Heywood & R. Scrimger, Networking with Microsoft TCP/IP* (New Riders Publishing 1997) at 46-60.

^{9/}Ms. Sehgal's reliability is further undercut by her deposition testimony that she had visited all of the allegedly blocked sites using non-library facilities and found that none of them contained sexually explicit or pornographic materials. Sehgal Dep. at pp. 106, 116-18. Included in our sealed exhibit is a color reproduction of one of the sites she testified was not obscene. See Defendant's Sealed Exhibit 5. That site, which is a photograph of one individual inserting his arm into the anus of another individual, is beyond question obscene under any reasonable definition.

^{10/}Defendant has been unable to verify many of the blocks Mr. Kropat claims to have experienced. Virtually all of the sites he says were blocked during his July 25, 1998, visit, are non-existent sites that cannot be retrieved using the URLs in his Second Declaration. See Henderson Dec. at ¶ 18.

^{11/}This issue is well analyzed in the *Amicus Curiae* Brief of NOW that has been filed in this case. See NOW Amicus Brief at 11-14.

^{12/}The Plaintiffs/Intervenors have mistakenly argued that Defendant's reliance on this policy justification is perverse since library staff is required to review blocked sites to determine whether they should be unblocked. As established by Mr. Henderson in his accompanying Declaration, no staff members has ever been required to participate in

review of any pornographic sites, either as part of the pre-installation evaluation process or during the post-installation review of blocked sites. Henderson Dec. at ¶ 3. All participants in the pre-installation testing were told in advance about the nature of the sites and advised that they could, without fear of any reprisal, decline to participate. *Id.* The individuals who participate in the procedure for reviewing sites to see if they should or should not be blocked are intentionally restricted to Mr. Henderson and Ms. Timmerman, both to insure consistency of judgment and reduce the number of staff who are exposed to inappropriate materials. *Id.* We are well past the point in time where one can make the sexist suggestion that women are necessarily offended by seeing pornography. Some may be and some may not. The point is that the only staff members who are exposed to blocked sites are those who choose, on an informed and voluntary basis, to participate in the review process. That participation, necessary to carry out the self-imposed duty of insuring minimal inappropriate blocking, cannot be described as a procedure that contradicts the Policy itself.

^{13/}Contrary to what some might think, there is nothing in the subsequent decision in *Manual Enterprises v. Day*, 370 U.S. 478 (1962) that undercuts our argument. In that case a publisher of magazines sued to overturn an administrative refusal to accept certain magazines for mailing. A divided seven-Justice Supreme Court set the refusal aside. Justices Harlan and Stewart concluded that the magazines in question "cannot be deemed legally 'obscene.'" *Id.* at 482. Justices Brennan, Douglas and the Chief Justice concluded that the criminal statute did not authorize administrative action to refuse to accept matter for mailing. *Id.* at 495-519. Justice Clark dissented and would have upheld the administrative exclusion against the First Amendment challenges. Justice Black concurred in the judgment without joining or expressing any opinion. *Id.* at 495. Justices White and Frankfurter did not participate in the decision. *Id.*

^{14/}Defendant recognizes that this Court appears to have adopted the "strict scrutiny" standard in its April 7, 1998, opinion. That decision, we submit, should not foreclose reconsideration at this time of the proper standard. The April decision on that point was not preceded by briefing or argument on the proper standard. The issue presented to the Court in that context was whether the First Amendment applied at all to the Loudoun Internet Policy. The sub-issue of what First Amendment standard should be applied **if** the Court denied Defendant's Motion to Dismiss was not briefed or argued. Thus in a meaningful sense the Court's discussion of that issue in the April opinion was premature dicta and should not automatically be followed as the law of the case at this point in the litigation.

^{15/}Described as "weeding" in Ms. Schneider's Supplemental Expert report. Pl. Ex. 43 at 4.

^{16/}As discussed in the next section, this traditional principle does not apply in cases like this one where the government entity is not a traditional public forum. In cases of non-traditional fora, content-based decisions are permissible. Moreover the Supreme Court has in recent years clarified that the essence of traditional antipathy to content-based decisions needs to be re-formulated to clarify that the area of judicial concern is really

with "viewpoint" discrimination as distinguished from "content" discrimination. *See generally* NOW Amicus Brief at 14-17.

^{17/}The Third Circuit applied the reasonableness test to two of the three rules at issue. It applied the "time, place and manner" test to a third rule, specifically holding that this test did not require the regulation to be the least restrictive means possible, but instead meant that the regulation was constitutional "so long as . . .the regulation promotes a substantial government interest that would be **achieved less efficiently** absent the regulation." 958 F.2d at 1264, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).

^{18/}*See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992) ("Airports are of course public spaces of recent vintage, and so there can be no time-honored tradition associated with airports of permitting free speech") (Kennedy, J. concurring).

^{19/}*See General Media Comm. v. Cohen*, 131 F.3d 273, 282 (2nd Cir. 1997), 1997 U.S. App. LEXIS 40571 *23 (corrected Mar. 25, 1998) (rejecting as "linguistic overreaching" claim that "lasciviousness" is a viewpoint); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (rejecting claim that "offensively lewd and indecent speech" was related to political viewpoint); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (an "unconstitutional motivation could not be demonstrated" if school board removed library books because they were "pervasively vulgar" rather than because of "disfavored ideas").