

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

MAINSTREAM LOUDOUN, INC., et al.)
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 Plaintiffs,)
)
 v.) Civ. Action No. 97-2049-A
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 BOARD OF TRUSTEES OF THE LOUDOUN)
 COUNTY PUBLIC LIBRARY)
)
 Defendant.)
)

THE SAFER SEX PAGE, et. al.,)
)
 Plaintiff-Intervenors,)
)
 v.)
)
 BOARD OF TRUSTEES OF THE LOUDOUN)
 COUNTY PUBLIC LIBRARY)
)
 Defendant.)
)

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

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

Counsel for Plaintiffs

Plaintiffs have demonstrated on the record of this proceeding that this Court should grant summary judgment and rule that the Loudoun County Policy on Internet Sexual Harassment (the "Policy") is unconstitutional. See Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment ("Pl. S.J. Br."). Defendant fails to identify any material facts that are genuinely in dispute, and declines even to take issue with the facts as documented by plaintiffs. Compare *id.* at 2-13 with Defendant's Brief in Opposition to Plaintiff/Intervenors' Motion for Summary Judgment ("Def. Opp. Br.") at 4-24. In addition, defendant misconstrues the applicable legal standard, and mainly asks this Court to reconsider the law of the case established in its April 7, 1998 Opinion and Order. *Id.* at 31-37. See *Mainstream Loudoun v. Board of Trustees*, 2 F. Supp.2d 783, 792-797 (E.D. Va. 1998).

However, defendant's errors extend beyond its legal and factual deficiencies and begin with a bald misrepresentation of the nature of this controversy. This is not, as defendant presents it, a disagreement between the "uncompromising 'no filtering' position of the American Library Association and the equally uncompromising 'no pornography' position of patrons, parents and public bodies." 1/ Nor is it "an effort to obtain a ruling that no filtering whatsoever could be utilized by public libraries." Def. Opp. at 3. It is beyond dispute that, during consideration of the Internet policy, plaintiff Mainstream Loudoun proposed an alternative that included the use of filtering. Plaintiff's proposal would have made filtering optional for adults and would have required minors to obtain written parental permission before being allowed to use library computers for Internet access without filtering software. Ex. 41. See also Def. Ex. 1, Plaintiffs' Response to Defendant's First Request for Admissions, Nos. 7, 8, 9.

Accordingly, libraries are not "caught squarely in the middle" of defendant's false dichotomy. 2/ Rather, they are forced to deal with activist groups marked by a preoccupation with the subject of pornography that alternately clamor for censorship and threaten litigation if they fail to achieve their intended result. 3/ The only solution is for this Court to declare the Loudoun County Policy unconstitutional and to draw clear lines protecting intellectual freedom.

I. Contrary to Defendant's claims, no material facts are genuinely in dispute

Although defendant understandably may now regret its repeated representations to this Court that no material facts are in dispute, 4/ it cannot now manufacture such a dispute on the record before this Court. A party cannot defeat an adequately supported summary judgment motion by simply asserting factual disputes. Instead, the party must set forth specific facts showing that there is a genuine issue for trial. 5/ Nor does the existence of some areas of disagreement require a case to go to trial. Rather, the dispute must center on facts that are "material to an issue necessary for the proper resolution of the case, and the quality and quantity of evidence offered to create a question of fact must be adequate to support a jury verdict." *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995). Defendant has made no such showing here.

A. Defendant Does Not Dispute Any of the Material Facts in Plaintiffs' Motion

Plaintiffs presented the facts of this case, with full support from depositions, declarations and other exhibits, Pl. S.J. Br. at 2-13, and defendant has done nothing to dispute them, except to assert that plaintiff's view of the relevant facts is "biased." Def. Opp. at 3. Defendant does not specifically take issue with any of the particular facts presented, and

the questions it does raise, as detailed below, are not material questions of fact about which there is a genuine dispute. In particular, for purposes of this Motion, defendant does not dispute that:

- o The Policy on Internet Sexual Harassment restricts access to constitutionally protected information in the Loudoun County libraries and requires that blocking software be installed on all public Internet terminals for patrons of all ages;
- o Patrons, regardless of their age, "will not be permitted" to access any material considered to violate the Policy, including information considered "Harmful to Juveniles" but legal as to adults;
- o The Policy states that library computers will be placed "in close proximity to, and in full view of library staff" so that staff can monitor use of the Internet by library patrons and prevent library patrons from accessing information prohibited under the Policy. Staff members must enforce the Policy and eject from the library any patrons who access "prohibited" information;

- o Under the Policy, the Library Director has no discretion to unblock a website considered to violate the Virginia Harmful to Juveniles law, even if an adult patron requests access to the site;
- o The methods used to enforce the Policy do not require any findings regarding the legal status of a particular website before, or even after, it is blocked;
- o Blocking software is incapable of applying a legal test;
- o The list of websites blocked by X-Stop is unknown to the defendant, and Log-On Data Corp. has rejected requests by the library staff for a list of blocked websites in the X-Stop database. Nor is defendant informed which websites are added to the list of blocked sites in daily automatic downloads;
- o There are no written guidelines that determine how staff members are to apply the Policy or evaluate a particular website;
- o The Library staff, patrons and experts on both sides of the case have experienced both over- and underblocking by X-Stop, and will continue to do so;
- o Various less restrictive measures have been employed with respect to Internet access in other libraries, but defendant rejected such approaches without trying them;
- o The "unblocking policy" requires patrons to seek permission from government employees to access information they have a constitutional right to obtain.

Based on these undisputed facts, as set forth in their opening brief at 3-13, plaintiffs are entitled to summary judgment as a matter of law.

B. The "Disputes" Defendant Conjures Are a Sham

Despite the many admissions listed above, defendant asserts several areas of disagreement. The facts purportedly in dispute in this case fall into one of three categories: They are either not material to resolution of the issues in this case, not genuinely in dispute, or are primarily questions of law. We address each of defendant's assertions in turn.

The Ability To Access and Display Illegal Pornography. This is not a question of material fact about which there is a genuine dispute. Although defendant notes that plaintiffs "acknowledge that 'sexually explicit' material is available" on the Internet, it asserts that there is a factual dispute because plaintiffs "refus[e] to differentiate between protected material that is sexually explicit and that which is unlawful." 6/ However, the issue in this case is not whether particular websites are or are not obscene; it is whether defendant

has adopted a policy by which it presumes their illegality without meeting constitutional requirements. This is a matter of law, as the Fourth Circuit has made clear. 7/ It is not enough simply to allege that obscenity exists on the World Wide Web to create a "material" dispute. The Supreme Court regularly rules on the constitutionality of governmental restrictions without the need to determine whether the speech at issue is obscene. 8/ Thus, the relevant issue is the fact that the government claims to block only material that is illegal, Def. Opp. at 5, but has adopted a Policy that is incapable of doing so and that lacks necessary constitutional safeguards. 9/

Delegation of Filtering Decisions to a Third Party. There are no facts genuinely in dispute on this question. Defendant does not dispute that X-Stop blocks websites according to Log-On Data Corp.'s own criteria, and not a legal standard, Pl. S.J. Br. at 5-6, that the list of blocked sites is not disclosed to Loudoun County librarians, id. at 7, that defendant is not told what sites are added to the list in daily updates, id., that X-Stop results in both over- and underblocking by the terms of the Policy, id. at 8-12, and that defendant typically discovers the erroneous blocking by happenstance (or in litigation). Id. at 9. Rather, defendant asserts that facts are in dispute because "no website is added to the X-Stop blocked site list until it is first reviewed and evaluated by a human being," that the Loudoun Policy was not adopted by third parties, and that the Library staff has evaluated "more than 172 websites." Def. Opp. Br. at 11.

None of these assertions has the slightest relevance to the resolution of this case, except to support plaintiffs' claims. The "viewed by a human" test that defendant now proposes is unknown in constitutional law. The fact that those humans are employees of a software company in California is relevant, but only to undermine defendant's claim that the Policy is not implemented by third parties. The Policy may be homegrown, but it is implemented in the first instance by people who do not apply the standards set out in the Policy -- or any legal standard. 10/ Defendant's claim that the library staff has reviewed more than 172 websites is not only undisputed, it is devastating to the Board's argument. By defendant's own admission, the library staff has been able to review only a tiny fraction of one percent of the websites blocked by X-Stop. Compare Declaration of Douglas Henderson, Def. Ex. 15, ¶ 9 with Ex. 13, D. Burt Dep. at 221-222 (estimating that the X-Stop blocked site list currently contains up to 80,000 websites). In any event, as a matter of law, the Policy would be unconstitutional even if all blocking decisions were made locally, because the library staff is given standardless discretion to restrict speech without regard to constitutional requirements. See Pl. S.J. Br. at 25-30.

Whether X-Stop is the "Most Effective System" for Blocking Access. This is essentially a legal question. Defendant's argument on this point boils down to an assertion that its Policy is the "most effective" alternative because it is a prior restraint. 11/ But as noted below, the use of a prior restraint is plainly unconstitutional. See *infra* pp. 17-18. Moreover, as a matter of law, the Supreme Court repeatedly has rejected the argument that greater restrictions are justified because less repressive alternatives "would not be effective enough." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. at 128. See *Near v. Minnesota*, 283 U.S. 697, 711 (1931) ("efficient repression or suppression of the evils" does not justify greater restrictions) (citation omitted). In *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2393 (1996) (plurality op.), for example, the Court acknowledged that no regulatory provision "short of an absolute ban" on indecent speech on cable television leased access channels would completely protect children from potential exposure, but nevertheless struck down mandatory restrictions on such speech. 12/

For purposes of this case, the relevant issue is whether defendant has met its burden to prove that the Policy is the least restrictive means of addressing the governmental interest. *Mainstream Loudoun*, 2 F. Supp.2d at 795. In *Sable*, the Supreme Court held that less intrusive measures should be "tried out in practice" before more restrictive measures can be adopted. 492 U.S. at 130. See also *Denver*, 116 S. Ct. at 2391-93. Here, however, defendant merely speculates that such options as acceptable use policies would be "effectively ignored in practice," Def. Opp. Br. at 13, even though the record shows that area libraries rely on such policies to govern their Internet usage and none have experienced any significant problems. 13/ In the one library that received a single informal complaint, 14/ the library director reported that they had installed "privacy screens, which work great." Ex. 15, at MLF-000707; see also Decl. of Thomas Hehman, ACLU Ex. K1. Indeed, the only evidence in this record indicates that less restrictive measures would be effective. Ex. 15; ACLU Ex. K-M.

Whether Particular Websites Were Inappropriately Blocked. There is no genuine dispute of material fact on this point. Contrary to defendant's argument, this case does not turn on whether the parties can agree on each instance of overblocking detected in Loudoun County. The relevant inquiry is whether the Policy and its implementation results in both over- and underblocking by its own terms -- a point defendant concedes, and even demonstrates through its expert report and other declarations. As defendant's Library Director stated in his most recent submission to this Court, "[w]e are, of course, aware that the blocking libraries downloaded from the X-Stop server may include blocks of certain URLs that, if we knew about them, we would not block." Def. Ex. 15, Decl. of Douglas Henderson, ¶ 18. Indeed, defendant confirmed the key facts in the Loren Kropat's Second Declaration, Ex. 27, which stated that X-Stop continues to block a significant number of websites that have nothing to do with pornography. 15/ Defendant further admits that in its initial evaluation of X-Stop the library staff looked at the filtering software "from the perspective of a user trying to obtain information," like plaintiff library patrons. In addition to the significant proportion of inappropriate blocks it discovered at that time (67 percent of blocked sites were deemed to be "protected speech", defendant admits that there are "many, many sites that were (and are still) blocked by X-stop that were not visited during our evaluation." Def. Ex. 15, Decl. of Douglas Henderson, ¶ 8.

Any disputes regarding which specific websites are blocked are not material. For example, defendant states that it was unable to verify many of the blocked sites Mr. Kropat found on July 25, 1998, although it does not dispute his findings. Def. Opp. Br. 22 n.10. The Library Director has even acknowledged the "ever changing nature" of material on the World Wide Web, and that "the specific content of a particular site may vary, or a site may disappear for unexplained reasons." Def. Ex. 15, Decl. of Douglas Henderson, ¶ 14. As a result, the fact that plaintiffs' and defendant's search results differ over the course of the litigation is no reason to preclude summary judgment. Quite to the contrary, the changing nature of material on the World Wide Web is evidence for why the Policy will always cause over- and underblocking, and why delay inherent to defendant's unblocking policy will result in permanent censorship when a page changes before it can be unblocked. Ex. 43, K. Schneider Third Decl. ¶¶ 41-43.

Despite the clear record in this case, Defendant at various stages has argued that such examples of blocking protected speech never happened, 16/ or that they resulted from a "glitch," Def. Opp. at 17, or that they will never happen again. *Id.* at 18. But ultimately it does not matter. Defendant has installed inside each of its public Internet access

terminals a censorship machine that is outside of its direct control. As experts on both sides of the case have testified, "glitches" are inevitable in any such system, Ex. 43, K. Schneider Third Decl. ¶ 33, and that over- and underblocking is a continuous problem with filtering software. Ex. 13, D. Burt Dep. at 172. Accordingly, there is no dispute of material fact, and summary judgment for plaintiffs should be granted.

Whether the Policy is Consistent Generally With Library Acquisition Standards. This is not a material fact, and any legal question relating to whether the Policy should be considered an "acquisition" or book "removal" policy has been decided already in plaintiffs' favor. *Mainstream Loudoun*, 2 F. Supp.2d at 793-794 ("the Library Board's action is more appropriately characterized as a removal decision"). Nor is it genuinely in dispute. Defendant's existing policies do not permit censorship. Ex. 5, 6 and 7. As the Loudoun County Library Director testified at deposition, "the Policy as it's written and has been passed is in violation of federal code, state code, and is not consistent with [our] own policies." Ex. 2, D. Henderson Dep. 221. See also *id.* at 219-220 (stating that the Policy violates the policies on intellectual freedom and electronic access adopted by most libraries).

Whether Loudoun Residents Have Alternative Access to the Web. This is not a material fact, but is a matter of settled law. As the Supreme Court has held on numerous occasions, "'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Reno v. ACLU*, 117 S. Ct. 2329, 2349 (1997) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). In particular, the Court in *Conrad* struck down as a prior restraint the denial of permission to use a municipal auditorium for the presentation of an allegedly "obscene" musical. In doing so, the Court noted that "[w]hether petitioner might have used some other, privately owned theater in the city for the production is of no consequence." 420 U.S. at 556. By the same reasoning, whether Loudoun residents may find other ways to access the Internet is immaterial. 17/

Whether Unfiltered Access Would Cause Problems. There is no genuine dispute of material fact on this point. Although there is no doubt that proponents of the Policy have adopted the position that unfiltered access is anathema, there are precious few disputed facts on this record, and none that are material. 18/ As noted above, the only information actually obtained from other libraries demonstrates that unfiltered access has not led to significant problems. 19/ Indeed, the Loudoun County Library Director testified that the principal problem reported to him by the Fairfax County Public Library director was that "Family Friendly Libraries, Enough is Enough, and the Christian Coalition had basically set them up to create a problem" by staging a situation "implying that this kid [and his family] had come across [a pornographic website] when in fact the child and that family weren't even there." Ex. 2, D. Henderson Dep. 190-192. Otherwise, the Fairfax library director reported no problems with unfiltered Internet access. *Id.* at 192. However, even if the record in this case was less clear, summary judgment for plaintiffs would be warranted for two reasons. First, it is defendant's burden to prove the existence of a problem related to the government's interest that is more than just theoretical or abstract, and it has utterly failed to do so here. 20/ Second, and more importantly, even if defendant has shown a compelling interest, it must also demonstrate that its Policy is consistent with the Constitution -- that it is not unnecessarily restrictive of protected speech, does not vest excessive discretion in the government and employs the least restrictive means. But as demonstrated below and in plaintiffs' opening brief, we are entitled to summary judgment on these grounds alone.

II. Public Libraries Do Not Have a Duty to Censor the Internet

Defendant states that it must restrict patrons' access to Internet information in order to avoid liability for passing on "illegal" materials. Def. Opp. at 26-29. It likewise treats adults and children alike to "minimiz[e] any risk of liability under applicable laws."

Answer ¶ 1(c). But defendant's assertion that it must censor Internet speech in order to avoid potential criminal or civil liability ignores the general rule that "there is no 'conduit liability' in the absence of fault." *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 931 (E.D. Wash. 1993). Accordingly, the First Amendment precludes imposing liability on a bookseller that has no "notice of the character of the books they sold." *Smith v. California*, 361 U.S. 147, 152 (1960) (no strict criminal liability may be imposed to screen out obscene literature because it would force the bookseller to "restrict the books he sells to those he has inspected"). Similarly, no civil liability may be imposed on a party that serves only as the conduit for information. 21/ Where, as here, library patrons decide which websites to access and all information is published by third parties, defendant's undifferentiated fear of future liability is groundless.

Not only does established case law preclude imposing liability in this circumstance, there is statutory immunity as well. Although defendant has mistakenly argued that Section 230 of the Telecommunications Act immunizes local government policy from constitutional review where it imposes a scheme of censorship, *Mainstream Loudoun*, 2 F. Supp.2d at 789-790, there is no question that Section 230 precludes "distributor liability" for the speech of third parties. 22/ See *Zeran*; 129 F.2d at 334. Similarly, defendant is immune from liability under the Virginia Harm to Juveniles statute, since the law specifically exempts from its prohibition the display of proscribed material in any accredited museum, library, school, or other institution of higher learning." VA Code § 18.2-391.1 Even without this exemption, it is far from clear that the law applies to public libraries in any event, since it generally applies to a "knowing display [of harmful material] for [a] commercial purpose." *Id.* § 18.2-391(a) (emphasis added). 23/ Under these circumstances, Defendant has no constitutional justification for using the threat of liability as a pretext for limiting information to minors in a library setting, much less to adults.

III. the policy is unconstitutional under settled first amendment principles

Well-established First Amendment principles, such as the legal standard articulated in this Court's previous Opinion and Order in the case, support summary judgment for plaintiffs. Defendant's repeated requests that this Court reconsider the legal standard set out in the April 7, 1998 Opinion and Order, Def. Opp. at 31-32, is a strong indication that the Policy is unconstitutional under the law of the case. After full briefing and oral argument this Court found that the Policy can survive only if it meets strict First Amendment scrutiny, *Mainstream Loudoun*, 2 F. Supp.2d at 795, a conclusion defendant implausibly characterizes as "premature dicta." Def. Opp. at 32 n.14.

In its opposition brief, defendant all but concedes that the Policy is unconstitutional as to adults and pleads for the Court not to focus on "the single standard for adults and children issue." Def. Opp. Br. at 4. However, the Policy at issue before the Court, as defendant concedes, applies at all times to adults and makes no attempt to apply separate policies for adults and minors as did an earlier Internet Use Policy eventually rejected by the Library Board. By its very terms and well-settled precedent, the Policy is not narrowly tailored as a matter of law and unconstitutionally restricts adults to reading even less than what is fit for minors. Summary judgment can properly be granted on these grounds alone. It also is warranted for the following reasons:

A. The Policy is Invalid Under the Public Forum Doctrine

Defendant's current claim, that the library is a non-public forum and that any restrictions need only be "reasonable," Def. Opp. at 31-39, is based on an obvious misreading of applicable precedent. After discussing the various categories established under the public forum doctrine, defendant concludes, without citing any authority, that libraries are non-public fora "subject to the broad authority that government may exercise over such property." Def. Opp. at 36. However, this assertion is contradicted by the only case defendant cites that is directly on point. 24/ Defendant may well be correct that a library is not an appropriate place for parades, leafleting, giving speeches or other activities normally associated with a traditional public forum, but the government indisputably opened this property "for the exercise of specific First Amendment activities" including "reading, studying, [and] using the Library materials." 25/ Accordingly, a public library is a designated public forum, and restrictions on speech in this context are subject to strict scrutiny. 26/ The Loudoun County Policy at issue here fails that test, as set out more fully in plaintiff's opening brief. See Pl. S.J. Br. at 13-30.

Additionally, the library policies at issue in Kreimer cannot be considered as support for the Loudoun County Internet Policy. They were expressly directed toward offensive and disruptive behavior, including "noisy or boisterous activities." The policy in Kreimer expressly excluded any restrictions on "reading, studying, or using library materials." 958 F.2d at 1247. In sharp contrast, the Loudoun Internet Policy is directed exclusively toward access to information on the public Internet terminals. There is no "behavior" aspect to the Policy, and the Library Director has testified that the library has separate policies that are adequate to deal with bad conduct by patrons. Ex. 2, D. Henderson Dep. Tr. 325-327. As discussed below, the Internet speech restrictions in Loudoun County are invalid regardless of whether they are analyzed under a "reasonableness test" or strict scrutiny. 27/

Determining whether library censorship decisions are consistent with the First Amendment is hardly a novel proposition, nor does it convert the judiciary into the "Supreme Librarian," as defendant puts it. Def. Opp. at 34. Defendant's current argument that courts are not authorized to "supervise library acquisition decisions," *id.* at 33, has already been considered and rejected by this Court. *Mainstream Loudoun*, 2 F. Supp.2d at 793-794 ("defendants have misconstrued the nature of the Internet . . . the Library Board's action is more appropriately characterized as a removal decision"). And, contrary to defendant's claims, the reasonableness test it proposes would require courts to engage in far more intrusive review of library Internet policies. 28/

B. The Postal Service Cases Support Summary Judgment for Plaintiffs

Defendant's claim that the Policy is constitutional because "the Postal Service can refuse to carry obscene mail," Def. Opp. at 30-31, is fatal to its case. 29/ Astonishingly, the only case defendant cites that, like the Policy at issue here, involved a non-judicial process to bar allegedly obscene publications from the mails, resulted in a holding that the government's actions were invalid. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). In subsequent decisions, the Court has been even more clear about the bedrock constitutional requirements restricting the government's ability to censor speech. In *Blount v. Rizzi*, 400 U.S. 410 (1971), the Court struck down sections of the Postal Reorganization Act that, analogous to the Policy here, authorized the Postmaster General to halt the use of the mails for commerce in allegedly obscene materials and to detain incoming mail that the government believed to meet the definition of obscenity. 30/ It held unanimously that the postal regulations were unconstitutional on their face because

they lacked the necessary safeguards against prior restraint. *Id.* at 416-418 ("procedures designed to deny use of the mails to commercial distributors of obscene literature . . . violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression"). The Court quoted Justice Holmes' admonition that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *Id.* at 416 (quoting *United States ex rel. Milwaukee Social Democratic Publ'g. Co. v. Burleson*, 255 U.S. 407, 423 (1921) (Holmes, J., dissenting)). There are no contrary decisions. 31/ Under this clear line of authority, defendant's Policy is plainly unconstitutional.

The result is no different if the information service provided by the government is characterized as a "benefit" rather than a "right." See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946) (government cannot withhold second-class mailing privilege to a men's magazine whose "dominant tone or characteristic" reflects "the smoking-room type of humor, featuring, in the main, sex"); see also *Burleson*, 255 U.S. at 423 (Holmes, J., dissenting) ("If such power were possessed by the Postmaster General, he would . . . become the universal censor of publications."). 32/ Nor can defendant claim the constitutional ability to exert greater control over speech because the library, like the Post Office, is a government agency. *Def. Opp.* at 30. Just the opposite is true: defendant is bound by constitutional constraints because it is a government agency. 33/

C. The Policy Imposes a Prior Restraint

Defendant's assertion that the Policy is not a prior restraint because Loudoun County does not "prohibit absolutely the publication" of affected websites, *Def. Opp.* at 40, is based on a fundamental misunderstanding of basic First Amendment concepts. "Administrative rules which operate to forbid expression before it takes place," like the filtering requirement here, are a classic prior restraint. 34/ There is something "peculiarly totalitarian" about such systems, because they "require the heavy hand of government in previewing vast quantities of speech to determine if it is suitable for public consumption." *Smolla and Nimmer on Freedom of Speech* § 15:10 (1996 & Supp. 1997). Such systems "are simply repugnant to the basic values of an open society." *Id.* Defendant cites no cases to support its very limited understanding of the prior restraint doctrine, for none exist. Indeed, the Supreme Court has considered and expressly rejected defendant's interpretation. In *Southeastern Promotions, Ltd. v. Conrad*, the Court struck down as a prior restraint the denial of the use of a municipal auditorium for the presentation of the musical "Hair," on grounds that it was obscene. The Court pointed out that "it does not matter . . . that the board's decision might not have had the effect of total suppression of the musical in the community. Denying use of the municipal facility under the circumstances present here constituted a prior restraint." 35/ Thus, the Supreme Court in *Conrad* dispensed with defendant's novel prior restraint argument, as well as its theory that the Board should have greater ability to regulate because the library is a government-owned institution.

Nor is defendant's citation of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) or its attempt to recast the Policy as mere "zoning" helpful to its argument for two reasons. First, as defendant has acknowledged, the Policy is content-based, and the Supreme Court has held repeatedly that Renton "secondary effects" analysis does not apply where regulation of theaters is based on "the content of the films being shown inside the theaters." 36/ More recently, the Court held that restrictions on Internet speech, characterized by the government as a form of "cyberzoning" to screen

inappropriate materials from children, could not be analyzed as a "secondary effect" but must be reviewed under strict scrutiny. *Reno v. ACLU*, 117 S. Ct. at 2342. Second, where, as here, advance regulation of speech is involved, the measure must be analyzed under the prior restraint doctrine even if it is content neutral. E.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Indeed, the Fourth Circuit, sitting en banc, has expressly rejected defendant's interpretation of *Renton*. 37/ This Court should do the same.

VI. on the undisputed facts, summary judgment is required in this case Although it begs the question as to why the Board has twice moved for summary judgment in this case, defendant now argues that this court should withhold summary judgment because the case involves important issues that eventually will be considered by appellate courts. With all due respect, this is precisely why summary judgment must be granted. Federal Rule of Civil procedure 56 provides that a party is entitled to summary judgment if "there is no genuine issue of fact and . . . the moving party is entitled to judgment as a matter of law." 38/ There is a particularly compelling need to resolve cases that involve First Amendment violations on summary judgment because prolonging the litigation only exacerbates the constitutional deprivation. *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) ("In the First Amendment area, summary procedures are even more essential.").

As the Supreme Court has made clear, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There is no dispute here but that defendant has implemented a system that employs arbitrary procedures, results in overblocking of speech, limits adults to information that is fit for children fails to employ the least restrictive means, and requires library patrons to seek permission from the government to obtain constitutionally protected information. Consequently, plaintiffs are entitled to summary judgment.

Conclusion

For the foregoing reasons, and for the reasons stated in plaintiffs' opening brief, plaintiff/intervenors' opening brief and reply brief, plaintiffs' respectfully request that this Court grant plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

Robert Corn-Revere

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

Elliot M. Minberg

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

Counsel for Plaintiffs
Dated: September 23, 1998

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- 1/ Def. Opp. Br. at 1. Defendant's initial confusion centers on the identity of the parties. The American Library Association is not a party in this case. Moreover, patrons and parents are plaintiffs -- not defendants. See Complaint at ¶¶ 12-25.
 - 2/ Ironically, the case defendant cites to show the peril faced by libraries that decide not to use a filter would have been avoided if that library had adopted a compromise like the one Mainstream Loudoun proposed here, as defendant is well aware. *Kathleen R. v. City of Livermore*, No. V-015266-4 (Sup. Ct., Cal.).
 - 3/ See, e.g., Ex. A, D. Henderson Dep. 229 (describing activists' bizarre claims presented at county supervisors' meetings that the American Library Association is "hand in hand with the pornography industry") (exhibits attached hereto are designated by letters; exhibits attached to plaintiff's opening brief are cited by their corresponding numbers); Justin Blum, Supervisors Vote to Help Pay for Internet Fight, *Washington Post* (Loudoun Extra), June 4, 1998 at 1, 4 (quoting Dixie Sanner of Enough is Enough) ("I will make a straight beeline for an attorney's office, and I will not settle for a six-figure amount.").
 - 4/ Tr. of Mot. Hr'g, Feb. 27, 1998 at 30. See Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss for Failure to State a Claim Or, in the Alternative, for Summary Judgment ("Def. Mot. to Dismiss"); Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Def. S.J. Br.").
 - 5/ *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 394 n.5 (4th Cir. 1994); Fed. R. Civ. P. 56(e). See also *Gomez v. United States*, 141 F.3d 1158 (4th Cir. 1998) (per curiam) (non-moving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another"); *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985) (same). It is not necessary that the moving party present and support evidence on matters in which the nonmoving party has the burden of proof. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986).
 - 6/ Def. Opp. Br. at 5. To document the extent of illegal materials on the Internet, defendant relies on the report of an anti-pornography activist who has no legal training. *Id.* at 5-6. See Ex. B, D. Hughes Dep. 119-120, 133-135 (describing herself as a "marketing and communications person" for an anti-pornography advocacy organization, with no legal expertise). Contrary to defendant's claim, plaintiffs do not dispute the sincerity of Ms. Hughes' statements, just her competence to make them. See *In re Grand Jury Subpoena*, 829 F.2d 1291, 1295 n.3 (4th Cir. 1994) (expressing doubt that "the special training of this [FBI] agent has heightened his perceptual abilities beyond those of this court" to determine what material is obscene).
 - 7/ See *In re Grand Jury Subpoena*, 829 F.2d at 1296 n.5 ("graphic depiction of sexual activity does not automatically push material beyond the first amendment pale. . . . All of [the Miller] guidelines must be considered by a trier of fact before material is legally

considered 'obscene.' That is not an easy task for a neutral, detached magistrate. . . . It is obviously not a task that the government can shift to a private party . . ."); see also *Baby Tam & Co. v. City of Las Vegas*, ___ F.3d ___, 1998 WL 575113 *5 (9th Cir., Sept. 10, 1998) ("[u]ntil the judicial officer makes the call, it ain't nothin'") (citing 11126 *Baltimore Ave. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (en banc).

8/ E.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) ("Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards. We need not decide whether the . . . production is in fact obscene."); *Smith v. California*, 361 U.S. 147, 149 n.4 (1960) (in light of the unconstitutional nature of the state procedures, the "obscene character" of the books at issue is irrelevant).

9/ See Pl. S.J. Br. at 13-30. In any event, there is no genuine dispute about the "ability" to access materials on the World Wide Web. Whether or not the material defendant cites is obscene, its expert testified that any determined user can access such websites with or without X-Stop. Ex. 13, D. Burt Dep. at 197-198.

10/ See Pl. S.J. Br. at 5-6. This was confirmed in the recent Declaration of Douglas Henderson, Def. Ex. 15, ¶¶ 9-13. See also *id.* ¶ 18 ("We are, of course, aware that the blocking libraries downloaded from the X-Stop server may include blocks of certain URLs that, if we knew about them, we would not block.").

11/ See Def. Opp. Br. at 13 ("None of [the] proposed alternatives prevents access. They would instead deal with the problem after it has occurred through such means as prosecution or eviction.") (emphasis in original). The Loudoun County Policy the Policy imposes "a prospective solution [to] prevent the problem rather than rely on a retrospective punishment . . ." *Id.* These are merely euphemisms for prior restraint.

12/ The Denver Court analyzed various less restrictive -- and, admittedly less effective alternatives -- and found that the more restrictive approach failed to satisfy even intermediate review, not to mention strict scrutiny. *Id.* at 2391-92 (plurality op).

13/ Ex. 2, D. Henderson Dep. at 145-225; Ex. 15, Internet Policies, Letters from Other Virginia Public Libraries; Answer, ¶ 13(c).

14/ The Director of the Bedford Public Library wrote to Doug Henderson that in 16 months of providing "free, unfiltered public access to the Internet," the library had received no official complaints, but had experienced one irate letter to the editor. Ex. 15, MLF-000707 to MLF-000711. No one knows what website concerned the writer of the letter, or whether it would violate any library policy. *Id.* at MLF-000709.

15/ Compare Ex. 27, Kropat Second Decl. ¶ 6 with Def. Ex. 22, Timmerman Decl. ¶ 10 and attachments. Although the library staff has sought to unblock incorrectly blocked sites as they discover them during the course of litigation, there are some notable exceptions. For example, defendant did not unblock a website devoted to the history of Sex Culture in Ancient China (www.beijingnow.com/chun). Nor is there any indication defendant unblocked sites identified by Karen Schneider, including

(<http://www.gayweb.com/113/ponce.html>), a website devoted to gay-themed jewelry. The level of selectivity is evidence of defendant's unbridled discretion under the Policy.

16/ Def. Mot. to Dismiss at 2-3 n.4 (defendant represented to this Court that "[t]he Complaint erroneously states in paragraph 8 that the Loudoun system blocks access to the websites of the Society of Friends (www.quaker.org), the American Association of University Women (www.aauw.org), the Yale University biology graduate program (www.biology.yale.edu/graduateprogram.html) and the AIDS quilt Web site (www.aidsquilt.org/aidsinfo). The Loudoun system does not block access to any of those

sites.") (emphasis added). For a similar argument, see Referral to the United States House of Representatives Pursuant to Title 28, United States Code, § 595(c) (quoting President Clinton's deposition testimony) ("It depends on what the meaning of the word 'is' is. . . . actually, in the present tense, that is an accurate statement.").

17/ Ironically, defendant argues that residents may obtain unfiltered Internet access at other area public libraries. Def. Opp. Br. at 21-22. This claim rests most uncomfortably with defendant's argument that all public libraries have a legal obligation to restrict Internet access. Id. at 26-29.

18/ This too is a matter about which defendant has the burden of proof. *Phillips v. Borough of Keesport*, 107 F.3d 164, 173 (3d Cir.) (en banc), cert. denied, 118 S. Ct. 336 (1997); *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 69 (2d Cir. 1997) ("experience, knowledge and common sense" does not fulfill the government's obligation to prove the need to restrict speech).

19/ *D. Henderson Dep.*, Ex. 2 at 145-225; Ex. 15, Internet Policies, Letters from Other Virginia Public Libraries; id. at MLF-000707 (reporting one informal complaint in 16 months of providing "free, unfiltered public access to the Internet"). These reports are not disputed. See Answer, ¶ 13(c). See also ACLU Ex. K-M.

20/ Although defendant cites *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) for proposition that protecting children from patently offensive sexual material is a compelling interest, Def. Opp. Br. at 39, the Court in *Denver* struck down a restriction on such materials on public access cable television channels because it was based on nothing more than a few "anecdotal references." Id. at 764-765. Here, defendant's argument is based on a letter to the editor in Bedford, Virginia -- obvious hearsay -- describing a situation that has been thoroughly debunked by the record. See Def. Opp. Br. at 23; but see Ex. 15, at MLF-000707 to MLF-711 (there is no indication of what the complainant saw, and the problem was solved through the use of privacy screens); see also Decl. of Thomas Hehman, ACLU Ex. K1. The other 15 Virginia libraries reported no problems associated with unfiltered Internet access. The only other "evidence" defendant offers come from second-hand accounts of newspaper stories, and are thus inadmissible as hearsay. See Ex. C, D. *Burt Dep.* at 144-145; 158-159, 165-168 (testifying that he lacks personal knowledge of examples listed in his report).

21/ *Cubby v. Compuserve, Inc.*, 776 F. Supp. 135, 139-140 (S.D.N.Y. 1991) (computerized data library not responsible for passing on libelous statements absent fault); *Auvil*, 800 F. Supp. at 932; *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986). See also *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

22/ See 47 U.S.C. § 230(c)(1) ("No 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."). This immunity is consistent with well-established common law principles, as noted above, and does not create any tension with the state action doctrine.

23/ The exemption for public libraries is a common feature of "harm to minors" statutes. See, e.g., *American Booksellers Ass'n., Inc. v. Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990) ("while it would be unlawful for any person to 'sell or loan' to a minor material deemed obscene as to minors under [the Georgia law] . . . it would be permissible for a public library to do so").

24/ *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259 (3d Cir. 1992) (library is a designated public forum); see also id. at 1262 n.23 (citing compatible authority).

25/ *Id.* at 1259 n.17, 1260. *Accord Conrad*, 420 U.S. at 555 (municipal theaters are "designed for and dedicated to expressive activities").

26/ *Kreimer*, 958 F.2d at 1256, 1259. See also *id.* at 1251-55 (discussing Supreme Court cases on the First Amendment right to read); *In re Subpoena to Kramerbooks and Afterwords, Inc.*, No. 98-135 (D.D.C. April 6, 1998) (same). The court in *Kreimer* expressly distinguished the nature of public libraries from government property such as schools and military bases. 958 F.2d at 1260 n.18, 1261 n.22 ("a public library is specifically dedicated to the exercise of certain First Amendment activities, unlike a military reservation"). Compare *Def. Opp.* at 37-38 & n.19 (discussing First Amendment considerations in high schools and military bases).

27/ There is no basis for defendant's claim that a "reasonableness" test applies here, or its assertion that a prior restraint on materials that adults have a constitutional right to obtain is "reasonable." Its discussion of content versus viewpoint discrimination is irrelevant in the context of strict scrutiny. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (censorial intent is not the sine qua non of a First Amendment violation).

28/ Even defendant's analysis suggests that a library filtering policy would be unconstitutional if motivated by censorial intent. *Def. Opp.* at 37. Moreover, a policy would be unreasonable if the filtering software employed was highly inaccurate. See *Ex. C, D. Burt Dep. Tr.* at 30-32, 38-40, 48-50, 225-236 (discussing problems of various filtering products). As a result, defendant's theory of the appropriate standard could lead to far more litigation over library Internet policies and the particular mechanics of each one.

29/ Acknowledging that this Court based its April 7 ruling, in part, on postal service cases, such as *Lamont v. Postmaster*, defendant asks for reconsideration on this issue now that there has been discovery and full briefing on the First Amendment issues. *Def. Opp.* at 30. However, this is a matter of pure law for which discovery is not a factor, and the uniformity of precedent on this issue underscores the validity of this Court's initial decision. See *Mainstream Loudoun*, 2 F. Supp.2d at 796.

30/ The Policy here is even more infirm than the scheme invalidated in *Blount*, since the Postmaster there could only detain mail after an administrative hearing. See 400 U.S. at 412-413.

31/ E.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *Lamont*, 381 U.S. 301 (1965).

32/ Defendant's reliance on *Finley v. National Endowment for the Arts*, 118 S. Ct. 2168 (1998), *Def. Opp.* at 31-32, is utterly inapposite. The Court in *Finley* expressly distinguished the discretionary grantmaking procedures there from the ability to deny mailing privileges or to deny the use of a municipal theater for an allegedly "obscene" production. *Id.* at 2178 (citing, inter alia, *Conrad*, 420 U.S. at 555; *Hannegan*, 327 U.S. at 148 n.1). Compare *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 385-386 (1984) (First Amendment prohibits speech-restrictive conditions on subsidies); *Kreimer*, 958 F.2d at 1260 (contrasting patrons' ability to use a library with programs in which government must affirmatively grant permission for access).

33/ Compare *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 730 (1970) (individual homeowner may exercise his sole discretion to block delivery of material he believes to be erotically arousing or sexually provocative) with *Bolger*, 463 U.S. at 73-74 (government may not preemptively block the unsolicited mailing of sexually-oriented materials). Cf. *United States Postal Service v. Hustler Magazine, Inc.*, 630 F. Supp. 867,

871 (D.D.C. 1986) ("Members of Congress are in a different category from 'addressees' who are householders.").

34/ *Smolla and Nimmer on Freedom of Speech* § 15:1 (1996 & Supp. 1997); see also *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968) (a licensing system need not effect a total suppression in order to create a prior restraint); *Information Providers' Coalition for the Defense of the First Amendment v. FCC*, 928 F.2d 866, 878 (9th Cir. 1991) (prior restraint exists where there is "some suppression, prohibition, inhibition, hindrance or constraint of speech by government action or rule").

35/ *Conrad*, 420 U.S. at 556; see also *Blount*, 400 U.S. at 415-416 & n.3 (prior restraint doctrine applies even where government seeks to prevent delivery of "a single issue of one magazine"); *Madison Joint School District v. Wisconsin Employment Relations Comm.*, 429 U.S. 167, 176 n.9, 177 (1976) (denial of discussion of collective bargaining at school board meeting "is the essence of a prior restraint" even though the order "does not prohibit all speech to the board on the subject").

36/ *Boos v. Barry*, 485 U.S. at 320 (1988) ("Regulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects' we referred to in *Renton*."); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-36 (1992) (same).

37/ *11126 Baltimore Blvd., Inc.*, 58 F.3d at 995 ("Following the decision in *Renton*, the Court has made clear that otherwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the *Freedman* procedural safeguards.").

38/ Fed. R. Civ. P. 56. Summary judgment is favored as a mechanism to secure the "'just, speedy and inexpensive determination' of a case . . . when its proper use can avoid the cost of a trial." *Thompson Everett, Inc.*, 57 F.3d at 1323 (quoting Fed. R. Civ. P. 1). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 322-23.