No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.,
Respondents.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR *AMICI CURIAE* THE CLEVELAND PUBLIC LIBRARY, THE RHODE ISLAND LIBRARY ASSOCIATION, AND THIRTEEN DEANS AND DIRECTORS OF UNIVERSITY SCHOOLS OF LIBRARY SCIENCE IN SUPPORT OF RESPONDENTS

DAVID W. OGDEN
Counsel of Record
MAYA ALEXANDRI
MARC BLITZ
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae the Cleveland Public Library, the Rhode Island Library Association, and Thirteen Deans and Directors of University Schools of Library Science

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INTEREST OF AMICI[1]

The individual *amici* are the *Cleveland Public Library*, the *Rhode Island Library Association* (a professional association of librarians, library trustees, and library supporters whose purpose is to promote the profession of librarianship),

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Dean Michael Eisenberg of the Information School of the University of Washington, *Dean Gustav Friedrich* of the School of Communications, Information and Library Science at Rutgers University, *Dean Ronald Larsen* of the School of Information Sciences of the University of Pittsburgh, *Director Louise S. Robbins* of the School of Library and Information Studies of the University of Wisconsin-Madison, *Director W. Michael Havener* of the Graduate School of Library and Information Studies of the University of Rhode Island, *Dean Michael E.D. Koenig* of the Palmer School of Library & Information Science at the University of Long Island, *Dean Beth M. Paskoff* of the School of Library and Information Science at Louisiana State University, *Director David Eichmann* of the School of Library and Information Science of the University of Iowa, *Dean Philip M. Turner* of the School of Library and Information Sciences of the University of North Texas, *Director Consuelo Figueras* of the Graduate School of Information Sciences and Technologies of the University of Puerto Rico, *Dean Raymond F. von Dran* of the School of Information Studies at Syracuse University, *Dean Joanne Gard Marshall* of the School of Information and Library Science at the University of North Carolina at Chapel Hill, *Director Vicki L. Gregory* of the School of Library and Information Science at the University of South Florida, and *Dean Prudence W. Dalrymple* of the Graduate School of Library and Information Science at Dominican University. As members of the nation's library community, *amici* agree with the decision of the district court below and believe that mandatory filtering of Internet access in public libraries is antithetical to the historical mission of public libraries and destructive of their traditional functioning. Accordingly, they believe that the decision of the district court should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case may appear to present an issue about the availability of a narrow category of expression ("harmful to minors" material) through a single medium (the Internet), but in fact it implicates an issue of great importance to the intellectual and political life of our nation: the role of the public library, long a vital center for the acquisition of information and the exploration of ideas. As a condition of receiving federal funds, Congress has—with the Children's Internet Protection Act ("CIPA"), Pub. L. No. 106-554, 114 Stat. 2763 (2000)—insisted that public libraries affirmatively censor constitutionally-protected material. By demanding that libraries be censors and devote resources—not to facilitating—but to interfering with patrons' pursuit of information and ideas, Congress has subverted the role of librarians and public libraries and violated the First Amendment rights of library patrons.

Public libraries exist to meet the information needs of their patrons, not to censor information in accordance with a predetermined agenda. Imposition of mandatory filtering on public libraries impairs the ability of librarians to fulfill the purpose of public libraries—namely, assisting library patrons in their quest for information—and distorts public libraries' traditional function by interfering with local control over the management of their resources. Mandatory filtering also imposes unwarranted restrictions on the use of the Internet, a library resource not subject to the spatial and budgetary constraints that typically restrict print collections. Far from being "just another collections decision," mandatory censorship of the Internet proscribes access to constitutionally-protected expressive materials without any resource-scarcity justification. Moreover, through ingenuity and adherence to the long-established values that guide the profession of library science, public libraries have developed techniques for protecting minors from harmful materials on the Internet that are more effective than mandatory filtering.

For all of these reasons, CIPA is unconstitutional. Congress cannot condition public libraries' receipt of funds on their agreement to violate the First Amendment rights of library patrons. The public library is the quintessential forum for the *receipt* of information. With respect to a medium like the Internet that is subject to virtually no resource limitations, content-based exclusions of constitutionally-protected material are subject to strict scrutiny. CIPA cannot survive such scrutiny because mandatory filtering is not narrowly-tailored to achieve a compelling purpose. Specifically, CIPA is both grossly overinclusive and significantly underinclusive in the material it censors, and prohibits access by adults to information they have a constitutional right to receive. Less restrictive approaches, including those already used by public libraries throughout the United States, are as or more effective in protecting children while interfering far less with the rights of adults.

ARGUMENT

I. THE MISSION OF PUBLIC LIBRARIES AND THE ROLE OF LIBRARIANS SERVE THE OVERRIDING PURPOSE OF ENSURING THAT INDIVIDUAL LIBRARY PATRONS OBTAIN THE INFORMATION THEY SEEK.

The public library serves a unique and critical role in our democratic society: it is the "quintessential locus of the *receipt* of information." *Kreimer* v. *Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) (emphasis added). People turn to the public library when they wish to explore a broad area of knowledge or research a particular question. Assisting library patrons in their pursuit of information is the singular institutional purpose of public libraries, the mission of public librarians, and the animating principle of their collections development decisions. *See* G. Edward Evans, *Developing Library Collections* 19 (1979) ("[P]roviding the information that a patron wants, regardless of its format or location is . . . the reason for the existence of libraries, and indeed, of librarians."). Due to this longstanding institutional commit-

ment to the information needs of library patrons, public libraries are literally "designed for freewheeling inquiry," *Board of Educ.* v. *Pico*, 457 U.S. 853, 915 (1982), and are "mighty resource[s] in the free marketplace of ideas." Among all our public institutions, public libraries are "specially dedicated to broad dissemination of ideas." *Minarcini* v. *Strongsville*, 541 F.2d 577, 582-83 (6th Cir. 1976).

CIPA disregards this unique role of public libraries. Far from identifying the information needs of patrons as the public library's *raison d'etre*, CIPA would cast public libraries and librarians as moral guardians and censors—and Appellants and their *amici* defend it in just these terms. *See, e.g.*, App. Br. 21-22 (librarians should play the role of gatekeepers who "give the public, not everything it wants, but the best of what it will read or use to advantage" (internal quotation marks and citation omitted)). This is not merely incorrect as a matter of librarianship; it also subverts the democracy-promoting premise of public libraries—that they exist to serve individuals' interests in obtaining information, not a governmental agenda or orthodoxy. *See* William A. Katz, *Collection Development: The Selection of Materials for Libraries* 105 (1980) (librarians select materials on the basis of what the "library audience will enjoy reading," not "on the basis what people *ought* to read" or "what they *ought not* to read" (emphases in original)). Contrary to the assertions of Appellants and their *amici*, the information needs of patrons are fundamental to the mission of public libraries and the role of librarians.

The mission of public libraries has long been so defined. *See* Robert N. Broadus, *Selecting Materials for Libraries* 36 (1981) ("Go back as far as 1894. The librarian of the St. Louis Public Library states his position in simple terms: 'In the first place, we try to provide the books people want—not those we think they ought to read.'"). Both the American Library Association ("ALA") Library Bill of Rights, first adopted in 1948, and the ALA Freedom to Read Statement,

which dates to 1953, affirm that libraries should provide a wide array of materials based on patrons' informational needs. ALA Library Bill of Rights, *available at* http://www.ala.org/ work/ freedom/ lbr.html; ALA Freedom to Read Statement, *available at* http://www.ala.org/alaorg/oif/ freeread.html. A broad and balanced collection obviously is more likely to contain information useful to and desired by a public library's varied patron base, and to afford adequate coverage of all sides of important issues. *See* Broadus, *supra*, at 46 ("In order to be fair and to insure the presentation of as much truth as possible, there should be some materials on all (or just about all) sides of controversial issues.").

To serve patrons' informational needs fully, public libraries embody "society's commitment to the preservation and transmission of the cultural record." *See* Vision & Mission Statement, University of Wisconsin-Madison School of Library and Information Studies, *available at* http://polyglot.lss.wisc.edu/slis/about/vision.html. For this reason, public libraries are a "source of last resort" for materials from our own or earlier times that are out of print, too expensive for purchase, or unavailable for any other reason.

This Court has recognized that universities serve as "traditional sphere[s] of free expression" that are "fundamental to the functioning of our society." *Rust* v. *Sullivan*, 500 U.S. 173, 200 (1991). Public libraries, too, undergird our system of free expression by enabling a "*large* segment of citizens [to] inform themselves." Broadus, *supra*, at 33 (emphasis in original). Indeed, public libraries may reach even more broadly than universities because they are free.

Appellants are simply wrong that libraries typically subordinate patrons' information needs to their own official agenda of promoting "worthwhile and appropriate" reading. App. Br. 12, 20-21. To the contrary, librarians are committed to the principle that patrons "should be able to find the reading matter and other media formats which [they] want[], educational or not." Broadus, *supra*, at 37. Indeed, without

rendering judgment or imposing content-based limitations on the materials sought, public libraries "routinely provide patrons with access to materials not in their collections through the use of bibliographic access tools and interlibrary loan programs." *American Library Ass'n* v. *United States*, 201 F. Supp. 2d 401, 421 (E.D. Pa. 2002). If a public library does not have a resource in its collection, librarians assist patrons in obtaining access to the source. The *sole* exception to this practice is where the work is clearly illegal. *Id.*[2]

Thus, the first and central principle governing public libraries' provision of reference services is "to provide the information *sought by the user*." 2 William A. Katz, *Introduction to Reference Work* 14 (2001) (emphasis added). Rather than assume that a particular work has little value for *every* patron, a reference librarian assisting a patron seeking a source "ask(s) questions that help define the user's own

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[2] Thus, *amici* National Center for Children and Families, *et al.* are simply incorrect when they assert that "[l]ibraries have no right, nor duty, to provide any and all available information to patrons." *Amici* Br. 21. Nor does any evidence in the record support Appellants' assertion that the mission of public libraries invariably *requires* the exclusion of sexually-explicit work or any other category of constitutionally-protected speech. App. Br. 22. To the contrary, if some libraries do not maintain sexually-explicit works, this may simply reflect the lack of articulated demand for such materials from the community. *See* Katz, *Collection Development*, *supra*, at 187 ("[I]f there really is popular demand for, say, *Playboy*, [the title] should be purchased. . . . Any heavily read title should be given consideration, no matter what its editorial content. It should be accepted or rejected on community need.").

In any event, including such materials in a public library's collection is simply not inconsistent with the historical and traditional mission of public libraries. The Library of Congress, for instance, collects sexually-oriented materials consistently with its mission of "preserv[ing] a universal collection of knowledge and creativity for future generations." *See* About the Library of Congress, *available at* http://www.loc.gov/about (last visited Feb. 8, 2003); *see also* Library of Congress Online Catalog, *available at* http://catalog.loc.gov/ (showing listings for Playboy, Hustler, and Penthouse magazine) (last visited Feb. 8, 2003).

evaluative criteria" and focuses the information search on the user's specific needs. Ellen D. Sutton & Leslie Edmonds Holt, "The Reference Interview," *in* Richard E. Bopp & Linda C. Smith, *Reference and Information Services: An Introduction* 47 (2d ed. 1995).

A second and related tenet of library science is that librarians must exercise their professional judgment without giving sway to personal bias. The vast majority of public libraries have adopted the ALA Library Bill of Rights, which states that library sources "should not be proscribed or removed because of partisan or doctrinal disapproval." ALA Library Bill of Rights, *supra*; *see also* ALA Code of Ethics, *available at* http://www.ala.org/alaorg/oif/ethics.html ("VII. We distinguish between our personal convictions and professional duties and do not allow our personal beliefs to interfere with fair representation of the aims of our institutions or the provision of access to their information resources.") (last modified Dec. 13, 2001); Guidelines for Behavioral Performance of Reference and Information Services Professionals 3.9, *available at* http://www.ala.org/rusa/stnd_behavior.html. ("As a good communicator, the librarian . . . [m]aintains objectivity and does not interject value judgments about subject matter or the nature of the question into the transaction.") (last modified Mar. 1, 2002).

The principle of neutrality in the exercise of professional judgment is so crucial that librarians have an ethical duty not only to refrain from denying access to information because of disapproval of its content, but also "to contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large." ALA Freedom to Read Statement, *supra*, at 3; ALA Code of Ethics, *supra* ("II. We uphold the principles of intellectual freedom and resist all efforts to censor library resources."); *see also* 201 F. Supp. 2d at 421 ("Reference librarians are trained to assist patrons without judging the pa-

tron's purpose in seeking information, or the content of the information that the patron is seeking.").

For this reason, *amici* Greenville, SC *et al.* are incorrect when they assert that "[t]he essence of librarianship is, in short, inconsistent with one of the basic tenets of traditional First Amendment jurisprudence that content-based decisions regarding speech are suspect." *Amici* Br. of Greenville, SC, *et al.* 5-6. Librarians do *not* make content-based decisions reflecting their own values or tastes and certainly not reflecting a government-imposed orthodoxy. To the contrary, the principles described above ensure that librarians' decisions about collection-building are driven by the overriding purpose of meeting patrons' information needs. *See* Broadus, *supra*, at 30 ("The first rule in selection is that libraries exist for patrons, not for librarians.").

Because collections decisions are driven by the needs and interests of patrons, they are necessarily made at the local level, closest to the patrons themselves. *See* Evans, *supra*, at 19 ("Every library's collection . . . must be assembled and developed with its unique patron community in mind."); Katz, *Collections Development*, *supra*, at 88 ("[T]he librarian must always be careful not to use national assumptions for local selection."). Moreover, contrary to Appellants' assertion, App. Br. 32, delegation of collections decisions to third parties is both rare and highly circumscribed in order to ensure that collections decisions are made by individuals with knowledge about and experience with the needs of the community. *See* Katz, *Collection Development*, *supra*, at 111-12 ("No matter what system is employed the librarian should have the final professional word in the selection process."); *see also* 201 F. Supp. 2d at 421 (libraries "do not generally delegate their selection decisions to parties outside of the public library or its governing body").

Critically, collections decisions are *not* analogous to mandatory filtering software. Professional and ethical standards guide collection development, unlike the decisions that

determine which web sites filtering software will block, which are unconstrained by such standards. *See id.* at 433; *see also* Rhode Island Library Ass'n Intellectual Freedom Committee Report on the Children's Internet Protection Act 2 (Mar. 25, 2001) ("RILA Report") ("Filtering . . . . is unable to make subjective or legal decisions, and therefore, does not know and often does not recognize the difference between illegal and legal speech."). Most important, unlike the censorship mandated by CIPA, collections decisions do not place obstacles in the way of patrons' access to information. To the contrary, because of the availability of interlibrary loans and the Internet itself, libraries can and will facilitate access to materials their own institutions do not maintain. In short, librarians are not censors, but facilitators of patrons' access to the world of information and expressive materials. CIPA, in contrast, mandates censorship.

II. CIPA SUBVERTS THE TRADITIONAL FUNCTION OF PUBLIC LIBRARIES.

As the foregoing demonstrates, the provision of unfettered Internet access by public libraries is entirely compatible with their traditional mission, and this mission requires the provision of such access without imposing mandatory filtering. As this Court has recognized, the Internet offers individuals an expansive "new marketplace of ideas," *Reno* v. *ACLU*, 521 U.S. 844, 885 (1997), allowing them to explore contents "as diverse as human thought." *Id.* at 852 (citation omitted). "No other medium has provided us with so much information so easily." ALA Libraries & the Internet Toolkit at 3, *available at* http://www.ala.org/alaorg/oif/2002toolkit.pdf.

For this reason, Internet access is virtually ubiquitous in public libraries. As of 2000, 95% of "all public libraries [were] provid[ing] public access to the Internet." 201 F. Supp. 2d at 422 (citing Bertot & McClure, *Public Libraries and the Internet 2000*, Report to the Nat'l Comm'n on Libraries and Information Science). Fully 10% of Americans

who access the Internet do so from their public library, *id.*, and just as the public library is a "source of last resort" for hard-to-find materials, the public library is also a critical source of Internet access for many lower-income Americans. *See id.* at 422 ("About 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access."); ALA Libraries & the Internet Toolkit, *supra*, at 21 ("[F]or people without Internet access at home, school or work, public libraries are the number one point of access" (citing *Falling Through the Net*, NTIA 2000)). Consistent with the principles described above, 93% of public libraries provide this Internet access without imposing mandatory filtering on their patrons' use. *See* 201 F. Supp. 2d at 426.

By requiring the installation of filtering software on all Internet-connected computer terminals in the library, including both staff terminals and those for use by the public, *see* 47 U.S.C. § 254(h)(6)(C); *In re Federal State Joint Bd. on Universal Serv.: Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 30 (Apr. 5, 2001), CIPA subverts the traditional functioning of public libraries in three significant ways: (1) it mandates unwarranted restrictions on an information resource, the Internet, that is not subject to budgetary and space limitations comparable to those that limit a library's print collection; (2) it supersedes local decision-making and replaces it with the decisions of third persons without training in library science; and (3) it impairs the ability of librarians to aid patrons seeking information. Indeed, far from functioning like "just another collections decision," CIPA is fundamentally incompatible with the historic mission and long-standing operation of public libraries.

First, CIPA flatly prohibits patrons from accessing a wide variety of materials through public library Internet facilities, and this censorship is completely unjustified according to library selection standards. As plaintiffs' trial expert made clear, "the main reason that selection is done in the first

place . . . is to make the best use of scarce budget and space resources. Librarians select in an environment of scarcity." Expert Witness Rep. of Mary K. Chelton ¶ 14. Absent the constraints of space and cost, no principle of librarianship justifies excluding material from a library's collection. Such scarce budget and space limitations do not impinge on the provision of Internet access as they do on a library's print collection. Once a library has purchased the Internet service, it need not pay extra for additional web sites. The addition of web sites to the Internet does not occasion a need for more computer terminals, the way adding books to a collection requires more shelf space.[3] Thus, application of content-based selection criteria to the Internet is not warranted by the professional standards that govern librarians. CIPA distorts the traditional functioning of libraries by requiring content restrictions in the absence of the historically critical factors of limited space and budget.

Second, in CIPA, Congress simply overrides the local, professional decision-making that is the hallmark of a public library's operation. Appellants blithely turn this situation on its head when they suggest that "[a] public library's judgment that [filtering] best serves its historic mission is entitled to substantial deference . . . ." App. Br. 30. Of course, if public libraries filter Internet access pursuant to CIPA, they will *not* have made a judgment that filtering best serves their historic missions; rather, they will be filtering because Congress, pursuant to CIPA, requires them to do so. Appellants cannot defend CIPA by invoking the deference due professional judgments made by local librarians. CIPA's central facet is its disregard for such judgments, and for local librarians' ex-

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[3] For this reason, the imposition of time limits on Internet access at public libraries does not "constrain [] libraries' ability to provide patrons with unrestricted Internet access," 201 F. Supp. 2d at 465 n.25, in the same way that spatial and budgetary restrictions circumscribe a library's print collection.

pertise about what kinds of resources best serve the interests of their communities.

Third, CIPA disrupts the traditional function of public libraries by interfering with librarians' ability to aid patrons. CIPA requires filtering software to be installed even on *staff* computer terminals. *See* 201 F. Supp. 2d at 413. This obviously prevents librarians from aiding patrons who encounter a blocked website. For instance, librarians cannot even access blocked web sites to ascertain whether they actually contain unprotected speech.[4] Moreover, librarians cannot resort to other resources to confirm the unprotected nature of the blocked web site because "no one but the filtering companies has access to the complete list of [blocked] URLs in any category." *Id.* at 430. Indeed, the filtering software companies consider these lists to be "proprietary information" and therefore keep them secret. *Id.* Librarians obviously cannot assist patrons effectively when they are excluded from the web site filtering process, and when that process is conducted according to a set of procedures that deviates from librarians' professional standards.

Indeed, by relegating the censorship decisions to filtering software companies, *see id.* at 433, CIPA entrusts content-based decisions to processes uninformed by the rigorous professional standards to which librarians adhere. For example, "one [filtering software] company admitted to categorizing some Web pages without any human review." *Id.* The other filtering software companies employ "limited" staff whose training and qualifications are not reflected in the record and who have not been "instruct[ed] to take community standards into account when making categorization deci-

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[4] For this reason, *none* of the libraries that use filtering software proffered by Appellants at trial install filtering software on staff terminals. 201 F. Supp. 2d at 427. Indeed, "[a] few of the defendants' proffered libraries represented that individual librarians would have the discretion to allow a patron to have full Internet access on a staff computer upon request . . . ." *Id.*

sions." *Id.* Moreover, as explained above, *supra* at 9, delegation of these kinds of substantive decisions is flatly contrary to established library practices.

For all of these reasons, the violence CIPA does to the traditional function of the public libraries requires that it be declared unconstitutional. "Where the [G]overnment uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations." *Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533, 543 (2001). "The First Amendment forb[ids] the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium." *Id.* By forcing public libraries to exclude constitutionally-protected material based on official disapproval of its content and absent any space or resource justification, CIPA "suppress[es] speech inherent in the nature of the medium" and thus violates the First Amendment.

Appellants cannot rehabilitate CIPA by arguing that it merely "define[s] the limits" of the funding program at issue. App. Br. 50 (internal quotation marks and citation omitted). Appellants concede that in *Velasquez*, this Court struck down funding limitations on Legal Services Corporation ("LSC") lawyers because "the role of lawyers supported by [the] federal funds . . . is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control." *Id.* at 51-52 (emphasis in appellants' brief). Public libraries, like LSC, are institutions whose independence from official orthodoxy is necessary to the service they provide. LSC happened to manifest this independence by advocating against the government, but nothing requires that opposition be the litmus test of independence. To the contrary, appellants have missed the "salient point" in *Velasquez*: what mattered was *not* that the LSC attorneys were arguing against the government, but rather that "the LSC program was designed to facilitate *private* speech, not to promote a governmental message." 531 U.S. at 542 (empha-

sis added). Here, as in *Velasquez*, the funding is intended to "facilitate private speech" activities—private decisions by library patrons to seek out and receive the information and expressive materials of their choice. Public libraries' neutral facilitation of those constitutionally-protected "private speech" activities is as central to libraries' traditional role as the oppositional speech of LSC lawyers was to theirs.

III. LIBRARIES ALREADY SAFEGUARD THE INTERESTS CONGRESS SEEKS TO PROTECT IN CIPA, AND THE VAST MAJORITY OF LIBRARIES DO SO WITHOUT MANDATORY FILTERING.

Public libraries share the legitimate goals expressed in CIPA. In particular, libraries do not intend to facilitate exposure to obscenity, child pornography, or, with respect to children, material that is "harmful," and thus legally proscribed. *See* ALA Libraries & the Internet Toolkit, *supra*, at 14 ("Librarians care deeply about children. Libraries already have policies and programs to ensure children have an enriching and safe online experience. And librarians are there to help them."). Public libraries overwhelmingly safeguard these interests without resort to mandatory filtering. *See id.* at 15 ("Education is more effective than filters—kids need to make good decisions about what they read and view, no matter where they are."); *see also* RILA Report at 2 ("Filtering software . . . gives parents and guardians a false sense of security" because it "often fails to block the type of site it claims it will block."). Of particular significance is the fact that public libraries achieve these results using techniques that are consistent with their unique purpose and function.[5]

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[5] In addition to being both over- and underinclusive with respect to material that is legally prohibited for children, the mandatory filtering software required by CIPA fails to take into account the important interest served when minors learn techniques for safely and efficiently using the Internet and other information technologies. "The Internet is good for kids. The Internet is changing how we live, learn, work and interact with

"Few libraries report having difficulties with people looking at pornography." ALA Libraries & the Internet Toolkit, *supra*, at 14. Moreover, public libraries have developed effective techniques for managing patrons' use of the Internet that enjoy wide currency. The vast majority of libraries opt for one or more of the following non-exhaustive list of alternatives to mandatory filtering:

- developing an Internet "use" policy and guidelines, which set forth the conditions for Internet use and the penalties for noncompliance, and which is posted prominently in the library;
- adopting special use policies that apply to children and facilitate parental control over children's Internet usage;
- providing training to patrons about how to use the Internet or guided searches of the Internet;
- optional linking from the library's home web page to a "white list" of recommended web sites that librarians have selected using the criteria and professional standards applicable to collection decisions generally;
- installing privacy screens on computer terminals with Internet access or placing such terminals in sunken desktops, both of which prevent passers-by from viewing the computer screen;
- continuing to innovate. For example, public libraries are experimenting with the use of personally-tailored, optional filtering in the form of "special library cards with computer chips that allow individual library users to control Internet access for them-

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one another. If today's children are to succeed, they must learn information literacy skills for ever-changing technologies." ALA Libraries & the Internet Toolkit, *supra*, at 14.

selves and their children." ALA Libraries & the Internet Toolkit, *supra*, at 25.[6]

Unlike mandatory filtering, these techniques for managing patrons' use of the Internet are *not* "one size fits all." Rather, they permit public libraries individually to tailor the management of their resources to the needs and demands of their communities and in accordance with their professional standards. Thus, through creativity, perseverance, and adherence to the professional standards and values that have long guided the profession, public libraries have devised means of managing patrons' use of the Internet that are more effective than the mandatory filtering required by CIPA. Public libraries' choice to implement these techniques—in contrast to CIPA's federal fiat—is indeed a "judgment . . . entitled to substantial deference, not judicial suspicion." App. Br. 30.

IV. CIPA Is Unconstitutional Because It Induces Libraries To Violate The First Amendment Rights Of Their Patrons.

Internet access available in libraries is a designated public forum that provides general access for a class of speakers and listeners—web publishers and library patrons—and libraries therefore cannot exclude speakers or prevent the receipt of certain information on the basis of the content of the speech without satisfying strict scrutiny.[7] Because CIPA

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[6] *Amici* American Center for Law and Justice *et al.*, plainly are wrong in asserting (Br. 10) that libraries would forgo providing Internet access altogether in the absence of mandatory filtering. As shown by the record in this case, 201 F. Supp. 2d at 424-26, public libraries do not simply discontinue offering Internet service in the absence of mandatory filtering. Rather, they adopt policies and practices that more effectively safeguard the interests they share with Congress than does CIPA.

[7] Any suggestion that striking down CIPA on First Amendment grounds threatens the independence and authority of public libraries is unfounded. *See Amici* Br. of Greenville, SC *et al.* 7 (application of the

fails strict scrutiny, Congress' requirement that public libraries implement mandatory filtering as a condition of receiving federal funds induces public libraries to violate the First Amendment rights of their patrons. *See South Dakota* v. *Dole*, 483 U.S. 203, 208 (1987) ("[O]ther constitutional provisions [like the First Amendment] may provide an independent bar to the conditional grant of federal funds.") (citations omitted).

The district court properly identified the forum at issue as "the library's provision of Internet access." 201 F. Supp. 2d at 455. Appellants do not currently dispute this definition of the forum. In their post-trial brief in the district court, Appellants argued for a narrow forum limited to "the content" that "the Internet delivers . . . to patrons." Def. Post-Trial Br. 19-20. On appeal, however, Appellants staked out a broader position: "any 'forum' that results from installing computers and connecting them to the Internet must take account of the fact that the computers and the access to the Internet they afford thereby become part of the resources of a library," App. Br. 39-40. Though Appellants appear to argue that this broader definition warrants reversal of the district court, defining the forum as the provision of Internet access *in the public library* is wholly consistent with the district court's holding.[8]

Appellants argue that the forum is properly classified as nonpublic; their argument is wrong, and the cases Appellants

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First Amendment will make the federal judiciary the "national Supreme Librarian"). *CIPA*, not the First Amendment, tramples the independence and authority of public libraries and casts Congress as the "national Supreme Librarian." Striking down CIPA on First Amendment grounds *restores*, rather than upsets, the traditional balance.

[8] Similarly, *amici* American Center for Law and Justice, *et al.* define the relevant forum as "the specific forum created when the library provides its patrons with Internet access." Br. 2. This also accords with the district court's holding.

cite are inapposite. Far from supporting Appellants' argument, *Arkansas Educational Television Commission* v. *Forbes* makes clear why a public library's provision of Internet access is a designated public forum. Unlike Internet access in public libraries, which creates "general access for a class of speakers," the televised debate in *Forbes* permitted only "selective access for individual speakers." 523 U.S. 666, 679 (1998). If a public library permitted patrons to access only the web sites of preapproved web publishers, for instance, *then* the forum at issue might be nonpublic, like the forum in *Forbes*. But computer terminals providing Internet access to a prescreened selection of web sites is not the forum at issue. The record is clear that the overwhelming majority of public libraries make the Internet available to adult patrons without content restrictions.

Appellants' reliance on *National Endowment for the Arts* v. *Finley* is misplaced for the same reason. This Court declined to classify the NEA funding program as a designated public forum because Congress had not permitted general access to the funding program to a class of speakers. Rather, as this Court explained, "[a]lthough the scarcity of NEA funding does not distinguish this case from *Rosenberger* [v. *Rector*, 515 U.S. 819 (1995), in which a university created a limited public forum], *the competitive process according to which the grants are allocated* does." 524 U.S. 569, 586 (1998) (citation omitted) (emphasis added). In other words, because artists had to compete for NEA funds, the funding program permitted only "selective access for individual speakers," *Forbes*, 523 U.S. at 679, and was therefore properly classified as a non-public forum. Again, such is not the situation at hand.

As the record in the district court makes clear, "the provision of Internet access within a public library in particular, is 'for use by the public . . . for expressive activity,' namely, the dissemination *and receipt* by the public of a wide range of information." 201 F. Supp. 2d at 457 (citation omitted).

Under standards promulgated by this Court, "[t]o create a [designated public] forum . . . the government must intend to make the property 'generally available' to a class of speakers." *Forbes*, 523 U.S. at 678 (citation omitted); *see also Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (the government creates a public forum when it "intentionally open[s] a non-traditional forum for public discourse."). One would be hard-pressed to find a designated public forum that more closely meets the criteria of having been "intentionally open[ed] . . . for public discourse" than Internet access in a public library. *Id.*

Appellants miss the point in asserting that "[a] public library does not make computers available to obtain material from the Internet in order to create a public forum for Web publishers to speak." App. Br. 26. Appellants ignore the district court's explicit finding that Internet access in public libraries creates a designated public forum for *both* the dissemination *and receipt* of information. *See* 201 F. Supp. 2d at 457. The First Amendment's protection of the right to receive information is so well-established as to be beyond question. *See, e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997) (Communications Decency Act violates the First Amendment where it "effectively suppresses a large amount of speech that adults have a constitutional right to receive"); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("[The] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.") (citation omitted); *see also supra* at 4 (public libraries are a "quintessential locus" for the receipt of information); *cf. Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."). Public libraries are of their essence a public forum for the receipt of information.

Having correctly identified the forum at issue and its character as a designated public forum, the district court properly determined that strict scrutiny applies because (a)

public libraries make Internet access generally available to a class of speakers or listeners, 201 F. Supp. 2d at 462, and (b) CIPA requires libraries to "single out for exclusion from the forum particular speech whose content is disfavored." *Id.* at 461. Application of strict scrutiny is mandated under this Court's precedents:

> [R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. . . . The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public. *Regulation of such property is subject to the same limitations as that governing a traditional public forum.*

International Soc'y for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672, 678 (1992) (emphasis added) (citations omitted); *see also Perry Educators Ass'n* v. *Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983) ("Although a state is not required to [create and maintain a designated public forum], as long as it does so it is bound by the same standards as apply in a traditional public forum."). "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Forbes*, 523 U.S. at 677 (citation omitted). The record below is clear that, because of intractable technological issues relating to the operation of filtering software, CIPA requires the content-based exclusion of substantial amounts of information that "falls within the class to which [the] designated public forum [at issue] is made generally available." *Id.* Because this exclusion is content-based, CIPA is subject to strict scrutiny. *Id.*

CIPA cannot survive such scrutiny because it clearly is not narrowly tailored. Filtering software is intrinsically inaccurate: "The commercially available filters on which evi-

dence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." 201 F. Supp. 2d at 475. In addition, material that is "harmful" as a legal matter certainly slips through. *Id.* at 406 (filtering software programs "are blunt instruments that . . . 'underblock,' i.e., fail to block access to substantial amounts of content that the library boards wish to exclude . . . ."). Moreover, because of inherent limitations in the nature of the technology, "it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech." *Id.* at 437.

The upshot is that Congress's requirement that public libraries use mandatory filtering software impermissibly restricts adults from receiving information to which they are constitutionally entitled access. Like the Communications Decency Act, which "on its face . . . simply restricted the distribution to minors of speech that was constitutionally unprotected with respect to minors," CIPA also "as a practical matter, . . . effectively prohibit[s] the distribution to adults of material that [is] constitutionally protected with respect to adults." *Id.* at 478. It is axiomatic that CIPA is not narrowly tailored if it "reduce[s] the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). Moreover, given the clumsiness of filtering software, CIPA denies adults access to information that even *children* have a constitutional right to receive. Further, by mandating filtering software in lieu of more sensitive decisions by local librarians about how to protect children from "harmful" images, CIPA mandates the use a crude one-size-fits-all solution in lieu of a more sensitive community-by-community approach.

The complaints of *amici* that the district court misapplied strict scrutiny are meritless. First, *amici* Greenville, SC, *et al.* (Br. 13) object that "[b]efore a particular restriction can be held unconstitutional, the court must find that there is an alternative that is less restrictive with respect to the protected speech, but equally effective at regulating the unprotected speech." It is clear, however, that "the *government* bears the burden of proof in showing the ineffectiveness of less restrictive alternatives." 201 F. Supp. 2d at 480 (emphasis added). Moreover, this burden is "especially heavy." *Reno* v. *ACLU*, 521 U.S. at 879. In light of the glaring inadequacies of filtering software, and the successful community-sensitive alternative approaches already used by public libraries, *see supra* at 16-17, the district court's ruling that Appellants failed to carry this burden is manifestly correct. *See* 201 F. Supp. 2d at 484.

Second, *amici* American Center for Law and Justice, *et al.* take issue with the district court's conclusion that CIPA's disabling provisions do not cure the constitutional infirmity,[9] claiming that the district court's analysis amounts to awarding library patrons "a constitutional right to immediate, anonymous access to materials in a public library's collection . . . ." *Amici* Br. of Am. Ctr. for Law & Justice 18. This argument is incorrect. As the district court found, this provision unreasonably requires the patron to identify himself and his desire to access blocked material. Thus, it violates this Court's long-standing precept that "content-based restrictions that require recipients to identify themselves before being granted access to disfavored speech are subject to no less

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[9] CIPA permits "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . [to] disable the technology protection measure concerned, during use by an adult to enable access for *bona fide* research or other lawful purpose." 47 U.S.C. § 254(h)(6)(D) (E-rate); *see also* 20 U.S.C. § 9134(f)(3) (LSTA) (permitting both adults and minors to request that blocking be disabled).

scrutiny than outright bans on access to such speech." 201 F. Supp. 2d at 486 (citing, *inter alia*, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965)). The constitutional problem is akin to that posed by laws that ban anonymous speech by unpopular speakers—it imposes an intolerable chilling effect on protected expressive activity. *See Talley* v. *California*, 362 U.S. 60, 64, 65 (1960); *Watchtower Bible & Tract Society* v. *Village of Stratton*, 536 U.S. 150 (2002); *see generally* David W. Ogden & Joel A. Nichols, *The Right to Anonymity Under the First Amendment*, 49 Fed. Lawyer 44 (Mar./Apr. 2002). Thus, identifying oneself to disable Internet filtering software is *not*, as *amici* suggest, like identifying oneself to obtain a library card or an interlibrary loan, *Amici* Br. of Am. Ctr. for Law & Justice 18, neither of which constitute content-based restrictions on access to speech and impose no chilling effect.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

DAVID W. OGDEN
Counsel of Record
MAYA ALEXANDRI
MARC BLITZ
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae the Cleveland Public Library, the Rhode Island Library Association, and Thirteen Deans and Directors of University Schools of Library Science

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