



raised more questions than it answered. The practical effect on the day-to-day administration of Internet access is speculative, since a majority of justices appeared to agree that the law may require libraries to disable filters for adults upon request—a conclusion that could permit libraries to continue to provide unfiltered Internet access for most adult patrons. For libraries that adopt more restrictive approaches, the decision raises the possibility of further challenges to the statute as applied. In doctrinal terms, the various opinions highlight the poor fit of the First Amendment doctrines of the “public forum” and “unconstitutional conditions” when applied to restrictions on public institutions created for the purpose of disseminating speech. The public forum doctrine, which originated as a way to preserve a “First Amendment easement” for private speakers on public streets and sidewalks, is not well-suited to the task of analyzing restrictions imposed on public institutions that are designed for the purpose of disseminating information. Likewise, the doctrine of unconstitutional conditions, which prohibits the government from accomplishing forbidden results indirectly, such as through incentives rather than prohibitions, may be of little use where there remains some doubt about how far the government may go in restricting information in public libraries. As a consequence, the precedential value of the *American Library Association* decision is questionable, and the case represents a missed opportunity for the Court to clarify constitutional doctrine.

### Background

A growing debate over Internet content filtering emerged after the Supreme Court struck down key portions of the Communications Decency Act (CDA) in *Reno v. ACLU*. That law was designed to shield children from access to indecent and pornographic speech on the Internet. Holding that the CDA unduly restricted online speech, the Court noted that “[s]ystems have been developed to help parents control the material that may be available on a home computer with Internet access.”<sup>2</sup> The *Reno* Court was not considering the question of government-mandated content filtering but instead was commenting only on the voluntary private use of filters in the home. Almost immediately thereafter, however, the debate over Internet

<sup>2</sup>*Reno v. ACLU*, 521 U.S. 821, 854–855 (1997).

filtering software centered on whether such filters should be required at the principal public institutions that provide Internet access—public libraries and schools.

Confrontations over filtering requirements tracked the rapid growth of public Internet access in schools and libraries. By 1999, more than 96 percent of public libraries provided public access to the Internet, according to a survey prepared for the American Library Association.<sup>3</sup> This represented a significant increase in public Internet access from what the same researchers found in 1998, when 73 percent of the nation's public libraries offered basic Internet access to their patrons.<sup>4</sup> A 1996 survey had found that only 28 percent of libraries offered Internet access. At the same time a growing number of schools began to provide Internet access. This increase in Internet access was promoted in part by Section 254(h) of the Telecommunications Act of 1996, which established the "e-rate" program to subsidize telecommunications services and computer networking equipment for schools and libraries. A primary goal of the e-rate program is to provide affordable Internet connections to all public schools.<sup>5</sup> Subsidies were also provided through the Elementary and Secondary Education Act (ESEA) and the Library Services and Technology Act (LSTA).

The rapid growth of Internet use brought with it access to information rarely, if ever, seen in the library setting. This access included personal Web pages, online gaming sites, and fringe political sites to name but a few examples. It also included access to the 2 percent of the Web that includes pornographic sites. This development prompted libraries to adopt a wide variety of measures, such as acceptable use policies, to cope with the challenges presented by this new medium. Some libraries also began to use filtering software. By 1999, 16.8 percent of the libraries that offered public Internet access reported the use of filters on some or all access terminals,

<sup>3</sup>JOHN CARLO BERTOT AND CHARLES R. McCLURE, SURVEY OF INTERNET ACCESS MANAGEMENT IN PUBLIC LIBRARIES (Library Research Center, Univ. of Illinois, June 2000) ("Library Survey 2000").

<sup>4</sup>JOHN CARLO BERTOT AND CHARLES R. McCLURE, THE 1998 NATIONAL SURVEY OF U.S. PUBLIC LIBRARY OUTLET INTERNET CONNECTIVITY (ALA, Office of Information Technology Policy, Oct. 1998).

<sup>5</sup>See FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, REPORT AND ORDER, 12 FCC Rcd. 8776 (1997).

while 83.2 percent did not use filters.<sup>6</sup> The 1998 survey had found that more than 85 percent of public libraries with Internet access did not use content filters. Of the libraries that used filters to restrict Internet content, most—approximately 60 percent—provided patrons with access to terminals without filters as well.<sup>7</sup> However, some libraries adopted more restrictive policies, thus spawning litigation over the issue.

Early cases held that public libraries could not adopt filtering policies that unduly restricted Internet access and that libraries were not compelled to use filtering to protect children. In *Mainstream Loudoun v. Board of Trustees*, the U.S. District Court for the Eastern District of Virginia held that the Internet access policy for the public library in Loudoun County, Virginia, was unconstitutional.<sup>8</sup> The court held that the policy, which required the use of blocking software at all times for all users, violated the First and Fourteenth Amendments to the United States Constitution. It concluded that the mandatory filtering policy was not necessary to further a compelling government interest in that no problem of accessing pornography had been demonstrated in the Loudoun County system. The court also found that the policy restricted adult library patrons to accessing only information suitable for minors, that it lacked adequate standards for restricting speech, and that it had inadequate procedural safeguards. In an earlier ruling denying the library board's motion to dismiss the case, the court found that the First Amendment governs library policies regarding Internet access, thereby rejecting the county's comparison of its policy with a book acquisition or interlibrary loan system.<sup>9</sup>

With regard to an obligation to protect children, the California Court of Appeals rejected a claim that the public library is required to install Internet content filters. In *Kathleen R. v. City of Livermore*, a parent filed suit to compel the use of filters after her son reportedly downloaded sexually oriented images using the library computer terminal. The trial court dismissed the claim under Section 230(c) of the Telecommunications Act of 1996 which provides that “[n]o

<sup>6</sup>BERTOT AND MCCLURE, *supra* note 3, at 7.

<sup>7</sup>*Id.* at 8.

<sup>8</sup>*Mainstream Loudoun v. Board of Trustees*, 24 F. Supp.2d 552 (E.D. Va. 1998).

<sup>9</sup>*Id.* at 783.

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” and that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>10</sup> The California Court of Appeals affirmed the judgment of dismissal pursuant to Section 230.<sup>11</sup>

### **The Children’s Internet Protection Act**

The Children’s Internet Protection Act added a provision conditioning federal subsidies on the use of Internet content filters as an amendment to the 2001 Labor, Health and Human Services Appropriations Bill, H.R. 4577.<sup>12</sup> Among other things, CIPA added the filtering mandate to e-rate subsidies administered by the Federal Communications Commission (FCC), funding via the Elementary and Secondary Education Act, and funding through the Library Services and Technology Act, programs that affected Internet access in public schools and libraries. The amendment combined earlier proposals submitted in both the 105th and 106th Congresses.

The law requires recipients of federal funds under the specified programs to develop “Internet safety policies” that meet a number of specific requirements. As part of this requirement all libraries and schools that receive e-rate funding for Internet access, Internet service, or internal connections must install and use blocking and filtering technology to preclude access to “visual depictions” that are obscene, constitute child pornography, or are harmful to minors.<sup>13</sup> Filters are required for all users on all access terminals regardless of the number of computers with Internet access that a school or library provides. However, when adults are using Internet terminals CIPA allows filters to be configured (theoretically, at least) so as not to block images that merely are “harmful to minors” but not obscene.

The various subsidy programs include provisions that allow blocked sites to be restored or filters to be turned off under certain

<sup>10</sup>47 U.S.C. § 230(c)(1), (3)(1996).

<sup>11</sup>Kathleen R. v. City of Livermore, 87 Cal. App. 4<sup>th</sup> 684 (Cal. App. 2001).

<sup>12</sup>Pub. L. No. 106-554, 114 Stat. 2763A-335.

<sup>13</sup>20 U.S.C. §§ 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. §§ 254(h)(6)(B)(i) and (C)(i).

conditions. The e-rate program permits recipients of funds to “disable the technology protection measure . . . during use by an adult, to enable access for bona fide research or other lawful purpose.”<sup>14</sup> The LSTA funding restrictions also permit institutions to “disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes.”<sup>15</sup> Institutions that receive subsidies through multiple programs must adhere to the more restrictive e-rate provision that permits disabling filters only for adult access.

### Judicial Challenge to CIPA

Two challenges were filed against the CIPA.<sup>16</sup> The complaints focused on the funding conditions that related to public libraries, rather than schools, and did not challenge the general requirement that recipients of funds create “Internet safety policies.” The cases were filed under the expedited judicial review provisions of CIPA, which provide that any facial constitutional challenge be heard by a three-judge district court, with a right of direct appeal to the Supreme Court if the law is found to be invalid.

The two cases were consolidated and in May 2002 the U.S. District Court for the Eastern District of Pennsylvania held in *American Library Association v. United States* that the CIPA filtering requirements for public libraries were unconstitutional. As a threshold matter, the district court found that Internet access in public libraries was a designated public forum and that filtering requirements were an effort to exclude certain speech selectively from the forum. Thus, the court reasoned that “where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored.”<sup>17</sup> Such exclusions “risk fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of

<sup>14</sup>47 U.S.C. §§ 254(h)(6)(D).

<sup>15</sup>20 U.S.C. § 9134(f)(3).

<sup>16</sup>*American Library Ass’n v. United States*, No. 01-CV-1303 (E.D. Pa. filed March 20, 2001); *Multnomah County Public Library v. United States*, No. 01-CV-1322 (E.D. Pa. filed March 20, 2001).

<sup>17</sup>*American Library Association v. United States*, 201 F. Supp. 2d 401, 460–461 (E.D. Pa. 2002).

millions of individuals around the world on a virtually limitless number of subjects."<sup>18</sup>

In applying strict scrutiny, the court agreed that the government has a compelling interest in limiting the distribution of obscenity and child pornography, but rejected the claim of a compelling interest in preventing unlawful or inappropriate conduct in libraries. It reasoned that the appropriate response to improper behavior in the library was to impose sanctions on the conduct, not to limit access to speech.<sup>19</sup> Ultimately, after an exhaustive review of available technology, the court found that the use of filters resulted in substantial overblocking (restricting nonpornographic information) as well as underblocking (failing to block pornographic information). Consequently, it concluded that CIPA was not narrowly tailored and could not survive First Amendment scrutiny. While the First Amendment "does not demand perfection when the government restricts speech in order to advance a compelling interest," the court noted, "the substantial amounts of erroneous blocking inherent in the technology protection measures mandated by CIPA are more than simply *de minimis* instances of human error."<sup>20</sup> CIPA's filtering requirements were also found to be constitutionally infirm because acceptable use policies and other measures represented a less restrictive alternative means of serving the government's asserted interest.<sup>21</sup>

### **The Supreme Court Decision**

In *United States v. American Library Association* the Supreme Court reversed the district court in a fractured decision that garnered no clear majority position and generated five separate opinions.<sup>22</sup> Led by Chief Justice Rehnquist's plurality opinion, the Court rejected claims that CIPA exceeded Congress's spending power to impose conditions on federal programs. A majority of the Justices agreed that the government did not create a designated public forum by

<sup>18</sup>*Id.* at 464.

<sup>19</sup>*Id.* at 475.

<sup>20</sup>*Id.* at 479.

<sup>21</sup>*Id.* at 480.

<sup>22</sup>*American Library Ass'n.*, 123 S. Ct. at 2297 (2003).





































