# Notes

# "PLEASE DISABLE THE ENTIRE FILTER": WHY NON-REMOVABLE FILTERS ON PUBLIC LIBRARY COMPUTERS VIOLATE THE FIRST AMENDMENT

By: Todd Anten*

## I. INTRODUCTION

On August 11, 2004, police in Phoenix, Arizona arrested Charlton Glenn Ward, a convicted child molester on parole, on six counts of sexual exploitation of a minor.[1] During their investigation police officers discovered that Ward possessed child pornography, which he claimed he downloaded and printed from a computer at the Phoenix Public Library.[2] In the days after this revelation, citizens of Phoenix understandably were distressed that a public library's computer could be used so easily for such an illicit purpose. In response, Phoenix Mayor Phil Gordon quickly announced plans for a new policy which would require Internet filters to be installed on all Phoenix public library computers.[3]

Mayor Gordon's idea quickly became a reality; on September 8, 2004, the Phoenix City Council unanimously voted to bar both minors and adults from unrestricted Internet access on all public

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1. Holly Johnson, *Man Admits Molesting Valley Girls, Police Say*, ARIZ. REPUBLIC, Aug. 13, 2004, at B1. Ward was arrested when his parole officers "found a book [in his motel room] detailing sexual acts with children. The book contained names of at least 40 girls." *Id.* The officers also found children's underwear and "pictures of what appeared to be Ward having sex with girls as young as 1 year old and as old as 13." *Id.*

2. *Id.* Ward later pled guilty to sexually exploiting a minor and agreed to serve twenty-eight years in prison. Emily Bittner, *Sex Offender Guilty in Case Tied to Library*, ARIZ. REPUBLIC, Jan. 19, 2005, at B4.

3. Ginger D. Richardson, *Phoenix Out to Ban Web Porn in Public Libraries*, ARIZ. REPUBLIC, Aug. 20, 2004, at A1.

library computers.[4] Under this new policy, which "appears to be the first of its kind among the nation's largest cities,"[5] not only are unfiltered computers unavailable at Phoenix public libraries, but librarians cannot remove Internet filters from library computers upon an adult patron's request. Phoenix's policy is significant, not only because of the lack of comparable policies in other large cities (although that soon may change),[6] but also because it is at odds with the 2003 Supreme Court decision, *United States v. American Library Association.*[7] In *American Library*, the majority opinion suggests that, while conditioning federal grants on the presence of library filters is constitutional, removing a librarian's discretion to disable a filter upon an adult patron's lawful request is impermissible.[8]

The crux of the controversy focuses on the civic role that libraries play in communities. While some view libraries as public spaces with a duty to be "family-friendly," others view libraries as research centers obligated to provide constitutionally protected[9] information.[10] At the center of the melee is the librarian—the gatekeeper of library materials. Phoenix's new mandatory Internet filtering policy raises a fundamental question: Do policies such as

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4. Ginger D. Richardson, *Phoenix Bans Internet Porn at Libraries*, ARIZ. REPUBLIC, Sept. 9, 2004, at B4.

5. *Id.*

6. Mayor Gordon and Vice Mayor Peggy Bilsten have repeatedly expressed their satisfaction with Phoenix's new policy, and have reassured other cities that it does not violate the First Amendment. *See* Phil Gordon & Peggy Bilsten, *Porn Filters, Other Actions, Keep Library Patrons Safe*, ARIZ. REPUBLIC, Dec. 10, 2004, at 2 ("The [City] Council agreed with us and, later, with *The Arizona Republic*, that this [policy] was not a violation of the First Amendment. We are pleased to report that we have made significant progress toward our goal of keeping Phoenix libraries places of family-friendly learning—and not allowing them to become adult bookstores and video arcades."). Pronouncements such as these may influence other cities to adopt similar policies. Indeed, the adoption of the Phoenix policy directly led other cities to reexamine their own library filtering systems. *See, e.g.*, Monica Alonzo-Dusmoor, *Net Filter Is Working in Libraries*, ARIZ. REPUBLIC, Jan. 6, 2005, at B5 ("A review of [Glendale, Arizona's] Internet-filtering policies . . . was prompted by a recent change in Phoenix libraries.").

7. 539 U.S. 194 (2003).

8. *See id.* at 209.

9. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); *see also* Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library (Loudoun II), 24 F. Supp. 2d 552, 560 (E.D. Va. 1998) ("[L]ibrary patrons have standing to challenge library policies restricting their exercise of the First Amendment right to receive information.").

10. *Compare* Richardson, *supra* note 3 ("'I don't believe that in our library, which is designed to be family-friendly, we should be obliged to provide access to these materials,' Gordon said."), *with id.* ("'I am telling you that you will be removing a great wealth of information that ought to be available and is protected under the First Amendment.'"). *See also* Phil Gordon, *Internet Porn at Public Libraries: Let's Pull the Plug* (Aug. 26, 2004), *available at* http://phoenix.gov/mayor/msg/msg20040826.html. ("Our libraries do not stock XXX-rated videos or *Hustler* magazine—and no one is arguing that the First Amendment requires us to. So why in the world would anyone think it requires us to provide access to the online versions?"). For an academic perspective, *see* Raizel Liebler, *Institutions of Learning or Havens for Illegal Activities: How the Supreme Court Views Libraries*, 25 N. ILL. U. L. REV. 1, 70 (2004) (concluding that "the Supreme Court has alternated between viewing libraries as purveyors of high culture and viewing them as dangerous places").

this unduly remove librarians' discretion to disable filters upon an adult patron's lawful request?

This question has more than mere theoretical importance because of the realities of Internet filtering technology. Even if library Internet filters could adequately block materials that are not constitutionally protected (such as obscenity, child pornography, or, in the case of minors, material that is "harmful to children"),[11] a critical weakness of filters is their pervasive tendency to "over-block"[12]—that is, to deny users access to materials that are constitutionally protected by the First Amendment.[13] When an Internet filtering system blocks "pornographic" or "sexual" content, the subsequent over-blocking of materials wrongly placed in these categories impairs patrons' ability to conduct lawful research.[14] Particularly at risk are materials of significance to women, teenagers, and sexual minorities, such as Web sites offering information on women's health, safe sex, sexually transmitted diseases, and homosexuality.[15] Indeed, one of the most oft-repeated fears of over-

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11. The Supreme Court has sustained these three categories as suitable for restricting First Amendment protections. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (state statute restricting dissemination of obscene material did not violate First Amendment); New York v. Ferber, 458 U.S. 747 (1982) (state statute prohibiting distribution of child pornography did not violate First Amendment); Ginsberg v. New York, 390 U.S. 629 (1968) (state statute making it illegal to sell particular materials "harmful to minors" did not violate First Amendment); *see also* Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213, 240-42 (2003) (discussing how laws regulating obscenity, child pornography, and materials that are harmful to children do not violate the First Amendment); *infra* text accompanying notes 79-83.

12. In fact, library filters do not adequately block such materials—a crucial weakness of library filters is their tendency to "under-block," by failing to filter out images that are obscene, pornographic, or harmful to children. For further discussion of how library filters severely under-block images, despite their success at blocking text, see *infra* Part IV.B.

13. Brief of Amici Curiae of Partnership for Progress on the Digital Divide et al. in Support of Appellees at 14, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (No. 02-361) (stating that "Internet filters block access to tens of thousands of valuable, non-pornographic Web pages on a host of subjects ranging from religion to medicine"). For an in-depth discussion of how Internet filters over-block and under-block, *see* Michael B. Cassidy, Note, *To Surf and Protect: The Children's Internet Protection Act Polices Material Harmful to Minors and a Whole Lot More*, 11 MICH. TELECOMM. & TECH. L. REV. 437, 451-55 (2005).

14. *Cf.* Scott Simonson, *Libraries Beef Up Filtering of Web Porn*, ARIZ. DAILY STAR, Sept. 22, 2004, at A1 ("Phoenix's change drew complaints from people who said pornography filtering might mistakenly block sites that deal with issues such as breast cancer, AIDS research or sex education.").

15. Professor Laughlin elucidates the connection of women and over-blocked material through a powerful hypothetical:

> It is true that a large amount of obscenity, child pornography, and material harmful to minors may be blocked, but so too will vast quantities of valuable information. . . . Suppose that a library instituted a rule that unsolicited books containing such words as sex, sexual, vagina, breast, women, and girls in the title or the text would be rejected without further review. Such a rule would undoubtedly prevent some obscene material from entering the collection, but it would also exclude books on women's health. Just as such an approach would be unacceptable when applied to books, it must likewise be deemed unacceptable when applied to online content. In fact, it is just this aspect of

blocking is the potential denial of access to information about breast cancer.[16] Further, future improvements in filtering technology will not solve over-blocking, since automated filtering cannot function as a complete replacement for individualized human judgment.[17]

Using Phoenix's new library Internet filtering policy as an illustration of one that other cities may choose to follow in the near future, this Note argues that mandatory, non-removable Internet filters in public libraries are unconstitutional under the Supreme Court's current jurisprudence. Specifically, this Note argues that: (1) Phoenix's new policy violates essential assumptions voiced by the Supreme Court in *United States v. American Library Association*, where a majority of the Court suggested that a form of heightened scrutiny applies to library filtering decisions;[18] and (2) practical alternative methods exist that allow for public libraries to adhere to *American Library*'s central holding[19] without resorting to the

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the filtering controversy that causes some opponents of filtering to question the motives of proponents.

Laughlin, *supra* note 11, at 262-63. *See also* Junichi P. Semitsu, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509, 510, 514 (2000) (stating that library filters may ban patrons "from . . . fairly innocuous areas—sites providing information on breast cancer, a site offering updates on upcoming gatherings of the local Gay and Lesbian Country-Western Line-Dancing Club"); Symposium, *www.TheGovernmentHasDecided ItIsInYour(Read: Our)BestInterestsNotToViewThis.com: Should the First Amendment Ever Come Second?*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 850 (2003) (describing the plaintiffs in *American Library* as including "people who were either focused on disseminating or accessing scientific information, such as about breast cancer, reconstructive breast surgery, that sort of thing. So in this particular area, at least, we see a notion that the scientific value of information acts almost as a trump, that is, there is a high value to scientific speech."); Christopher Harne, Note, *Filtering Software in Public Libraries: Traditional Collection Decision or Congressionally Induced First Amendment Violation?*, 55 MERCER L. REV. 1029, 1041 (2004) (stating that using filters in public libraries to restrict access could block "sites discussing topics ranging from breast cancer to homosexuality"); Leah Wardak, Note, *Internet Filters and the First Amendment: Public Libraries After United States v. American Library Association*, 35 LOY. U. CHI. L.J. 657, 677 (2004) ("[I]f either 'breast' or 'sex' is on the control list, the filtering software will block information on breast cancer and safe sex.").

16. *See supra* note 15 for examples of library filters blocking access to breast cancer information. *See also* Whitney A. Kaiser, *The Use of Internet Filters in Public Schools: Double Click on the Constitution*, 34 COLUM. J.L. & SOC. PROBS. 49, 50 n.5 (2000) ("A commonly used example is the blocking of the word 'breast,' which may prevent Internet users from gaining access to information about breast cancer research . . . ."); *cf.* Semitsu, *supra* note 15, at 514 ("America Online once banned the word 'breast' from some areas of its service, only to realize that it shut breast-cancer survivors out of their bulletin boards.").

17. *See* Brief of Amici Curiae of Partnership for Progress on the Digital Divide et al. in Support of Appellees at 14, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (No. 02-361). ("The problem stems from the nature of filtering technology, and hence cannot be cured by 'improvements' in the computer programs that filtering companies use to compile their blacklists."); *id.* ("The fundamental problem with Internet filtering is that it assumes human expression can be categorized based on 'artificial intelligence' (i.e., key words and phrases). As expert witness Geoffrey Nunberg explained, there are some tasks that computers simply cannot do, 'both because they involve subjective judgments and because they rest on a broad background of human knowledge and experience that computers cannot easily acquire.'").

18. 539 U.S. 194 (2003). *See infra* Part IV.A.

19. This Note does not argue that the Supreme Court should overrule *American Library*. *See, e.g.*, Cassidy, *supra* note 13, at 463-72 (arguing that the Supreme Court erred by not applying

overbroad, unconstitutional method of mandating filters on all library computers, even in the face of an adult[20] patron's lawful request for its removal.[21] This analysis differs from previous discussions of *American Library* and its First Amendment implications because it uses Phoenix as a tangible case study of non-removable library filters in action—previous legal analyses primarily engaged in hypothetical scenarios, if anything.[22] Exploring how non-removable filters function in libraries offers a nuanced, practical account of the real issues librarians will face if other cities adopt similar policies. Part II details Phoenix's new library filtering policy. Part III first explores early case law addressing library acquisition and removal policies in the face of technological change, and then dissects *American Library*, the Supreme Court's only ruling on Internet filters in public libraries. Part IV discusses why Phoenix's new policy would, and should, be deemed unconstitutional under *American Library*, if the policy is challenged. Finally, Part V considers viable alternative methods of restricting access to pornographic materials on library computers, as well as their practical limitations.

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strict scrutiny); Larissa Piccardo, Note, *Filtering the First Amendment: The Constitutionality of Internet Filters in Public Libraries Under the Children's Internet Protection Act*, 41 HOUS. L. REV. 1437, 1467 (2004) (same); Wardak, *supra* note 15 (same). Rather, the key benefit of this Note is that it works within the law established by *American Library* to distinguish filters that library administrators can remove at an adult patron's lawful request (which is what the Supreme Court assumed to be the case) compared to those filters that libararians cannot remove (which characterizes the Phoenix policy).

20. In this Note, "adult" refers to those who are at least seventeen years old, while "minor" refers to those who are less than seventeen years old, since this is the age line drawn by Phoenix. *See infra* text accompanying note 31.

21. This Note focuses on filtering more than blocking (which involves banning a specific Web site, rather than relying on an automated filter). The Phoenix policy still allows librarians to unblock an individual Web site if a patron specifically asks for it by submitting to a procedural review. *See infra* text accompanying notes 33-34. However, unblocking an already-known Web site is quite different from being denied the ability to do general research and accessing search results that have not been pre-filtered. *See infra* note 35.

22. Previous commentaries, while theoretically informative, analyzed the constitutionality of *American Library* in a vacuum. *See, e.g.*, Felix Wu, Note, United States v. American Library Ass'n*: The Children's Internet Protection Act, Library Filtering, and Institutional Roles*, 19 BERKELEY TECH. L.J. 555, 560 (2004) (hypothesizing without direct evidence or explanation that "courts would likely hold that banning outright all material blocked by any given software filter would be overbroad and hence a violation of the First Amendment"); Liebler, *supra* note 10, at 54-56 (briefly discussing the hypothetical issue of whether librarians must turn off filters on a patron's request); *cf.* Barbara A. Sanchez, Note, United States v. American Library Association*: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 502 (2005) (noting that the "Court may see a similar case again"). No legal scholarship, to the author's knowledge, has yet fully analyzed an actual policy where a public library refuses to remove filters.

## II. THE PHOENIX PUBLIC LIBRARY INTERNET FILTERING POLICY (PPLIF POLICY)

The Phoenix Public Library computer system is similar to that of other large cities. It consists of "255 Internet computers in the 13 library facilities citywide," which "are used 30,000 times a month."[23] Prior to September 10, 2004, patrons over the age of sixteen years old had the option of selecting filtered or unfiltered Internet sessions.[24] Users sixteen years old or younger could use only filtered computers;[25] adults, however, had the option of using any of the one hundred and twenty five unfiltered computers in adult areas.[26]

After Ward's arrest, the Phoenix City Council determined that "[t]here is not a filtering product that blocks illegal content—obscenity and child pornography—and only illegal content."[27] Nonetheless, the City Council decided to implement a policy to ensure that the Phoenix Public Library would not "provide computer access to pornographic material."[28] In approving this policy, the City Council directed the Phoenix Library Department "to accomplish this by eliminating the library users' option of disengaging the filter for pornography."[29]

On September 8, 2004, the City Council unanimously passed this legislation, taking effect on September 10, 2004. Mayor Phil Gordon strongly supported the passage of the new Phoenix Public Library Internet filtering policy ("PPLIF Policy") with a proclamation, declaring November to be "Keep Pornography out of our Public Libraries" month.[30]

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23. Phoenix City Council Meeting of Sept. 8, 2004, Item 56, New Business, *available at* http://phoenix.gov/FAGENDA7/agenweb6.html.

24. News Release, City of Phoenix, Questions and Answers About Phoenix Public Library Internet Filtering Policy, Sept. 10, 2004, *available at* http://phoenix.gov/NEWSREL/ARCHIVE /2004/SEPTEMBER/filter.html [hereinafter Phoenix FAQ].

25. *Id.* Also, "15-minute express computers" and "wireless hot spots" were filtered.

26. *See* Item 56, New Business, *supra* note 23.

27. *Id.*

28. *Id.*

29. *Id.* Surprisingly, Item 56 seems to admit that the previous policy of allowing adult patrons access to non-filtered computers was required by the Supreme Court. *See id.* ("[P]er the Supreme Court, individuals 17 and older are given the option of unfiltered access.").

30. Phil Gordon, Proclamation, Keep Pornography Out of Our Public Libraries, *available at* http://phoenix.gov/mayor/procs/archive/2004/sep/procporn092204.html (Sept. 22, 2004) [hereinafter Mayor's Proclamation].

The PPLIF Policy is as follows:

> Beginning Friday, Sept. 10, patrons 17 and older will have two options. One option is "basic filtering," where the intent of the filtering software is to block Web sites the software provider considers to be pornographic. The other option is "additional filtering," where the intent of the filtering software is to block not only pornography, but also other sites that include violence or adult material that may not be appropriate for children. Computers in the Children's and Teen's areas, express computers, wireless hot spots and all computer use for library users who are less than 17 years of age will continue to be filtered as before, i.e., at the "additional filtering" level.[31]

In other words, the PPLIF Policy mandates that the lowest acceptable level of filtering for adult patrons be shifted from "no filtering" to "basic filtering," which blocks sites that 8e6 Technologies, the Phoenix Public Library's filtering company, deems "pornographic."[32] The PPLIF Policy permits patrons who feel that a site has been wrongly blocked to ask a librarian to unblock the site,[33] although librarians "don't have the authority to block or unblock sites on the spot."[34] However, adult patrons cannot ask for an entire *filter* to be removed—it is mandatory and irreversible. As a result, patrons conducting research may not even be aware when a harmless,

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31. Phoenix FAQ, *supra* note 24.

32. The Phoenix Public Library has since switched to another filtering system. *See* Norman Oder, *Phoenix PL Adds Internet Staff, New Position to Hear Unblocking Requests; Data to Be Saved 30 Days*, LIBR. J., Jan. 15, 2005, at 26 (reporting that "the library [is] switching from 8e6 Technologies to Websense and [will] block the categories Adult Content and Sex for all users"). Though this Note operates under the assumption that an 8e6 Technologies filter is in use, the fundamental analysis does not change—differences between 8e6 Technologies and Websense are matters of degree; the same fundamental constitutional questions remain.

33. Phoenix FAQ, *supra* note 24. When the question arose as to what patrons should do if a site is improperly blocked, the City Council did not respond directly. Instead, it explained that "[b]ecause filtering software is imperfect, the Library is exploring options to address situations such as this. Patrons can speak to the librarian, but it's important for them to understand that the process of evaluating Web sites is not instantaneous. Staff members do not have the ability to block or unblock sites immediately." *Id.* Note that the Phoenix Public Library recently spent $175,000 dollars to hire four new staff members, including another librarian, specifically to help manage the city's "no pornography" policy. "[T]he new librarian, dubbed an Internet resource specialist, would ensure that requests for unblocking wrongly blocked sites were dealt with promptly and would monitor evolving filter technology. The other aides would both assist people with computers and, by their presence, serve as a deterrent to surfers of pornographic sites." Oder, *supra* note 32, at 26. The presence of this extra staff, however, supports providing librarians, not filters, with the discretionary power to make blocking decisions. *See infra* Part V.C.

34. Carol Sowers, *Library Patrons Taking Anti-Porn Rule Well*, ARIZ. REPUBLIC, Sept. 24, 2004, at 5. In the first few months, the library received numerous requests from patrons to override the filter. Garvey stated that "[w]e can get 25 [requests] in two days, or 25 in two weeks." Oder, *supra* note 32, at 26.

constitutionally protected Web site has been wrongly blocked by the filter, and thus, do not know to request that the specific site be unblocked.[35]

## III. Library Filtering Law: Past and Present

While *American Library* represents the first time the Supreme Court addressed Internet filters in public libraries, three earlier cases offer strong preliminary guidance on the impropriety of mandatory, non-removable library filters: (1) *Board of Education v. Pico*[36]; (2) *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* ("*Loudoun II*")[37]; and (3) *Kathleen R. v. Town of Livermore*.[38] This Part first explores these initial forays into library filtering, and then uncovers how *American Library* both clarifies and confuses current filtering law.

### A. PRE-*AMERICAN LIBRARY* FILTERING LAW

#### 1. REMOVAL DECISIONS ARE HELD TO HIGHER STANDARDS THAN ACQUISITION DECISIONS

The debate over the power of an entity to influence a library's acquisition and removal policies predates the advent of the Internet; the Supreme Court first tackled the question of the constitutionality of removing materials from a library's collection in 1982. In *Board of Education v. Pico*, the Board of Education of the Island Trees Union Free School District in New York removed nine books from a high school library, characterizing the books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[39] The Court faced the question of whether the same standards apply to a decision to add a book to a school library as to a decision to remove a book from the same library.

Justice Brennan, writing for a plurality of the Supreme Court, stated that a higher standard of scrutiny applies to a school library that attempts to *remove* particular books than to a school library that

35. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 224-25 (2003) (Stevens, J., dissenting) (stating that "a patron is unlikely to know what is being hidden, and therefore, whether there is any point in asking for the filter to be removed."). Therefore, a patron could only ask for a specific site to be unblocked if she already knew that the site existed, which seems to obfuscate the entire point of conducting open-ended, freewheeling library research in the first place.

36. 457 U.S. 853 (1982).

37. 24 F. Supp. 2d 552 (E.D. Va. 1998).

38. 87 Cal. App. 4th 684 (2001).

39. 457 U.S. at 857 (alteration in original). The books included *Slaughter House Five*, *Best Short Stories of Negro Writers*, *Go Ask Alice*, *Black Boy*, and *A Hero Ain't Nothin' But a Sandwich*. *Id.* at 857 n.3.

refuses to *add* particular books to its collection.[40] Based on this distinction, the Court denied a school board's "absolute discretion" to remove materials from public school libraries.[41] The Court did not deny that "local school boards have a substantial legitimate role to play in the determination of school library content . . . . Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner."[42] In other words, removal decisions will be viewed with heightened scrutiny; books may be actively removed from a school library's collection based on the "educational suitability" of the books, not based on a school board's desire to suppress ideas with which it did not agree.[43]

The holding of *Pico* is undoubtedly narrow, since a high school library is not identical to a public library. If anything, however, removal decisions at public libraries are held to an even higher standard of scrutiny since they are institutions intended for use by the public at large, not only children.[44] Nonetheless, *Pico* offers the first glimpse into the constitutional protections provided to library materials. Describing both school and public libraries as "place[s] dedicated to quiet, to knowledge, and to beauty,"[45] the Court recognized the importance of limiting a library's arbitrary removal decisions. Perhaps most importantly, then-Justice Rehnquist specifically signaled public libraries as being "designed for freewheeling inquiry,"[46] a description indicating potential skepticism for policies which mandate non-removable filters on library computers.

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40. *Id.* at 862 ("[T]he action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them."); *id.* at 871-72 ("As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books.").

41. *Id.* at 869.

42. *Id.* at 869-70.

43. *See id.* at 871 ("If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.") (footnote omitted) (emphasis omitted).

44. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding that the State cannot enforce policies which restrict adults' First Amendment rights based on the desire to protect children, because such policies would impermissibly "reduce the adult population . . . to reading only what is fit for children.").

45. *Pico*, 457 U.S. at 868 (citing Brown v. Louisiana, 383 U.S. 121, 142 (1966)).

46. *Id.* at 915 (Rehnquist, J., dissenting).

### 2. NON-REMOVABLE FILTERS CONSTITUTE REMOVAL DECISIONS

In 1998, a district court in Virginia faced a case very similar to the situation in Phoenix.[47] On October 20, 1997, the Board of Trustees of the Loudoun County Library passed a "Policy on Internet Sexual Harassment" instituting restrictions to Internet access at libraries, requiring all library computers to be "equipped with site-blocking software to block all sites" that displayed obscene material, child pornography, and material deemed harmful to minors.[48] The Loudoun County Library then purchased site-blocking software called X-Stop, whose method of choosing which sites to block was "kept secret by its developers."[49] Under the Loudoun Policy, much like in Phoenix, if "a patron is blocked from accessing a site that she feels should not be blocked . . . she may request that defendant unblock the site by filing an official, written request."[50] The plaintiffs claimed their own constitutionally protected materials were wrongly blocked, asserting that the Loudoun Policy "violates their First Amendment rights because it impermissibly discriminates against protected speech on the basis of content and constitutes an unconstitutional prior restraint."[51] The defendants responded that their Policy "does not implicate the First Amendment and is reasonable."[52]

The defendants tried to frame the filters as constituting a valid "library acquisition decision . . . rather than a decision to remove library materials,"[53] since acquisition decisions are subject to wide discretion by libraries. This distinction was critical to the defendants' defense of the Loudoun Policy, since *Pico* suggested that courts should subject a library's removal decisions to more rigorous scrutiny than its acquisition decisions.[54] The *Loudoun II* court, however, flatly rejected viewing Internet filtering as an acquisition decision. Adopting the language of the defendant's expert, the *Loudoun II* court stated that "filtering cannot be rightly compared to 'selection', since it involves an active, rather than passive exclusion of

47. Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library (*Loudoun II*), 24 F. Supp. 2d 552 (E.D. Va. 1998).

48. *Id.* at 556.

49. *Id.*

50. *Id.* However, "[t]here is no time limit in which a request must be handled and no procedure for notifying the patron of the outcome of a request." *Id.* at 556-57. Further, just as in Phoenix, the patron could not request that the *filter* be removed. *See id.* at 567 (stating that "install[ing] filtering software that could be turned off when an adult is using the terminal" would be a superior policy).

51. *Id.* at 557.

52. *Id.*

53. *Id.* at 561.

54. *See supra* Part III.A.1.

certain types of content."[55] Rather, the court relied on an earlier ruling in the case, *Loudoun I*, which held:

> By purchasing Internet access, each Loudoun library has made all Internet publications instantly accessible to its patrons. Unlike an Interlibrary loan or outright book purchase, no expenditure of library time or resources is required to make a particular Internet publication to a library patron. . . . As such, the Library Board's action is more appropriately characterized as a removal decision. We therefore conclude that the principles discussed in the *Pico* plurality are relevant and apply to the Library Board's decision to promulgate and enforce the Policy.[56]

In other words, Internet materials (both constitutionally protected and unprotected) were already present in the library, and their "active" removal should have been guided by *Pico*.

The *Pico* decision does not leave libraries powerless from blocking particular materials from its computers; it does imply, however, that such decisions should be subjected to strict scrutiny.[57] The *Loudoun II* court confirmed this requirement, holding that public libraries "are limited public fora"[58] subject to strict scrutiny analysis, thus requiring that the Loudoun Policy be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[59]

The court assumed in its analysis that the defendants had two compelling state interests: minimizing access to illegal pornography and avoiding the creation of a sexually hostile environment.[60]

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55. *Loudoun II*, 24 F. Supp. 2d at 561 (quotations omitted). The court also noted the crucial difference between public libraries ("which are 'designed for freewheeling inquiry'") and school libraries ("which serve unique educational purposes"). *Id.* (internal quotations omitted).

56. Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library (*Loudoun I*), 2 F. Supp. 2d 783, 793-94 (E.D. Va 1998). "[The Internet resembles] a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons." *Id.* at 794.

57. *Pico* did not use the term "strict scrutiny"; however, it did require some form of a compelling state interest. "[W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).

58. *Loudoun II*, 24 F. Supp. 2d at 563. This is significant because the Loudoun policy, like the PPLIF policy, is a content-based regulation of speech, and "content-based regulations of speech in a limited public forum are subject to strict scrutiny." *Id.* at 562.

59. *Id.* at 563 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

60. *Id.* at 565.

However, the court doubted whether the Loudoun Policy was necessary to further those interests, pointing to the extreme paucity of examples of pornography viewing or complaints of sexual harassment.[61] Finally, even if the Loudoun Policy was necessary, the court still required that the defendants show the Policy was narrowly tailored to achieve its interest. The court ultimately held that: (1) less restrictive means were available (such as privacy screens and "casual monitoring" by library staff); and (2) the Loudoun Policy was "overinclusive because, on its face, it limits the access of all patrons, adult and juvenile, to material deemed fit for juveniles."[62] As a result, the court struck down the Loudoun Policy as unconstitutional, concluding that "[a]lthough defendant is under no obligation to provide Internet access to its patrons, it has chosen to do so and is therefore restricted by the First Amendment in the limitations it is allowed to place on patron access."[63]

The *Loudoun II* decision is particularly instructive when examining the PPLIF Policy because of the uncanny similarity of the relevant facts: Both involve a public library system mandating non-removable filters on all library computers, with minimal, burdensome avenues to unblock constitutionally protected information. While there are several differences between the Loudoun and PPLIF Policies—for example, the six-year interval between the policies might mean that 8e6 Technologies' filter is more refined than X-Stop—the fundamental approach to the constitutionality of the Loudoun Policy has not yet been rejected by any other court, including the Supreme Court.[64]

### 3. LIBRARIES DO NOT HAVE AN AFFIRMATIVE DUTY TO FILTER

While not a federal court decision, *Kathleen R. v. Town of Livermore*[65] provides an important example of why policies such as the PPLIF Policy cannot be justified based on a city having a legal duty to block patrons from unlawful Internet content. In *Kathleen R.*, a parent filed suit against the City of Livermore because her son

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61. *Id.* at 566 (stating that there is "no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the county [to] establish that the Policy is necessary to prevent sexual harassment or access to obscenity or child pornography"). The PPLIF Policy may suffer from the same weaknesses—does one instance of a possible violation, based only on Ward's statement and not observable fact, constitute enough evidence that the PPLIF Policy is "necessary"?

62. *Id.* at 567. *See also supra* note 44.

63. *Loudoun II*, 24 F. Supp. 2d at 570. The court also expressed concerns about prior restraint, finding that the Loudoun Policy did not establish adequate standards for restricting access, nor provide adequate procedural safeguards to ensure prompt judicial review. *Id.*

64. The Supreme Court did not even mention *Loudoun II* in its *American Library* decision. This omission is likely partially due to the Supreme Court's assumption that filters would be removable upon request. *See infra* Part III.B.2.

65. 87 Cal. App. 4th 684 (2001).

downloaded sexually explicit images from a library computer.[66] The library's Internet policy disclaimed any responsibility for monitoring Internet usage, stating that "[p]arents are expected to monitor and supervise children's use of the Internet."[67] Nonetheless, the plaintiff alleged, *inter alia*, that the library was unsafe for minors and the city had a duty to enjoin it "from acquiring or maintaining computers which allow people to access obscenity or minors to access harmful sexual matter."[68] The court disagreed, holding that "a city is not subject to suit for damages or an injunction for offering unrestricted access to the Internet through computers at a public library."[69]

The *Kathleen R.* court recognized that public libraries are "in a 'damned if you do, damned if you don't' situation"[70]—they get sued both for filtering content (*Loudoun II*) and for failing to filter content (*Kathleen R.*). The court's holding, which generally absolves libraries and librarians from suit for failing to monitor Internet content, undermines a critical justification for cities that try to implement Internet policies such as the PPLIF Policy. Any duty that a city claims to have may be based only on ethical, moral, or public policy duties, rather than legal duties.[71]

## B. *AMERICAN LIBRARY* AND THE CURRENT STATE OF FILTERING LAW

### 1. THE CHILDREN'S INTERNET PROTECTION ACT (CIPA)

In the early days of the Internet, the Supreme Court repeatedly critiqued congressional legislation which attempted to place content-based restrictions on the Internet. Congress' first attempt, the Communications Decency Act of 1996 (CDA),[72] was struck down by the Supreme Court in *Reno v. ACLU*, largely because of the CDA's vagueness and lack of narrow tailoring.[73] The next wide-scale

66. *Id.* at 690.

67. *Id.* at 691.

68. *Id.*

69. *Id.* at 690. The court ruled that the immunity covered both the library and its librarians. *Id.* at 701. The court provided two basic reasons for its ruling. First, 47 U.S.C. § 230(c)(1) stated that an "interactive computer service" was immune from suit for "failure to edit, withhold, or restrict access to offensive material disseminated through their medium," and the court determined that the library was "entitled to that immunity here." *Id.* at 692. Second, the library did not establish a "special relationship" with or "functional custody" of the plaintiff's son, the only ways that the library could have assumed a duty to protect. *Id.* at 699 (citing Garcia v. Superior Court, 50 Cal. 3d 728, 729 (1990)).

70. *Id.* at 691.

71. Mayor Gordon's proclamation relies on public policy, stating that removing filters may "create situations where adults, accessing legal, graphic images, can do so in the presence of schoolchildren and other minors who may be within viewing distance—a situation that is unacceptable to all reasonable adults." Mayor's Proclamation, *supra* note 30.

72. 47 U.S.C. § 223 (Supp. III 1997).

73. 521 U.S. 844 (1997).

congressional attempt to regulate Internet pornography was the Child Online Protection Act (COPA).[74] While COPA is narrower in scope than the CDA (for instance, it is limited only to commercial Web sites that contain material "harmful to minors"), the Supreme Court has not yet removed an injunction placed on COPA.[75]

In an effort to deal with these Constitutional limitations on COPA and CDA, Congress attempted to regulate Internet pornography through the more narrowly-tailored Children's Internet Protection Act (CIPA),[76] which focused on public library computers. Passed in 2001, "CIPA requires any public library receiving certain 'universal service' (E–rate) discounts or Library Services and Technology Act (LSTA) grants from the Institute for Museum and Library Services to filter certain types of online content so that children cannot view the regulated content."[77] These discounts and grants provide libraries with significant funding—"[i]n the year ending June 30, 2002, libraries received $58.5 million in [E-rate] discounts," and "[i]n fiscal year 2002, Congress appropriated more than $149 million in LSTA grants."[78]

For public libraries to receive E-rate or LSTA funds, they must "certify to the Federal Communications Commission ('FCC') that they have an Internet protection policy and have installed a 'technology protection measure'" which prohibits access to certain materials.[79] Specifically, this "technology protection measure" must restrict access to all "visual depictions" of "obscenity" or "child pornography," as well as restrict minors' access to materials that are "harmful" to them.[80] CIPA "defines a '[t]echnology protection measure' as 'a specific technology that blocks or filters Internet access to materials covered by' CIPA"[81]—most libraries choose to use filtering software to satisfy the statute.[82] Finally, and most

74. 47 U.S.C. § 231 (Supp. V 1999).

75. *See* Ashcroft v. ACLU, 535 U.S. 564 (2002); Ashcroft v. ACLU 542 U.S. 656 (2004). Although historically significant, neither the CDA nor COPA offer substantial guidance to the interrelationship of CIPA and non-removable filters. Thus, they are outside the scope of this Note. For scholarship discussing the interrelationship of the CDA, COPA, and CIPA in general, see Sue Ann Mota, *Protecting Minors From Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court*, 7 TUL. J. TECH. & INTELL. PROP. 95 (2005).

76. Pub. L. No. 106-554 47 (47 U.S.C. § 254(h)(6) (2002) and 20 U.S.C. § 9134(f)(1) (2003)).

77. Paul T. Jaeger & Charles R. McClure, *Potential Legal Challenges to the Application of the Children's Internet Protection Act (CIPA) in Public Libraries: Strategies and Issues*, 9 FIRST MONDAY 2 (2004), http://www.firstmonday.org/issues/issue9_2/jaeger/.

78. United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003).

79. Wardak, *supra* note 15, at 692.

80. Mary Minow, *Lawfully Surfing the Net: Disabling Public Library Internet Filters to Avoid More Lawsuits in the United States*, 9 FIRST MONDAY 4 (2004), http://www.firstmonday.org/issues/issue9_4/minow/.

81. *American Library*, 539 U.S. at 201 (citing 47 U.S.C. § 254(h)(7)(I)).

82. *See* Minow, *supra* note 80 ("It is common to refer to the law as requiring 'filters,' but technically the law's term 'technology protection measure' is broader. It encompasses not only the

importantly for the PPLIF Policy, both E-rate and LSTA permit adult users to disable filters, though the statute does not address whether libraries "must" provide for such disabling.[83]

### 2. *UNITED STATES V. AMERICAN LIBRARY ASSOCIATION*

Libraries were not pleased with CIPA. A "group of libraries, library associations, library patrons, and Web site publishers"[84] immediately challenged CIPA as facially unconstitutional because it: (1) induces libraries to violate patrons' First Amendment rights; and (2) requires libraries to relinquish their own First Amendment rights as a condition for receiving federal funds.[85] The district court agreed with the plaintiffs. After holding that "the filtering software contemplated by CIPA was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny," the court decided that "the use of software filters is not narrowly tailored to further" what it conceded was a compelling government interest.[86] The United States appealed directly to the Supreme Court.

#### A. THE PLURALITY

In a six-three decision, the Supreme Court reversed the district court and held that CIPA is facially constitutional.[87] Beyond that bare holding, however, the Court's reasoning was murky. Chief Justice Rehnquist, representing a plurality joined by Justices O'Connor, Scalia, and Thomas, upheld CIPA largely because "CIPA does not 'penalize' libraries that choose not to install [filtering] software . . . . Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[88]

The plurality's reasoning depended on two steps of analysis. First, the plurality held that strict scrutiny was not the proper standard for review, believing that public libraries, much like a public television station, need wide discretion "to fulfill their

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filters, but other technology protection measures that protect against access."). Minow provides examples of other technologies, such as "blacklists," "whitelists," and "PICS." *Id.*

83. Under E-rate, "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may 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). Under LSTA, "[a]n administrator, supervisor, or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3). In other words LSTA allows for any person, including minors, to disable filters, while E-rate limits this right only to adults.

84. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002).

85. *Id.*

86. United States v. Am. Library Ass'n, 539 U.S. 194, 202-03 (2003) (summarizing district court's holding).

87. *Id.*

88. *Id.* at 212.

traditional missions."[89] Because "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum,"[90] the plurality found any form of heightened scrutiny to be "out of place."[91] Instead, the plurality implicitly chose to treat Internet filters as they would a decision regarding the *acquisition* of any library material. "Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. *We do not subject these decisions to heightened scrutiny*; it would make little sense to treat libraries' judgments to block online pornography any differently . . . ."[92] In other words, following the *Pico* rationale, the plurality viewed a filter as a choice not to allow the entrance of materials into a library collection, rather than a decision to remove what had already been accepted. Therefore, the plurality refused to apply any form of heightened scrutiny, strict or otherwise.

Second, and more directly applicable to the PPLIF Policy, the plurality made several assumptions in reference to potential problems of over-blocking protected sites:

> Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. . . . [T]he Solicitor General stated at oral argument that a "library may . . . eliminate the filtering with respect to specific sites . . . at the request of a patron."[93]

The plurality plainly believed that any unconstitutional blocking can quickly be fixed by disabling a filter. While this does not promise that the plurality would arrive at a different decision if a library refused to disable its filter, it certainly would put more pressure on the plurality to defend the constitutionality of such a decision. In any event, the plurality did seem to find comfort in the Solicitor

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89. *See id.* at 205 ("Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.").

90. *See id.* at 206 ("A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.").

91. *Id.* at 205.

92. *Id.* at 208 (emphasis added).

93. *Id.* at 209 (internal citations omitted). *Cf.* Liebler, *supra* note 10, at 69 ("The Supreme Court has left librarians in the difficult position as the arbiters of legality, leaving them to determine whether patrons' activities (or their own activities) are within the realm of a legal purpose, allowing for the removal of filters.") (footnote omitted).

General's assurance that filters would (or, at least, could) be disabled upon request.

## B. THE CONCURRENCES

Justice Kennedy concurred in the judgment, but conspicuously displayed the assumption that filters would be disabled upon request as being central to his vote. The first sentence of his concurrence stated that "[i]f, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact."[94] However, Justice Kennedy clearly warned libraries that "if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way," it would constitute a valid as-applied challenge.[95] Justice Kennedy's concurrence all but dares a library to make a policy such as that in Phoenix.[96]

Justice Breyer also concurred in the judgment, even though he believed that some form of heightened scrutiny should apply.[97] He chose to focus on the proper fit between the compelling state interests and the "relatively cheap and effective" results that filters provide.[98] However, Justice Breyer also relied on the "important" exception which prevents over-blocking: "[T]he Act allows libraries to permit any adult patron access to an 'over[-]blocked' Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, '*Please disable the entire filter.*'"[99] The implication is clear: Without this escape clause, a filter suddenly becomes significantly more restrictive than he presumes, violating heightened scrutiny.

## C. THE DISSENTS

The remaining three Justices dissented, and all included harsh words for the assumptions upon which the plurality and concurrences relied. Justice Stevens, for example, wrote that CIPA "operates as a blunt nationwide restraint on adult access to an

94. *American Library*, 539 U.S. at 214 (Kennedy, J., concurring in judgment).

95. *Id.* at 215.

96. *See id.* (criticizing the plaintiffs' "failure to show that the ability of adult library users to have access to the material is burdened in any significant degree"). Justice Kennedy's concurrence all but dares a library to make a policy such as that in Phoenix by implying that he will look unfavorably upon any significant burden, such as those imposed by the PPLIF Policy.

97. *Id.* at 216 (Breyer, J., concurring in judgment) (unambiguously stating that he "would apply a form of heightened scrutiny").

98. *Id.* at 219.

99. *Id.* (emphasis added).

enormous amount of valuable information that individual librarians cannot possibly review."[100] Justice Stevens felt strongly that less restrictive measures, such as penalties for accessing illegal speech, requiring parental consent, and privacy screens, could perform just as well as filters, without burdening adults' rights.[101] But most importantly, Justice Stevens critiqued the notion that an adult would even know to ask for a filter to be disabled, because "a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed."[102] Finally, Justice Stevens noted that most software only reliably excludes text, not images,[103] rendering the filtering software infirm for its purposes.

Justice Souter's dissent, which Justice Ginsburg joined, cast a wary eye on the General Solicitor's assurance that adult patrons could ask for a filter to be removed. According to Justice Souter,

> Nor would I dissent if I agreed with the majority of my colleagues . . . that an adult library patron could, consistently with the Act, obtain an unblocked terminal simply for the asking. I realize the Solicitor General represented this to be the Government's policy . . . . But the [FCC], in its order implementing the Act, pointedly declined to set a federal policy on when unblocking by local libraries would be appropriate under the statute.[104]

As a result, Justice Souter felt that because the statue only said that a library "may" and not "must" unblock, the plurality wrongly accepted the Solicitor General's assurances when the text provided no such promise. Additionally, Justice Souter reiterated many of the arguments that the *Loudoun II* court addressed, including that Internet filtering is a removal, not an acquisition decision, and stating that "[a]fter a library has acquired material in the first place, . . . the variety of possible reasons that might legitimately support an initial rejection are no longer in play."[105]

As the above descriptions display, even though the Court reached a consensus on CIPA's facial constitutionality, a similar decision would by no means be assured if an as-applied challenge,

100. *Id.* at 220 (Stevens, J., dissenting) (internal quotation marks and citations omitted).
101. *Id.* at 223.
102. *Id.* at 224.
103. *Id.* at 221.
104. *Id.* at 232 (Souter, J., dissenting).
105. *Id.* at 242.

such as one challenging the PPLIF Policy, were to confront the Court.[106]

## IV. UNDER *AMERICAN LIBRARY*, THE PPLIF POLICY IS UNCONSTITUTIONAL

In spite of the Supreme Court's holding that CIPA is facially constitutional, the assumptions that each supporting Justice made in reaching this decision suggest that the Court was not addressing filtering systems such as the PPLIF Policy. To the contrary, the six Justices who upheld CIPA all made an explicit assumption that adult patrons' requests to disable library filters could succeed. The question then is: What becomes of a policy, such as the PPLIF Policy, which directly challenges that assumption? The PPLIF Policy provides an ideal vehicle for analysis of this question because it purely involves a library's power to refuse to disable filters based on public policy, rather than being complicated by questions about the Spending Clause or E-rate/LSTA funding. Phoenix did not implement the PPLIF Policy out of fear of losing federal grant money; rather, it was a reaction to a single instance of possible usage of a library computer to download child pornography—an act which is already illegal, regardless of the presence or absence of a filtering policy.

The reasons why the PPLIF Policy is unconstitutional fall into three key arguments: (1) filtering Internet content constitutes a "removal" decision, so library filtering must be held to some form of heightened scrutiny; (2) non-removable filters are not sufficiently narrowly tailored to the State's compelling purpose; and (3) the farming out of decision-making power to a commercial software company impermissibly removes librarians' discretion to make such choices.

### A. A MAJORITY OF THE SUPREME COURT WOULD HOLD LIBRARY FILTERING TO A FORM OF HEIGHTENED SCRUTINY

While the four Justices in the *American Library* plurality decided that a library is not a public forum, and thus not deserving of heightened scrutiny, the remaining five Justices seem to be more open to such a possibility. The dissenters surely implied that strict scrutiny should apply, while Justice Kennedy was silent on the matter. Justice Breyer, straddling the middle, suggested that while strict scrutiny would "unreasonably interfere with the discretion

106. *See* Minow, *supra* note 80, for an alternative analysis of the Justices' positions on disabling library filters.

necessary to create, maintain, or select a library's 'collection,'" a form of heightened scrutiny based on "a kind of 'selection' restriction" is nonetheless appropriate.[107] Therefore, if Justice Kennedy agrees that at least *some* kind of heightened scrutiny applies,[108] then five Supreme Court Justices[109] are prepared to seriously balance the strengths of the state interests with the burdens which a non-removable filter imposes, rather than merely require a rational basis for the PPLIF Policy. Such a step is crucial, for the plurality implicitly uses rational basis scrutiny.[110] An elevation of the scrutiny bar will place a higher burden on the plurality to justify "the harm to speech-related interests."[111] Though the Supreme Court would not likely agree with *Loudoun II* that library Internet collections constitute removal decisions (since the plurality and Justice Breyer clearly rejected strict scrutiny), a step toward a form of heightened scrutiny is realistic, indeed probable. Therefore, in analyzing the constitutionality of the PPLIF Policy, the appropriate frame of reference is heightened scrutiny, the lowest level that the Supreme Court would apply.[112]

Acknowledging that the Court would embrace some form of heightened scrutiny, the more difficult issue is determining what form this heightened scrutiny will take. Justice Breyer provides a clue in his concurrence, stating that heightened scrutiny is generally appropriate when;

> complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. Typically the key question in such instances is one of proper fit. . . . In such cases the Court has asked whether the harm to speech-related interests is

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107. United States v. Am. Library Ass'n, 539 U.S. 194, 216-17 (2003).

108. The decision by Justice Kennedy not to join the plurality opinion, which implicitly argued that rational basis scrutiny should apply to all library filtering decisions, strongly implies that he believes heightened scrutiny would apply to cases such as the PPLIF Policy.

109. This point assumes that Chief Justice Roberts and the individual who replaces Justice O'Connor would have joined the plurality, which is by no means a guarantee. Additionally, even if the entire composition of the Supreme Court were to change by the time an appropriate challenge came before the Court, the fact that five justices did not join the plurality opinion indicates that *American Library* is not binding precedent under such circumstances.

110. *See American Library*, 539 U.S. at 208 ("[I]t is *entirely reasonable* for public libraries to . . . exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality.") (emphasis added).

111. *Id.* at 217 (Breyer, J., concurring).

112. This is not to argue, as many scholars have, that heightened scrutiny is the superior standard to apply. *See, e.g.*, Cassidy, *supra* note 13, at 463-72 (arguing that the Supreme Court erred by not applying strict scrutiny); Wardak, *supra* note 15, at 721 (same); Piccardo, *supra* note 19, at 1467 (same). Rather, this Note argues that, if the PPLIF Policy were challenged and heard by the Supreme Court today, a majority could easily apply heightened scrutiny without overruling *American Library*.

> disproportionate in light of both the justifications and the potential alternatives.[113]

Heightened scrutiny focuses on the "fit," gauging if the intrusion upon speech-related interests is proportional to both the government's justifications and the potential alternatives. Such a standard is "more flexible [than strict scrutiny] but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue."[114] This approach to regulating speech is consistent with the Court's approach to other disputes where the Court recognizes a need for some form of heightened scrutiny to prevent overzealous government regulation of speech, though it is not willing to grant strict scrutiny.[115]

The PPLIF Policy appropriately maps Justice Breyer's conception of heightened scrutiny—there are unusually strong government interests involved, and yet, as Justice Breyer notes, the First Amendment undoubtedly applies in this context.[116] Further, even though heightened scrutiny is more flexible than strict scrutiny, permitting comparisons based upon a more lax assessment of a disproportionate "fit," the PPLIF Policy nonetheless fails Justice Breyer's conception of heightened scrutiny. Despite the government's strong interest in protecting children, the fit is wildly disproportionate, particularly because of its marked failure to accomplish its professed justifications, the presence of significantly less harmful alternatives, and the wrongful replacement of librarians' superior discretion.[117]

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113. *American Library*, 539 U.S. at 217.

114. *Id.* at 218.

115. For example, the Supreme Court repeatedly has recognized that, while commercial speech may not necessarily be entitled to strict scrutiny protection, it nonetheless is entitled to more than rational basis protection from government interference. The Court then analyzes the constitutionality of the proposed government burden based on the "fit," comparing the harm to free-speech interests to the government's interests and the potential alternatives. *See, e.g.*, Bd. of Tr. of State University of New York v. Fox, 492 U.S. 469, 480 (1989) (stating that in judging the regulation of commercial speech, the Court required "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.") (citations omitted); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 740-41 (1996) ("Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application.").

116. *American Library*, 539 U.S. at 216 (Breyer, J., concurring) ("[W]e should not examine the statute's constitutionality as if it raised no special First Amendment concern . . . .")

117. *See infra* Part V.C for such alternatives.

## B. NON-REMOVABLE FILTERS ARE NOT SUFFICIENTLY TAILORED TO THE STATE'S COMPELLING INTEREST

None of the Justices in *American Library* disputed that there was a compelling state interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors."[118] The crucial question then becomes whether non-removable filters on library computers burden free speech disproportionately enough to justify the removal of constitutionally protected Web sites from them. That is, is there a close enough "fit" between the interest and the answer? The primary test for such balancing often centers on suggesting a superior alternative.[119] In applying such a test to the PPLIF Policy, the facts support that even if removable filters are constitutional, non-removable filters clearly impose unconstitutionally severe burdens on free speech through a disproportionate lack of a "fit."[120] This misfit may be observed in two ways: (1) the failure of image filtering; and (2) the inability of Phoenix's library patrons to conduct constitutionally protected research on Phoenix library computers.

### 1. THE FAILURE OF THE PPLIF POLICY'S IMAGE FILTERING TECHNOLOGY

First and foremost, the PPLIF Policy is primarily targeted not at obscene, pornographic, or harmful text, but rather *images*—images that children might see on an adult's computer screen, or images that are printed out by pedophiles such as Ward. As Mayor Gordon's proclamation after the institution of the PPLIF Policy states,

> WHEREAS, Recent events have pointed out the flaws of a library system that allows, through the internet, content to be *viewed* on-line that would never be displayed in the hardcopy portions of the library; and

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118. *American Library*, 539 U.S. at 203 (quoting American Library Ass'n v. United States, 201 F. Supp. 2d 401, 471 (E.D. Pa. 2002)).

119. *Id.* at 219 (Breyer, J., concurring). *See infra* Part V.C for a superior alternative.

120. Under heightened scrutiny, narrow tailoring does not require a perfect fit, or even the best fit, unlike the narrow tailoring required for strict scrutiny. Rather, the tailoring must be proportional to the interest served while considering the burden placed upon speech. Such scrutiny is commonly used for commercial speech. *See supra* note 115. *See also* Anuj C. Desai, *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 1, 34 (2004) (stating that Justice Breyer relied "on the intermediate level of scrutiny given to restrictions on commercial speech and content-neutral laws.").

> WHEREAS, This can create situations where adults, accessing legal, *graphic images*, can do so in the presence of schoolchildren and other minors who may be within viewing distance—a situation that is unacceptable to all reasonable adults; and . . .
>
> WHEREAS, We all know the difference between websites on breast cancer and pornographic sites. We know the difference between XXX-rated websites and *pictures* of Michelangelo's David.[121] Our intent is not to stifle legitimate research or intellectual curiosity.[122]

The intent is clear: Images, not words, are the targets. This became even clearer when Mayor Gordon and Vice Mayor Peggy Bilsten provided an update to the public of the PPLIF Policy, writing that, "[i]n addition to taking the obvious steps to filter *pornographic images* while allowing *non-offending images* to display, the city began working on the broader issue of ensuring the safest possible environment for library patrons."[123] Therefore, the true efficacy of the PPLIF Policy depends on its ability to filter out offending images.

Such technology, however, is limited. As Justice Stevens noted in quoting the district court, "The search engines that software companies use for harvesting are able to search text only, not images. . . . Image recognition technology is immature, ineffective, and unlikely to improve substantially in the near future. . . . [A] Web page with sexually explicit images and no text cannot be harvested using a search engine."[124] Justice Stevens thus concludes that "the software's reliance on words to identify undesirable sites necessarily results in" such massive over-blocking that it "abridges the freedom of speech protected by the First Amendment."[125]

While one might argue that image filtering technology has improved substantially since the district court's 2002 ruling, such advancements have not reached Phoenix (or any other city) in an effective form. In a test of 8e6 Technologies' efficacy in blocking pornographic images, a reporter and a computer expert visited Google.com, a popular search engine, and conducted searches

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121. Although "we all" may know the difference, filtering technology is not a "we"—it is an "it."

122. Mayor's Proclamation, *supra* note 30 (emphasis added).

123. Gordon & Bilsten, *supra* note 6 (emphasis added).

124. *American Library*, 539 U.S. at 221 (citing *American Library*, 201 F. Supp. 2d at 431-32).

125. *Id.* at 222.

through its image search function at a Phoenix public library.[126] The reporter related the results of his experiment:

> We went back to Google, this time using the image search. Instead of a listing of Web sites, this function returned a screen full of pictures. He typed in "MILF" again. The screen filled up with photos. . . . Most were of women in explicit poses. This was pornography. We knew it when we saw it.
>
> "How long did that take? Like 30 seconds?" Colburn asked.
>
> The answer was obvious, but I asked whether it's tougher to screen out images. "It's a different methodology, yes," Colburn said, going back to Google's image search and typing in "Playboy."
>
> The screen was again filled with nudes. Model Carmen Electra was the first image. Three down was a topless photo of one-named singer Shakira. Most of the rest appeared to be centerfold model shots.
>
> "I don't see much filtering going on," Colburn said.
>
> We received similar results typing in other words, like hardcore and sex. We were able to see a photo of Janet Jackson's infamous "wardrobe malfunction" at the Super Bowl.[127]

Considering that the primary goal of the PPLIF Policy is to target the viewing of images, its filtering software is woefully inadequate. The Phoenix filter appears to only reliably filter text and not images, thereby failing at its paramount goal.[128] While the Phoenix Public Library recently suggested that it may switch from 8e6 Technologies to Websense, another filtering software provider, blocking the "Adult Content" and "Sex" categories for all users,[129] there is no indication that Websense will succeed in any significant way where

126. Richard Ruelas, *Asking Library Filters to Do the Impossible*, ARIZ. REPUBLIC, Sept. 27, 2004, at 18, *available at* http://www.azcentral.com/news/columns/articles/0927ruelas27.html.

127. *Id.*

128. While some filters now exist which filter out offending images, such filters have proven to be inadequate solutions. See *infra* Part V.B for discussion of these weaknesses.

129. Oder, *supra* note 32, at 26.

8e6 Technologies has failed.[130] Indeed, filters that block based in part on automated computer programs in lieu of human judgment will always under-block.[131]

Additionally, even if a filter were able to prevent a user from viewing pornographic images, it would not necessarily prevent users such as Ward from printing such images on library printers. Most computer users are aware that when one arrives at a Web site with hyperlinks to images (such as pornographic images), the user may right-click on the hyperlink and print its contents without viewing the images on the screen. Because no filtering technologies, including 8e6 Technologies' filters, block printing, pedophiles such as Ward will still be able to print out child pornography on library printers.[132]

### 2. THE INABILITY OF PATRONS TO VIEW CONSTITUTIONALLY PROTECTED INTERNET CONTENT

Not only do the Phoenix filters severely under-block the precise content they intend to remove, but they also severely limit patrons' ability to conduct constitutionally protected research at Phoenix libraries. First, non-removable filters automatically block patrons from accessing constitutionally protected content. The Phoenix Public Library,[133] Mayor Gordon, and Vice Mayor Bilsten,[134] have

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130. In fact, an earlier version of Websense reportedly "blocked the Jewish Teens page and the Canine Molecular Genetics Project at Michigan State University." Marjorie Heins & Christina Cho, *Internet Filters: A Public Policy Report*, FREE EXPRESSION POLICY PROJECT 2 (2001), http://www.fepproject.org/policyreports/filteringreport.pdf.

131. *See* Brief Amici Curiae of Partnership for Progress on the Digital Divide et al. in Support of Appellees at 14, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (No. 02-361) ("The fundamental problem with Internet filtering is that it assumes human expression can be categorized based on 'artificial intelligence' (i.e, key words and phrases). As expert witness Geoffrey Nunberg explained, there are some tasks that computers simply cannot do, 'both because they involve subjective judgments and because they rest on a broad background of human knowledge and experience that computers cannot easily acquire.'"). Such weaknesses are not limited to 8e6 Technologies or Websense—these problems are inherent in the current state of filtering technology. *See* Cassidy, *supra* note 13, at 451-55, for many examples of how various filters over-block and under-block.

132. There was no evidence that if Ward did print child pornography on a library computer, it was on a computer without a filter or a computer with a disabled filter. Perhaps he downloaded the images from a mistakenly unblocked site, or perhaps hacking the filter is extremely easy. Further, note that "Ward initially told officers that he printed pornographic images of children at the library but later took that statement back." Bittner, *supra* note 2. In fact, "[i]t's possible that Ward didn't download any pornographic images off the city's computers. A detective is looking into the possibility that Ward took the photos himself and used the Internet story as a cover." Richard Ruelas, *Filtering for Truth on Porn*, ARIZ. REPUBLIC, Nov. 25, 2004, at 1.

Further, the Phoenix Public Library has already found an alternative solution: printers have been moved closer to reference desks and "everything sent to library printers will come out face up." Monica Alonzo-Dunsmoor, *Libraries Ban 14 from Using City Computers*, ARIZ. REPUBLIC, July 6, 2005, at 4B.

133. *See supra* note 33 (describing the procedure for requesting a particular site to be unblocked).

each admitted as much, reassuring patrons that a method exists for requesting that particular sites be unblocked. However, allowing patrons to ask for a site to be unblocked does not adequately solve a filter's mistaken blocking if a patron engages in open-form research. As Justice Stevens points out in his concurrence, when a filter does not even present a Web site in a patron's list of search results, "a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed."[135] The PPLIF Policy amputates the "freewheeling inquiry" for which Chief Justice Rehnquist once said public libraries are specifically designed.[136]

Note that it is undoubtedly true that "[a]dults are not entitled to 'child pornography' or 'obscenity.' Minors are not constitutionally entitled to materials that courts uphold as 'harmful to minors.'"[137] Between criminal sanctions and removable filters, libraries do have the capability to respond to Internet pornography. The only question is whether the use of non-removable filters is so severe a response that it wrongfully infringes on First Amendment rights to view constitutionally protected content. Considering that filters are so poor at blocking images, yet so quick to block constitutionally protected text, the "fit" is undoubtedly deficient.

### C. THE PPLIF POLICY WRONGLY REPLACES LIBRARIANS' DISCRETION WITH 8E6 TECHNOLOGIES' UNCHECKED JUDGMENT

Finally, and perhaps most distressingly, the PPLIF Policy removes librarians' discretion to gauge whether a Web site violates its Internet Use Policy, and redistributes that discretion to 8e6 Technologies, the software vendor for the PPLIF Policy. However, 8e6 Technologies, like all filtering companies, refuses to disclose its computer programming formulae which determine what sites to block. Rather, the Phoenix Public Library informs 8e6 Technologies which "category" of content to block (e.g., "pornography"), and the library makes individual requests to 8e6 Technologies when patrons ask for particular sites to be unblocked.[138] Such a method of review

134. Gordon & Bilsten, *supra* note 6 ("The library is purchasing new filtering software after a review of more than 20 products. A form has been developed to allow users to request the reclassification of any non-pornographic Website that has been mistakenly blocked.").

135. United States v. Am. Library Ass'n, 539 U.S. 194, 224 (2003) (Stevens, J., dissenting). Justice Stevens goes on to comment that "[s]ome curious readers would in time obtain access to the hidden materials, but many would not. Inevitably, the interest of the authors of those works in reaching the widest possible audience would be abridged." *Id.* at 224-25.

136. Bd. of Educ. v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

137. Minow, *supra* note 80.

138. As one reporter found,

sustains two harms: (1) libraries and librarians are disenfranchised of their traditional roles as the gatekeepers of content decisions; and (2) 8e6 Technologies is relatively unaccountable and unqualified to make discretionary decisions regarding library Internet content.

First, as Chief Justice Rehnquist proclaimed in his plurality opinion, "public libraries must have broad discretion to decide what material to provide their patrons."[139] While Chief Justice Rehnquist was not addressing the issue of non-removable filters, his reverence of libraries and librarians strongly suggests that he trusts those institutions to employ discretion, not independent commercial software companies who are not directly liable to anyone except through market pressures. Librarians will not even be aware that a particular site is blocked by a filter unless a patron actively attempts to access that pre-chosen site, and then makes a request to the librarian to unblock the site. Instead, 8e6 Technologies retains initial discretion to block or permit Web sites, and librarians only use their discretion after a patron has made an unblocking request—as such, a librarian's discretion to unblock a site depends on patrons who ask for access to content that might be embarrassing but is nonetheless constitutionally protected.[140]

Second, while *American Library* trumpets the role of librarians as having discretion to decide which materials to provide, the PPLIF Policy removes the discretionary power from the individual who is in direct contact with the community, and hands it over to an unaccountable private company which uses undisclosed methods to block Web sites, likely influenced by personal bias, prejudice, and incomplete information.[141] Several have voiced such concerns in the aftermath of the PPLIF Policy, worrying that "installing such software puts the city at the mercy of software providers' personal biases and prejudices."[142] Is it not clear, then, that a local librarian would have superior discretionary judgment over what is acceptable

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> Some of those [categorizing] decisions are made by people in Orange, Calif, workers with 8e6 Technologies, makers of the library's filter. Eric Lundbohm, vice president of marketing, said employees view and categorize sites on the Internet. "Everything is put through a human verifier," he said. That way, sites about breast cancer are differentiated from sites of women in bikinis, and from hardcore porn. It's up to the library to decide what categories to block. An updated list of blocked sites is electronically sent to the filter at the Phoenix library every day.

Ruelas, *supra* note 126.

139. *American Library*, 539 U.S. at 204.

140. *See* Wardak, *supra* note 15, at 699.

141. If everything is put through "a human verifier," as the vice president of marketing at 8e6 Technologies claims, then that means that patrons have replaced one human's judgment (the librarian's) with another's (an 8e6 Technologies employee). Ruelas, *supra* note 126.

142. Richardson, *supra* note 4. As one strange example, an early version of Websense blocked a Liza Minnelli fan Web site under the category of "Adult Entertainment." Heins & Cho, *supra* note 130, at 42.

in her community than would a worker at a software company who has no connection to the community, and may in fact be hundreds of miles away? As the *Loudoun II* court noted,

> [A] defendant cannot avoid its constitutional obligation by contracting out its decisionmaking to a private entity. . . . Defendant concedes that it does not know the criteria by which [the software programmer] makes its blocking decisions. . . . [It] does not base its blocking decisions on any legal definition of obscenity or even the parameters of the defendant's Policy.[143]

These same concerns apply directly to the PPLIF Policy: the City Council cannot abrogate its constitutional obligations to free speech by delegating that power to a private entity—someone must be responsible. Further, the hidden nature of 8e6 Technologies' blocking methods raises constitutional concerns. While librarians are beholden to the First Amendment when using their discretion regarding Internet content, there is no evidence that 8e6 Technologies' methods follow constitutional guidelines in choosing what to block, nor is there any accountability for latent biases.[144] Though the Phoenix Public Library's possible shift to Websense as a new filter provider may suggest that filtering software will be accountable via market pressures, it is still the provider, not the librarian, who makes the initial decision of whether to block materials or not.

While it is true that librarians often rely on third-party sources (such as professional journals)[145] for information to aid them in acquisition decisions concerning books they have not read, there are several important distinctions between such third-party journals and filtering companies such as 8e6 Technologies. First, professional journals supply librarians with aid in making acquisition decisions, which are treated with less skepticism than removal decisions.[146] Moreover, librarians have discretion not to rely upon journals for suggestions. Additionally, they may supplement the journals' advice with their own discretionary judgments about appropriate library materials. The PPLIF Policy, however, fully sidelines librarian discretion by only allowing them to employ discretion after a patron asks for a site to be unblocked. Even if a librarian, in her

143. *Loudoun II*, 24 F. Supp. 2d 552, 569 (E.D. Va. 1998).

144. Indeed, if 8e6 Technologies made filtering decisions based on its political persuasions, even unwittingly, uncovering systematic latent biases would be nearly impracticable, if not impossible.

145. *Library Journal* is one example of such professional publications.

146. *See supra* Part III.A.1 (discussing *Pico* and the different standards applying to acquisition and removal decisions).

professional capacity, believes that entire categories of information are wrongly blocked by 8e6 Technologies, she has no recourse except to request for each overblocked site to be unblocked, one by one. Such a burden on librarians' discretion clearly displays that 8e6 Technologies is not a mere recommender upon which a librarian actively chooses to rely; rather, it is an imposed substitute for a librarian's central duty.

## V. ALTERNATIVES: HOW LIBRARIANS MAY RESTRICT INTERNET ACCESS

In light of the unconstitutionality of mandatory, non-removable Internet filters in public libraries, the central challenge becomes whether any viable alternatives exist which can placate both the defenders of the First Amendment and the defenders of children.[147] The Phoenix Public Library previously housed unfiltered computers, which supposedly allowed Ward to access and print illegal materials, and the city felt the need to respond.[148] While non-removable filters are unconstitutional, practical alternatives do exist. In addition, anecdotal evidence in Phoenix suggests that the librarians themselves would prefer a less restrictive alternative to the PPLIF Policy.[149]

### A. KEEP NON-REMOVABLE FILTERS, REJECT CIPA FUNDING

Based on *American Library*'s holding, the simplest solution would be for Phoenix to reject CIPA's funding under the E-rate or LSTA grants and keep its non-removable filters. For instance, "the public library systems in San Francisco, Salt Lake City and

147. These are not mutually exclusive positions; however, the news coverage of the PPLIF Policy has generally delineated two sides to the battle: Mayor Gordon, Vice Mayor Bilsten, and the City Council versus defenders of free speech, such as the American Library Association and Eleanor Eisenberg, executive director of the American Civil Liberties Union of Arizona. Eisenberg expressed a nuanced position, however, stating, "While I am very sympathetic to Mayor Gordon's concerns and I understand why he is taking the viewpoint he is, we will still defend the First Amendment." Ginger D. Richardson, *Phoenix Eager to Move Against E-Porn at Library*, ARIZ. REPUBLIC, Aug. 29, 2004, at 1B.

The difficult balance is captured in a college student's reaction to the various factions: "'There are so many children in and out of here that a ban is probably a good idea,' [the student] said. She did say, however, that she hopes the filter isn't so widespread that it would effect [sic] her ability to conduct research." Kevin Blocker, *Next Step: Anti-Porn Filters*, ARIZ. REPUBLIC, Sept. 10, 2004, at 1.

148. "The filters were mandated just to make us feel better. The anger over a child molester was transferred to city computers." Ruelas, *supra* note 126.

149. News accounts noted that after the City Council's vote Toni Garvey, Phoenix's public library director, appeared "visibly upset." *See, e.g.*, Norman Oder, *Bumps on the CIPA Road*, LIBR. J., Oct. 1, 2004, at 18. Further, the Phoenix Public Library Advisory Board refuses to support the PPLIF Policy. Ginger D. Richardson, *Phoenix Library Board Doesn't Back Mayor's Plan to Ban Internet Porn*, ARIZ. REPUBLIC, Sept. 6, 2004, at 4B.

Bridgeport, Conn., have opted to forgo their federal funding, which allows them to keep computer terminals filter-free,"[150] so perhaps Phoenix could forgo funding, giving the city the freedom to use its library filters as it sees fit. However, this argument is based on a fundamental flaw in reasoning: a library may choose to not install filters, but it cannot block access to lawful, constitutionally protected materials. CIPA provides incentives for libraries to install filters, but not even CIPA suggests that rejecting its funding allows for a library to contravene the First Amendment.[151]

### B. IMPLEMENT SUPERIOR FILTERS THAT ARE MORE NARROWLY TAILORED

In August, 2004, Des Plaines, Illinois, moved in the direction of the PPLIF Policy without going quite as far: "Their filters stay on all the time, but block only pornographic images, not text."[152] Under this policy, "filters would deny patron access to all images perceived by the technology to be obscene, and the technology would not censor text. Computer users would see all text on the web, including sites with blocked images."[153] Such a policy is more narrowly tailored than the PPLIF Policy, since the filter only blocks images, thus achieving Phoenix's prime goal of protecting children from harmful images, not text. Further, all Web sites will remain accessible—it is only images that are blocked.

However, the Des Plaines filter still encounters constitutional problems. First, the filter replaces a librarian's judgment of whether a particular image is deemed to be pornographic. Moreover, the filter might wrongfully block lawful images, such as medical or health related pictures, which are constitutionally protected by the First Amendment. The largest problem, however, is that pure image filters lack reliability. For example, a reporter for the Arizona Republic was still able to access many pornographic images on a Phoenix library computer installed with an 8e6 Technologies' filter.[154] The vice president of marketing at 8e6 Technologies acknowledged this weakness of the technology to the reporter, who wrote, "As for the pornographic images I was able to see, Lundbohm said the small images returned by the Google image search are an 'industry-wide

150. Richardson, *supra* note 3.

151. *Cf.* Miller v. Northwest Region Library Board, 348 F. Supp. 2d 563, 569-70 (D.N.C 2004) ("[T]he Supreme Court's decision in *American Library Association* does not stand for the proposition that no constitutional protections apply to Internet computers at public libraries.").

152. Richardson, *supra* note 147.

153. Michelle Orris, *Try Porn Filters for 6 Months*, DES PLAINES J., Aug. 11, 2004, *available at* http://www.journal-topics.com/dp/04/dp040811.1.html.

154. Ruelas, *supra* note 126.

problem.'"[155] Reliance on an unreliable filtering technology, where "it is inevitable that a substantial amount of such material will never be blocked . . . will provide parents with a false sense of security without really solving the problem."[156] In other words, even though the Des Plaines filter solves much of the over-blocking problems that text filtering creates, it still does not solve under-blocking difficulties. While such filters are admittedly more narrowly tailored than Phoenix's filter, they are still severely deficient.

### C. RETURN TO REMOVABLE FILTERS WHILE GIVING LIBRARIANS GREATER DISCRETION

The optimal method for addressing library pornography while still maintaining sufficient respect for patrons' First Amendment rights is to allow adult patrons to either request a library computer that does not have a filter or to disable an existing filter, provided that the patron uses the computer for lawful purposes. Further, librarians should have greater discretion in determining whether the patron's reason for having the filter removed is protected by the First Amendment.

#### 1. REMOVING NON-REMOVABLE FILTERS

In *American Library*, the six justices voting to uphold CIPA operated under the assumption that filters could quickly and easily be removed.[157] Justice Breyer went so far as to suggest that the speed of disabling a filter should be comparable "to traditional delays associated with requesting materials from closed stacks or interlibrary lending practices."[158] In other words, not only do libraries have a duty to remove a filter for lawful use, but that removal must be held to a reasonable standard. There is evidence that Phoenix is trying to accommodate such a standard—the city recently agreed to spend $175,000 to create four new positions, including a librarian who is an "Internet specialist," to "ensure that

155. *Id.* Lundbohm claimed that "his company should introduce a solution within a month," though it is unclear if a viable solution has been discovered. *Id.*

156. United States v. Am. Library Ass'n, 539 U.S. 194, 222 (2003) (Stevens, J., dissenting).

157. "[T]he plurality noted that a patron 'may' request disabling with 'ease' (plurality), 'without significant delay' (Kennedy concurrence) or 'need only ask a librarian' (Breyer concurrence.)." Minow, *supra* note 80.

158. *See American Library*, 539 U.S. at 219 (Breyer, J., concurring) ("The Act does impose upon the patron the burden of making this request [to disable the filter]. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere.").

requests for unblocking wrongly blocked sites were dealt with promptly and would monitor evolving filter technology."[159]

However, it may not be fair to compare the removal of a filter with an interlibrary loan at all—there are logistical consequences to filter removal. For instance, after the filter is removed, it must be reinstalled for the next patron. Unless a library chooses to maintain a filter-free computer, which it is under no obligation to do, the removal and reinstallation of a filter might not be as simple as the Supreme Court suspects. Alternatively, it is possible that a library system's computers are interconnected on a network, where removing a single computer's filter could be impracticable. A possible solution: While each library would not be required to maintain a computer with a removable filter, there must be a filter-free computer (or computer with a removable filter) within a reasonable distance, such as at the library's main branch. Setting up a particular computer in advance without a filter will allow patrons the benefit of unfiltered research, while avoiding the nuisance of every librarian being required to determine how to remove and reinstall a filter.

Questions about the difficulty of removing a filter, however, do not apply to Phoenix. Prior to the institution of the PPLIF Policy, Phoenix libraries allowed librarians to remove and reinstall filters based on patrons' requests, and there were no reported technological difficulties with this policy. Therefore, even if a city could theoretically encounter disabling problems, such a theory cannot justify the PPLIF Policy.

Finally, filtering technology exists that allows for librarians to create their own list of individually blocked Web sites. Librarians at other Arizona public libraries have expressed satisfaction with the use of filters that block sites at the librarian's specific request.[160] While dedicated patrons would undoubtedly be able to visit sites that librarians have yet to block, such users would have circumvented the mandatory filters as well, through "creative" surfing.[161]

### 2. GUARDING LIBRARIANS' DISCRETION

The second prong of this solution is to return discretion to librarians, who are the optimal arbiters of acceptable content for Internet viewing in a particular community. Since adults can be

159. Oder, *supra* note 32, at 26.

160. *See* Alonzo-Dunsmoor, *supra* note 6 ("In Glendale, computer filters have been blocking certain Web sites, such as pornographic ones, since free public access began in 1993. Other cities, including Tempe, Chandler and Peoria, have similar policies.").

161. *See supra* text accompanying note 127 (presenting a reporter's account of how easy it was to circumvent 8e6 Technologies' filters).

legally prohibited from viewing child pornography or obscenity, and children may additionally be prohibited from viewing content that is "harmful to children," criminal penalties already provide some protection. Additionally, the PPLIF Policy includes an increased role for librarians:

> Staff members will terminate the computer sessions of anyone who hacks through the filters and displays porn on the screen. If it's child porn, the staff will immediately notify police. We are preparing to transfer library security from the library staff to the Police Department. Finally, library staff members will be assigned to computer areas at all times of public usage.[162]

It seems, therefore, that librarians will always have a role in guarding children from injurious images.

Considering that librarians are trusted to use their discretion to stop patrons who "hack" through filters and display pornography, it is difficult to understand why a filter cannot be removed at a librarian's discretion. Since the PPLIF Policy already grants librarians the power to look over patrons' shoulders, and patrons are aware of this vigilance, then it seems that the only function of the non-removable filter is to reduce librarians' workload—the software performs the "first sweep," but librarians are still needed. If librarians must observe all patrons (for potential hacking), even with filters, is it a greater strain for them to monitor computers that they *know* have had their filters disabled? If anything, disabling filters helps librarians focus their energies on appropriate users.

Allowing librarians to look over the shoulders of Internet users is a fundamental discretionary power which all seem to agree that librarians possess. Much as "we have always assumed that libraries have discretion when making decisions regarding what to include in, and exclude from, their collections," librarians have also always had the power to use their own discretion in making the initial assessment of whether the images a patron views are lawful or not.[163] Librarians are undoubtedly more qualified to gauge community standards for the acceptability of questionable content than a far-off technology worker.[164] A preferable (and constitutional) alternative to non-removable filters is to move computer monitors closer to librarians, hire more librarians for monitoring purposes, and have printers print

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162. Gordon & Bilsten, *supra* note 6.

163. *American Library*, 539 U.S. at 226 (Stevens, J., dissenting).

164. *See supra* notes 141-146 and accompanying text (describing how librarians are superior judges of community standards than are software programmers).

all materials face-up—actions which Phoenix libraries recently instituted.[165]

Such discretion does not leave patrons who believe that they are wrongly being prevented from viewing lawful content without recourse. For instance, a central part of the *Loudoun II* holding found the Loudoun Policy unconstitutional because it did not provide adequate procedural safeguards for unblocking lawful Web sites in a timely manner.[166] Similarly, librarians in Phoenix must justify their definitions of a particular site as unlawful in adherence to procedural safeguards. While the current version of the PPLIF Policy does not provide for such safeguards (patrons may request that a site be unblocked, but no specific timeline for assessment is provided),[167] the presence of safeguards would adequately protect patrons from librarians' abuse of discretion.

## VI. CONCLUSION

The PPLIF Policy is unconstitutional—it frustrates patrons' attempts to view lawful content protected by the First Amendment while it simultaneously imposes a non-removable filter that is not sufficiently tailored to the City Council's goal of preventing patrons from viewing unprotected images. While Mayor Gordon has repeatedly stated that Phoenix already makes subjective decisions about what information is seen by patrons by, for example, "opting not to carry pornographic magazines or adult videotapes,"[168] he neglects to acknowledge that failing to carry adult videotapes does not prevent patrons from viewing other unrelated, lawful content, such as Web sites related to women's health, sex education, or gay and lesbian issues—Web sites which suffer disproportionately, due to their heightened likelihood of being confused with pornography. The PPLIF Policy runs afoul of such dangers. Librarians who are located in the community and are physically present during Internet use are far superior judges of whether a Web site's content is

165. Scholars provide several examples of viable alternatives, including: placing Internet terminals away from crowded areas, moving terminals closer to librarians, "tap-on-the-shoulder" interference by librarians, asking patrons to stop their searches, special children's areas, privacy screens, recessed monitors, and parental consent. Wardak, *supra* note 15, at 679-80. Phoenix's decision to hire extra staff, move computers closer to librarians, and have all documents print face-up are all constitutionally permissible to effectuate librarians' discretionary powers. Oder, *supra* note 32, at 26. With librarians monitoring users so closely, the need for non-removable filters to function as substitutes for librarians' discretion drops dramatically.

166. Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library (Loudoun II), 24 F. Supp. 2d 552, 569 (E.D. Va. 1998) ("The three minimum procedural safeguards required are (1) a specific brief time period of imposition before judicial review; (2) expeditious judicial review; and (3) the censor bearing the burden of proof.").

167. *See* Gordon & Bilsten, *supra* note 6 ("A form has been developed to allow users to request the reclassification of any non-pornographic Web-site that has been mistakenly blocked.").

168. Richardson, *supra* note 149.

constitutionally protected than are filtering companies' personnel, who do not necessarily have a connection to the community in which the filter is used, may employ a different community standard in gauging obscenity, and are politically unaccountable for their filtering decisions.

Librarians are not perfect. They might abuse their discretion, or fail to act reasonably in catering to a patron's lawful request. Nevertheless, librarians historically have been entrusted with the discretion to act in patrons' best interests, and the PPLIF Policy instructs them to continue doing so, even after the non-removable filters are put into place. Rather than removing a significant portion of librarians' discretion and reassigning it to a software vendor, librarians should retain control—and responsibility—of their libraries' computers.