

NOTE

FILTERING THE FIRST AMENDMENT: THE CONSTITUTIONALITY OF INTERNET FILTERS IN PUBLIC LIBRARIES UNDER THE CHILDREN’S INTERNET PROTECTION ACT

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I. INTRODUCTION

Beginning with the widespread popularity of the World Wide Web in the 1990s, the Internet became a place where people of all ages could go to research and educate themselves on a virtually unlimited number of topics.¹ As of the late 1990s, more and more public libraries began providing their patrons with access to the extensive amount of information available via the Internet.² But there was one major problem—among the countless informative and educational websites, there were also thousands of pornographic websites that could be accessed free of charge, exhibiting lewd and obscene images inappropriate for minors.³ With unbridled access to the Internet, adults and minors alike had the ability to view sexually explicit and obscene materials easily.⁴ Although it is legal for adults to view this type of material, it is illegal for children and adolescents to do so because they may be harmed by exposure.⁵ Therefore, something had to be done to limit Internet access.

In *United States v. American Library Ass'n*,⁶ the U.S. Supreme Court upheld the provisions of the Children's Internet Protection Act (CIPA), an act that requires public libraries, as a condition for receipt of certain federal subsidies, to install Internet filtering software on computer terminals to block obscene or pornographic images.⁷ The Court concluded that CIPA does not violate the First Amendment's free speech clause nor impose unconstitutional conditions on public libraries.⁸ Additionally, the Court stated that the public forum doctrine principles did not apply because they were "incompatible with

1. See S. REP. NO. 106-141, at 2 (1999) (reporting "more than a 13-fold increase in the Internet host computer count between 1994 and 1998 . . . [and Internet] grow[th] at a rate of approximately 40 percent to 50 percent annually").

2. See John Carlo Bertot & Charles R. McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables, Report to National Commission on Libraries and Information Science* 3, at <http://www.nclis.gov/statsurv/2000plo.pdf> (Sept. 7, 2000) (reporting that in 2000 nearly ninety-five percent of all libraries provided the public with access to the Internet—an increase of over twenty percent from 1998).

3. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002) (observing that at the time of the case there were approximately 100,000 sexually explicit websites that could be accessed for free).

4. *Id.* (explaining that at the time of the case, sexually explicit material could be reached easily and at no cost using any public search engine).

5. *Id.* at 405–06 (stating that adults have every right to access pornographic materials "so long as it is not legally obscene or child pornography").

6. 539 U.S. 194 (2003).

7. *Id.* at 199, 214 (overruling the district court's holding that CIPA's provisions were invalid because of violations of patrons' First Amendment rights).

8. *Id.* at 214.

the discretion that public libraries must have to fulfill their traditional missions.”⁹

This Note argues both that the Supreme Court erred in holding that CIPA does not violate the First Amendment and that it was incorrect in not applying the public forum doctrine to Internet access in public libraries. The government, even on its own property, does not have unlimited control over the restraints it can place on speech.¹⁰ Rather, under the public forum doctrine, the First Amendment limits the speech the government can restrict depending “on the character of the forum that the government has created.”¹¹ Thus, the public forum doctrine provides a framework under which speech restrictions on government property are evaluated.¹²

Part II of this Note provides a brief history of the purpose underlying CIPA and a description of relevant CIPA provisions. Part II also discusses the district court opinion that preceded the Supreme Court’s ruling in *United States v. American Library Ass’n*, as well as the concurring and dissenting opinions of the Justices. Part III gives an overview of the public forum doctrine. Part IV details the history of the First Amendment right to access information and discusses why the public forum doctrine should be applied to Internet access in public libraries. Additionally, Part IV examines the public forum doctrine as applied in the district court’s opinion. Lastly, Part V argues that the Court was incorrect in applying only rational basis review and in holding that Internet access in public libraries is not a designated public forum.

II. CASE RECITATION

A. *Introduction*

Public libraries provide approximately ten percent of all American Internet users their sole means of connection to the web.¹³ The widespread availability of Internet access in public libraries is, in part, due to two forms of federal assistance.¹⁴ One

9. *Id.* at 203–05 (explaining that the traditional mission of libraries is to facilitate learning and cultural enrichment).

10. *Am. Library Ass’n*, 201 F. Supp. 2d at 454.

11. *Id.*

12. *Id.*

13. *Id.* at 422 (commenting that public libraries play an important role by providing Internet access because a majority of the 14.3 million Americans who access the Internet at public libraries are low-income persons who could not otherwise afford Internet access).

14. *Id.* (noting that public library funding comes from a combination of federal

form is the E-rate Program, which entitles qualified libraries to buy Internet access at various discount prices, depending on the library's economic and geographic status.¹⁵ The other form of assistance consists of grants provided by the Library Services and Technology Act (LSTA)¹⁶ that enable libraries to be connected through electronic networks and provide libraries with funds to purchase computers and telecommunication hardware.¹⁷

Before CIPA's passage, although many library patrons likely used government-subsidized Internet access to educate themselves on various scholarly topics, other patrons, including both adults and minors, used the libraries' Internet services to access pornography.¹⁸ Additionally, patrons viewing pornographic websites exposed others (inadvertently or not) to this material, either by leaving Internet images displayed on computer screens or by printing material on library printers.¹⁹

Responding to the wide availability of pornography on the Internet and the ease with which the public was accessing it through public libraries, government decisionmakers enacted the Children's Internet Protection Act (CIPA).²⁰ CIPA provides that public libraries wishing to receive federal subsidies in the form of discounts under the E-rate Program or grants under LSTA must install Internet filtering software on their computer terminals to block obscene or pornographic images.²¹ In addition, CIPA requires that the filters be in operation during use by adults as well as minors.²² CIPA does have a provision that allows library officials to disable the Internet filters for patrons conducting bona fide research or for other lawful purposes.²³

funding programs regulated by CIPA and other state and local funding).

15. See *id.* at 411 (recognizing that 47 U.S.C. § 254(h)(1) (2000) is commonly referred to as the E-rate Program); see also 47 U.S.C. § 254(h)(1)(B) (requiring telecommunication carriers to provide Internet service to schools and libraries at discounts determined by the Federal Communication Commission depending on each entity's needs).

16. Pub. L. No. 104-208, 110 Stat. 3009-295 (1996) (codified as amended in scattered sections of 20 U.S.C.).

17. 20 U.S.C. § 9141(a)(1)(B), (C), (E).

18. *Am. Library Ass'n*, 201 F. Supp. 2d at 405-06, 422 (explaining that the record before the court reflected that "library patrons of all ages, many from ages 11 to 15, have regularly sought to access" pornography at public libraries).

19. *Id.* at 423.

20. Pub. L. No. 106-554, 114 Stat. 2763, 2763A-335 (2000) (codified as amended at 20 U.S.C. § 9134(f), 47 U.S.C. § 254(h)(6)).

21. 20 U.S.C. § 9134(f)(1); 47 U.S.C. § 254(h)(6)(B)(i), (C)(i).

22. 47 U.S.C. § 254(h)(6)(C); *Am. Library Ass'n*, 201 F. Supp. 2d at 413.

23. 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D) (allowing those libraries that receive E-rate discounts to disable the filters for use by *adult* patrons, but only if the patrons are conducting bona fide research).

Ideally, the filtering technology mandated by CIPA would benefit children by protecting them from viewing harmful material, while allowing millions of other library patrons to retain access to most of the material available via the Internet. In reality, however, Internet filtering software is simply unable to cut out pornography and spare all of the rest.²⁴ It is currently impossible to develop a filter that neither underblocks nor overblocks websites because the Internet is growing and changing at such a rapid pace.²⁵ The resulting problem is that current filtering technology erroneously blocks a large number of websites containing constitutionally protected free speech.²⁶ This is where the lawsuit began.

B. The District Court

In 2003, a group of libraries, library associations, library patrons, and website publishers filed a complaint in the U.S. District Court of Eastern Pennsylvania against the United States.²⁷ The plaintiffs alleged that CIPA's filtering provisions were facially unconstitutional, arguing that they induced public libraries to violate their patrons' First Amendment rights.²⁸ They also argued that CIPA required libraries to relinquish their own First Amendment rights as a condition to receiving federal funds, a practice that is impermissible under the doctrine of unconstitutional conditions.²⁹

24. *See Am. Library Ass'n*, 201 F. Supp. 2d at 448 ("Any currently available filtering product that is reasonably effective in preventing users from accessing content within the filter's category definitions will necessarily block countless thousands of Web pages, the content of which does not match the . . . legal definitions of obscenity, child pornography, or harm[] to minors.").

25. *Id.* at 448–49 (explaining there are several reasons why the filters overblock and underblock material, such as the automated review process, which is unable to distinguish with accuracy whether materials should fall into a certain filtering category, and human review of websites, which is hampered by the size of the Internet, its rapid growth rate, and the limited number of people employed to individually review these websites).

26. *Id.* at 448.

27. *Id.* at 407.

28. *Id.*

29. *Id.* In addition to claiming that CIPA was facially unconstitutional, the plaintiffs also posited three additional grounds for finding CIPA facially invalid. *Id.* at 407 n.1. First, they submitted that CIPA imposed "an unconstitutional condition on public libraries by requiring them to relinquish their own First Amendment rights to provide unfiltered Internet access as a condition on their receipt of federal funds." *Id.* Second, they contended that CIPA was facially invalid because it "effects an impermissible prior restraint on speech by granting filtering companies and library staff unfettered discretion to suppress speech . . . before it has been subject to a judicial determination that it is unprotected under the First Amendment." *Id.* Finally, plaintiffs argued that CIPA was unconstitutionally vague. *Id.*

Because the case turned on the limitations to the government's exercise of its spending power, the Supreme Court's decision in *South Dakota v. Dole*³⁰ controlled.³¹ *Dole* articulates four constitutional limitations on Congress's exercise of its spending power.³² The first limitation is that "the exercise of the spending power must be in pursuit of 'the general welfare.'"³³ The second is that any condition placed on the receipt of federal funds must be unambiguous so that it properly informs states about the consequences of their decisions.³⁴ Third, the conditions imposed must bear a relationship to the purpose of the funding program.³⁵ Finally, Congress cannot use its spending power to induce states to engage in unconstitutional activities.³⁶

Of the four limitations on Congress's spending power articulated in *Dole*, the plaintiffs in *American Library Ass'n v. United States* contended that CIPA ran afoul of only one.³⁷ They asserted that CIPA provisions failed to satisfy the final condition of the *Dole* test: that the spending power may not be used to induce states "to engage in activities that would themselves be unconstitutional."³⁸ Plaintiffs argued that by conditioning the receipt of funds on the use of currently imperfect Internet filters, CIPA induced libraries to violate their own First Amendment rights.³⁹ Pursuant to CIPA provisions, a three-judge district court convened to decide the constitutionality of CIPA's filtering provisions.⁴⁰

The district court ruled that CIPA was facially unconstitutional and it enjoined the government from withholding federal funding for failure to comply with the provisions of CIPA.⁴¹ The court held that Congress had exceeded its authority under the Spending Clause because in order to

30. 483 U.S. 203 (1987) (granting Congress wide latitude with respect to conditions attached to the receipt of federal funds).

31. *Am. Library Ass'n*, 201 F. Supp. 2d at 450 (noting that both parties agreed that the case was challenging the constitutionality of conditions imposed by Congress for states to receive federal funding and, as such, the *Dole* framework was applicable).

32. *Dole*, 483 U.S. at 207-08.

33. *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

34. *Id.*

35. *Id.* at 207-08.

36. *Id.* at 208.

37. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 450 (E.D. Pa. 2002).

38. *Id.* at 450-51 (quoting *Dole*, 483 U.S. at 210).

39. *Id.* (noting the plaintiff's argument that CIPA would violate the First Amendment free speech right of Internet content providers to disseminate information to library patrons and the corollary right of library patrons to receive that information).

40. *United States v. Am. Library Ass'n*, 539 U.S. 194, 202 (2003).

41. *Am. Library Ass'n*, 201 F. Supp. 2d at 495.

comply with CIPA's conditions, public libraries had to restrict protected speech, thereby violating the First Amendment.⁴² Reasoning that the filtering software mandated by CIPA constituted a content-based restriction on access to a designated public forum, the court determined that the restrictions were subject to strict scrutiny.⁴³ The court further explained that although the government had a compelling interest in preventing the dissemination of obscene materials, child pornography and material harmful to minors, the requirement that libraries use today's software filters was not narrowly tailored to further that interest.⁴⁴

According to the court, the provisions of CIPA allowing the filters to be disabled or specific websites to be unblocked provided an inadequate remedy because some patrons might have been too embarrassed to request removal of the filters or might have wanted to retain their anonymity.⁴⁵ Additionally, the court noted that the process of unblocking websites could take several days or could be unavailable in smaller libraries; therefore, the court determined that the disabling provisions did not cure its constitutional deficiencies.⁴⁶

C. *The Supreme Court*

In March 2003, the CIPA case was appealed directly to the U.S. Supreme Court.⁴⁷ In a plurality opinion, the Court reversed the district court's decision and held both that CIPA did not violate the First Amendment's Free Speech Clause and that it did not impose unconstitutional conditions on public libraries.⁴⁸

1. *Plurality.* In its plurality opinion, authored by Chief Justice Rehnquist, the Court first defended its position that CIPA is not facially unconstitutional by evaluating the role of libraries in American society.⁴⁹ Chief Justice Rehnquist stated that a library's mission is to facilitate learning and cultural enrichment and that to fulfill this mission, libraries must have broad discretion to decide what materials will be provided to

42. *Id.* at 490.

43. *Id.* at 489.

44. *Id.* (noting that in order to survive strict scrutiny, a narrowly tailored means is needed to further the government's compelling interest).

45. *Id.* at 411.

46. *Id.*

47. *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003).

48. *Id.* at 214.

49. *Id.* at 203-04.

patrons.⁵⁰ Because of the breadth of the discretion necessary for libraries to fulfill their mission, Chief Justice Rehnquist reasoned that neither forum analysis nor heightened judicial scrutiny were applicable.⁵¹

In declining to apply public forum analysis principles, the Court likened the broad discretion that librarians have to the discretion discussed in *Arkansas Education Television Commission v. Forbes*⁵² and in *National Endowment for the Arts v. Finley*.⁵³ In *Forbes*, the Court held that the public forum doctrine was not applicable to public television stations' editorial judgments concerning the private speech they present because they must have editorial discretion to "fulfill their journalistic purpose."⁵⁴ Likewise, in *Finley*, the Court upheld an art funding program requiring the National Endowment for the Arts (NEA) to make funding decisions using content-based criteria, stating that applying public forum principles would conflict with the NEA's mandate to make aesthetic judgments.⁵⁵

Applying only rational basis review, the Court concluded that even if the erroneous blocking of some protected speech by the filtering software presented a constitutional difficulty, CIPA's provisions enabling library patrons to request that specific websites be unblocked eliminated that difficulty.⁵⁶ Additionally, in response to the argument that some patrons might be too embarrassed to request that specific websites be unblocked, Chief Justice Rehnquist stated that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."⁵⁷

Likewise, the Court rejected the district court's judgment with respect to the argument that "CIPA impose[d] an unconstitutional condition on the receipt of federal assistance."⁵⁸ Under the doctrine of unconstitutional conditions, "the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech"

50. *Id.*

51. *Id.* at 205.

52. 523 U.S. 666 (1998).

53. 524 U.S. 569 (1998); *Am. Library Ass'n*, 539 U.S. at 204–05.

54. *Forbes*, 523 U.S. at 672–73 ("[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.")

55. *Finley*, 524 U.S. at 585–86 (refusing to apply the public forum doctrine to a federal program that awarded grants to artists on the basis of artistic excellence).

56. *Am. Library Ass'n*, 539 U.S. at 209.

57. *Id.*

58. *Id.* at 210–12.

even if he has no entitlement to that benefit.”⁵⁹ Plaintiffs argued that CIPA would require them “to surrender their First Amendment right to provide the public with access to constitutionally protected speech.”⁶⁰ The government contended, however, that a public library, as a government entity, has no First Amendment rights.⁶¹ The Court declined to decide this question altogether, stating that the claim would fail on the merits because the government was not denying a right to anyone; rather, it was “simply insisting that public funds be spent for the purposes for which they were authorized.”⁶² In *Rust v. Sullivan*,⁶³ the Supreme Court held that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”⁶⁴ Thus, applying the holding in *Rust*, the government is allowed to require the use of filtering software because it helps to carry out the E-rate and LSTA programs.

2. *Justice Kennedy’s Concurring Opinion.* Justice Kennedy concurred with the Court’s opinion, reasoning that there was “little to th[e] case” if a library would unblock filtered material or disable the filters in a timely manner.⁶⁵ He reasoned that, if libraries do not unblock websites when requested to do so by patrons or if it is shown that a substantial burden is imposed on an adult user’s ability to view constitutionally protected speech, then there would be a basis for an as-applied challenge, rather than the facial challenge presented in the instant case.⁶⁶

3. *Justice Breyer’s Concurring Opinion.* Although Justice Breyer concurred in the plurality’s decision, he did so by applying a form of heightened scrutiny.⁶⁷ Justice Breyer stated that the CIPA filtering provisions raised competing constitutional interests and that the appropriate inquiry was one of “proper fit”:

59. *Id.* at 210 (alteration in original) (quoting Board of Comm’rs, Wabaunsee County v. Umbehr, 518 U.S. 668, 674 (1996)).

60. *Id.*

61. *Id.* at 210–11 (explaining that the First Amendment was designed to protect the press from the government and that there is no corresponding right for a government entity).

62. *Id.* at 211–12 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

63. 500 U.S. 173 (1991).

64. *Id.* at 194.

65. *Am. Library Ass’n*, 539 U.S. at 214 (Kennedy, J., concurring).

66. *Id.* at 215 (Kennedy, J., concurring).

67. *Id.* at 215–16 (Breyer, J., concurring) (“In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care.”).

“whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives.”⁶⁸ Recognizing the legitimate and compelling interest the government had in restricting the access of minors to obscene materials, Justice Breyer concluded that the speech-related harm that CIPA might cause would not be disproportionate in light of CIPA’s legitimate goals.⁶⁹

4. *Justice Stevens’s Dissenting Opinion.* Justice Stevens dissented, stating, “Neither the interest in suppressing unlawful speech nor the interest in protecting children from access to harmful materials justifies this overly broad restriction on adult access to protected speech.”⁷⁰ Justice Stevens argued that the disabling provisions of CIPA were not enough to save the statute because patrons would not know what was being hidden by a filter and most would not ask for the filter to be removed.⁷¹ Justice Stevens likened the situation to that of a library keeping a significant part of its reading materials in an unmarked, locked room that could only be accessed by specific request.⁷² In his view, the more curious patrons would eventually ask to go into this room, but most would not.⁷³

Additionally, he disagreed with the plurality’s finding that the statute does not impose an unconstitutional condition on public libraries by stating, “[CIPA] impermissibly conditions the receipt of Government funding on the restriction of significant First Amendment rights.”⁷⁴ Justice Stevens argued that a library’s exercise of judgment with respect to what should be contained in its collection is entitled to First Amendment protection and that a federal statute that threatens to deny funds if a library refuses to install filtering software on each of its computers is a violation of the First Amendment.⁷⁵

Justice Stevens concluded that the Court “should not permit federal funds to be used to enforce this kind of broad restriction

68. *Id.* at 217–18 (Breyer, J., concurring). See generally *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (utilizing some level of heightened scrutiny when balancing the harms against the justifications and the alternatives).

69. *Am. Library Ass’n*, 539 U.S. at 220 (Breyer, J., concurring).

70. *Id.* at 222 (Stevens, J., dissenting).

71. *Id.* at 224 (Stevens, J., dissenting).

72. *Id.* (Stevens, J., dissenting).

73. *Id.* at 224–25 (Stevens, J., dissenting).

74. *Id.* at 225 (Stevens, J., dissenting).

75. *Id.* at 226 (Stevens, J., dissenting).

of First Amendment rights,” especially in a situation where less restrictive alternatives could have been employed.⁷⁶

5. *Justice Souter’s Dissenting Opinion.* Justice Souter’s dissent, which Justice Ginsburg joined, reasoned that CIPA’s filtering provisions were invalid for two reasons.⁷⁷ First, Justice Souter agreed with Justice Stevens that the filtering requirements of CIPA impose an unconstitutional condition on the receipt of government funds earmarked for public libraries’ Internet access.⁷⁸ Second, Justice Souter stated that the CIPA provisions were an invalid exercise of Congress’s spending power because they require libraries to take actions that would violate the First Amendment if libraries were to take those actions entirely on their own.⁷⁹

Recognizing the legitimacy of governmental efforts to block minors’ access to harmful materials, Justice Souter stated, “[I]f the only First Amendment interests raised here were those of children, I would uphold application of the Act.”⁸⁰ Justice Souter took the position that the statute had to be evaluated with the understanding that adults would be denied access to a substantial amount of nonobscene materials because the language of the statute only stipulates that a library “may” unblock a website, not that it must.⁸¹ He also noted that the Federal Communications Commission (FCC), in its order implementing CIPA, had refused to establish a federal policy that would determine when unblocking a website would be appropriate.⁸² Justice Souter’s opinion finding CIPA unconstitutional rested on his belief that a local library could not constitutionally impose blocking restrictions on content otherwise available to adult patrons in a public library.⁸³ In reaching this conclusion, he reasoned that a library that chooses to block an adult’s access to material harmful to children would impose a content-based restriction on material under the library’s control that would otherwise be legal for an adult to

76. *Id.* at 231 (Stevens, J., dissenting).

77. *Id.* (Souter, J., dissenting).

78. *Id.* (Souter, J., dissenting).

79. *Id.* (Souter, J., dissenting).

80. *Id.* at 232 (Souter, J., dissenting).

81. *Id.* at 233 (Souter, J., dissenting).

82. *Id.* at 232 (Souter, J., dissenting) (citing *In re Fed.-St. Joint Bd. on Universal Serv.: Children’s Internet Protection Act*, 16 F.C.C.R. 8182, 8204, para. 53 (2001) (stating that any rules directing libraries when to unblock “would likely be overbroad and imprecise”)).

83. *Id.* at 233–34 (Souter, J., dissenting).

view.⁸⁴ To Justice Souter, “This would simply be censorship.”⁸⁵ Justice Souter conceded that not all adults would be subject to censorship because some might convince librarians to unblock specific websites for “lawful purposes.”⁸⁶ However, Justice Souter also reasoned that for those who were unsuccessful in convincing a librarian to unblock a specific website, the censorship would be complete and thus subject to strict scrutiny.⁸⁷ In disagreeing with the plurality, Justice Souter did not liken the CIPA blocking provisions to the discretion that librarians exercise in deciding what to purchase for their collections.⁸⁸ Rather, he suggested that the case involved a situation in which libraries—not constrained by scarcity of resources or shelf space—were blocking material after its acquisition, and he analogized this scenario to a library purchasing “an encyclopedia and then cutting out pages with anything thought to be unsuitable.”⁸⁹

III. OVERVIEW OF THE PUBLIC FORUM DOCTRINE

The public forum doctrine addresses the extent to which the government can restrict speech on its own property without running afoul of the First Amendment.⁹⁰ The government does not possess the power to restrict all types of speech, even when the speech occurs on its property.⁹¹ In determining what degree of protection any particular type of speech will be given, the preliminary inquiry is what type of forum the government has created.⁹² The Supreme Court has identified three distinct categories of fora: traditional public fora, designated public fora, and nonpublic fora.⁹³

84. *Id.* at 234–35 (Souter, J., dissenting).

85. *Id.* at 235 (Souter, J., dissenting).

86. *Id.* (Souter, J., dissenting).

87. *Id.* (Souter, J., dissenting).

88. *Id.* at 235–36 (Souter, J., dissenting).

89. *Id.* at 237 (Souter, J., dissenting).

90. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 454 (E.D. Pa. 2002).

91. *Id.* (noting that the government’s power to restrict speech is limited but that “the First Amendment affords greater deference to restrictions on speech in those areas considered less amenable to free expression”).

92. *Id.*

93. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983) (applying the public forum doctrine to teacher mailboxes in an interschool mail system); *see also Am. Library Ass’n*, 201 F. Supp. at 454–55 (applying the public forum doctrine to the use of Internet filters on public library computers).

The first category, traditional public fora, consists generally of streets and parks.⁹⁴ In *Hague*, the Supreme Court stated that

streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.⁹⁵

When the government tries to restrict content-based speech in traditional public fora, its restrictions are subject to strict scrutiny.⁹⁶ As such, the ability of the government to enforce a content-based exclusion in a traditional public forum depends on whether it can show that the regulation is narrowly tailored to meet a compelling state interest.⁹⁷

The second category, designated public fora, consists of “public property which the State has opened for use by the public as a place for expressive activity.”⁹⁸ In contrast to traditional public fora, designated public fora can be limited in purpose and restricted to use by certain groups or selected speakers.⁹⁹ However, if a state retains the open character of a facility, it is bound by the same standards that apply to traditional public fora.¹⁰⁰ Some examples of types of designated public fora include university meeting facilities,¹⁰¹ school board meetings,¹⁰² and municipal theaters.¹⁰³

94. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

95. *Id.* at 515.

96. *Perry Educ. Ass’n*, 460 U.S. at 45 (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.”); see also *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (“[R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny.”).

97. *Perry Educ. Ass’n*, 460 U.S. at 45.

98. *Id.* at 45.

99. *Id.* at 46 n.7 (giving specific examples of how the government may choose to limit access to a public forum such as by limiting use to certain school groups or for the discussion of specific topics such as school board business).

100. *Id.* at 45.

101. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (explaining that a university meeting facility becomes a designated public forum when the university makes it generally available for all activities of registered student groups and that a university policy of excluding a registered student religious group from the facility was a violation of the First Amendment).

102. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 174–76 & 174 n.6 (1976) (explaining that a school board meeting that is open to the public is a designated public forum).

103. *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554–55 (1975) (stating that a

Finally, the last category, nonpublic fora, encompasses all remaining public property.¹⁰⁴ In this category, restrictions are only subject to a mere reasonableness standard—a state is given wide latitude to make content-based restrictions as long as the restrictions are not based on any speaker’s viewpoint.¹⁰⁵

The standard for determining the relevant forum, articulated by the Supreme Court in *Cornelius*, is as follows: when a plaintiff seeks limited access, rather than general access, to government property, the approach is more tailored and the forum selected is not the entire property itself.¹⁰⁶ The court in *Cornelius* stated,

Although . . . as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.¹⁰⁷

For example, in *Cornelius*, the plaintiffs—legal defense and political advocacy groups—sought to participate in the Combined Federal Campaign (CFC) charity drive.¹⁰⁸ The fundraising activities of the drive were directed toward federal employees and military personnel and participation was limited to voluntary, tax-exempt, nonprofit charitable agencies providing direct health and welfare services.¹⁰⁹ Legal defense and political advocacy organizations were not listed.¹¹⁰ The Court explained that the more narrow forum of the charity drive, rather than the broader forum of the entire federal workplace, was the relevant forum because the plaintiffs sought access to a particular means

municipal theater, generally open to the public, is a designated public forum and that the denial of its use to a certain group without review of the content of what was to be performed was an abridgement of the First Amendment).

104. *Perry Educ. Ass’n*, 460 U.S. at 46 (“Public property which is not by tradition or designation a forum for public communication is governed by different standards.”).

105. *See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (stating that “limitations on expressive activity conducted [in nonpublic forums] must survive only a much more limited review”).

106. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985).

107. *Id.* (citations omitted).

108. *Id.* at 790.

109. *Id.* at 790–92.

110. *Id.* at 792–93.

of communication—the CFC.¹¹¹ Similarly, in *Perry Education Ass’n*, where union members sought access to an interschool mail system and teacher mailboxes, the Court concluded that the relevant forum was the mail system.¹¹²

Therefore, in applying the public forum doctrine to a given situation, the first step is to identify the relevant forum, using a more tailored approach when limited access is sought.¹¹³ Once the proper forum has been identified, the next step is to determine in to which category—traditional public, designated public, or nonpublic—the forum falls.¹¹⁴ Finally, once the proper forum has been designated and categorized as public or nonpublic, the restrictions placed on that forum can then be analyzed under the appropriate standard.¹¹⁵

IV. ANALYSIS

In *American Library Ass’n v. United States*, the plaintiffs challenged the constitutional validity of the provisions of CIPA that denied them the right to access information.¹¹⁶ In order to analyze the merits of their claim, it is first necessary to evaluate whether the right to access information is indeed protected by the First Amendment.

A. *Is There a First Amendment Right to Access Information?*

The First Amendment states that Congress shall not make a law that abridges the freedom of speech.¹¹⁷ The term “speech” is wide in breadth and includes various means of communication.¹¹⁸

111. *Id.* at 800–01 (rejecting the argument that forum designation should be based on the tangible property involved in the dispute, in this case the federal workplace).

112. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (stating that the school mail facilities were the forum at issue).

113. *Cornelius*, 473 U.S. at 801 (identifying the specific location *within* the government property rather than just the government-owned property).

114. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 456–57 (E.D. Pa. 2002) (demonstrating the thought process required to move from identifying the forum to determining into which category the forum falls).

115. *Id.* at 470 (analyzing the provision of Internet access by a library under the heightened scrutiny because it deemed the access to be a designated public forum).

116. *Id.* at 450–51 (arguing that CIPA would violate the First Amendment right of library patrons to receive constitutionally protected speech on the Internet and the First Amendment right of Internet content providers to disseminate constitutionally protected speech to library patrons).

117. U.S. CONST. amend. I.

118. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1252 (3d Cir. 1992) (listing means of communication encompassed by the First Amendment’s right to freedom of speech, including “freedom of inquiry, freedom of thought, and freedom to teach” and “the right to receive information and ideas” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482–83

Accordingly, a discussion of the relevant cases that define speech and the development of the right to access speech is necessary.

In *Martin v. City of Struthers*,¹¹⁹ the Supreme Court decided that the speech component of the First Amendment includes not only the freedom to speak, but also the freedom to receive speech.¹²⁰ In *Martin*, a Jehovah's Witness brought suit claiming that a city ordinance prohibiting people from ringing doorbells or knocking on doors when distributing circulars violated the First and Fourteenth Amendments.¹²¹ In holding that the ordinance violated both amendments, the Supreme Court noted that the freedom to distribute and receive information is "clearly vital to the preservation of a free society" and, hence, it "must be fully preserved."¹²²

The Supreme Court further defined the right to access speech in *Griswold v. Connecticut*,¹²³ wherein a statute prohibiting the dissemination of contraceptive information to married couples was struck down as unconstitutional.¹²⁴ The Court articulated that "the right of freedom of speech and press includes . . . the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach."¹²⁵

Later, in *Stanley v. Georgia*,¹²⁶ the Supreme Court observed that "it is now well established that the Constitution protects the right to receive information and ideas."¹²⁷ The Court then explained that the right to receive information is fundamental to a free society, regardless of the content or social worth of the information.¹²⁸

Similarly, in *Board of Education v. Pico*,¹²⁹ the plurality decision explained that the First Amendment does not merely

(1965))).

119. 319 U.S. 141 (1943).

120. *Id.* at 146–47; *see also Kreimer*, 958 F.2d at 1246–48, 1251 (involving a homeless person who challenged the constitutionality of a library's regulations concerning the use of the library and the types of behavior permitted in the library).

121. *Martin*, 319 U.S. at 142.

122. *Id.* at 146–47.

123. 381 U.S. 479 (1965).

124. *Id.* at 480, 485–86.

125. *Id.* at 482 (citations omitted).

126. 394 U.S. 557 (1969).

127. *Id.* at 563–64 (holding unconstitutional a state statute prohibiting the private possession of obscene materials).

128. *Id.* at 564.

129. 457 U.S. 853 (1982) (concerning the constitutionality of a school library's removal of books based on their characterization as anti-American, anti-Christian and anti-Semitic).

protect the right to self-expression; it also guarantees “public access to discussion, debate, and the dissemination of information and ideas.”¹³⁰ The plurality also noted that the right to receive information “is an inherent corollary of the rights of free speech.”¹³¹ Accordingly, as the Court in *Kreimer v. Bureau of Police*¹³² noted, the First Amendment “includes the right to some level of access to a public library, the quintessential locus of the receipt of information.”¹³³

B. Should the Public Forum Doctrine Apply in American Library Ass’n?

Having established that the First Amendment protects the public’s access to information, the next step is to determine whether public forum analysis should apply when the government places content-based restrictions on the private speech it allows the public to access via the Internet in public libraries.

Public libraries, of course, do not have infinite resources to purchase all the books and other materials necessary to completely satisfy the needs of every patron.¹³⁴ Therefore, library officials must utilize professional discretion to decide what materials to include in their print collections.¹³⁵ These decisions are not arbitrary; rather, they are based on principles that encourage librarians to provide materials that present information from all points of view.¹³⁶ As such, librarians should not make acquisition decisions based solely on the “origin, background, or views” of the author.¹³⁷ The First Amendment generally subjects acquisition decisions to rational basis review.¹³⁸ Because it is clear that librarians need discretion when

130. *Id.* at 866 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)); see also *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (declaring that the First Amendment encompasses the right to “receive information and ideas”).

131. *Pico*, 457 U.S. at 867.

132. 958 F.2d 1242 (3d. Cir. 1992).

133. *Id.* at 1255.

134. See Steven D. Hinckley, *Your Money or Your Speech: The Children’s Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025, 1079–80 (2002) (demonstrating that libraries are financially constrained in their pursuit to satisfy both their own objectives and the needs of their patrons).

135. *Id.* at 1080.

136. *Id.*; AM. LIBRARY ASS’N, LIBRARY BILL OF RIGHTS (last amended Jan. 23, 1996) [hereinafter ALA, LIBRARY BILL OF RIGHTS], available at <http://www.ala.org/ala/oif/statementspols/statementsif/librarybillofrights.pdf>.

137. ALA, LIBRARY BILL OF RIGHTS, *supra* note 136.

138. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 462 (E.D. Pa. 2002).

purchasing library materials, advocates of CIPA's filtering provisions contend that having the discretion to exclude Internet websites from a library's online collection is no different than the discretion a library already has to make additions to its print collections.¹³⁹

In *United States v. American Library Ass'n*, the Supreme Court agreed with this logic, reasoning that forum analysis, and thus strict scrutiny, should not apply to public libraries that make content-based restrictions by applying Internet filters.¹⁴⁰ The Court determined that strict scrutiny should not apply because it is "incompatible with the discretion that public libraries must have to fulfill their traditional missions" of facilitating learning and cultural enrichment.¹⁴¹ The Supreme Court analogized this discretion to that of a public television station in making editorial judgments concerning what speech to present to its viewers and that of the National Endowment for the Arts (NEA) in making art funding decisions.¹⁴²

In *Arkansas Educational Television Commission v. Forbes*,¹⁴³ the Supreme Court held that public forum principles did not apply because they interfered with the discretion that the defendant television station needed to fulfill its journalistic purpose.¹⁴⁴ The Court explained that recognizing a broad right of public access "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."¹⁴⁵ Similarly, in *National Endowment for the Arts v. Finley*,¹⁴⁶ the Court declined to apply forum analysis to an art funding program that used content-based criteria to make disbursement decisions.¹⁴⁷ The *Finley* Court reasoned that applying forum analysis would interfere with the NEA's ability to make aesthetic judgments.¹⁴⁸ Thus, the Supreme Court in *United States v. American Library Ass'n* stated, "Just as forum analysis and

139. Hinckley, *supra* note 134, at 1081.

140. *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003).

141. *Id.*

142. *Id.* at 204-05.

143. 523 U.S. 666, 669-71 (1998) (involving an independent political candidate's claim against a state-owned public television broadcaster, alleging that his exclusion from a candidate debate violated his First Amendment rights).

144. *Id.* at 673-74.

145. *Id.* at 674.

146. 524 U.S. 569 (1998).

147. *Id.* at 586.

148. *Id.* (explaining that the mandate of the NEA, to make judgments based on subjective determinations of excellence, distinguishes it from programs whose grant allocations are based on relatively easily attainable objective criteria, to which forum analysis appropriately applies).

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.”¹⁴⁹

However, the difference between *Finley* and *Forbes* and Internet filtering in libraries is that the state actors who exercised editorial discretion in *Finley* and *Forbes* reviewed the content of the material involved before it was presented to the public.¹⁵⁰ For example, in *Forbes*, the public broadcaster scrutinized every speaker who participated in the televised debate and, in *Finley*, the NEA officials examined the content of each work subsidized.¹⁵¹

Arguably, the discretion described in *Finley* and *Forbes* is different from the process that occurs when a library provides Internet access on its computers but filters out certain websites based on content. When public libraries provide patrons with the ability to access speech via the Internet, library officials neither review the material nor determine whether it is valuable.¹⁵² Additionally, library officials do not review the material excluded by Internet filters.¹⁵³ For these reasons, the district court in *American Library Ass’n v. United States* explained that “the state cannot be said to be exercising editorial discretion permitted under the First Amendment when it indiscriminately facilitates private speech whose content it makes no effort to examine.”¹⁵⁴

Furthermore, the analogy between the installation of Internet filters and the acquisition decisions librarians make fails to recognize the difference between a library’s traditional collection and the Internet.¹⁵⁵ By purchasing Internet access, the library is, in essence, purchasing access to every individual publication available via the Internet.¹⁵⁶ As Justice Souter stated, “deciding against buying a book means there is no book . . . , but

149. *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003).

150. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 462–63 (E.D. Pa. 2002).

151. *Finley*, 524 U.S. at 586; *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998); see also *Am. Library Ass’n*, 201 F. Supp. 2d at 462–63 (analogizing the discretion permitted in *Forbes* and *Finley* to that of a librarian selecting books for a library’s collection).

152. *Am. Library Ass’n*, 201 F. Supp. 2d at 463.

153. *Id.* at 464.

154. *Id.*

155. *Hinckley*, *supra* note 134, at 1084–86 (explaining that the analogy fails because although each book in a library’s acquisition selection process is comprehensively reviewed, Internet websites cannot be reviewed due to the sheer volume of material on the Internet).

156. *Mainstream Loudoun v. Bd. of Trs.*, 2 F. Supp. 2d 783, 793–94 (E.D. Va. 1998).

blocking the Internet is merely blocking access purchased in its entirety.¹⁵⁷ Thus, to purchase Internet access only to block it partially afterwards can be better characterized as removal of material after purchase rather than a prepurchase acquisition decision subject to a library official's educated discretion. Consequently, the decision to block prepurchased Internet material resembles a library's decision to cut out pages containing anything believed to be unsuitable for all patrons from a collection of encyclopedias.¹⁵⁸ The First Amendment does give the government editorial discretion to subsidize favored speech; however, when the state allows any member of the public to access speech at a library on a wide range of topics, any exclusion of speech based on its content should be subject to strict scrutiny.¹⁵⁹

C. Application of the Public Forum Doctrine

1. *What Is the Relevant Forum?* In order to apply the public forum doctrine principles to *United States v. American Library Ass'n*, the relevant forum must first be identified.¹⁶⁰ The patron plaintiffs were not trying to compel the library to purchase additional materials for its print collection.¹⁶¹ Instead, the library patrons were asserting their right to access information on the Internet at the library.¹⁶² When limited access to a forum is sought, the definition of the relevant forum should be tailored to the specific need; it is not simply the entire property itself.¹⁶³ Hence, the relevant forum in *United States v. American Library Ass'n* was the public library's provision of Internet access rather than the library's entire collection of print and electronic media.¹⁶⁴ This conclusion is consistent with the tailored approach

157. *United States v. Am. Library Ass'n*, 539 U.S. 194, 237 (2003) (Souter, J., dissenting).

158. *Id.* (Souter, J., dissenting).

159. *Am. Library Ass'n*, 201 F. Supp. 2d at 464–66 (holding that although certain discretionary decisions are subject only to rational basis review, when a library provides public access to information via the Internet, strict scrutiny applies to any attempt to filter the public's use of that information).

160. *Id.* at 455 (explaining that the choice of forum designation is between the library's collection as a whole, which includes both print and electronic resources, and the library's provision of Internet access).

161. *Id.* at 456.

162. *Id.*

163. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) ("In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.").

164. *Am. Library Ass'n*, 201 F. Supp. 2d at 456.

because it makes the relevant forum conform to what is specifically being requested: Internet access.

2. *Internet Access in Libraries as a Designated Public Forum.* Having determined the relevant forum, the next step in the public forum analysis is to determine into which forum category Internet access in public libraries can most properly be placed: traditional, designated public, or nonpublic.¹⁶⁵ Traditional public fora, to which strict scrutiny applies, have generally been limited to those places used for assembly or debate for time immemorial.¹⁶⁶ Accordingly, Internet access in public libraries cannot be considered a traditional public forum. Instead, the issue is whether to consider Internet access in public libraries as a designated public forum or as a nonpublic forum.

As previously mentioned, a designated public forum is created when the government voluntarily creates a forum for use by the public as a place for expressive activity.¹⁶⁷ The government is not required to maintain the character of this type of forum.¹⁶⁸ However, once it does, “it is bound by the same standards as apply in a traditional public forum.”¹⁶⁹ Therefore, “a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”¹⁷⁰

In *Kreimer*, the Third Circuit used three factors to determine a public library’s forum status.¹⁷¹ The first factor considered was whether “the government . . . intended to open a non-traditional forum for expressive activity.”¹⁷² The *Kreimer* court recognized that the public library at issue was not mandatory and that the decision process used to determine whether or not to establish a library was set by state statute.¹⁷³ This finding is significant because a library, opened voluntarily and for expressive use,

165. Refer to Part III *supra* (explaining the differences among each type of forum).

166. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (explaining that in order to restrict speech in traditional public forums, the government must show a compelling state interest that is narrowly tailored or, alternatively, it may regulate the time, place, and manner of speech as long as the regulations are content neutral and narrowly tailored to a significant state interest and do not eliminate all available methods of communication).

167. *Id.*

168. *Id.* at 46.

169. *Id.*

170. *Id.*

171. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259–61 (3d Cir. 1992). Although the relevant forum in *American Library Ass’n* is Internet access in public libraries, rather than the entire public library itself, these three factors still prove useful in determining the status of the forum.

172. *Id.* at 1259 (footnotes omitted).

173. *Id.*

precisely fits the definition of a designated public forum described by *Perry*.¹⁷⁴ Similarly, the voluntary opening of a library for expressive activity is analogous to the purchase of Internet access in libraries. It is not mandatory for libraries to provide patrons with Internet access; however, once libraries choose to provide access, Internet access should become a designated public forum.

The next factor the *Kreimer* court considered in determining library forum status was the extent of the use granted to the public.¹⁷⁵ The court reasoned that if the government retained control over who was permitted to enter the library that would be indicative of an intent not to open the library to the public for expressive activity.¹⁷⁶ However, the court found that the library generally granted access to all residents and only excluded patrons if they violated library rules.¹⁷⁷ Thus, the government opened the library to the public without any true restrictions on access. This grant of open access indicates designated forum status because the library was created for unlimited use by the public. This situation can be analogized to public libraries giving Internet access to its patrons. The public library as an Internet provider does not retain control over who has Internet access, thus indicating an intent to provide Internet access to the public for expressive activity. Internet access in a public library is provided to all patrons just as a library opens its doors to all patrons; thus, the Internet access provided in public libraries should be considered a designated public forum.

The third factor the *Kreimer* court discussed was the nature of the forum and its compatibility with expressive activity.¹⁷⁸ The *Kreimer* court found that libraries offer a wide variety of information to the public and that the expressive activities carried on within them, such as reading and writing, are exactly why they were created.¹⁷⁹ Obviously, libraries do restrict some forms of expressive activity; however, they do not restrict the types of expressive activity for which they were designed.¹⁸⁰

174. *Perry Educ. Ass'n*, 460 U.S. at 45–46 (finding that with respect to a designated public forum, as with a public library, the government can choose whether it desires to keep the forum open; however, for the period during which it remains open, the government is held to the same restrictions on its ability to regulate the time, place, and manner of speech as in the traditional public forum).

175. *Kreimer*, 958 F.2d at 1260.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1261.

180. *Id.* (explaining that the exercise of “oral and interactive First Amendment

Therefore, libraries are compatible with these types of expressive activities, and thus, they resemble designated public fora.¹⁸¹ The type of expressive activity, access to information, found in libraries through print media is analogous to the Internet access found in public libraries. Access to Internet service was provided explicitly for information access purposes and thus, it should also be considered a designated public forum.

In conclusion, Internet access in a public library should be regarded as a designated public forum considering the analogy that can be drawn between Internet access and the facts that satisfied the three-part test in *Kreimer*. In addition, the dissemination of a wide variety of information to the public via the Internet is compatible with the definition of a designated public forum given in *Perry*.¹⁸²

3. *CIPA Provisions Subjected to Strict Scrutiny.* In determining what level of scrutiny should apply to content-based restrictions imposed by CIPA on Internet access in public libraries, a court should consider that the government has the ability to limit the use of designated public fora to “narrowly specified purposes.”¹⁸³ However, the easier the government makes it to access speech in its facilities, the less deference the courts will allow the government in controlling that speech.¹⁸⁴ For example, in *Finley*, the government made content-based decisions when awarding grants to artists on the basis of artistic excellence.¹⁸⁵ These content-based decisions were evaluated under reduced scrutiny because the government had not invited a wide range of public speech.¹⁸⁶ The *Finley* type of situation is distinguishable from that involving a public library and, more specifically, that involving Internet access in a public library because both public libraries and Internet access in them were created “for use by the public . . . for expressive activity.”¹⁸⁷

activities is antithetical to the nature of the Library” because the library is a place dedicated to “reading, writing, and quiet contemplation” (emphasis added)).

181. *Id.* at 1261–62.

182. Refer to note 167 *supra* and accompanying text.

183. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002).

184. *Id.* at 460 (noting that “where the government creates a designated public forum to facilitate private speech representing a diverse range of viewpoints, the government’s decision selectively to single out particular viewpoints for exclusion is subject to strict scrutiny”).

185. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 576 (1998).

186. *See id.* at 582–83 (stating that the content-based decisions had not silenced speakers by threatening censorship).

187. *Am. Library Ass’n*, 201 F. Supp. 2d at 457 (alteration in original) (quoting *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983)).

Funding conditions imposed on designated public fora, which the government itself created to facilitate private speech concerning a wide array of viewpoints, should be subject to strict scrutiny when the conditions imposed act to exclude speech whose content is disfavored.¹⁸⁸

Similarly, when the government chooses to open a designated public forum to allow the general public to speak on a particular topic, strict scrutiny applies to the government if it excludes certain speakers based on the content of their speech.¹⁸⁹ For example, in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,¹⁹⁰ the Court held that when school board meetings are open to the public, union and nonunion teachers must be allowed to speak regarding pending collective-bargaining negotiations.¹⁹¹

Finally, when the government opens a designated public forum and allows virtually unlimited public access to a wide range of topics, strict scrutiny applies to content-based restrictions that selectively exclude certain speech.¹⁹² For instance, in *Southeastern Promotions, Ltd. v. Conrad*,¹⁹³ the Court held that a local government could not exclude a group who was to perform the rock musical “Hair” at a municipal theater that was open to the general public.¹⁹⁴ Likewise, in *FCC v. League of Women Voters*,¹⁹⁵ the Court held that “a federal program that funded a wide range of public broadcasting stations that disseminated speech on a wide range of subjects” could not prohibit the stations from producing speech whose content amounted to editorializing.¹⁹⁶

Therefore, the general trend that emerges from this line of reasoning is that strict scrutiny should apply to restrictions that exclude certain speech from a forum when the state opens the forum to the general public for expressive activity on a wide

188. *Id.* at 460–61 (referring to *FCC v. League of Women Voters*, 468 U.S. 364 (1984) to illustrate that strict scrutiny applies to a content-based restriction of speech in designated public fora when the government has opened the forum for unrestricted use by the general public on an unrestricted range of topics).

189. *Id.* at 460.

190. 429 U.S. 167 (1976).

191. *Id.* at 174–75.

192. *Am. Library Ass’n*, 201 F. Supp. 2d at 460.

193. 420 U.S. 546 (1975).

194. *Id.* at 552, 556–58. The rock musical “Hair” was deemed controversial by some because it involved nudity and obscenity on stage. *Id.* at 548.

195. 468 U.S. 364 (1984).

196. *Am. Library Ass’n*, 201 F. Supp. 2d at 460–61 (summarizing the holding in *League of Women Voters*).

range of topics.¹⁹⁷ When a public library acquires Internet access capability and then provides patrons with only filtered Internet access, the library invites patrons to access speech by an unlimited number of speakers but then selectively excludes materials whose content is disfavored.¹⁹⁸ Strict scrutiny should apply to these content-based restrictions.¹⁹⁹

This is not to say, however, that strict scrutiny should apply to libraries when they are making content-based decisions on what materials to purchase for their print collections.²⁰⁰ Public libraries require the discretion to purchase certain books and not others based on adopted selection criteria.²⁰¹ The editorial discretion that libraries have when making content-based restrictions on acquisitions for their print collections should not be extended into the realm of filtered Internet access.²⁰² The difference between selecting print materials and filtering Internet access is that when acquiring print materials, libraries cannot provide patrons access to an unlimited number of topics due to their limited resources.²⁰³ However, libraries, when providing Internet access, can provide patrons access to a virtually unlimited number of topics.²⁰⁴ Financial constraints do

197. *See, e.g., id.* at 461 (stating that strict scrutiny applies to restrictions that exclude certain speech in a forum established for expressive activity that is open to the public at large); *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) (applying strict scrutiny to designated public fora, but only a reasonableness standard to limited public fora); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990) (reinforcing the rule that as long as the government keeps a designated public forum open to the public for a wide range of expressive activities, any restrictions on speech must pass strict scrutiny to survive).

198. *Am. Library Ass'n*, 201 F. Supp. 2d at 466.

199. *See id.* (holding that where a public library opens a forum to an unlimited numbers of speakers on an unlimited range of topics, strict scrutiny applies to the library's selective exclusion of particular speech).

200. *See id.* at 462 (recognizing that rational review applies to libraries' content-based decisions about which print materials to acquire for their collections).

201. *Id.* at 462–63 (explaining that librarians evaluate a book's quality based on a variety of criteria, including accuracy, authority of the author and the publisher, and how the specific work would compare with other material already owned by the library in that subject or genre).

202. *Id.* at 462–63.

203. *Id.* at 462, 465 n.25.

204. *Id.* at 462 (assuming that there are enough Internet terminals).

The central difference, in our view, is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable.

Id.

not exist because, when purchasing Internet access, the library has essentially purchased the whole Internet.²⁰⁵

The government may, in certain situations, exercise the power of editorial discretion when deciding what speech to include or subsidize in a state-created forum;²⁰⁶ however, in these situations, the state actor making the editorial decision must review the excluded material.²⁰⁷ In the case of filtered Internet access, no state actor reviews excluded material nor uses editorial discretion to exclude particular speech.²⁰⁸ As a result, because public libraries are opening a forum to the public at large to speak on an unlimited number of topics when they provide Internet access, strict scrutiny should apply to any content-based exclusions.²⁰⁹

4. *Can CIPA Survive Strict Scrutiny?* After reaching the conclusion that strict scrutiny should apply to the filtering provisions of CIPA, the final step is to analyze whether CIPA's restrictions can survive strict scrutiny review.²¹⁰ To survive strict scrutiny, the filtering provisions of CIPA "must be narrowly tailored to promote a compelling Government interest."²¹¹ In addition, the least restrictive alternative that would satisfy the government's purpose must be employed.²¹²

The government clearly has a compelling interest in preventing the dissemination of obscene materials, child pornography, and material that could be harmful to minors.²¹³ The compelling nature of this interest stems from the fact that the First Amendment does not protect speech considered legally obscene.²¹⁴ Likewise, the government is permitted, under the

205. See *id.* at 462.

206. *Id.* at 462–63.

207. *Id.*; see also *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669 (1998) (noting that a state-owned public television broadcaster's decision to exclude a political candidate from a public debate was a reasonable exercise of journalistic discretion).

208. *Am. Library Ass'n*, 201 F. Supp. 2d at 464 ("Put simply, the state cannot be said to be exercising editorial discretion permitted under the First Amendment when it indiscriminately facilitates private speech whose content it makes no effort to examine.").

209. *Id.* at 466.

210. *Id.* at 470–71.

211. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing the standard from *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

212. *Id.*

213. *Am. Library Ass'n*, 201 F. Supp. 2d at 471 (explaining that the government's interest in preventing the dissemination of these materials is well established); see also *Miller v. California*, 413 U.S. 15, 18 (1973) (recognizing that states have a legitimate interest in prohibiting the dissemination of obscene materials).

214. *Am. Library Ass'n*, 201 F. Supp. 2d at 405–06 (noting that many of the patrons

First Amendment, to prohibit the distribution of materials considered obscene to minors.²¹⁵ Thus, the state does have a compelling interest in preventing the dissemination of obscene materials and in preventing a minor's exposure to harmful materials.²¹⁶

In addition, the government may have an interest in protecting patrons from unwilling exposure to sexually explicit materials.²¹⁷ However, the U.S. Supreme Court has yet to recognize a compelling state interest in shielding unwilling viewers from offensive materials outside of the context of laws that protect the privacy of individuals in their own homes or captive audiences.²¹⁸ Furthermore, the case law pertaining to whether the government has a compelling interest in shielding unwilling library patrons from viewing obscene materials is undecided.²¹⁹

Finally, another possible state interest is the prevention of criminal or inappropriate conduct in public libraries.²²⁰ This interest is not compelling, however, because the government may not limit speech merely because restrictions could reduce crime or other undesirable behavior.²²¹ As the district court stated in *American Library Ass'n v. United States*, the more appropriate way to deter unlawful or undesirable conduct is not to suppress speech, but rather to sanction those who take part in that type of conduct.²²² Therefore, the only state interests sufficient to justify the use of Internet filters on public library terminals are the prevention of the dissemination of obscene materials, child

that seek access are young teenagers who have the ability, via library computers, to access the more than 100,000 free pornographic websites and tens of thousands of sites containing child pornography).

215. *Id.* at 471; *see also* *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

216. *Am. Library Ass'n*, 201 F. Supp. 2d at 472.

217. *See id.* at 472–74 (noting, however, that in general, First Amendment rights do not protect the unwilling viewer from speech that is constitutionally protected).

218. *Id.* at 474.

219. *Id.*

220. *Id.* (stating that several libraries had reported that unfiltered Internet access had led to instances of criminal and offensive acts, such as public masturbation and harassment).

221. *Id.* at 474–75 (explaining that the above rule is subject to the narrow exception of speech that is directed at producing “imminent lawless action and is likely to incite or produce such action” (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))).

222. *Id.* at 475 (noting that these sanctions could include removal from library, revocation of library privileges, or calling the police).

pornography, or material harmful to minors and, possibly, the shielding of unwilling patrons from viewing obscene materials.²²³

Not only does the state need to advance compelling interests to survive strict scrutiny, but also its interests “must be narrowly tailored.”²²⁴ The district court’s opinion in *American Library Ass’n v. United States* noted that many commercially available filters block thousands of websites that are neither harmful to minors nor obscene.²²⁵ Actually, the government’s own expert, after analyzing the filters’ performance, conceded that between six to fifteen percent of the websites blocked on library terminals neither contained sexually explicit material nor met the filters’ own definitions of sexually explicit materials.²²⁶ Incidents of erroneously blocked websites occurred with respect to several different subject areas, including those relating to churches, religious orders, religious charities, governmental entities, health issues, education, careers, traveling, and sports.²²⁷ The filters not only erroneously blocked websites that did not contain sexually explicit materials, they also did not catch websites that contained sexually explicit materials meeting the filters’ own definitions of obscene materials.²²⁸ Moreover, no filter is capable of consistently recognizing obscene images and distinguishing them from images that are not.²²⁹

The government does not possess the power under the First Amendment to restrict constitutionally protected speech through Internet filters in order to prevent the dissemination of speech that is not constitutionally protected.²³⁰ The district court’s conclusion that the filters were not narrowly tailored to the government’s identified interest—due to the substantial amount of constitutionally protected speech blocked by the filters—is the correct result.²³¹ The government failed to carry its burden of showing that filtering promoted a compelling interest via a narrowly tailored means.²³²

223. *Id.*

224. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

225. *Am. Library Ass’n*, 201 F. Supp. 2d at 475.

226. *Id.* at 475–76.

227. *Id.* at 446–47.

228. *See id.* at 431 (noting that search engines cannot “index,” or filter, much of the web, including materials that meet CIPA’s definition of obscene).

229. *Id.* at 476 (highlighting the plaintiffs’ expert witness’s testimony that no software exists with the ability to automatically distinguish visual depictions that are obscene, pornographic, or harmful to minors from those images that are not).

230. *Id.*

231. *Id.* at 477.

232. *See id.* (explaining that the government had the burden to demonstrate the availability of filters that both block enough speech to qualify as technology protection

Furthermore, the government had the burden to prove that there were no less restrictive alternatives available that would have furthered its interests.²³³ The district court noted several less restrictive alternatives that would have served the government's interests. With respect to the interest of preventing the dissemination of obscene materials and child pornography, libraries could have employed several alternatives.²³⁴ For example, libraries could have adopted policies explaining to patrons that they could not use library terminals to access illegal content. Libraries also could have required patrons to sign user agreements signifying that they would comply with library policies before accessing the Internet.²³⁵ Library employees could have then tracked those patrons who violated their Internet policies by reviewing Internet use logs or observing patrons directly.²³⁶

In addition, less restrictive alternatives existed to further the interest of preventing minors from accessing material that might have been harmful to them.²³⁷ These alternatives included requiring minors to use only specific terminals located in children's departments of libraries or placing filtering software on computer terminals accessible to minors who lack the consent of a parent to use unfiltered terminals.²³⁸ Finally, even unwilling patrons could have been protected from exposure to obscene images by segregating filtered terminals from unfiltered terminals, using recessed monitors, or placing privacy screens on monitors.²³⁹ All of these possible alternatives illustrate that the government failed to meet its burden of employing the least restrictive alternative to further its interest.²⁴⁰

However, the government put forth the argument that even if the filtering software overblocked certain protected speech and

measures and avoid the erroneous blocking of a substantial amount of constitutionally protected speech).

233. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

234. *Am. Library Ass'n*, 201 F. Supp. 2d at 480–83.

235. *Id.* at 480.

236. *Id.*

237. *Id.* at 482.

238. *Id.*

239. *Id.* at 483–84 (acknowledging that even the above suggestions are not perfect because they would expose libraries to increased costs and they would not be permitted under the broad reach of CIPA, which does not allow *any* unfiltered computers).

240. *Id.* at 484.

therefore could not pass the “narrowly tailored” requirement, the disabling provisions of CIPA could cure that defect.²⁴¹ The disabling provisions provide that library officials may remove filtering technology when an adult requests that it be removed, if it is being removed for “bona fide research or other lawful purposes.”²⁴² This broad language, however, lacks clarity because it does not state what “bona fide research or other lawful purposes” encompasses.²⁴³

Concluding that even the broadest interpretation of this language would not cure CIPA’s defects, the district court, in *American Library Ass’n v. United States*, explained that because CIPA required library patrons to ask a state actor for access to disfavored speech, CIPA still violated the First Amendment.²⁴⁴ The U.S. Supreme Court has stated that a requirement that patrons identify themselves when requesting access to disfavored speech is subject to the same strict scrutiny as if there were a general ban on that speech.²⁴⁵ For example, in *Lamont v. Postmaster General*,²⁴⁶ the Court held that a federal statute requiring the Postmaster not to deliver any mail containing communist propaganda (unless the addressee specifically requested the material) violated the First Amendment.²⁴⁷

Just as it was a First Amendment violation to require those in *Lamont* to request that propaganda be mailed to them, the disabling provisions of CIPA violate the First Amendment by requiring library patrons who choose to view blocked material to identify themselves to library officials and to request that the

241. *Id.*

242. 20 U.S.C. § 9134(f)(3) (2000). Under the LSTA, the language of the disabling provision reads, “An administrator, supervisor, or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes.” *Id.* Under the E-rate Program, the disabling provision reads, “An 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) (2000).

243. *Am. Library Ass’n*, 201 F. Supp. 2d at 485.

244. *Id.* at 485–86.

245. *Id.* (recognizing the chilling effect on the access to protected, yet culturally sensitive, material that occurs when a person must individually request access); *see also* *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 753–56, 760 (1996) (holding that it is unconstitutional to require cable subscribers to request in advance and in writing that they want access to view sexually explicit programming).

246. 381 U.S. 301 (1965).

247. *Id.* at 307; *see also* *Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm’n*, 896 F.2d 780, 788 (3d Cir. 1990) (stating that requiring telephone users to obtain in advance access codes to call and listen to sexually explicit telephone messages would burden adults’ receipt of constitutionally protected speech).

filters be disabled.²⁴⁸ These requirements would undoubtedly discourage patrons from requesting that filters be removed because of factors such as the time delay involved with removing filters and the embarrassment of such a request.²⁴⁹ Therefore, the requirements placed on library patrons are unacceptable. In conclusion, the filter disabling provisions of CIPA should not justify the defect that CIPA is not “narrowly tailored” to further a compelling state interest.

V. CONCLUSION

The U.S. Supreme Court erred in holding that CIPA does not violate the First Amendment and in not applying the public forum doctrine to Internet access in public libraries. Internet access in a public library should be considered a designated public forum. Additionally, any content-based restrictions placed on a library patron’s access to speech via the Internet should be subjected to strict scrutiny. The filtering provisions of CIPA violate a library patron’s First Amendment right to access information, and the Supreme Court was wrong in holding otherwise in *United States v. American Library Ass’n*. The Court’s decision will make it overly difficult for those who depend on the library for Internet access to obtain information that has been blocked by filters installed on library computers.

With numerous other alternatives available to the government to achieve its goal, such as putting filters on only those computers that children use, segregating filtered computers from those that are not, or using privacy screens on monitors without filters, one can only wonder why the government would choose a method that blocks constitutionally protected speech from adults who have a First Amendment right to access it. Library patrons and others can only hope that the Court’s intrusive decision does not further open the door for the government to censor disfavored speech in the name of editorial discretion.

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248. *Am. Library Ass’n*, 201 F. Supp. 2d at 486.

249. *Id.* at 487–88 (explaining that in some libraries it can take up to several days for a library official to review the requests for filters to be removed and for websites to be unblocked).