SUPREME COURT OF THE UNITED STATES

No. 02–361

UNITED STATES, ET AL., APPELLANTS *v.* AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[June 23, 2003]

JUSTICE STEVENS, dissenting.

"To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide their patrons." *Ante*, at 6. Accordingly, I agree with the plurality that it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images. I also agree with the plurality that the 7% of public libraries that decided to use such software on *all* of their Internet terminals in 2000 did not act unlawfully. *Ante*, at 3. Whether it is constitutional for the Congress of the United States to impose that requirement on the other 93%, however, raises a vastly different question. Rather than allowing local decisionmakers to tailor their responses to local problems, the Children's Internet Protection Act (CIPA) operates as a blunt nationwide restraint on adult access to "an enormous amount of valuable information" that individual librarians cannot possibly review. *Ante*, at 11. Most of that information is constitutionally protected speech. In my view, this restraint is unconstitutional.

I

The unchallenged findings of fact made by the District

Court reveal fundamental defects in the filtering software that is now available or that will be available in the foreseeable future. Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images. As the District Court explained:

> "[T]he search engines that software companies use for harvesting are able to search text only, not images. This is of critical importance, because CIPA, by its own terms, covers only 'visual depictions.' 20 U. S. C. §9134(f)(1)(A)(i); 47 U. S. C. §254(h)(5)(B)(i). Image recognition technology is immature, ineffective, and unlikely to improve substantially in the near future. None of the filtering software companies deposed in this case employs image recognition technology when harvesting or categorizing URLs. Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize the Playboy name in that logo." 201 F. Supp. 2d 401, 431–432 (ED Pa. 2002).

Given the quantity and ever-changing character of Web sites offering free sexually explicit material,[1] it is inevita-

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[1] "The percentage of Web pages on the indexed Web containing sexually explicit content is relatively small. Recent estimates indicate that

ble that a substantial amount of such material will never be blocked. Because of this "underblocking," the statute will provide parents with a false sense of security without really solving the problem that motivated its enactment. Conversely, the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that "contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" *Id.,* at 449. In my judgment, a statutory blunderbuss that mandates this vast amount of "overblocking" abridges the freedom of speech protected by the First Amendment.

The effect of the overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the Nation. 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. "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft* v. *Free Speech Coalition,* 535 U. S. 234, 255 (2002).[2]

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no more than 1–2% of the content on the Web is pornographic or sexually explicit. However, the absolute number of Web sites offering free sexually explicit material is extremely large, approximately 100,000 sites." 201 F. Supp. 2d. 401, 419 (ED Pa. 2002).

[2] We have repeatedly reaffirmed the holding in *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957), that the State may not "reduce the adult population . . . to reading only what is fit for children." See *Ashcroft* v. *Free Speech Coalition*, 535 U. S., at 252; *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno*

Although CIPA does not permit any experimentation, the District Court expressly found that a variety of alternatives less restrictive are available at the local level:

> "[L]ess restrictive alternatives exist that further the government's legitimate interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit content. To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet." 201 F. Supp. 2d, at 410.

Those findings are consistent with scholarly comment on

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v. *American Civil Liberties Union*, 521 U. S. 844, 875 (1997) ("[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults").

the issue arguing that local decisions tailored to local circumstances are more appropriate than a mandate from Congress.[3] The plurality does not reject any of those findings. Instead, "[a]ssuming that such erroneous blocking presents constitutional difficulties," it relies on the Solicitor General's assurance that the statute permits individual librarians to disable filtering mechanisms whenever a patron so requests. *Ante*, at 12. In my judgment, that assurance does not cure the constitutional infirmity in the statute.

Until a blocked site or group of sites is unblocked, 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. It is as though the statute required a signifi-

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[3] "Indeed, federal or state mandates in this area are unnecessary and unwise. Locally designed solutions are likely to best meet local circumstances. Local decision makers and library boards, responding to local concerns and the prevalence of the problem in their own libraries, should decide if minors' Internet access requires filters. They are the persons in the best position to judge local community standards for what is and is not obscene, as required by the *Miller* [v. *California*, 413 U. S. 15 (1973)] test. Indeed, one nationwide solution is not needed, as the problems are local and, to some extent, uniquely so. Libraries in rural communities, for instance, have reported much less of a problem than libraries in urban areas. A library in a rural community with only one or two computers with Internet access may find that even the limited filtering advocated here provides little or no additional benefit. Further, by allowing the nation's public libraries to develop their own approaches, they may be able to develop a better understanding of what methods work well and what methods add little or nothing, or are even counter-productive. Imposing a mandatory nationwide solution may well impede developing truly effective approaches that do not violate the First Amendment. The federal and state governments can best assist this effort by providing libraries with sufficient funding to experiment with a variety of constitutionally permissible approaches." 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, 279 (2003).

cant part of every library's reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests. Some 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. Moreover, because the procedures that different libraries are likely to adopt to respond to unblocking requests will no doubt vary, it is impossible to measure the aggregate effect of the statute on patrons' access to blocked sites. Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech. A law that prohibits reading without official consent, like a law that prohibits speaking without consent, "constitutes a dramatic departure from our national heritage and constitutional tradition." *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton,* 536 U. S. 150, 166 (2002).

II

The plurality incorrectly argues that the statute does not impose "an unconstitutional condition on public libraries." *Ante*, at 17. On the contrary, it impermissibly conditions the receipt of Government funding on the restriction of significant First Amendment rights.

The plurality explains the "worthy missions" of the public library in facilitating "learning and cultural enrichment." *Ante*, at 6. It then asserts that in order to fulfill these missions, "libraries must have broad discretion to decide what material to provide to their patrons." *Ibid.* Thus the selection decision is the province of the librarians, a province into which we have hesitated to enter:

> "A library's need to exercise judgment in making collection decisions depends on its traditional role in

identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. 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, when these judgments are made for just the same reason." *Ante*, at 11.

As the plurality recognizes, we have always assumed that libraries have discretion when making decisions regarding what to include in, and exclude from, their collections. That discretion is comparable to the "'business of a university . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in result) (citation omitted).[4] As the District Court found, one of the central purposes of a library is to provide information for educational purposes: "'Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves.'" 201 F. Supp. 2d, at 420 (quoting the American Library Association's Library Bill of Rights). Given our Nation's deep commitment "to safeguarding academic freedom" and to the "robust exchange of ideas," *Keyishian*

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[4] See also J. Boyer, Academic Freedom and the Modern University: The Experience of the University of Chicago 95 (2002) ("The right to speak, to write, and to teach freely is a precious right, one that the American research universities over the course of the twentieth century have slowly but surely made central to the very identity of the university in the modern world").

v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967), a library's exercise of judgment with respect to its collection is entitled to First Amendment protection.

A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate that Amendment. Cf. *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997). I think it equally clear that the First Amendment protects libraries from being denied funds for refusing to comply with an identical rule. An abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty.

Our cases holding that government employment may not be conditioned on the surrender of rights protected by the First Amendment illustrate the point. It has long been settled that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" *Wieman* v. *Updegraff,* 344 U. S. 183, 191–192 (1952). Neither discharges, as in *Elrod* v. *Burns,* 427 U. S. 347, 350–351 (1976), nor refusals to hire or promote, as in *Rutan* v. *Republican Party of Ill.,* 497 U. S. 62, 66–67 (1990), are immune from First Amendment scrutiny. Our precedents firmly rejecting "Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,'" *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr,* 518 U. S. 668, 674 (1996), draw no distinction between the penalty of discharge from one's job and the withholding of the benefit of a new job. The abridgment of First Amendment rights is equally unconstitutional in either context. See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free

exercise of religion as would a fine . . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

The issue in this case does not involve governmental attempts to control the speech or views of its employees. It involves the use of its treasury to impose controls on an important medium of expression. In an analogous situation, we specifically held that when "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning," the distorting restriction must be struck down under the First Amendment. *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 543 (2001).[5] The question, then, is whether requiring the filtering software on all Internet-accessible computers distorts that medium. As I have discussed above, the over- and underblocking of the software does just that.

The plurality argues that the controversial decision in *Rust* v. *Sullivan*, 500 U. S. 173 (1991), requires rejection of appellees' unconstitutional conditions claim. See *ante*, at 14–15. But, as subsequent cases have explained, *Rust* only involved and only applies to instances of governmental speech—that is, situations in which the government seeks to communicate a specific message.[6] The discounts

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[5] Contrary to the plurality's narrow reading, *Velazquez* is not limited to instances in which the recipient of Government funds might be "pit[ted]" against the Government. See *ante*, at 16. To the contrary, we assessed the issue in *Velazquez* by turning to, and harmonizing it with, our prior unconstitutional condition cases in the First Amendment context. See 531 U. S., at 543–544.

[6] See *id.,* at 541 (distinguishing *Rust* on the ground that "the counseling activities of the doctors . . . amounted to governmental speech"); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229 (2000) (unlike *Rust*, "the issue of the government's right . . . to use its own funds to advance a particular message" was not presented);

under the E-rate program and funding under the Library Services and Technology Act (LSTA) program involved in this case do not subsidize any message favored by the Government. As Congress made clear, these programs were designed "[t]o help public libraries provide their patrons with Internet access," which in turn "provide[s] patrons with a vast amount of valuable information." *Ante*, at 1, 2. These programs thus are designed to provide access, particularly for individuals in low-income communities, see 47 U. S. C. §254(h)(1), to a vast amount and wide variety of private speech. They are not designed to foster or transmit any particular governmental message.

Even if we were to construe the passage of CIPA as modifying the E-rate and LSTA programs such that they now convey a governmental message that no "'visual depictions' that are 'obscene,' 'child pornography,' or in the case of minors, 'harmful to minors,'" 201 F. Supp. 2d, at 407, should be expressed or viewed, the use of filtering software does not promote that message. As described above, all filtering software erroneously blocks access to a substantial number of Web sites that contain constitutionally protected speech on a wide variety of topics. See *id.,* at 446–447 (describing erroneous blocking of speech on churches and religious groups, on politics and government, on health issues, on education and careers, on sports, and on travel). Moreover, there are "frequent instances of underblocking," *id.,* at 448, that is, instances in which filtering software did not prevent access to Web sites with depictions that fall within what CIPA seeks to block access to. In short, the message conveyed by the use of filtering

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Rosenberger v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834 (1995) (*Rust* is inapplicable where the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

software is not that all speech except that which is prohibited by CIPA is supported by the Government, but rather that all speech that gets through the software is supported by the Government. And the items that get through the software include some visual depictions that are obscene, some that are child pornography, and some that are harmful to minors, while at the same time the software blocks an enormous amount of speech that is not sexually explicit and certainly does not meet CIPA's definitions of prohibited content. As such, since the message conveyed is far from the message the Government purports to promote—indeed, the material permitted past the filtering software does not seem to have any coherent message—*Rust* is inapposite.

The plurality's reliance on *National Endowment for Arts* v. *Finley,* 524 U. S. 569 (1998), is also misplaced. That case involved a challenge to a statute setting forth the criteria used by a federal panel of experts administering a federal grant program. Unlike this case, the Federal Government was not seeking to impose restrictions on the administration of a nonfederal program. As explained *supra*, at 9–10 *Rust* would appear to permit restrictions on a federal program such as the NEA arts grant program at issue in *Finley*.

Further, like a library, the NEA experts in *Finley* had a great deal of discretion to make judgments as to what projects to fund. But unlike this case, *Finley* did not involve a challenge by the NEA to a governmental restriction on its ability to award grants. Instead, the respondents were performance artists who had applied for NEA grants but were denied funding. See 524 U. S., at 577. If this were a case in which library patrons had challenged a library's decision to install and use filtering software, it would be in the same posture as *Finley*. Because it is not, *Finley* does not control this case.

Also unlike *Finley*, the Government does not merely

seek to control a library's discretion with respect to computers purchased with Government funds or those computers with Government-discounted Internet access. CIPA requires libraries to install filtering software on *every* computer with Internet access if the library receives *any* discount from the E-rate program or *any* funds from the LSTA program.[7] See 20 U. S. C. §9134(f)(1); 47 U. S. C. §§254(h)(6)(B) and (C). If a library has 10 computers paid for by nonfederal funds and has Internet service for those computers also paid for by nonfederal funds, the library may choose not to put filtering software on any of those 10 computers. Or a library may decide to put filtering software on the 5 computers in its children's section. Or a library in an elementary school might choose to put filters on every single one of its 10 computers. But under this statute, if a library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount.

This Court should not permit federal funds to be used to enforce this kind of broad restriction of First Amendment rights, particularly when such a restriction is unnecessary to accomplish Congress' stated goal. See *supra*, at 4 (discussing less restrictive alternatives). The abridgment of speech is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit.

I would affirm the judgment of the District Court.

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[7] Thus, respondents are not merely challenging a "refusal to fund protected activity, without more," as in *Harris* v. *McRae,* 448 U. S. 297, 317, n. 19 (1980), or a "decision not to subsidize the exercise of a fundamental right," as in *Regan* v. *Taxation With Representation of Wash.,* 461 U. S. 540, 549 (1983). They are challenging a restriction that applies to property that they acquired without federal assistance.