

Abstract

Alexandra R. Harrington is a 2005 Juris Doctor candidate at Albany Law School of Union University. She is the current Editor in Chief of the *Albany Law Journal of Science & Technology*. In this note, Ms. Harrington discusses the arguments in the amici briefs filed in *United States v. American Library Association*, and analyzes the impact of these arguments on the majority and dissenting opinions in the case. From this analysis, she then draws conclusions as to what types of arguments will be most persuasive to the Court in future cases involving internet-related litigation.

Part I of this note discusses basic constitutional jurisprudence regarding public libraries and the internet. Part II provides background information on the *United States v. American Library Association* case itself, which is particularly helpful to the amici analysis because of the facts and figures presented in the District Court's findings on internet usage and availability in public libraries, and the ability of library patrons to access pornography on these library computers. Part II also provides a discussion of the Children's Internet Protection Act (CIPA). Part III discusses the amici briefs filed on behalf of the parties, and then describes the opinions. Part IV compares the opinions and the amici brief arguments and finds the common threads running through the briefs and opinions. This Part then goes on to make predictions as to the types of arguments which will be persuasive to the Court in future internet-based litigation. Part V concludes this note with a brief analysis and discussion of the amici and Court opinions in the first relevant case since *United States v. American Library Association*, the rehearing of *Ashcroft v. ACLU*.

Edited by Brian Carter

**COURTHOUSES, BOOKSHELVES AND PORTALS: THE IMPLICATIONS OF U.S. v. AMERICAN LIBRARY ASSOCIATION ON FIRST AMENDMENT FORUM ANALYSIS AND FUTURE INTERNET-BASED LITIGATION STRATEGIES**

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**I. Introduction**

Throughout its history in First Amendment jurisprudence, the public library has represented a conundrum of scrutiny and protection.<sup>1</sup> Both open to the public and yet by their

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<sup>1</sup> See *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 462 (E.D. Pa. 2002).

size and scope parameters limited in their content,<sup>2</sup> public libraries have earned a separate status in First Amendment analysis:<sup>3</sup> one that both protects the interests of the public and at the same time realizes the necessary limitations on the content and administration of the libraries themselves.<sup>4</sup>

Constitutional jurisprudence regarding the Internet in general, and access to pornography through the Internet in particular, is an emerging and ever-changing genre.<sup>5</sup> While it is difficult to decipher trends across decisions in recent Internet-based pornography cases,<sup>6</sup> one trend does stand out, particularly in light of the U.S. Supreme Court decision in *U.S. v. Am. Library Ass'n II*<sup>7</sup> – that constitutional protections of the Internet are separate entities from other forms of media and communication.<sup>8</sup>

In this respect, Internet-based pornography and public libraries are similar due to their separate status under constitutional analysis and protection.<sup>9</sup> A comparison of the constitutional niches carved out for these two entities would be interesting, but when both entities are combined into a constitutional question, the decision transcends mere interest and enters into a new realm of constitutional tenets and concepts. As this case note will examine, the decisions of

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<sup>2</sup> See *United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2321 (2003) (Souter, J., dissenting).

<sup>3</sup> See *id.* at 2321-23.

<sup>4</sup> See generally *id.*

<sup>5</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the Children's Online Protection Act (COPA), an attempt to regulate access by minors eighteen years old and younger through interactive online programs, was a violation of the First amendment as a result of content-based restrictions; but stating that such restrictions, if termed to only include obscene materials and not indecent materials as well, would survive initial scrutiny); *cf. Ashcroft v. ACLU*, 535 U.S. 564 (2002) (remanding for clarification the community norms definitional issue brought in the suit, which challenged the constitutionality of COPA).

<sup>6</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

<sup>7</sup> *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003).

<sup>8</sup> See *infra* note 105; see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 555 (1998); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

<sup>9</sup> See generally *Reno*, 521 U.S. at 844; *Ashcroft*, 535 U.S. at 564; *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D.Pa. 2002).

the plurality,<sup>10</sup> concurrence,<sup>11</sup> and dissent<sup>12</sup> in *Am. Library Ass'n II* established that Internet access to pornography in public libraries is not a public forum *per se*, and is thus not entitled to the protections associated with such a designation.<sup>13</sup> Furthermore, although there is disagreement over the level of scrutiny to be used,<sup>14</sup> all sides of the decision agree that the mandated use of pornography filters on Internet terminals in public libraries would be acceptable if it were carefully enacted by localities and political subdivisions on a smaller scale than the U.S. Congress.<sup>15</sup>

In this case note, I will argue that this agreement is the key to deciphering the future of pornography on the Internet in particular, and Internet regulation in general, both in terms of constitutional jurisprudence and doctrine, as well as legislative actions on the federal, state, and local levels. I will examine in more depth the strands of arguments offered to the Court by the various and sundry amici briefs filed in *Am. Library Ass'n II*<sup>16</sup> and their interplay both with the content of the other amici<sup>17</sup> and, ultimately, the opinions delivered by the Court.<sup>18</sup> From the common themes among the statements of the amici regarding the roles of libraries,<sup>19</sup> the

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<sup>10</sup> Comprised of Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas. *See* discussion *infra* Part II, IV.

<sup>11</sup> Comprised of Justices Kennedy and Breyer. *See* discussion *infra* Part II, IV.

<sup>12</sup> Written by Justices Stevens and Souter (with Justice Ginsburg, joining). *See* discussion *infra* Part II, IV.

<sup>13</sup> *See generally* *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003).

<sup>14</sup> *See* discussion *infra* notes 80-125.

<sup>15</sup> *See id.*

<sup>16</sup> *See* Brief of Amici Curiae Cities, Mayors and County Commissioners, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae American Center for Law and Justice et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae American Civil Rights Union, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae Brennan Center for Justice, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Online Policy Group et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Association of American Publishers et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>17</sup> *See generally id.*

<sup>18</sup> *See* *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003).

<sup>19</sup> *See supra* note 16.

Internet,<sup>20</sup> accessing pornography on the Internet through public libraries,<sup>21</sup> and the appropriate levels of interference with these three areas by the federal, state, and local political subdivisions and judiciary,<sup>22</sup> I propose that the basis for prosecution and defense of future Internet-based First amendment suits can be predicted. Additionally, I propose that an examination of the accepted and rejected themes within these briefs, and the reasons for their acceptance or rejection, can lead to predictions as to litigation strategies in potentially-similar suits in the future.

The combined weight of the decisions allow for regulation of the Internet in ways unparalleled by the treatment and regulation of any other media source. It also indicates that even if there were to be a change in the composition of the bench in the near future, there is enough agreement (between those justices most likely to remain on the bench for the foreseeable future) regarding at least the abilities of smaller political subdivisions to promulgate these types of regulations that courts and legislatures can begin to address the issue with some level of constitutional certainty.<sup>23</sup> Given the number of states that have already introduced legislation adopting the contested filter-requirements for funding<sup>24</sup> as a result of the Children's Internet Protection Act<sup>25</sup> provisions, I argue that the effect of this decision will not only impact Internet access to pornography in public libraries, but also to the regulation of the Internet as a whole.

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

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

<sup>22</sup> *Id.*

<sup>23</sup> This prediction is based on looking at the reasoning behind the opinions in *Am. Library Ass'n II* and the placement of the Justices issuing them on an ideological spectrum.

<sup>24</sup> At present, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Louisiana, and Massachusetts had bills relating to filter in public libraries which expired at the end of the 2003 legislative term. Florida has adopted similar legislation and codified it.

<sup>25</sup> Pub. L. No. 106-554 tit. 17, 114 Stat. 2763A, 335, 2763A, 352 (1996) (codified at 47 U.S.C §§ 254-7001 (2000)) [hereinafter CIPA].

## II. Background Information

The case in question stems from the 1996 Congressional enactment of CIPA.<sup>26</sup> CIPA, as enacted, applies to Internet usage and access in both public libraries and public schools.<sup>27</sup> Interestingly, there has been no challenge to the public school section of CIPA, and there is no ruling as to the constitutionality or enforceability of these provisions in either the District Court decision *Am. Library Ass'n I*<sup>28</sup> or the Supreme Court decision in *Am. Library Ass'n II*.<sup>29</sup>

Under the CIPA provisions applicable to public libraries, in order to receive federal funding through the Museum and Library Services Act,<sup>30</sup> public libraries seeking funding for Internet access and computer terminals are required to have in place

a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are – (I) obscene; (II) child pornography; or (III) harmful to minors; and (ii) is enforcing the operation of such technology protection measure during any use of such computers by minors....<sup>31</sup>

CIPA also requires that the same technological protection be available and in use “during any use of such computers,” not just when the computer is being used by a minor.<sup>32</sup> It should be noted at this juncture that the relevant definitions of “obscene,” and “child pornography” are found under title 18 of the U.S.C.<sup>33</sup> CIPA itself defines “minor” as “an individual who has not attained the age of 17,”<sup>34</sup> and defines “harmful to minors” as

any picture, image, graphic image file, or other visual depiction that – (i) taken as a whole and with respect to minors, appeals to a

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<sup>26</sup> See *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 405 (2002).

<sup>27</sup> Pub. L. No. 106-554 tit. 17 (codified at 47 U.S.C. §§ 254-7001 (2000)).

<sup>28</sup> *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (2002).

<sup>29</sup> *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003).

<sup>30</sup> 20 U.S.C. § 9134(b) (2000).

<sup>31</sup> Pub. L. 106-544 § 1712, 114 Stat. 2763A-340 (1996).

<sup>32</sup> *Id.*

<sup>33</sup> See 18 U.S.C. §§ 1460, 2256.

<sup>34</sup> Pub. L. 106-544, § 1712, 114 Stat. at 2763A-340.

prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.”<sup>35</sup>

Decisions regarding the designation of content as inappropriate for minors are delegated to localities under CIPA,<sup>36</sup> and the Act specifically states that

[a] determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may – (A) establish criteria for making such a determination; (B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or (C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority....<sup>37</sup>

In terms of oversight, CIPA provides for an expedited review of decisions to revoke funding for non-complying libraries.<sup>38</sup> The Federal Communications Commission is the regulatory agency for CIPA based complaints;<sup>39</sup> however, challenges to the constitutionality of CIPA’s provisions are fast-tracked to go from the District Court to the Supreme Court,<sup>40</sup> which was the procedural track in the *Am. Library Ass’n. II* case.<sup>41</sup>

The *Am. Library Ass’n II* case was filed as *Am. Library Ass’n v. U.S.* in the Eastern District of Pennsylvania<sup>42</sup> and was decided by the District Court on May 31, 2002.<sup>43</sup> The case was brought by a “group of public libraries, library associations, library patrons, and Web site

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<sup>35</sup> *Id.*, 114 Stat. at 2763A-342-43.

<sup>36</sup> Pub. L. No. 106-554, §1732, 114 Stat. at 2763A-350-51.

<sup>37</sup> *Id.*

<sup>38</sup> Pub. L. No. 106-554, §1741, 114 Stat. at 2763A-351-52.

<sup>39</sup> Pub. L. No. 106-554, §1733, 114 Stat. at 2763A-351.

<sup>40</sup> Pub. L. No. 106-554, § 1741, 114 Stat. at 2763A-351-52.

<sup>41</sup> See *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (2000); *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003).

<sup>42</sup> See *Am. Library Ass’n*, 201 F. Supp. 2d at 401.

<sup>43</sup> *Id.*

publishers”<sup>44</sup> on the ground that the filter requirement in CIPA violated the First Amendment rights of libraries and patrons “because: (1) it induces public libraries to violate their patrons’ First Amendment rights contrary to the requirements of *South Dakota v. Dole*...; and (2) it requires libraries to relinquish their First Amendment rights as a condition on the receipt of federal funds and is therefore impermissible under the doctrine of unconstitutional conditions.”<sup>45</sup> More specifically, the plaintiffs alleged that Internet access in public libraries constituted a public forum for First Amendment purposes.<sup>46</sup> As a result of this classification, they further alleged that the content-based restrictions imposed under CIPA were not sufficiently “narrowly tailored to further a compelling state interest,”<sup>47</sup> and that there were less restrictive means available.<sup>48</sup> Thus, the plaintiffs contended that CIPA could not withstand the strict scrutiny requirements for restrictions on public fora.<sup>49</sup> Along with these allegations came the claim that the CIPA provisions were void for overbreadth<sup>50</sup> and that the Act was “unconstitutionally vague.”<sup>51</sup>

The District Court<sup>52</sup> conducted a lengthy investigation into the usage of the Internet in public libraries, the filtration technology currently available to public libraries and others who sought to filter out Internet pornography sites, the other content-regulatory options available to libraries outside of the filtration realm, and the impact of filtration on the complaining group of

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<sup>44</sup> *Id.* at 407.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> In order to avoid confusion, the District Court for the Eastern District of Pennsylvania will be hereinafter referred to as “the District Court” and the U.S. Supreme Court will hereinafter be referred to as “the Court.”

Internet users.<sup>53</sup> From this investigation, the District Court made several determinations which are especially relevant to the discussion which follows in this case note.

First, the District Court determined that roughly 143 million Americans use the Internet,<sup>54</sup> that roughly 10% of these users access the Internet through public library facilities<sup>55</sup> and that roughly 95% of American public libraries make Internet access available to their patrons.<sup>56</sup> Second, the District Court admitted that, despite the many positive uses for the Internet, a problematic result of the nature of the Internet is the ease with which children can access and/or be exposed to pornographic materials online.<sup>57</sup>

Third, the District Court elaborated on techniques used by public libraries which had not begun using the filtration technology to block access to Internet pornography. Among these techniques were using recessed computer monitors, using privacy screens on computers, and having librarians monitor the usage of computer terminals and reprimand those who were using the terminals to access off-limit sites.<sup>58</sup> Significantly, the District Court discussed the problems with these options,<sup>59</sup> yet they used them to justify its decision that CIPA as applied to public libraries was unconstitutional.<sup>60</sup> Fourth, the District Court agreed with the plaintiffs that the current filtration technology available to public libraries was an overbroad remedy because of its searching and filtering capabilities and that, as a result, websites that would otherwise not be

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<sup>53</sup> See Am. Library Ass'n, 201 F. Supp. 2d at 407.

<sup>54</sup> *Id.* at 405.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 406.

<sup>58</sup> *Id.*

<sup>59</sup> See generally *id.*

<sup>60</sup> *Id.*

classified as pornographic were being classified as pornographic and blocked due to the word searches conducted through the filters.<sup>61</sup>

After making these findings of fact, the District Court held that CIPA was unconstitutional.<sup>62</sup> The District Court adopted the position that, within the context of public libraries, the Internet was indeed a public forum<sup>63</sup> and, accordingly, that attempted content-based regulations of Internet access in public libraries should be subject to strict scrutiny.<sup>64</sup> In making this decision regarding public forum designation, the District Court advanced the following justifications:

[i]n providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics. Where the state provides access to a ‘vast democratic forum’ ...open to any member of the public to speak on subjects ‘as diverse as human thought’ ...the state’s decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated.”<sup>65</sup>

Furthermore, the District Court found that “[a]pplication of strict scrutiny finds further support in the extent to which public libraries’ provision of Internet access uniquely promotes First Amendment values in a manner analogous to traditional public for a such as streets, sidewalks, and parks, in which content-based regulations are always subject to strict scrutiny.”<sup>66</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 495.

<sup>63</sup> *Id.* at 410; *see also id.* at 456, stating that, when evaluating Internet access at public libraries: the relevant forum analysis is not the library’s entire collection, which includes both print and electronic media, such as the Internet, but rather the specific forum created when the library provides its patrons with Internet access. Although a public library’s provision of Internet access does not resemble the conventional notion of forum as a well-defined space, the same First Amendment standards apply.

<sup>64</sup> *Id.* at 411.

<sup>65</sup> *Id.* at 409 (citations omitted).

<sup>66</sup> *Id.*

After making the public forum designation, the District Court then applied strict scrutiny and found that, although there was a legitimate government objective in trying to keep pornographic materials out of the hands of children and minors,<sup>67</sup> the means used were both overbroad in some regards and not broad enough in other regards,<sup>68</sup> and that they filtered out speech and content that were not pornographic and not within the scope of protections afforded by the enactment of CIPA.<sup>69</sup> Moreover, the District Court found that the filters allowed through some speech and content which were so blatantly pornographic as to be within the intent of CIPA.<sup>70</sup> The District Court also found that the ability to disable the filters upon the request of an adult library patron was not sufficient to overcome the content-based restrictions which were held to violate strict scrutiny.<sup>71</sup> However, even the District Court found that if technology were to advance to the point where filtration could be more narrowly tailored, it could be a legitimate and constitutional method of regulating Internet access and exposure to pornography by minors at public library computer terminals.<sup>72</sup>

In accordance with CIPA, the District Court's decision was appealed to the U.S. Supreme Court through expedited review.<sup>73</sup> The Court received numerous amici briefs<sup>74</sup> from groups

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<sup>67</sup> *Id.* at 410.

<sup>68</sup> *Id.* at 432-36.

<sup>69</sup> *Id.* at 410-11.

<sup>70</sup> *Id.* at 432-35.

<sup>71</sup> *See generally id.*

<sup>72</sup> *Id.* at 449-50; *see also id.* at 472 (“[A] public library’s use of software filters survives strict scrutiny if it is narrowly tailored to further the state’s well-recognized interest in preventing the dissemination of obscenity and child pornography, and in preventing minors from being exposed to material harmful to their well-being.”).

<sup>73</sup> *See* CIPA provisions, Pub. L. No. 106-554, § 1700, 114 Stat. 2763A-351 (1996).

<sup>74</sup> *See* Brief of Amici Curiae Cities, Mayors and County Commissioners, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y., *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae American Center for Law and Justice et al., *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae American Civil Rights Union, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae Brennan Center for Justice, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Online Policy Group et al., *United States v. Am. Library Ass’n*,

concerned with the manifold issues, and potential issues, raised by the case. These groups ranged from groups advocating for and against filters in public libraries,<sup>75</sup> to free speech activists, to governmental officials urging the Court to look at the governmental and societal interests at stake in preserving the filtration requirements.<sup>76</sup>

The Court's final decision was handed down on June 23, 2003.<sup>77</sup> The Plurality opinion reversing the District Court was written by Chief Justice Rehnquist, who was joined by Justices O'Connor, Scalia, and Thomas.<sup>78</sup> Concurring in the reversal were Justices Kennedy<sup>79</sup> and Breyer.<sup>80</sup> Dissenting opinions were written by Justices Stevens<sup>81</sup> and Souter, who was joined by Justice Ginsburg.<sup>82</sup>

The Plurality opinion cited to many of the facts discovered by the District Court but examined these facts in a different light both in terms of their impact on the public forum debate and the evaluation of the alternative measures available to libraries in lieu of filters.<sup>83</sup> Additionally, the Court examined case law applying to public libraries in contexts other than Internet access and explained that public libraries *per se* have not been subject to the strict scrutiny review that comes with the designation of a public forum for First Amendment purposes.<sup>84</sup>

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123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Association of American Publishers et al., United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003).

<sup>78</sup> *Id.* at 2301 [hereinafter plurality].

<sup>79</sup> *Id.* at 2309.

<sup>80</sup> *Id.* at 2310.

<sup>81</sup> *Id.* at 2312.

<sup>82</sup> *Id.* at 2318.

<sup>83</sup> *Id.* at 2301-03.

<sup>84</sup> *Id.* at 2303-04.

The Court then looked at other media cases to determine whether the Internet as a genre would warrant the appellation of a public forum.<sup>85</sup> Specifically, the Plurality looked to *Ark. Ed. Television Comm'n v. Forbes*<sup>86</sup> and *Nat'l Endowment for the Arts v. Finley*<sup>87</sup> for forum designation guidance. In *Forbes*, the Court held that a public television station could make editorial judgments as to the private speech it broadcast to its viewers because “broad 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.”<sup>88</sup> In *NEA*, the Court allowed an art funding scheme that required the National Endowment for the Arts to make content-based decisions about who would receive funding.<sup>89</sup> There, the Court held that the nature of the funding was such that it was by its nature based on discretionary decisions of the National Endowment for the Arts and, therefore, could not be deemed a public forum.<sup>90</sup> Analogizing between public libraries, public television stations, and the National Endowment for the Arts, the Plurality held that the discretionary element of public libraries’ decisions to purchase and provide materials to their patrons was not meant to be subject to public forum requirements and restrictions:<sup>91</sup>

Internet access in public libraries is neither a “traditional” nor a “designated” public forum...First, this resource – which did not exist until quite recently – has not “immemorially been held in trust for the use of the public and, time out of mind, ...been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions.”<sup>92</sup> ...The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.<sup>93</sup>

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<sup>85</sup> *Id.* at 2304-06.

<sup>86</sup> 523 U.S. 666 (1998).

<sup>87</sup> 524 U.S. 569 (1998).

<sup>88</sup> *United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2304 (2003) (citing to *Forbes*, 523 U.S. at 673).

<sup>89</sup> *Id.* at 2304 (citing to *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2305 (quoting to *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)).

Looking at the content-based discretionary decisions made by public librarians regarding the print collections in their libraries, the Court held that these decisions often included a conscientious choice not to include pornographic materials and have not been subjected to heightened levels of scrutiny. Therefore, there was no basis for extending a heightened standard of review to Internet access decisions which reflect the same ideas and policies.<sup>94</sup>

Apart from the discretionary aspects of public libraries in relation to similar discretionary abilities of areas deemed not to be public fora, the Court held that the nature and purpose of having Internet access in public libraries does not lend itself to the designation of a public forum for constitutional analysis,

[n]or does Internet access in a public library satisfy our definition of a ‘designated public forum.’ To create a forum, the government must make an affirmative choice to open up its property for use as a public forum...The situation is here is very different. A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to ‘encourage a diversity of views from private speakers,’<sup>95</sup>...but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.<sup>96</sup>

In examining the overbreadth argument, the Plurality found the ability of adult library patrons to ask to have the filters disabled dissipated the possible First Amendment taint based on overbreadth of regulation.<sup>97</sup> The Plurality also held that, since libraries have the ability to unblock permanently any websites that they determine to have been deemed pornographic erroneously, the overbreadth implications are further dissipated.<sup>98</sup> Addressing the

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<sup>93</sup> United States v. Am. Library Ass’n, 123 S. Ct. 2297, 2305 (2003).

<sup>94</sup> *Id.* at 2306.

<sup>95</sup> Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

<sup>96</sup> *Am. Library Ass’n*, 123 S. Ct. at 2305.

<sup>97</sup> *Id.* at 2306.

<sup>98</sup> *Id.*

constitutionality of a patron's request to remove the filter in the face of potentially embarrassing stigma, the Plurality stated that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."<sup>99</sup>

Further, the Plurality pointed out that there was no deprivation under CIPA, as there is no penalty for libraries that choose not to comply with the filter provisions, and that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."<sup>100</sup> In making this determination, the Plurality relied heavily on the holding of *Rust v. Sullivan*,<sup>101</sup> where the issue was federal funding of family planning services and the decision not to fund planning services which provided abortion counseling.<sup>102</sup> Thus, the Court drew from a wide-ranging spectrum of constitutional issues, both within First Amendment-related jurisprudence and without in order to carve out a niche for Internet access within public libraries.

In his concurring opinion, Justice Kennedy addressed the ability to disable the filters upon the request of an adult patron and stated that, in the absence of any facts to support a finding that it was impossible for this to occur, the filters were constitutional.<sup>103</sup> By reasoning that there is a "legitimate, and even compelling" state interest in ensuring that minors do not access pornography through public libraries provided and Congressional funded Internet access<sup>104</sup> -- and furthermore that the ability of adults to access these pornographic sites if desired is not "burdened in any significant degree,"<sup>105</sup> -- Kennedy implies that CIPA would pass strict scrutiny.<sup>106</sup> However, he does not say that strict scrutiny is the threshold requirement for

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<sup>99</sup> *Id.* at 2307.

<sup>100</sup> *Id.* at 2308.

<sup>101</sup> 500 U.S. 173 (1994).

<sup>102</sup> *Am. Library Ass'n*, 123 S. Ct. at 2308.

<sup>103</sup> *Id.* at 2309-10 (Kennedy, J., concurring).

<sup>104</sup> *Am. Library Ass'n*, 123 S. Ct. at 2310.

<sup>105</sup> *Id.*

<sup>106</sup> *See id.* (using the first prong of strict scrutiny analysis, legitimate and compelling state interests).

Internet access in this context, and that there is no mention of CIPA being narrowly tailored. This can be interpreted as meaning that strict scrutiny is not required; hence, there is no support for the public forum contention.<sup>107</sup>

By contrast, Justice Breyer's concurring opinion explicitly endorses the Plurality's designation of Internet access in public libraries as a non-public forum.<sup>108</sup> Breyer's contention is that, while the restrictions placed on the ability of library patrons to access information are valid considerations, they do not trigger the application of strict scrutiny.

To apply 'strict scrutiny' to the 'selection' of a library's collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library's 'collection'... That is to say, 'strict scrutiny' implies too limited and rigid a test for me to believe that the First Amendment requires it in this context.<sup>109</sup>

Additionally, Breyer hints that even if a public forum designation had been adopted by the Plurality, CIPA would still withstand strict scrutiny due to the nature of the interests that it seeks to protect.<sup>110</sup>

Justice Stevens' dissent was not due to disagreement over the non-public forum designation *per se*, but rather as to the appropriate governmental agency to design and oversee the filtration definitions, as well as whether to use them at all.<sup>111</sup> Realizing that CIPA's requirements function as "blunt nationwide restraint[s] on adult access to 'an enormous amount of valuable information'...."<sup>112</sup> Stevens' dissent focuses on the idea that localities are in the best

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<sup>107</sup> *Id.* at 2309-10.

<sup>108</sup> *Id.* at 2310 (Breyer, J., concurring).

<sup>109</sup> *United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2311 (2003).

<sup>110</sup> *Id.* at 2310-12.

<sup>111</sup> *Id.* at 2312-13.

<sup>112</sup> *Id.* at 2313.

position to decide what materials to filter.<sup>113</sup> Furthermore, he draws an analogy between the ability of librarians to decide what to purchase and provide to their patrons – a topic discussed by the Plurality. He uses this to invalidate the concept for federal determination as to prohibited subject matter access.<sup>114</sup> It is of both interest and note that throughout Stevens' dissent there is neither mention of the public forum designation nor language which would seem to hint at his predilections towards forum classification for Internet access in public libraries, or the Internet in general.<sup>115</sup>

Finally, Justice Souter's dissent discusses at length the history of public libraries' acquisition policies and their constitutional protections,<sup>116</sup> stating that strict scrutiny is appropriate here because of the open nature of the Internet.<sup>117</sup> Souter justifies this stance because, in his view, the Internet allows in all content placed on it, and, under CIPA, the library is then in a position to censor it. Librarians in his description only decide what print materials to bring in, and do not keep out those materials available to patrons.<sup>118</sup> Accordingly, he holds that a higher level of scrutiny is required.<sup>119</sup> There is no mention of the classification of Internet access in public libraries as a public or non-public forum in his opinion.<sup>120</sup>

### III. Amici, Opinions, and Implications

At the District Court level, the factual considerations and realities of the Internet, filtration devices, and other screening methods available to public libraries in *Am. Library Ass'n*

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<sup>113</sup> *Id.* at 2317-18.

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 2312-18.

<sup>116</sup> *Id.* at 2319-23.

<sup>117</sup> *Id.* at 2324-25.

<sup>118</sup> *See id.* at 2318-25.

<sup>119</sup> *Id.* at 2324-25.

<sup>120</sup> *See id.* at 2318-25.

I drew considerable research and analysis by the District Court itself.<sup>121</sup> Once certiorari was granted, interested groups and coalitions from across the cultural and political spectrum eagerly joined in the fray through the contribution of amici briefs.<sup>122</sup> Given the relatively new status of the Internet as a constitutional battleground,<sup>123</sup> and the potential impact that the Supreme Court's decision in *Am. Library Ass'n II* would have on a broad area of the law (reaching far beyond the specifically stated issue of CIPA and Internet access through public library portals),<sup>124</sup> it is perhaps not surprising that there would be many different interest groups clamoring to make themselves heard by the Court. What is surprising – and indicative of the future of Internet-based litigation – is the coalition groupings that formed around a cluster of arguments presented in the individual amicus briefs filed with the Court.<sup>125</sup> Moreover, what is both interesting and indicative of the tenor of the outcome of future Internet-based litigation is the series of arguments adopted by the several opinions in *American Library Ass'n II*,<sup>126</sup> as well as those arguments that were rejected either across the board or by certain segments of the bench.<sup>127</sup>

#### **A. Pro – CIPA Amici and Oral Arguments**

The appellant's brief filed by Solicitor General Theodore Olson,<sup>128</sup> and his statements at oral arguments,<sup>129</sup> not surprisingly, refute the public forum designation rendered by in *Am Library Ass'n I*, and promote the constitutional validity of CIPA in general and the filtering

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<sup>121</sup> See *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2000) (extensively discussing and explaining the technology behind the possible filtration systems and their benefits and pitfalls).

<sup>122</sup> For a sample of these groups and their zealous advocacy, see *supra* note 74 (listing many of the amici to be discussed in this note).

<sup>123</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Am. Library Ass'n v. United States*, 201 F. Supp. 2d at 401.

<sup>124</sup> See generally plurality, concurring, and dissenting opinions in *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003); see also amici briefs, *supra* note 74.

<sup>125</sup> See *infra* Part III.A, III.B.

<sup>126</sup> See *infra* Part III.C.

<sup>127</sup> See *infra* Part III.C.

<sup>128</sup> Brief for the Appellant, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>129</sup> Oral Argument for the Appellant, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

provisions in particular.<sup>130</sup> What is of interest and note is the group of amici that filed briefs in support of the CIPA filtering provisions, including: Cities, Mayors and County Commissioners (CMCC);<sup>131</sup> the public libraries of Greenville, South Carolina, Kaysville, Utah, and Kenton County, Kentucky;<sup>132</sup> the American Center for Law and Justice (ACLJ), joined by several members of Congress;<sup>133</sup> the State of Texas;<sup>134</sup> and the American Civil Rights Union (ACRU).<sup>135</sup> While at first an association of libraries might not seem like the most natural bedfellow of the Cities, Mayors and County Commissioners, nor would it seem that the American Civil Rights Union would team up with the State of Texas, their arguments all coalesce around the same point.

The first issue raised by the amici, predictably, is whether there is a public forum created by public libraries providing their patrons with Internet access. As a corollary to this issue is the debate as to whether the classification would help or hurt libraries in the long run, and the extent to which the libraries need to have the ability to self-regulate in terms of their acquisitions and the content of their collections.

The CMCC brief starts out with a statement that, in its view, the case presents a fundamental issue of choice for both the libraries themselves as well as the communities and governmental bodies in which the libraries are located and to whom the libraries provide

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<sup>130</sup> Oral Argument for the Appellant, Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>131</sup> Brief of Amici Curiae Cities, Mayors and County Commissioners, United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>132</sup> Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y., United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>133</sup> Brief of Amici Curiae American Center for Law and Justice et al., United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>134</sup> Brief of Amicus Curiae for the State of Texas, United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>135</sup> Brief of Amicus Curiae American Civil Rights Union, United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361).

services.<sup>136</sup> It goes on to state that there is no “right of citizens to compel the government to provide access to particular Internet websites,”<sup>137</sup> and uses this argument to undermine the District Court holding. Under this theory, if there is no right, then there can be no constitutional protection or guarantee, and, accordingly, no violation of that protection if Congress chooses to enact what this group of amici class as a funding mechanism devoid of First Amendment implications.<sup>138</sup>

According to the CMCC brief, this is nothing more than a funding case, and there is no compulsion for libraries to go along with the provisions if they do not want to, as there is no active penalty for not installing filters other than exemption from funding.<sup>139</sup> Solicitor General Olson’s oral argument builds on this by saying that, if a library so desired, it could create off-site locations for unfiltered computers and still receive federal funds for the on-site computers, provided that they were blocked.<sup>140</sup> Throughout many of the briefs, there is heavy emphasis on *Rust v. Sullivan*’s holding<sup>141</sup> that governmental intent is central to forum analysis. Here, the intent of Congress is not to open up libraries as public fora under constitutional definition,<sup>142</sup> nor is the intent of the libraries receiving CIPA funds to hold themselves out as public fora.<sup>143</sup>

The amici on this side also stress that the appropriate decision makers are, at the very least, some form of governmental body other than a court, whether on a smaller political division

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<sup>136</sup> Brief of Amicus Curiae Cities, Mayors and County Commissioners at 1, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>137</sup> *Id.* at 2.

<sup>138</sup> *Id.* at 2-6.

<sup>139</sup> *Id.* at 6-12.

<sup>140</sup> Oral Argument for the Appellant at 16-19, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>141</sup> 500 U.S. 173 (1991).

<sup>142</sup> Brief of Amicus Curiae Cities, Mayors, and County Commissioners at 7-12, *United States v. Am. Library Ass’n*, 123 U.S. 2297(2003) (No. 02-361).

<sup>143</sup> Brief of Amici Curiae American Center for Law and Justice et al., at 8-10, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

level or a larger one.<sup>144</sup> Much of the public libraries argument centers on the idea that many public libraries want there to be filters in place.<sup>145</sup> This strand of argument also encourages traditional decision making freedom of libraries, which is seen as imperiled by the potential ramifications of applying public forum analysis to discretionary acquisitional policies.<sup>146</sup> Furthermore, libraries have always had a special niche carved out of First Amendment jurisprudence so that they can practice some necessary form of discrimination in order to function<sup>147</sup> and “[a]ffirmance of the district court’s opinion would, in effect, make the federal judiciary the national Supreme Librarian.”<sup>148</sup>

Another oft-stressed point is that much of the filtered content is illegal anyway.<sup>149</sup> Local authorities, the United States and its amici maintained, are in the best position to make decisions as to library acquisitions and, consequently, what materials to allow in through the Internet.<sup>150</sup> This traditional function would thus be ruined if the District Court opinion was upheld.<sup>151</sup>

A common thread running throughout all of the amici briefs for the appellants is that the Internet is analogous to print media collections and should be evaluated under these decisions.<sup>152</sup> As both the CMCC and the ACLJ stress, the First amendment has never been held to extend to

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<sup>144</sup> See generally Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); see also Brief of Amicus Curiae Cities, Mayors, and County Commissioners at 18-22, *United States v. Am. Library Ass’n*, 123 U.S. 2297(2003) (No. 02-361).

<sup>145</sup> Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y. at 13-16, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>146</sup> *Id.* at 3-12; Brief of Amici Curiae American Center for Law and Justice et al. at 5-14, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae American Civil Rights Union, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>147</sup> Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y., at 4-10, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>148</sup> *Id.* at 6-7.

<sup>149</sup> *Id.* at 16.

<sup>150</sup> Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae Cities, Mayors, and County Commissioners at 18-22, *United States v. Am. Library Ass’n*, 123 U.S. 2297(2003) (No. 02-361); Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y. at 16-20, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>151</sup> See *id.*

<sup>152</sup> See also Brief for the Appellant at 9, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (No. 02-361).

collection content decisions made by public libraries.<sup>153</sup> Libraries must use content-based decisions in all acquisitions, which would be undermined by adoption of the District Court holding.<sup>154</sup> CMCC's idea is that there is no violation of the right to receive information because the Internet can be accessed from anywhere in the world, and just because a particular avenue of accessing pornography is blocked under CIPA does not mean that there is an effective ban or censorship of that genre of site.<sup>155</sup> "Internet filtering involves the acquisition process, not the removal of information that has already been acquired."<sup>156</sup> Library use itself (i.e., inter-library loans, getting library cards, requesting special collection materials, reserve materials) requires a "loss of anonymity, and often a wait for the desired materials," so there is no problem with a patron having to request that the filters be lifted and having to wait for a while for them to be lifted.<sup>157</sup>

A common theme among all of these briefs is also stress on the potential ramifications of adopting the District Court's holding. Under these arguments, adoption of the ruling could lead to libraries deciding not to offer any Internet access at all rather than allowing their patrons to be subject to accessing and/or having those around them access pornography over the unfiltered/regulated Internet.<sup>158</sup> The theory also goes that if a right is conveyed by providing access to the Internet, then this could easily carry over into other areas, such as a government

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<sup>153</sup> See Brief of Amicus Curiae Cities, Mayors, and County Commissioners, *United States v. Am. Library Ass'n*, 123 U.S. 2297(2003) (No. 02-361); see also Brief of Amici Curiae American Center for Law and Justice et al., at 8-10, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>154</sup> See *id.*; see also Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>155</sup> Brief of Amicus Curiae Cities, Mayors, and County Commissioners, *United States v. Am. Library Ass'n*, 123 U.S. 2297(2003) (No. 02-361).

<sup>156</sup> Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y. at 5, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>157</sup> Brief of Amici Curiae American Center for Law and Justice et al. at 18, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>158</sup> Brief of Amicus Curiae Cities, Mayors, and County Commissioners at 20-22, *United States v. Am. Library Ass'n*, 123 U.S. 2297(2003) (No. 02-361); Brief of Amicus Curiae for the State of Texas at 8-13, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

provision of Internet access to its employees. This could compel such entities to refrain from blocking/filtering sites deemed inappropriate, even if they are not pornographic,<sup>159</sup> could drastically alter the other acquisition policies of libraries<sup>160</sup> and would be of bad precedential value.<sup>161</sup>

The majority of the amici also conducted constitutional scrutiny tests, and argued that the rational basis test is met for the filtration provisions under CIPA. CMCC advanced a heavy secondary effects argument about pornography and its attendant crimes, both within libraries and without.<sup>162</sup> CMCC states that print media selections by libraries are subject only to rational basis review, and that this shouldn't change with the Internet, where the avenue to access is even greater.<sup>163</sup> Stated correlations between those reading hard-core pornography and child molestations advance a rational basis for allowing localities to make the decision as to what types of Internet pornography to block, both for the good of patrons and for the good of the community.<sup>164</sup> Also, experiences of librarians indicate that other methods do not work.<sup>165</sup> The Texas brief was quick to point out that the District Court's decision could undermine state laws if

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<sup>159</sup> Brief of Amicus Curiae Cities, Mayors, and County Commissioners, *United States v. Am. Library Ass'n*, 123 U.S. 2297(2003) (No. 02-361); Brief of Amici Curiae American Center for Law and Justice et al., at 10, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>160</sup> Brief for the Appellant at 2-3, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>161</sup> Oral Argument for the Appellants, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>162</sup> See Brief of Amicus Curiae Cities, Mayors, and County Commissioners, *United States v. Am. Library Ass'n*, 123 U.S. 2297 (2003) (No. 02-361); Brief of Amici Curiae American Center for Law and Justice et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae American Civil Rights Union, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>163</sup> Brief of Amicus Curiae Cities, Mayors, and County Commissioners at 13-17, *United States v. Am. Library Ass'n*, 123 U.S. 2297(2003) (No. 02-361).

<sup>164</sup> *Id.* at 22-24.

<sup>165</sup> Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y. at 17-20, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

allowed to stand.<sup>166</sup> In particular, the decision could do damage to child protection statutes and programs, both because of access of children to potentially harmful sites and chat rooms and because of the class of predator that the open access could attract to public libraries.<sup>167</sup>

States, as well as the federal and local governments, have a strong interest in protecting children from viewing – in public libraries – the vast amount of sexually explicit material available over the Internet. They have an equally strong interest in protecting children from the secondary effects of the availability of these materials, such as the attraction to libraries or similar public places of persons who might victimize children.<sup>168</sup>

Furthermore, arguments are made that the District Court decision could lead to determination that Internet access within schools is public forum, which would undermine laws and law enforcement, as well as endanger children.<sup>169</sup>

Another take on the forum issue is advanced through the idea that forum analysis should disregard the Internet and look only at the fact of location within a public library, which would invoke many of the above named privileges, and result in a different forum analysis altogether.<sup>170</sup> Alternative means of monitoring discussed and approved of by the district court are actually more intrusive than the filters and should not be advocated in lieu of filter technology.<sup>171</sup>

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<sup>166</sup> See generally Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass'n*; see also Brief of Amici Curiae Greenville, S.C., Kaysville, U.T., and Kenton County, K.Y. at 20-21, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae American Civil Rights Union at 5, *U.S. v. Am. Library Ass'n*, 123 S.Ct. 2297 (2003) (No. 02-361).

<sup>167</sup> Brief of Amicus Curiae for the State of Texas at 2, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>168</sup> *Id.* at 7.

<sup>169</sup> *Id.* at 10-11.

<sup>170</sup> See Brief of Amici Curiae American Center for Law and Justice et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>171</sup> See Brief for the Appellant at 2-3, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

## **B. Anti-CIPA Amici and Oral Arguments**

The Brennan Center brief focuses on academic freedom precedents and the idea that they should be extended to libraries (i.e., *Rosenberger*).<sup>172</sup> Brennan also assumes that there is a protected right to the messages that are being placed on the Internet, and the ability to access them. Accordingly, the interference with this right should trigger strict scrutiny because of First Amendment implications.<sup>173</sup> Problems are also found in the blanket nature of the filters and the ability of library staff to block and unblock certain sites and information selectively as they see fit.<sup>174</sup> Additionally, Brennan strongly advocated that *Rust* should not be applied because of the speech element involved in filtering out websites based on their stated content.<sup>175</sup>

Online Policy Group's brief finds two main problems with the CIPA provisions and Internet filters. First, there is an issue as to the problems of over and under blocking associated with the filtration systems (as identified and discussed at length by the District Court), and the resulting First Amendment violation which it sees occurring.<sup>176</sup> Second, the Online Policy Group sees the blocking which occurs through filtration usage as being a means to the end of promoting viewpoint discrimination within public libraries, which would implicate higher constitutional scrutiny.<sup>177</sup>

The Association of American Publishers maintains a stance that the requirement that the public libraries comply with the statutory definitions of the terms to be blocked – as well as the filtration mechanism itself – takes away the traditional discretionary abilities of local librarians

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<sup>172</sup> Brief of Amicus Curiae Brennan Center for Justice at 5-7, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361) [hereinafter Brennan Center].

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 5-7.

<sup>175</sup> *Id.*

<sup>176</sup> Brief of Amicus Curiae Online Policy Group et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361) [hereinafter OPG].

<sup>177</sup> *Id.*

in balancing the composition their collections and the needs of their communities.<sup>178</sup> The AAP maintains that the Internet, within the context of a public library, serves the same traditional library goals as do other forms of media to which a higher level of scrutiny has been applied. As evidence of this, the AAP highlights the inherent usefulness of the medium in areas which have been classed as being subject to First amendment considerations.<sup>179</sup> A public forum is created because the Internet by its definition and the low threshold needed to access it and put things on it, creates essentially an “expressive activity,” which cannot be blocked or censored because of its viewpoint.<sup>180</sup>

There is also an argument that the Internet is inherently different than print media in that there is a hint of censorship in having to filter out certain parts of the Internet which are part of the whole initial package *per se*, as opposed to librarians looking through a print catalogue and deciding what to bring into the library without it actually being there first.<sup>181</sup> The focus of the argument here is on the medium over the forum, which aligns with the district court’s opinion,<sup>182</sup> and also on the other means available to libraries to effect filtration.<sup>183</sup> The idea expressed by the AAP is that there are adequate less restrictive means available to effect the desired result of shielding minors from pornography and that, since strict scrutiny should be applied, these less restrictive means are fatal to the CIPA filtering provisions.<sup>184</sup> These arguments were also given to the Court by counsel for the American Library Association during oral arguments.<sup>185</sup>

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<sup>178</sup> Brief of Amici Curiae Association of American Publishers et. al., United States v. Am. Library Ass’n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Brief of Amici Curiae Association of American Publishers, et. al., United States v. Am. Library Ass’n, 123 S. Ct. 2297 (2003) (No. 02-361).

<sup>185</sup> Oral Argument for the Appellee, United States v. Am. Library Ass’n, 123 S. Ct. 2297 (2003) (No. 02-361).

### C. The Accepted Strands

From the ultimate disposition of *Am. Library Ass'n II* it is obvious that the pro-CIPA amici strands won the day.<sup>186</sup> However, the decision was a victory of many smaller legal and policy battles, and in these areas, some strands of amici arguments were more accepted than others.

Turning first to the Plurality opinion, perhaps the most compelling argument, and hence the biggest winner, was the traditional discretionary function of public libraries regarding the content of their collections and their control over acquisition of additional content.<sup>187</sup> Another point that received a great deal of support from the Chief Justice was the parallel in nature and discretionary requirements between the public libraries at issue here and the funding mechanism at issue in the *NEA* case.<sup>188</sup>

Aside from the latitude granted to libraries because of their traditional function and acquisitional decisions, the next and most endorsed argument by the Plurality was that there was no public forum created through the availability of the Internet in public libraries.<sup>189</sup> Interestingly, one of the foundations of this determination was the idea that the Internet within public libraries is akin to any other print media, and that the libraries could thus filter out websites based on content as they do when making decisions about the appropriateness of carrying tangible print media.<sup>190</sup> Reluctant to subject libraries to strict scrutiny in this context, the Plurality also endorsed the idea that there is no difference between keeping out selected sites

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<sup>186</sup> See *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

which are technically available once there is an Internet portal installed and deciding whether to bring a specific book into the physical confines of the library.<sup>191</sup>

Additionally, the Plurality opinion relied heavily on the distinction made at oral arguments between filtering out certain websites altogether and the ability of the CIPA-approved software to be disabled at the request of the patron. It drew on the idea that there are parallels between the request and potential wait time necessary for the filters to be removed, and certain traditional aspects of library print-collection accessing.<sup>192</sup>

And on a final note, the argument that *Rust* should be extended for its holding on the ability of Congress to direct the ways in which funds it appropriates for certain programs are spent resonated with the Plurality and provided another key underpinning to the decision.<sup>193</sup>

In his concurrence, Justice Kennedy only highlighted two factors upon which he based his decisions,<sup>194</sup> but both of them have wide-ranging potential ramifications. The first is the availability, however flawed, of a mechanism to unblock Internet access at the patron's request.<sup>195</sup> And the second strand is the policy and societal interest in protecting children which CIPA and those advocating it aim to advance.<sup>196</sup>

Justice Breyer, who seems to suggest that mid-level scrutiny is the appropriate level of analysis in the case, looked to the traditional functions of libraries and their abilities to make content-based acquisitional decisions and found that this ability would be undermined by the application of strict scrutiny.<sup>197</sup> Breyer then used the idea of "best fit" analysis, under which he weighed the interest of society (placing more weight on the advanced goal of the statute –

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

protecting children from dangerous predators) and the over-blocking allegations. He held that the societal interests and the ability to remove the filters tipped the balance in favor of upholding CIPA.<sup>198</sup>

In contrast, Justice Stevens was unwilling to allow Congress the ability to dictate CIPA provisions,<sup>199</sup> although he did explicitly hold that similar provisions under the color of a state or local statute would be acceptable.<sup>200</sup> Additionally, Stevens was unpersuaded by the blocking argument, although he was not completely won over by the argument that the act of filtering was positive censorship (as opposed to deciding not to purchase a book for the library collection).<sup>201</sup>

Finally, Justice Souter's dissent focused on the need for such statutes to come from the community, and also for more precise language in the statute mandating the availability of the unblocking technology.<sup>202</sup>

#### **IV. DIRECTION OF FUTURE INTERNET LITIGATION ARGUMENTS**

After analysis of the arguments made to the Court, and those accepted by the Court, several trends for future Internet-based litigation strategies and outcomes can be discerned.

First and foremost is the importance of the public forum argument. Although this case was limited to the context of a public library, there are still important lessons to be gleaned from its holdings. Perhaps the most important and glaring of these lessons is that, while there are accepted analogies to print media, arguments made regarding the Internet must be carefully worded so as not to be void for underinclusiveness or overbreadth. I use the term overbreadth because it is clear that at least a plurality of the Justices do not believe the Internet to be as

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

controllable through limited locales (such as libraries) as is print media. While books and newspapers are certainly available in many locations other than libraries, the Court suggests that this is not as much of a consideration as it is with Internet access. Indeed, perhaps because of the many places – both public and private – in which people can access the Internet without implicating state action, the Court seems unwilling to view a restriction on access at one location (or even a class of locations) to be a significant burden to the freedom of the medium. And I use the term underbreadth for primarily the same reasons. Even if a plaintiff were to plead that his access was being denied because he could not, for example, afford to access the Internet through any other venue than a library, the plurality opinion would suggest that the suit would not be successful precisely because of this limited impact on the large – and continually growing – medium as a whole.<sup>203</sup> This is especially true if the societal interest arguments in *Am. Library Ass'n II* come into play.<sup>204</sup>

Second is the tradition argument. This might actually be the hardest hurdle for a potential litigant to overcome, as there is no way around the fact that the Internet is a new medium and, as Justice Rehnquist explicitly states, is not a part of the rich and robust jurisprudence protecting the press and printed matter from censorship.<sup>205</sup> Indeed, although not addressed here, the Internet *per se* is difficult to square with traditional First amendment claims because of its fluidity and openness. Websites do not have to pass through customs or border patrol. If they are located outside of the jurisdiction in question, suppressing them or banning their content can be difficult to achieve at best. When compared to print media – or even television – which is dependent on more regulated and easily-accessible sources of origin, it is doubtful that the Court could ever

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

effectuate the regulation (or protection) of the Internet that it has established viz a viz print and other broadcast media. As a result, reliance on history for protection of the Internet is likely to fail. Furthermore, attempts to argue that the medium is a new one, but should be subject to the same hard-won protections as older, more well established varieties of media, are equally apt to fail. This puts potential litigants in a catch-22 situation of both needing to appeal to traditional notions of protection as well as modernity, with the knowledge that to date the Court has been reluctant to accept either rationale.

Third is the societal interest element, paired with the governmental interest at stake. Here, there was a very strong and appealing governmental and societal interest – protecting children from on-line predators and other pedophiles. The nature of the societal claim involved in future litigation will be key to the extension of the social interest element. Perhaps incorporating some of the elements of the tradition argument, it seems that the Court is more suspicious of the new Internet medium.<sup>206</sup> Therefore, it is more willing to protect sacred societal and legitimate governmental interests in the face of protecting a medium which has the potential for such unprecedented harm as well as good. Especially where issues such as safety and children are involved, as well as the ability of law enforcement and localities to protect citizens and communities as a whole, the Court will be reluctant to grant the Internet a public forum designation. It is one thing for a child to read a book or watch a television program and act out on a violent scene contained in either media – this requires the active participation of the child after the media in question has conveyed the idea (which itself is a separate sphere of First Amendment analysis). It is quite another for a child to sit at a library computer – or a home computer for that matter – and innocently enter into a chat room where he comes in contact with

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<sup>206</sup> *See id.*

a would-be predator. The interaction goes on and escalates, and the medium is no longer the passive conveyor of the information, but is rather the active means by which potential criminality is committed. With this in mind, future litigants will need to argue not only a persuasive forum analysis prong, and deal with the underlying issues of tradition; they will also need to have a strong societal - and preferably governmental as well - interest that they are seeking to advance. This, in particular, will be the case when the litigation involves a safety issue.

And fourth, future litigants should take from this case that multiple amici can be very helpful in expanding the scope of the Court's vision on Internet-related issues. Not only did both sides bring in the arguments presented in *Am. Library Ass'n I*, they also reached outside of their own particular interests and illustrated how the law at issue, and more importantly, the Internet within the given context, impacted on a larger and more diverse population than those involved in the suit. For a new medium with traditional biases against it and a relatively untested (and rocky at best) judicial history, it is necessary to demonstrate to the Court the real impact that the ruling could have in areas which might not be closely associated with the dispute. Even for the losing side in *Am. Library Ass'n II*, by broadening the scope of litigants and amici to include those outside of the realm of the challenging librarians, introduced issues and class considerations which arguably might not have come up if it had only used the original group bringing suit.

## VI. CONCLUSION

As has been illustrated, the impact of the *Am. Library Ass'n II* holding reaches far beyond public libraries.<sup>207</sup> Rather, the case holding,<sup>208</sup> opinions of the justices,<sup>209</sup> and accepted strands

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<sup>207</sup> See *infra* Part III.

<sup>208</sup> See *United States v. Am. Library Ass'n*, 123 S. Ct. at 2297; see also *infra* Part II.

<sup>209</sup> See generally *id.*

of arguments made throughout the amici briefs illustrate that the Internet aspects of the case reach into a variety of personal and public spheres.<sup>210</sup> Additionally, because it is one of the first major cases in which the Court has examined the definition and place of the Internet, both in common parlance and in First Amendment jurisprudence, this case provides vital and telling insights for litigators seeking to enter the Internet fray. From the accepted and rejected strands running throughout the amici briefs and the opinions themselves, litigators can take away a better understanding of litigation strategies and arguments necessary to litigating Internet cases which involve First Amendment issues.<sup>211</sup> Litigators, scholars, and others interested in the topic can also take away a sense of what arguments are likely not to curry much favor with the Court.<sup>212</sup> Both of these understandings will help lawyers, scholars, judges, and policy makers to frame their future views of, and arguments regarding, both the Internet as a whole and the nexus of the Internet and public libraries.

This note has been written while the Court heard, deliberated on, and decided the second version of *Ashcroft v. ACLU*.<sup>213</sup> The fact that the Court agreed to rehear that case within two years of its initial decision<sup>214</sup> further demonstrates that the Court is grappling with the issue of Internet regulation and First amendment freedoms, as well as the moral tenets of American society and jurisprudence. A brief look at the amici and the Court's holding in *Ashcroft II* provides further insights on the ideas advanced in this note.

*Ashcroft II* is a rehearing of *Ashcroft I*, which reached the Court after both the District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit

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<sup>210</sup> See discussion *infra* Part III.

<sup>211</sup> See *id.*

<sup>212</sup> See *id.*

<sup>213</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004).

<sup>214</sup> The first case was decided in 2002 and the Court granted certiorari in 2003.

approved an injunction in the enforcement of the Child Online Protection Act (COPA).<sup>215</sup> Briefly, COPA imposed fines of up to \$50,000.00 and jail time for those found to “knowing[ly] post, for ‘commercial purposes’” material that is “harmful to minors” on the web, unless there was an attempt to minor’s abilities to access these materials, such as requiring a viewer to register with a credit card.<sup>216</sup> The District Court based its decision to grant the injunction on its view that COPA would be invalidated because the means used to effect the compelling state interest were not the least restrictive available to Congress,<sup>217</sup> while the Court of Appeals upheld the injunction on the alternate view that evaluating the “harmful to minors” designation using “community standards” would be void for overbreadth.<sup>218</sup> *In Ashcroft I*, however, the Court remanded the issue of whether COPA there were less restrictive means available to Congress than those it chose for COPA.<sup>219</sup> The Court of Appeals on remand held that COPA would be void because of the availability of less restrictive means for the affirmative defense of attempting to block the accessibility of the website to minors. This was the issue before the Court in *Ashcroft II*.<sup>220</sup>

Interestingly, both the amici and the Court stressed the importance of regulating the web for pornography which could be accessed by children,<sup>221</sup> and all sides agreed that the filtering

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<sup>215</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004).

<sup>216</sup> *Id.* at 2800.

<sup>217</sup> *Id.* at 2785.

<sup>218</sup> *Id.*

<sup>219</sup> *See Ashcroft v. ACLU*, 535 U.S. 564 (2002).

<sup>220</sup> *Ashcroft v. ACLU*, No. 03-218, 2004 U.S. LEXIS 4762 \*16 (U.S. June 29, 2004).

<sup>221</sup> *See generally id.*; *see also* Brief of Amici Curiae Volunteer Lawyers for the Arts et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 U.S. LEXIS 4762 \*1 (U.S. January 14, 2004); Brief of Amici Curiae American Association of Publishers et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 U.S. LEXIS 4762 \*1 (U.S. January 14, 2004); Brief of Members of Congress, Sen. John McCain et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 U.S. LEXIS 4762 \*1 (U.S. December 10, 2003); Brief of Amici Curiae WallBuilders, *Ashcroft v. ACLU*, No. 03-218, 2004 U.S. LEXIS 4762 \*1 (U.S. December 10, 2003); Brief of Amici Curiae American Center for Law and Justice et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief of Amici Curiae Morality in Media et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 1, 2003); Brief of Amici Curiae DuPage County, Illinois et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. November 28, 2003); Brief of Amici Curiae

which was so roundly decried until the Court's decision in *Am. Library Ass'n* was either an appropriate, less restrictive means to achieve the legislative goals of protecting minors, or as only a threshold above which further restrictions and regulations are required to truly protect children and parents.<sup>222</sup>

As the all involved in this case agreed, the issue was not the forum for the speech, but rather the speech itself and its status as protected or unprotected.<sup>223</sup> The forum arguments were more subtle, and went into how the idea of "community standards" can be assessed in the context of a medium as broadly reaching as the web.<sup>224</sup> That this was an issue, and that the Court itself was not able to establish a jurisdictional definition for the confines of the web,<sup>225</sup> illustrates that this is not a decision to be made easily or lightly, and that it will be a persistent problem facing courts and legislators in the future.

In terms of tradition and societal arguments, there was not a great difference between the litigants regarding the newness of the Internet and the web, and the need to develop regulations for the Internet which fully take into account the individual nature of the web as opposed to other, traditional forms of media.<sup>226</sup> All sides also agreed that there is a massive importance to

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Focus on the Family and the Family Research Council, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. November 26, 2003).

<sup>222</sup> See generally *Ashcroft v. ACLU*, No. 03-218, 2004 U.S. LEXIS 4762 \*16 (U.S. June 29, 2004); see also Brief for the Petitioners, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief for the Respondents, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. January 14, 2004); Reply Brief for the Petitioner, *Ashcroft v. ACLU*, 2004 LEXIS \*1 (U.S. February 18, 2004) (No. 03-218).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (No. 03-218).

<sup>226</sup> See *id.*; see also Brief for the Petitioners, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief for the Respondents, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. January 14, 2004); Reply Brief for the Petitioner, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. February 18, 2004); Brief of Amici Curiae Volunteer Lawyers for the Arts et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. January 14, 2004); Brief of Amici Curiae American Association of Publishers et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. January 14, 2004); Brief of Members of Congress, Sen. John McCain et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief of Amici Curiae WallBuilders, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief of Amici Curiae American Center for Law and Justice

preventing children from accessing pornography on the Internet, and being exposed to potential predators;<sup>227</sup> the litigants simply disagreed over how to do this without overstepping constitutionally protected freedoms.<sup>228</sup>

Finally, there were fewer amici in this case than in *Am. Library Ass'n*,<sup>229</sup> however those amici who were involved obviously provided the Court with a wider depth of understanding, particularly on the jurisdictional arguments arising out of the “community standards” provision.<sup>230</sup> While the ultimate fate of COPA remains in the hands of the District Court to which it was remanded for further proceedings,<sup>231</sup> *Ashcroft II* illustrates that the litigation strategies presented in this note are the backbone of Internet-based litigation for the future.

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et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief of Amici Curiae Morality in Media et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 1, 2003); Brief of Amici Curiae DuPage County, Illinois et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. November 28, 2003); Brief of Amici Curiae Focus on the Family and the Family Research Council, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. November 26, 2003).

<sup>227</sup> See *id.*

<sup>228</sup> See Brief for the Petitioners, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. December 10, 2003); Brief for the Respondents, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. January 14, 2004); Reply Brief for the Petitioner, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (U.S. February 18, 2003).

<sup>229</sup> *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003). Compare Brief of Amici Curiae Cities, Mayors and County Commissioners, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae American Center for Law and Justice et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae for the State of Texas, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae American Civil Rights Union, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae Cities, Mayors and County Commissioners at 1, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae American Center for Law and Justice et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae Brennan Center for Justice at 5-7, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amicus Curiae Online Policy Group et al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361); Brief of Amici Curiae Association of American Publishers, et. al., *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361), with Brief of Amici Curiae Volunteer Lawyers for the Arts et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Amici Curiae American Association of Publishers et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Members of Congress, Sen. John McCain et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Amici Curiae WallBuilders, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Amici Curiae American Center for Law and Justice et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Amici Curiae Morality in Media et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Amici Curiae DuPage County, Illinois et. al., *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004); Brief of Amici Curiae Focus on the Family and the Family Research Council, *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004).

<sup>230</sup> See *supra* note 226.

<sup>231</sup> The Court ultimately remanded *Ashcroft II* to the District Court for the Eastern District of Pennsylvania for further trial proceedings with the injunction in place. *Ashcroft v. ACLU*, No. 03-218, 2004 LEXIS \*1 (2004).