No. 02-361

IN THE

Supreme Court of the United States
OCTOBER TERM, 2002

United States, *et al.*
Appellants,
v.
American Library Association, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI[1]

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States. It represents the nation's 95,000 school board members, who, in turn, govern the nation's 14,722 local school districts.

NSBA has a long history of defending local school districts' authority to restrict disruptive, lewd, or offensive speech in school and to determine curriculum content. NSBA filed *amicus* briefs with this Court in both *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

The Pennsylvania School Boards Association (PSBA), founded in 1895, is a not-for-profit association comprised of nearly all the local and intermediate public school districts in the Commonwealth of Pennsylvania and their school board members. PSBA has a long record of advocacy aimed at preserving the tools educators need to maintain safe school environments, conducive to learning.

In this brief *amici* take no position on the constitutionality of CIPA's filtering requirements as applied to public libraries. *Amici* seek to minimize any spillover effect this case may have on the ability of public schools to continue filtering content on computers within the school environment, *i.e.*, in school libraries and classrooms, if they so choose. *Amici* urge this Court to maintain the crucial distinction between the First Amendment standards that apply to public schools and those that govern other state actors, allowing school boards and administrators greater

[1] *Amici* file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici*, their members or their counsel, made a monetary contribution for the preparation or submission of this brief.

flexibility and control over the content of expression within the schools to promote educational interests and to protect students.

STATEMENT OF THE CASE

In response to the proliferation of pervasively vulgar and pornographic materials available on the World Wide Web, Congress enacted the Children's Internet Protection Act (CIPA), Pub. L. 106-544, Div. B, Tit. XVII, 114 Stat. 2763A-335, to protect children from exposure to sexually explicit and other "harmful" materials while accessing the Internet on public library or school computers.

CIPA requires school districts to adopt Internet safety policies and practices as a condition of receiving funds under the Elementary and Secondary Education Act (renamed during reauthorization to *No Child Left Behind*), 20 U.S.C. § 6301 *et seq.*, or "E-rate discounts" under the Telecommunications Act, 47 U.S.C. § 251 *et seq.*. One of the practices, which must be in place as a condition of funding, is the use of filtering devices on computers with Internet access, to block access to obscenity, child pornography and materials which may be harmful to minors. This filtering requirement affects approximately 98% of public schools.

A coalition of public libraries arguing that, despite their best efforts, they would be unable to separate the wheat, *i.e.*, protected speech, from the chaff, *i.e.*, pornographic sites, filed suit on First Amendment grounds challenging the CIPA filtering requirements for public libraries. No challenge was raised to the filtering requirements applicable to public schools. The libraries' argument focused on the inability of current filters to block access to all pornography and obscenity while simultaneously allowing access to all materials protected by the First Amendment.

A three-judge court was empanelled to expedite a decision before July 1, 2002, when public libraries would be

required to certify compliance with filtering requirements to receive federal subsidies. The federal district court for the Eastern District of Pennsylvania held that §§ 1712(a)(2) and 1721(b) of CIPA, codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6) respectively, were facially invalid under the First Amendment. *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). It permanently enjoined the federal government from enforcing those sections. The court found that the limitations inherent in the current filtering technology mandated by CIPA would require public libraries attempting to comply with the Act to restrict patrons' access to a substantial amount of protected speech in violation of their First Amendment free speech rights. The court noted that because it was basing its decision on facial invalidity, it would not reach the issues of prior restraint, vagueness, or unconstitutional conditions.

SUMMARY OF THE ARGUMENT

Amici take no position as to the constitutionality of CIPA's filtering requirements as applied to public libraries. This brief is submitted to call attention to the distinction between the First Amendment standards that apply to public schools and those that govern other state actors such as public libraries. This Court has long recognized the need for school boards and administrators to control the content of speech within schools, particularly within the curriculum. In tandem, this Court has recognized a special relationship between students and school officials that in many contexts justifies modification of the constitutional rights extended to students in public schools. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), the Court stated, "we reaffirm that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." In *Bethel School Dist. No.*

403 v. Fraser, 478 U.S. 675 (1986), the Court applied this principle to a lewd and offensive speech given by a student at a school assembly. It concluded that it does not necessarily follow "that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." *Id.* at 682. In essence, the Court has said that the uninhibited and uncensored exchange of ideas available to adults in public settings may not be available to students in a school setting. These principles mean that even if this Court finds that public libraries may not use the filtering software required by CIPA without violating the Constitution, a similar result is not necessarily true for schools. *Amici* further contend that school officials may choose to use filtering software and other technology protection measures without violating the First Amendment when they do so for legitimate pedagogical reasons. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

ARGUMENT

I. This Court has long recognized that the special governmental function of public schools warrants special constitutional consideration and judicial deference on matters of educational policy.

This Court has explicitly recognized that the educational mission of schools alters constitutional analysis under the First Amendment. Although students do not "shed their consti-tutional rights to freedom of speech or expression at the schoolhouse gate," schools may regulate "speech or action that intrudes upon the work of the schools or the rights of other students." *Tinker*, 393 U.S. at 506, 508. This Court has applied different standards than those imposed on other state actors--standards that permit judicial

deference to school officials' decisions on the substance and methodology of education and on matters respecting the health and safety of students entrusted to their care. These standards have been established in the following cases:

- *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988) (students' free speech rights do not override the authority of school officials to make reasonable pedagogical decisions regarding the content of school newspapers);
- *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) (students' free speech rights do not prevent school officials from punishing a student for sexual innuendo in a speech during a school assembly);
- *New Jersey v. T.L.O.,* 469 U.S. 325 (1985) (students' right to be free from unreasonable searches must be viewed in the light of school officials' responsibility for health and safety of students);
- *Vernonia School Dist. No. 47J v. Acton,* 515 U.S. 646 (1995) (public school's special responsibility as guardian and tutor of children recognized as the most significant factor in finding suspicionless drug testing of student athletes constitutionally permissible).

At a minimum schools have the authority to curtail student speech if they can reasonably forecast that the speech would cause a "material and substantial disruption" to the school. *Tinker,* 393 U.S. 503. Despite the fact that *Tinker* involved private, political speech by students at school, the Court still held that schools do not have to tolerate private expression that disrupts their educational function. The *Tinker* standard has been more clearly circumscribed by subsequent decisions.

This Court has relied primarily on three standards to determine whether the school can control or limit student

expression (or access to information) within the school environment. The standard used depends on the context involved. *Bethel School Dist.*, 478 U.S. 675. The standards are based on the premise that school facilities are by their very nature not public forums and do not become such unless school authorities open them "for indiscriminate use by the general public." *Hazelwood School Dist.*, 484 U.S. at 271 .

School officials have the greatest control over student speech that occurs within the confines of the curriculum and school-sponsored activities. Clearly, the school creates no forum, limited or public, for speech within instructional activities. In *Hazelwood*, this Court found that school officials do not violate the First Amendment by exercising control over expression that occurs as part of school-sponsored activities as long as "their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

No public, or limited public, forum was found in the circumstance of a student delivering a campaign speech in a student assembly, *i.e.*, speech within the school environment but not within instructional activities. *Bethel School Dist.*, 478 U.S. 675. Within the school environment, school officials may regulate speech that is "lewd, indecent or offensive" or "would undermine the school's basic educational mission." *Id.* at 685. As stated there:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." [citations omitted] The determination of what manner of speech in the classroom or in a

> school assembly is inappropriate properly rests with the school board.

Id. at 683.

Even in the context of school libraries, courts have provided school officials with control, finding neither a public forum, nor a limited public forum. In *Board of Education, Island Trees Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), the Island Trees Board of Education mandated that several books be removed from the school library because they were "anti-American, anti-Christian, anti-Semitic, and just plain filthy." Students brought an action for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the board action denied their First Amendment right to receive information. This Court found that students do have some constitutional right to receive information so that schools may not restrict the spectrum of knowledge merely because certain ideas are controversial or offensive. But the Court reaffirmed that school officials do enjoy broad discretion in setting and selecting the curriculum and in the selection and retention of materials in school libraries. Certainly, school boards are on solid constitutional ground if they exclude materials because they are "pervasively vulgar" or lack "educational suitability." *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 189 (5th Cir. 1995).

II. Public schools may constitutionally make filtering and blocking decisions reasonably related to legitimate pedagogical concerns and may block materials deemed vulgar or harmful to students.

A. Internet access is a part of the school curriculum or environment and does not create a public forum within the schools.

Under pressure to improve student achievement, many schools have invested substantial amounts of money in computers, software and wiring classrooms and other school facilities in an effort to harness the great potential of technology to enhance student learning. In 2001, 87% of public school classrooms in the United States were connected to the Internet. This number reflects a jump from 77% in 2000 and no doubt will continue to grow in the next few years, making access to the Internet in school nearly universal.

Schools provide Internet access to students for educational purposes as an important part of the instructional program. In a recent survey, school leaders reported that the Internet is currently used primarily for research purposes in the areas of history/social studies and science, but more than a third believe that at least one in five students will soon receive a substantial portion of their instruction over the Internet. National School Boards Foundation, *Are We There Yet?* (2002), *available at* http://www.nsbf.org/thereyet/fulltext.htm (last visited Jan. 3, 2003).

Because Internet access is offered as a component of a school's academic program and as an instructional resource, it is communication clearly occurring within the confines of the school, not in an open forum for "indiscriminate use by the general public." It is instead an integral part of the formal learning experience that schools offer. Even where schools allow or encourage students to engage in non-assigned reading or to practice their technology skills outside regular classroom projects, these activities are part of the structured learning process over which school boards exercise broad discretion. This discretion includes the right to alter the content of the materials that form the substance of these educational activities. Under these circumstances, access to the Internet on school premises while using school-provided equipment

and resources does not create a forum where the school must allow unlimited expression and receipt of ideas. It does not implicate students' personal expression rights established in *Tinker* nor their limited right to receive ideas under *Pico*.

B. The use of filters to block inappropriate materials is within the discretion of school officials.

Along with the incredible growth in the use of the Internet at school has come a huge concern for the safety of children while online. The decision to adopt safety measures has come from public schools' own recognition of their responsibility for student welfare and education and from legal mandates such as CIPA. Nearly all schools with Internet access have taken steps to adopt policies regarding online safety at school. Ninety-six percent of schools include in their policies at least one technology protection measure to control student access to inappropriate materials on the Internet. Some of the most common safety mechanisms include teacher/staff monitoring (91%), blocking or filtering software (87%), written contracts between schools, students and parents (80%), monitoring software (46%), student honor codes (44%) and intranet access only (26%). National Center for Education Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994-2001*, (U.S. Department of Education, 2002) *available at* http://nces.ed.gov/pubs2002/internet/8.asp (last visited Jan. 3, 2003).

Since Internet access is a part of the school instructional environment, the appropriate constitutional standards to assess school Internet safety policies and practices are those developed by this Court to determine the extent of regulation school officials may exert over student expression or access to information. This Court has found

that within the school environment school authorities have the right to restrict student expression that may be vulgar or harmful, and may restrict student access to information for legitimate pedagogical concerns. In evaluating the constitutionality of Internet safety measures adopted by public schools, it is clear that filtering and blocking decisions need only be reasonably related to legitimate pedagogical concerns, and schools may constitutionally block materials which are deemed to be vulgar or harmful to students.

Schools act both as "guardian and tutor of the children entrusted to [their] care. " *Vernonia School Dist.*, 515 U.S. at 665. There is then no doubt that schools have a valid interest in protecting students from the vast amounts of inappropriate and potentially harmful materials available through the Internet. Given the special role of public schools, the First Amendment certainly does not grant speakers whose expression is sexually explicit or pornographic the right to reach students engaged in educational activities at school. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (state statute banning sale of sexually oriented materials to minors upheld).

Schools use filters, either alone or in combination with other safety measures, to reduce the possibility of student access to inappropriate materials either purposefully or inadvertently when using the Internet at school. Educational decisions regarding appropriate materials necessarily involve considerations of students' emotional, physical, psychological and cognitive development. The use of filters is only a mechanical way of implementing these decisions regarding educational suitability. School officials have the constitutional leeway to make these determinations, which should not be curtailed merely because they have employed a mechanical device in their implementation.

The standards as related to student speech within the school environment require that the use of filters by schools be *reasonably* related to legitimate pedagogical concerns. Because schools are neither traditional nor designated public forums, the adoption of filters does not have to meet the "narrowly tailored" standard that the district court applied to public libraries. The district court's determination that filters are not narrowly tailored to CIPA's purpose of screening out inappropriate sexually explicit material focused on the inherent overblocking and underblocking of current technology.

Amici contend that while overblocking and underblocking of Internet filters may raise practical and pedagogical concerns for schools, this lack of precision does not raise a constitutional bar to their use in schools. A recent report by the National Research Council recognized that "filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable." Dick Thornburg and Herbert Lin, eds., *Youth, Pornography and the Internet Executive Summary* at 8 (National Research Council, 2002), *available at* http://books.nap.edu/books/0309082749/html/10.html#pagetop. A recent study by the Kaiser Family Foundation found that on average Internet filters blocked from 87% - 91% of pornographic sites (sites with text or graphic of a sexual act or genitals designed to appeal to prurient interests that was not of an educational or scientific nature). Kaiser Family Foundation, *See No Evil: How Internet Filters Affect the Search for Online Health Information Executive Summary* at 8 (Dec. 12, 2002), *available at* http://www.kff.org/content/2002/3294/Internet_Filtering_exec_summ.pdf. Given that filters can be effective in reducing exposure of children to sexually explicit content, it is reasonable for school boards to decide to use them to promote legitimate pedagogical concerns, even if filters block "large amounts" of appropriate material.

Where school boards have the flexibility to use filters in concert with other safety measures consistent with their educational philosophies, curriculum and resources, blocking raises no First Amendment concerns. For example, a district might use filters only in elementary grades, or only at student terminals where screens are not easily visible to staff. Others might use filters on all student terminals but select blocking categories or restrictive setting levels based on who would be using the computer and for what purpose. Other districts might choose to reduce overblocking of appropriate materials by disabling filters depending on specific instructional needs, *e.g.*, in advanced biology, health, or medical science classes. *See Comments of National Education Association submitted to the National Telecommunications and Information Administration,* U.S. Department of Commerce in Docket No. 020514121-2121-01, RIN 0660-XX14 (Aug. 27, 2002), *available at* http://www.ntia.doc.gov/ntiahome/ntiageneral/cipacomments/comments/nea/NEA.htm. Given that school officials' actions in the educational context need only be reasonably related to legitimate pedagogical concerns, the availability of less restrictive methods or other educationally-appropriate strategies does not negate the constitutionality of filters. Boards properly have the authority to determine the appropriate balance between Internet safety and the scope of accessibility students have to Internet content. They need not provide access to all information on the Internet that might be deemed educationally appropriate to be reasonably related to pedagogical goals. In exercising their authority boards can choose those safety measures that are reasonably related to their educational goals even if those methods are not the least restrictive in First Amendment terms.

CONCLUSION

Amici urge this Court to make clear that its decision in this case applies only to public libraries and not to public schools. Because of their very distinct governmental functions and institutional missions, libraries and schools might take different approaches to protecting children from inappropriate Internet material. In evaluating the constitutionality of Internet safety measures adopted by public schools, it is clear that filtering and blocking decisions need only be reasonably related to legitimate pedagogical concerns, and schools may constitutionally block materials which are deemed to be vulgar or harmful to students. This Court should continue to apply the special First Amendment standards it has recognized within the school environment.

Respectfully submitted,

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