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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, ET AL. , :

Peti ti oners :

v. : No. 02-361

AMERICAN LIBRARY ASSOCIATION, :

INC. , ET AL. :

- - - - -X

Washi ngton, D. C.

Wednesday, March 5, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:25 a.m

APPEARANCES:

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

PAUL M SMITH, ESQ., Washington, D.C., on behalf of the Respondents.

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P R O C E E D I N G S

(10:25 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 02-361, the United States v. the American Library Association.

General Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS

MR. OLSON: Mr. Chief Justice, and may it please the Court:

When libraries block Internet pornography from their computer terminals, they are simply declining to put onto their computer screens the same content they have traditionally excluded from their bookshelves. By offering Internet access without pornography, freedom of speech is expanded, not abridged. Under the Children's Internet Protection Act, or CIPA, no Internet speech is prohibited, inhibited, threatened, or chilled. Libraries are simply exercising their discretion as to the content that their libraries will contain, the historic discretion to exercise that -- that authority, and to how their library resources will be used.

QUESTION: Mr. Olson, you have a number of important legal concepts to address. I have three factual questions. I've been through the extensive opinion of the

1 district court, and -- and they may be important for me.
2 Three different things.

3 When the library patron requests that the filter
4 be disabled, does he have to explain why he wants it
5 disabled?

6 MR. OLSON: No. Shall I wait until you've
7 asked --

8 QUESTION: Go ahead.

9 MR. OLSON: It's my understanding that the --
10 the library patron would not have to explain any reason
11 why he was asking a site to be unblocked or the filtering
12 to be disabled.

13 QUESTION: That's the next question. Do you ask
14 site by site or can I -- can the library patron say,
15 unblock the whole thing?

16 MR. OLSON: The library patron, if the patron is
17 an adult, can ask the -- the entire filtering to be
18 disabled, and the library may disable -- I mean, eliminate
19 the filtering with respect to specific sites either on
20 their own or at the request of a patron.

21 QUESTION: All right.

22 And third, the district court said in some cases
23 it takes 24 hours to a week. Is that the usual thing or
24 does -- in many cases can the librarian just push a
25 button?

1 MR. OLSON: I think that it is -- it is -- the
2 record is not clear on that, and I -- but my -- my
3 experience and my judgment in connection with our
4 preparation is that it need not be a very difficult thing.
5 It's something that libraries can do without a great deal
6 of difficulty. But to the extent that it took any time at
7 all, it would be the same as asking for a book that is not
8 on the shelf or asking for an inter-library loan, the kind
9 of customary things that library patrons do when they ask
10 for a book or a resource in a library.

11 QUESTION: Is -- is there anything in the
12 statute that would prohibit a library from doing the
13 following? Any adult who wants to watch the thing without
14 the screen, come up and ask, do you want to do it, and you
15 -- we can tell you, don't watch these obscene child
16 pornography, et cetera. Then we disconnect it. Does the
17 statute prohibit the library from doing that?

18 MR. OLSON: If I understand your question
19 correctly, I -- I know of nothing in the statute that
20 would prohibit the library from doing that, provided that
21 the -- the person asks and the patron asking is an adult.

22 The First Amendment does not require libraries
23 to sponsor the viewing of pornography. When Government
24 gives financial aid to speech on Government premises, it
25 may make rational choices as to what not to finance.

1 Those -- that -- that doctrine is consistent with this
2 Court's previous decisions. In connection with this
3 particular content, Congress and this Court have found
4 that Government has -- the Government has a compelling
5 interest in preventing the dissemination of obscenity,
6 child pornography, and in the case of minors, material
7 that is harmful to children. Such material has been
8 traditionally excluded from public libraries, and
9 Government has a basic, fundamental right in addition not
10 to associate with or finance pornography.

11 QUESTION: Isn't part of the problem that a lot
12 more is being excluded? I mean, as I understand it, the
13 statute requires that a -- a filter of some sort be used.
14 Filters are not sold -- the blocking devices are not sold
15 or prepared apparently in terms of the concepts that the
16 statute uses. The companies that do prepare them will not
17 even disclose what in fact they are blocking so that it
18 seems that an inevitable price of this is blocking more
19 than -- than the statute requires, and that's even without
20 getting into the question of blocking material for adults
21 as -- as opposed -- that -- that might be unsuitable for
22 children, but certainly aren't for adults.

23 How do you -- how do you get over the problem of
24 the -- sort of the -- the imprecision, the crudity, the
25 overkill of the blocking devices?

1 MR. OLSON: Justice Souter, that is -- that is
2 true that any system is going to involve some over-
3 blocking and under-blocking because it's impossible to
4 know what is going to be coming over the Internet or
5 impossible to make systems that are perfect. But that's
6 consistent with what -- the historical decisions that
7 libraries have made.

8 QUESTION: But there's one thing that is clearly
9 inconsistent I think, and that is when the libraries make
10 -- historically have made these decisions, they've known
11 what they weren't buying or weren't stocking on their
12 shelves, and here they don't --

13 MR. OLSON: Well --

14 QUESTION: -- because they -- the blocking
15 makers regard that as proprietary information.

16 MR. OLSON: It's -- there's several answers to
17 that it seems to me. In the first place, libraries have
18 known that they have not stocked pornography, and it's not
19 because of space, popularity, or expense. They have
20 chosen traditionally not to stock that type of material.
21 Every time a library decides not to subscribe to a
22 magazine, it is over-blocking in a sense. A magazine may
23 have three pornographic pictures in it or sexually
24 explicit pictures in --

25 QUESTION: But it -- but it does know what the

1 magazine is, and here it does not know what the website
2 is.

3 MR. OLSON: It knows what the magazine has been.
4 It may not know what the magazine is in the future.
5 Furthermore, librarians don't read every book.

6 QUESTION: No, but it -- you know, it knows it's
7 Playboy or whatever the magazine is, and here it doesn't
8 know what the website is that's being excluded.

9 MR. OLSON: Yes, but it can -- it can test this
10 -- what we're saying here with respect to that is over-
11 blocking or under-blocking is a necessary part of the
12 library function of making appropriateness judgments with
13 respect to content generally. That's the type of
14 distinction --

15 QUESTION: Well, I -- I have a problem with --
16 with that. It -- it seems to me a large part of your
17 argument is you want us to think of this just in the same
18 context of the librarian going through a list of books and
19 deciding what books to buy. But the Internet isn't like
20 that. What is it? There's a -- 1.5 million new entries
21 into the system every day? This is a whole new medium
22 It's not like a library.

23 MR. OLSON: Yes. And, Justice Kennedy, it seems
24 to -- it seems to the Government and it seemed -- it
25 seemed to Congress that gross judgments are going to have

1 to be made. These libraries, as the record reflects and
2 the findings of the district court reveal, traditionally
3 or -- or customarily block e-mail, chat, gambling, gaming,
4 dating services, and some of them, as reflected -- I think
5 it's on page 37, 38 of the appendix to the jurisdictional
6 statement -- make -- make judgments with respect to what's
7 appropriate, what's offensive. Those types of judgments
8 are being made.

9 Yes, this is a new medium and it's --

10 QUESTION: Well, but General Olson, there are
11 supposed to be 90,000 books a year published in the United
12 States. Do you think librarians know the contents or even
13 know of the existence of all of those 90,000 books?

14 MR. OLSON: No, that -- Mr. Chief Justice,
15 that's our point. This is a difference in quantity, but
16 it is not a difference generically from what libraries
17 traditionally have done.

18 QUESTION: But when the library makes a book
19 decision, doesn't it make a decision that says, we will
20 not put God's Little Acre on our shelves? It's a yes or
21 no decision with respect to the book. It's quite true
22 there are lots of books out there that the library not --
23 may not know about, but when it makes a decision not to
24 put it on the shelf, it knows what it's deciding not to
25 do, and here it doesn't.

1 MR. OLSON: Well, in a specific situation, a
2 library might know that. A library might decide that it
3 would just stock history books or just stock -- stock
4 novels of a particular period. There's nothing to suggest
5 that libraries don't have the right to make those
6 decisions and customarily make those decisions.

7 QUESTION: Sure, but somebody along the line
8 knows what they've decided to buy within the category and
9 what they haven't decided to buy.

10 MR. OLSON: Well, that's right, but the
11 traditional decisions that libraries have made -- and the
12 appellees do not dispute this -- is that libraries have
13 not chosen to stock the types of material on their shelves
14 that they're now being asked to keep out with respect to
15 the Internet. This is a similar decision with a different
16 medium.

17 QUESTION: No, but that's -- that's true. But I
18 think the thing that -- one of the things that's troubling
19 us is they're -- they're -- they are -- they are forced,
20 by virtue of that decision, not to stock a lot of other
21 material, and they don't even know what it is and there's
22 no way for them to find out.

23 MR. OLSON: But, Justice Souter, they -- they
24 may on their own -- there's a -- there's -- one of the
25 materials that's in the record is someone that made a

1 study of several hundred thousand sites and decided which
2 ones were properly blocked or improperly blocked. Those
3 types of studies may be used to unblock sites, to modify
4 the filtering system. Libraries could get together and
5 create their own filtering system rather than the ones
6 that are --

7 QUESTION: Could the library in -- General
8 Olson, in view of what you answered earlier, you said any
9 patron could say, I want to unblock everything. Could the
10 library say, well, we want our staff to have access to
11 everything? Therefore, we are going to unblock everything
12 for the computers that we use internally. I thought the
13 answer to that question was no, but it seems inconsistent
14 with the answer that you gave. A patron says, I want to
15 see everything. Fine.

16 MR. OLSON: Well, I -- I believe that the answer
17 is that, A, the librarian can, in response to a request
18 from a patron, unblock the filtering mechanism altogether.
19 And secondly, I think it's not entirely -- it's not -- the
20 statute doesn't get into it, but it -- but it seems
21 entirely consistent with what I've just said, and I think
22 consistent with the import of your question is that the
23 library staff can disable the filter in order to make
24 judgments about whether something has been, quote,
25 properly or improperly blocked.

1 QUESTION: Because one of the things that was
2 criticized about this statute was that every terminal,
3 even the ones in the librarian's own office, closed
4 office, has to have this filtering. But your answer is,
5 no, they don't. You -- you make it sound like it's really
6 the library's option. If they want to put everything on,
7 they can.

8 MR. OLSON: I -- I was answering your question
9 with respect to what the staff may review in making the
10 administrative decisions with respect to unblocking or
11 other decisions with respect to the implementation of the
12 statute. The statute speaks in terms of having in place
13 this technological mechanism by which this material can be
14 filtered out or is designed and calculated to do that. It
15 doesn't -- the statute does not require perfection. It
16 doesn't require librarians to act in --

17 QUESTION: General Olson, if I understand the
18 situation correctly, the libraries are wasting a lot of
19 money litigating. They could simply hire somebody to come
20 into the library everyday and say, please unblock
21 everything, and then they could do it.

22 MR. OLSON: With respect to that patron. I
23 mean, the -- the -- if my answer suggested that the
24 library could just switch off the filter on a daily basis,
25 I didn't mean to say anything remotely like that.

1 QUESTION: Oh, okay.

2 MR. OLSON: It -- this -- particular patrons may
3 say, I'm investigating breast cancer. This -- the sites
4 -- some of the sites that I'm looking for I can't find,
5 and they appear to be on block. Can those sites -- or
6 I've heard about these sites -- be unblocked?

7 QUESTION: But do they have to --

8 QUESTION: Or -- or he can say, according to
9 you, what do you care what I'm investigating? I just want
10 the site unblocked. Isn't that right?

11 MR. OLSON: That's -- that's correct. Yes,
12 that's correct.

13 QUESTION: I wonder how -- how effective that --
14 that system is in -- in achieving some of the goals of the
15 statute which -- which is not just that -- that some
16 people using the -- the Net happen to stumble across
17 pornographic stuff but also, passing by, see it, and --
18 and including children.

19 MR. OLSON: That -- that may happen, Justice
20 Scalia. The system is not perfect. It is not going to be
21 perfect. But what it does, it's a reasonable, rational
22 articulation by Congress of an attempt to decide --

23 QUESTION: Why couldn't the -- why couldn't the
24 children be protected by having two screens? One screen
25 for the kids; the other for the adults. One is blocked;

1 the other isn't.

2 MR. OLSON: Well, I think that is -- again, is a
3 practical judgment that may work in some libraries. It
4 might require a great deal more resources from librarians.
5 It might require establishing different screens and
6 mechanisms. Yes, there are ways in which Congress could
7 have done this differently, but this is a rational
8 judgment, consistent with --

9 QUESTION: May I go back to Justice Ginsburg's
10 question with respect to the library staff on the
11 unblocking? I -- I think her original question was, could
12 the library say, we want our staff to have free access on
13 the computers that they use, not that we want them to be
14 able to look behind the block to see what's being kept
15 out. We just want them to have a free computer. Is -- is
16 that a violation of the statute? I had thought it was --

17 MR. OLSON: I think that the -- my answer to
18 your question, if I understand it correctly, is that the
19 computers in the library, if the library uses the -- the
20 Federal funds with either respect to the discounts or the
21 subsidies, direct subsidies, all the computers in that
22 library must be equipped with the technology protection
23 measure with respect to each of those computers.

24 QUESTION: And that would include the staff
25 computers.

1 MR. OLSON: Yes. But that does not preclude the
2 staff from determining, in connection with specific
3 requests --

4 QUESTION: Yes, but that's not the question.
5 The question is can the library say, this is ridiculous
6 blocking this stuff for our staff. We're not going to
7 block them. The staff computers are either going to have
8 no blocks or every morning we will press the button that
9 unblocks the staff computers.

10 MR. OLSON: Well --

11 QUESTION: That would violate the statute,
12 wouldn't it?

13 MR. OLSON: Well, one could -- you're in an
14 area, it seems to me, that -- where there might be an as-
15 applied challenge. We're talking about a facial challenge
16 to the constitutionality of the statute.

17 QUESTION: And we want to know the extent of the
18 statutory prohibition.

19 MR. OLSON: I -- I understand that. I -- and
20 the -- your -- the import of your question suggests that
21 in this situation a librarian might exercise this
22 discretion with respect to a filter. I don't think in the
23 first place --

24 QUESTION: All I want to know is whether they
25 can do it without violating the statute.

1 MR. OLSON: My answer to your question is that
2 to the extent that librarians are disabling the filter for
3 the performance of their administrative function --

4 QUESTION: That's not my question. The library
5 simply says, we want our staff to have free computers.

6 MR. OLSON: I don't think so, Justice Souter.

7 QUESTION: That would violate it.

8 MR. OLSON: That's right. But remember, this is
9 in the context of -- of material that's been traditionally
10 excluded by libraries, that libraries are free to put on
11 their shelves in the form of books anytime they want.

12 It -- the -- the position of the district court
13 and the position of the appellees is that the libraries,
14 by doing this, violate the First Amendment right of their
15 patrons. I don't think that would be an issue in that
16 context, and we're suggesting that the patrons have a
17 right to Internet access anywhere they want outside the
18 federally subsidized library.

19 And the library has several choices it may make
20 here. The library might not have Internet. Maybe it's
21 not appropriate for that particular library. The library
22 may have Internet with the filtering and accept Federal
23 money with respect to putting in the computers. Or the
24 library --

25 QUESTION: Could the library do this? Could the

1 library say, okay, we're -- we're certainly going to
2 comply with the statute for the library, but we are going
3 to -- we are going to establish -- or the city says, we
4 will establish a separate office? It's called the -- the
5 computer viewing office. It has a separate budget from
6 the library. It's in a separate building. It has a
7 separate staff. Administratively it's different. And
8 with respect to the computers in -- in that establishment,
9 we're not going to ask for any Federal subsidies and the
10 computers are going to be wide open. Any reason they
11 couldn't do it?

12 MR. OLSON: I -- I think they could. They could
13 either have a separate branch where separate Federal funds
14 are not being obtained, or you're talking about a separate
15 administrative ability --

16 QUESTION: Yes.

17 MR. OLSON: -- facility. I don't -- I don't
18 believe that the statute would prohibit that set of
19 operations.

20 QUESTION: Yes, but it would apply if they had,
21 say, ten computers and nine of them were financed by the
22 Federal subsidy and one of them was independently
23 financed. That one would be covered by the statute.

24 MR. OLSON: Yes, it would, Justice Stevens,
25 although --

1 QUESTION: And if you rely on the -- on the
2 Spending Clause to justify this restriction, how do you --
3 how does that justification apply to that tenth computer?

4 MR. OLSON: Because it's a reasonable condition
5 to the operation of the funds. In the first place,
6 Justice Stevens, in -- the Internet is going to come
7 through one opening, and the -- the various different
8 computers will be plugged up to that one opening so that
9 the -- the technological answer in part to your question
10 is it's -- the -- the library would have to decide --

11 QUESTION: Well, you -- you could have it on a
12 separate phone line, it seems to me.

13 MR. OLSON: Yes, the library could do that sort
14 of thing, but it would --

15 QUESTION: The statute would still apply.

16 MR. OLSON: Yes, it would. Yes, it would.

17 QUESTION: And how do you justify that under the
18 Spending Clause?

19 MR. OLSON: We believe that it's a reasonable
20 condition that Congress reasonably -- the patrons may not
21 be able to distinguish where the --

22 QUESTION: Well, wouldn't it be equally
23 unreasonable if we said it applies to separate facilities
24 too? I don't know why -- I don't understand the
25 distinction between a branch library that has one computer

1 in it and a big central library with 10 computers, one of
2 which is separately financed.

3 MR. OLSON: Well, again, as we said in our
4 briefs, that to the extent that that is an issue, it
5 should be made -- that point should be made in a -- in an
6 as-applied challenge to the statute, as opposed to a
7 challenge on the face. We don't think it's
8 technologically going to be a problem and we do think that
9 Congress can reasonably have assumed we're using Federal
10 money to finance Internet in this library. Patrons are
11 going to be exposed. If you're going to take the money,
12 we would like patrons not to be exposed in this manner to
13 that material, and the Congress could well have decided
14 that it -- the taxpayers don't want to be associated with
15 a subsidy of that types of material -- that type of
16 material which has traditionally been excluded from the
17 libraries in any event.

18 QUESTION: Well, you're saying not only that
19 they -- that they don't want to be associated with the
20 subsidizing of it, but they -- you're saying they don't
21 want to subsidize an operation which includes some non-
22 subsidized material of this sort. Don't you have to say
23 that in --

24 MR. OLSON: I -- well, I think that that would
25 be a reasonable choice for Congress to make.

1 QUESTION: You say they've made it.

2 MR. OLSON: Well, with respect to all of the
3 computers in the library in -- in that narrow context,
4 yes, but I do think that that's the -- we're getting down
5 to the refinements of particular applications and those
6 types of challenges have not yet been made.

7 QUESTION: General Olson, the words of the
8 statute itself, though -- there is some ambiguity. It's
9 -- with regard to disabling the filter, the words are for
10 bona fide research or other lawful use. And am I right in
11 thinking that your prior answer meant other lawful use
12 means anything? So, in effect, for an adult anything but
13 obscenity would be a lawful use.

14 MR. OLSON: I believe that that's -- that's --
15 well, child pornography would also be excluded. Both
16 obscenity and child pornography --

17 QUESTION: Yes.

18 MR. OLSON: -- there are Federal criminal
19 statutes with respect to both of those. And -- and again,
20 this is a reasonable effort by the library -- by the
21 Congress to make rational decisions with respect to
22 allowing for some escape for people who are doing research
23 or for other appropriate purposes.

24 QUESTION: Yes, but -- but how would that
25 authorize the unblocking entirely which would let in not

1 just the material that's useful for research, but also
2 obscenity, also child pornography? How is that allowing a
3 -- a lawful use? That's allowing an unlawful use, isn't
4 it?

5 MR. OLSON: Well, I -- I agree with that, but --

6 QUESTION: So if you agree with it, it means
7 that -- that --

8 MR. OLSON: If -- if -- excuse me, Justice
9 Scalia.

10 QUESTION: No. I think if you agree with it, it
11 -- it means that you can't unblock a whole channel. You
12 can say, I'll let you have this material, but I can't
13 unblock this channel.

14 MR. OLSON: The -- the --

15 QUESTION: God knows what else there is out
16 there.

17 MR. OLSON: The statute put it in terms of bona
18 fide research or other lawful purposes. That -- there's
19 bound to be some interpretive -- given the joints there.
20 And again, to the extent that that would trigger a funding
21 decision with respect to the enforcement authority or
22 something, that's appropriately raised in an as-applied
23 challenge.

24 I think it's important to stress the converse of
25 what the appellees are asking for here. They're asking

1 this Court to make a judgment that the First Amendment
2 prohibits them from exercising the discretion to make that
3 kind of choice with respect to the Internet that they've
4 always made or traditionally made with respect to the
5 books on their shelf.

6 The consequence of that, it seems to me, would
7 be strict scrutiny applicable to librarians' judgments
8 with respect to not just the Internet, but microfilm,
9 television, other medium that might -- other media that
10 might come into the library, and that librarians, instead
11 of spending money on books, are going to be spending money
12 on lawyers defending cases brought by authors saying, you
13 -- you violated my First Amendment right not to have
14 strict scrutiny, and that instead of librarians making
15 these --

16 QUESTION: But, General Olson, Justice White
17 wrote a number of opinions in the First Amendment area
18 where he started out saying, this is a case about
19 billboards, or this is a case about something else. I
20 would think this is a case about the Internet. It's not a
21 case about books.

22 MR. OLSON: Well, it might be if the decision
23 was written that way, Justice Stevens, but if -- if the
24 appellees are right, the types of decisions that
25 librarians have been making, appropriateness is -- is the

1 word, quality, appropriateness, and appropriate decisions
2 -- it's -- it's in the record. Those types of decisions
3 the librarians are saying -- asking this Court to say are
4 subject to strict scrutiny and violate the Constitution.
5 This Court would have to make a First Amendment
6 distinction between the selection of a book and the
7 selection of another source of information.

8 QUESTION: But isn't there a practical
9 distinction that's got to be taken into consideration in
10 your argument? And that is, not every library can have
11 every book. Something has got to be excluded. So we
12 start with the assumption that the librarians have got to
13 make these judgments. We don't start with that assumption
14 in the case of the Internet at all.

15 And the question in the case of the Internet is
16 the different one. Can you require them to exclude
17 certain materials that it would be illegal for them to
18 have as -- as an abstract matter? Sure, I suppose.

19 But the -- the tough question is, can you
20 require them necessarily to exclude a great deal more
21 about which they make no decision whatsoever and which
22 would be perfectly legal for them to have?

23 MR. OLSON: Justice Scalia -- I mean, Justice
24 Souter --

25 QUESTION: You do me a great honor. But I --

1 (Laughter.)

2 QUESTION: I am Souter.

3 MR. OLSON: I think I was expecting the next
4 questi on.

5 (Laughter.)

6 QUESTION: I wasn't even leaning forward.

7 MR. OLSON: Nothing is being --

8 (Laughter.)

9 MR. OLSON: Nothing is being required of the
10 library. The library, if it chooses --

11 QUESTION: If -- if they want them. But you're
12 -- but you're right, sure.

13 MR. OLSON: If it wants to.

14 But the case comes to this Court in the posture
15 that the district court has held and the appellees are
16 arguing that for the library voluntarily to make that
17 choice on their own, irrespective of any Federal
18 Government subsidy or anything, would violate the First
19 Amendment rights of their patrons.

20 QUESTION: General Olson, what does the record
21 disclose is the percentage of lawful material that is
22 excluded under these software programs as opposed to
23 material that is unlawful for the library to --

24 MR. OLSON: Well, the -- the testimony was
25 varied, Justice O'Connor. One of the -- one of the

1 findings of the district court was that tens of thousands
2 of pages of material may be erroneously blocked. Now, the
3 problem with that is that different filters might block
4 different things. Sites may be unblocked. The filter may
5 be set aside. But even if it's tens of thousands of the
6 -- of the 2 billion pages of material that is on the
7 Internet, we're talking about one two-hundredths of 1
8 percent, even if it's 100,000, of materials would be
9 blocked.

10 If it -- if it please the Court, I would like to
11 reserve the remainder of my time.

12 QUESTION: Very well, General Olson.

13 Mr. Smith, we'll hear from you.

14 ORAL ARGUMENT OF PAUL M SMITH

15 ON BEHALF OF THE RESPONDENTS .

16 MR. SMITH: Mr. Chief Justice, and may it please
17 the Court:

18 The Children's Internet Protection Act is
19 unconstitutional for two separate reasons.

20 First, the act does require libraries accepting
21 Federal funds to engage in conduct that is itself at least
22 presumptively unconstitutional. Strict scrutiny does
23 apply, we say, because the --

24 QUESTION: What -- what cases are you relying on
25 to say that the libraries would be required to engage in

1 -- in conduct that is presumptively unconstitutional?

2 MR. SMITH: This Court's whole series of cases
3 involving the public forum doctrine, Your Honor, which I
4 noticed was -- was not really mentioned by my colleague,
5 Mr. Olson.

6 The Internet, when it comes into the library, is
7 -- all of the information available on the Internet, as
8 diverse as human thought -- immediately available to the
9 patron. It is the most pure form of public forum that you
10 can possibly imagine.

11 QUESTION: Yes, but it begs the question. The
12 -- the point is that the Government is saying, if you want
13 to get our money, you don't let it all come in. So it is
14 not -- it is not a public forum once -- once the -- once
15 the blocking is applied.

16 MR. SMITH: Well, Your Honor, the whole question
17 about whether the library could do it this way depends on
18 how you view the public forum doctrine. And the -- what
19 the Court has said again and again is in deciding whether
20 something is or is not a public forum, you look at whether
21 the access is selective or general. That -- that's what
22 the terminology was in the Court's case --

23 QUESTION: You're not relying, at any rate, on
24 cases dealing with libraries as such.

25 MR. SMITH: No. No, Your Honor.

1 QUESTION: You're relying on a more general --

2 MR. SMITH: Applying the Court's general
3 holdings in -- in a whole series of cases to try to decide
4 whether this is a public forum, a designated public forum,
5 created --

6 QUESTION: You conclude that -- you conclude
7 that a library is a designated public forum

8 MR. SMITH: The Internet terminals in the
9 library are a designated public forum, Your Honor.

10 QUESTION: Not the whole library?

11 MR. SMITH: Certainly not. We do not say that
12 strict scrutiny applies to the decisions that the library
13 makes about which book to buy because when the library
14 buys books, it chooses books one by one. It engages in
15 selective access as opposed to general access.

16 With the Internet, on the other hand, the entire
17 world of -- of content that is on the Internet is there
18 available to the patrons. It has not been selected --

19 QUESTION: Not --

20 MR. SMITH: -- by the library in any way.

21 QUESTION: Not necessarily. I mean, a library
22 says -- and some have -- some did this before -- before
23 the Federal statute was in effect. A library says,
24 there's this whole wide world of the Internet out there,
25 but we don't want all of it. Some of it is garbage, and

1 therefore we're going to block the obscenity. We're going
2 to block the child pornography, and we're going to block
3 the -- the pornography that's harmful to children. Now,
4 once they've made that decision, hey, presto, it is not a
5 public forum anymore.

6 MR. SMITH: That -- that -- with respect,
7 Justice Scalia, the way the public forum doctrine works in
8 our judgment -- and we're basing this as -- as close as we
9 can on this Court's cases -- is that the one thing that
10 Government can't do is allow all content under the sun,
11 not even knowing what content is there, and then exclude,
12 cull out one area of disfavored content. If -- if you say
13 that that exclusion, that -- that pointing at that one
14 particular area of content and excluding it, is the same
15 as not making it a public forum, then -- then the public
16 forum doctrine no longer has any meaning.

17 QUESTION: Is it also a public forum if it's a
18 public school library?

19 MR. SMITH: The -- the case of a public school
20 library is a -- is a more difficult case.

21 QUESTION: I just want a yes or no answer. On
22 your theory is it or is it not a public forum if it's in a
23 public school library?

24 MR. SMITH: I think, Your Honor, I can't give
25 you a yes or no answer.

1 QUESTION: Well, I need a yes or no. You either
2 do think it is or you don't think it is.

3 MR. SMITH: I would have to know how the
4 policies are of the school --

5 QUESTION: No, no. Exactly everything is the
6 same. I just want to know on your theory of the public
7 forum doctrine is the 10th grade library or in an
8 elementary school or a high school -- they have -- they do
9 exactly what the libraries do here. Is it a public forum?

10 MR. SMITH: Then I -- then I do say it's a
11 public forum, Your Honor. If they allow students --

12 QUESTION: All right. So on your theory of the
13 case --

14 MR. SMITH: Yes.

15 QUESTION: -- then if it is a public forum, the
16 elementary school, Addison Hill Elementary School, has to
17 let the worst possible pornography go over the computers
18 that come into the public school library.

19 MR. SMITH: Certainly not, Your Honor.

20 QUESTION: Because?

21 MR. SMITH: Certainly not.

22 QUESTION: That's what I want my answer to --

23 MR. SMITH: First of all, all that holding that
24 it's a public forum does is -- is give you the level of
25 scrutiny that applies to the rule. Then you have to look

1 at the rule, apply the usual standards of narrow
2 tailoring, less restrictive alternatives, compelling
3 interests --

4 QUESTION: No. We make all those same arguments
5 that you've just made and say, look, there would be all
6 these other alternatives and all -- all the -- I'm -- I'm
7 just -- I'm not putting a -- I'm putting a difficult --
8 what to me is -- is a difficult problem with your
9 doctrine. And I -- I want to see how it works here.

10 MR. SMITH: But I think the Constitution
11 analysis may well come out differently with respect to
12 young children, Your Honor.

13 QUESTION: Well, but I -- I need to know fairly
14 specifically because I don't want if there -- if -- to me
15 frankly if -- if your theory of it means that every public
16 school has to have a computer attachment which bring this
17 material into the school, I suppose a lot of schools
18 wouldn't have computers at all in their libraries. And --
19 and that is worrying me. So I'd appreciate --

20 MR. SMITH: Well --

21 QUESTION: -- a fairly definite answer on this.

22 MR. SMITH: Your Honor, I think that -- that,
23 first of all, classrooms are different from libraries even
24 in the school context because a school classroom --
25 library -- a computer is obviously not used for

1 independent research. If the -- in the library situation
2 in the school, you would have different age groups. You'd
3 have different considerations. You'd have different
4 policies. There's a lot of different things that could be
5 distinguished from this case.

6 And I think it -- it's important --

7 QUESTION: So your answer is that in your
8 opinion now you think it probably would be constitutional
9 as applied to school libraries but not as to public
10 libraries?

11 MR. SMITH: It -- it may well be, Your Honor,
12 depending on the age group, depending on the
13 circumstances, depending on the way the -- the library is
14 used by the students.

15 QUESTION: Mr. Smith, why shouldn't we be
16 conscious of the holding of this Court in *Denver Area v.*
17 *the FCC* where the Court concluded it might be premature to
18 apply forum analysis due to changes taking place in the
19 law, the technology, and the industrial structure related
20 to telecommunications? I mean, this too seems to me an
21 area for caution, is it not, in importing wholesale public
22 forum analysis in the library?

23 MR. SMITH: Well, Your Honor --

24 QUESTION: I would think *Denver Area* would have
25 some bearing on that.

1 MR. SMITH: Denver Area has a substantial
2 bearing and I think it's one of the strongest cases
3 supporting our position. It is true that the Court did
4 not go -- it -- the -- the plurality opinion in -- in the
5 case did not go so far as to say we're going to apply a
6 public forum analysis and strict scrutiny, but -- but
7 Justice Breyer's opinion went much -- very close to that
8 and said we're going to apply very heightened scrutiny.
9 We're going to look very carefully at this.

10 And this was a law that is in many ways closely
11 analogous to what's going on here. It was a law that
12 said, we have a public access station. Anybody from the
13 outside world can come in and put whatever programming
14 they want on that station, but we're going to exclude
15 indecency, just that one area of content, because we don't
16 think that belongs in the home.

17 QUESTION: But the -- the other part -- assuming
18 it's some kind of stricter than just reasonable, however
19 that is brought about, the -- I'm very much concerned also
20 about something Justice Kennedy raised. If all that this
21 statute means is that a person who wants access to the
22 10,000 deep -- whatever it's called -- what's the -- some
23 special word. It's -- it's deeply like Star Wars almost.
24 It's some kind of like an extra galaxy that's very hard to
25 get to.

1 All right. These 10,000 pages which now were
2 blocked -- what he has to do -- that person -- is he goes
3 to the desk and says, please unblock it. I want to use --
4 I want to do research and this is blocking things that I
5 want. I'm not going to look at material that is
6 absolutely unlawful, such as this very obscene material,
7 child pornography. And then the library is free -- will
8 say, fine.

9 MR. SMITH: Well, Your Honor --

10 QUESTION: Now, if all that's necessary, you
11 have to go to the desk, what is the great burden on
12 speech? After all, I grew up in a world where they used
13 to keep certain materials in a special place in the
14 library and you had to go and ask for them. So?

15 MR. SMITH: Well, Your Honor, the -- the way the
16 disabling provision is set up, first of all, is it's
17 designed to give the library some job to determine whether
18 your purpose is bona fide or not. It says bona fide
19 research or other lawful purpose. So the first problem is
20 you go to the librarian's supervisor who has the authority
21 under the statute to turn off the filter and you have to
22 explain to them what your purpose is to look at the --

23 QUESTION: General Olson said no, you don't have
24 to explain.

25 MR. SMITH: Well, the -- the statute on the face

1 of it says the library is required to inquire into your
2 purpose and make a decision about whether it is a bona
3 fide research purpose or other lawful purpose for looking
4 at the material which has been filtered out by the -- by
5 the filter.

6 So you have a discretion problem of severe
7 proportions, I submit. Plus, you have a stigma problem,
8 very much like the one --

9 QUESTION: But not if you read other lawful
10 purpose to mean everything except the specific categories,
11 child pornography, obscenity.

12 MR. SMITH: They will presumably have to have
13 some information about what sites you're interested in
14 looking at in order to determine whether that would be
15 lawful or not. So they will then have to inquire into,
16 well, what's -- what is it you need to get that's being
17 blocked? Why are you looking at it? Is it lawful?

18 QUESTION: It doesn't say that in the statute.
19 All it says in the statute is that the administrator may
20 disable a technology protection to enable access for a
21 lawful purpose. So why couldn't you just sign a piece of
22 paper saying I do not want to use this for an unlawful
23 purpose? Period. End of the matter. What in the statute
24 prevents the library from accepting that?

25 MR. SMITH: Well, clearly the library is

1 responsible for determining whether or not you fall within
2 the exception. Even if -- even if they're empowered under
3 the statute -- and I think this is unclear -- just to
4 accept your representation without any further
5 explanation, you still have the problem that you're going
6 up to the -- to the librarian and saying please turn off
7 the smut filter. I need to get access to some material.
8 So that -- that you're being required to do that. There's
9 a stigma problem very much like --

10 QUESTION: Is there any other problem?

11 MR. SMITH: There's a third problem, which is
12 you have -- a lot of times this will only come up in the
13 middle of your research session. You won't know that
14 you're going to be blocked getting access to the
15 Republican National Committee site or to the site for some
16 orphanage that is trying to raise money. There's -- since
17 the -- many of the blocks are so irrational, you can't
18 anticipate it. So you'll have to stop your session and go
19 talk to a librarian about getting this thing turned off or
20 getting this site unblocked. Somebody will then have to
21 look at the site --

22 QUESTION: But in a library, when you're looking
23 for a book, it might not be there, and you might have to
24 go to the librarian and order it or borrow it from another
25 institution. I don't think that's atypical of what

1 happens in research.

2 MR. SMITH: But certainly, Your Honor. But --
3 but our submission is that you shouldn't just willy-nilly
4 compare the Internet in the public library to books and
5 how they're handled by libraries because the Internet is a
6 public forum. It is all of this content that has not been
7 prescreened or preselected by the Government which they
8 are making available to you --

9 QUESTION: But in this context, perhaps we
10 should not import public forum analysis. It creates lots
11 of problems --

12 MR. SMITH: Well, perhaps --

13 QUESTION: -- for instance, in public schools,
14 as has already been discussed. So it's -- and there is no
15 case from this Court saying that having an Internet in a
16 library creates a public forum. That's what we're here to
17 decide I think.

18 MR. SMITH: Indeed, Your Honor. And -- and the
19 Court has repeatedly cautioned that when you're making a
20 decision about whether something is a public forum, you
21 have to look at the particular medium of communication
22 that is at issue, not the broader context.

23 So, for example, when the Court in *Cornelius* was
24 looking at the Combined Federal Campaign and trying to
25 decide whether that was a public forum, the Government

1 said, well, it's the Federal work force. The Federal work
2 force is not a public forum. But the Court said, no, we
3 have to look and see what kinds of people have been given
4 access to the Combined Federal Campaign and allowed to
5 solicit funding from the Federal -- the Federal workers
6 and has it been done on a selective basis or a general
7 basis. Because it was selective, the Court ultimately
8 determined that it's not a public forum.

9 It may well be that --

10 QUESTION: Well, if you say that the world we
11 look at is the people using these programs under the
12 Federal law requirements in libraries, then it isn't a
13 public forum.

14 MR. SMITH: Well, Your Honor, if you allow the
15 Government to define its forum as all content under sun --
16 under the sun ever invented by mankind except the piece
17 that they don't like, then I submit that -- that will be
18 the end of the public forum doctrine because there will
19 never be any situation in which the Government will be
20 constrained in any way to censor out a particular piece of
21 content that it -- from the public forum.

22 QUESTION: Designated public forum doctrine.

23 MR. SMITH: Yes, Your Honor.

24 QUESTION: Traditional public forums will always
25 be public forums.

1 MR. SMITH: Right, but I'm -- we're here in the
2 context of designated public forums. And if you allow
3 content --

4 QUESTION: I've always had trouble with that
5 doctrine anyway.

6 MR. SMITH: If -- if you allow the content --
7 (Laughter.)

8 MR. SMITH: -- to be defined as everything but,
9 that's okay. Then there -- there is no doctrine.

10 QUESTION: So -- so a -- a library that chooses
11 not to get the Internet at all is not a public forum
12 It's only when it gets Internet terminals that it becomes
13 a public forum?

14 MR. SMITH: Well, and it -- and then it has to
15 make another decision. Is it going to just turn the
16 Internet on or is it going to do what it could do, which
17 is to say we are going to treat websites like we treat
18 books. We're going to look at them one by one and decide
19 whether they should be available, whether they meet our
20 collection development policies.

21 QUESTION: But I thought -- you said there are
22 two reasons why you should prevail, and we're still on the
23 first.

24 MR. SMITH: I appreciate that, Your Honor.
25 (Laughter.)

1 QUESTION: But -- but you -- you said at the --
2 at the outset that it would be -- as I understood it, that
3 it would be unconstitutional for you to do this on your
4 own initiative. And now you're saying that you could?

5 MR. SMITH: No, no, no. It would be -- it would
6 trigger strict scrutiny for a library to do exactly what
7 the statute requires. That's our submission, which is to
8 say if they allow the whole Internet in except this one
9 piece of content under the public forum doctrine -- or
10 perhaps the Court wants to apply the kind of public forum
11 doctrine light of the whole question of whether --

12 QUESTION: I just want to be -- I just want to
13 be clear. Suppose this is a general public library.

14 MR. SMITH: Yes, sir.

15 QUESTION: Could it voluntarily do exactly what
16 the statute tells it it must do?

17 MR. SMITH: Our position is that that would
18 trigger strict scrutiny that they would then have to
19 satisfy and --

20 QUESTION: Well, and how would the strict
21 scrutiny come out?

22 MR. SMITH: Excuse me? Well, in -- in most, if
23 not all, cases it would come out against it. It would be
24 unconstitutional, clearly, because they're blocking a vast
25 amount of speech that is not even sexually explicit. And

1 so we have a narrow tailoring problem And there are much
2 more -- much more effective, less restrictive alternatives
3 which we had all this evidence at trial about.

4 QUESTION: And that -- and that is -- and that
5 is because legally you would be a state entity denying
6 access to a designated forum to a -- a listener who is a
7 member of the public.

8 MR. SMITH: Exactly, Your Honor.

9 QUESTION: Okay.

10 QUESTION: What was your --

11 QUESTION: What if the -- what if the facts were
12 changed in this way? The library -- I'm sorry. Did I --
13 no. Please go ahead.

14 QUESTION: No. I think we're still pursuing the
15 first --

16 MR. SMITH: Yes. I'm trying to make sure I get
17 the --

18 QUESTION: Sooner or later, I want you to get to
19 the second --

20 MR. SMITH: I appreciate it, Your Honor.

21 (Laughter.)

22 QUESTION: Okay. One last question before you
23 get to the second one.

24 What if the library said, we're not letting in
25 the whole Internet? We think there are some sites that it

1 would be valuable for our research patrons to have. We're
2 going to -- we're simply going to select 100 websites or
3 1,000 out of the millions that are there and we're going
4 to let them in. Would that be a violation of designated
5 public forum?

6 MR. SMITH: Clearly not, Your Honor.

7 QUESTION: Okay.

8 MR. SMITH: There's no -- there's no argument
9 that we -- we'd make that that would be unconstitutional.
10 They would then be letting them in as they would books,
11 using their collection development policies, deciding
12 what's valuable, and that would not be a violation.

13 QUESTION: But -- but how did -- I mean, it's
14 fine to say it's no violation of the Constitution. But
15 you're also saying yet it remains a designated public
16 forum.

17 MR. SMITH: No, Your Honor.

18 QUESTION: Oh, it -- you agree it would not be a
19 designated public forum.

20 MR. SMITH: Absolutely not. If they're not
21 letting everybody in, as -- as general access. They're
22 exercising selective access.

23 QUESTION: But don't -- don't many libraries
24 already exclude, for example, chat rooms?

25 MR. SMITH: It's not a question of exclusion.

1 It's a question of affirmative inclusion through
2 selection --

3 QUESTION: No, no. I mean, but -- but my
4 understanding was that some libraries that -- that have
5 access to the Web do not allow access to chat rooms. They
6 don't think that that's a proper library -- library
7 function or whatever. At least as to those libraries, I
8 assume you would acknowledge that there's no designated
9 public forum

10 MR. SMITH: No, Your Honor. We don't
11 acknowledge that excluding --

12 QUESTION: I didn't think you would.

13 MR. SMITH: -- excluding an area of content can
14 take it out of the forum doctrine.

15 Let me get to my second point, though, which --
16 which is --

17 QUESTION: When you start on your second point,
18 let me just ask you to comment on one thing because I want
19 to be -- I want the Solicitor General also to comment on
20 the same thing. Do you think, given the state of the
21 record now, if we agreed with the Government's submission
22 that the district court's rationale was wrong, would it be
23 proper for us to decide to rule on the second theory?

24 MR. SMITH: Oh, clearly, Your Honor. I don't
25 think there are any -- any facts that it would be

1 necessary for the Court that haven't been brought out in
2 that -- that trial and that lengthy opinion.

3 Now, our position with respect to point two
4 is --

5 QUESTION: What is point two?

6 MR. SMITH: It is that libraries --

7 (Laughter.)

8 MR. SMITH: -- even -- even if the Internet is
9 precisely analogous to books in the library context, that
10 something about the library context lets librarians in the
11 exercise of professional judgment that they ordinarily
12 exercise, even in deciding to edit the Internet, that the
13 Federal Government under the First Amendment has no
14 business using the spending power to try to distort that
15 medium and push librarians away from their professional
16 judgment toward the most restrictive possible policy on
17 information flow into the library setting.

18 In other words, our second point is that a
19 library is very much like a public university which this
20 Court has several times indicated is a -- is a special
21 sphere set off for the governmental promotion of private
22 and free expression, that in that kind of a setting, the
23 Federal Government should not use the spending power to
24 impose a one-size-fits-all policy about --

25 QUESTION: Is this a federalism concept and you

1 -- and you would cite our cases like Printz and so forth?

2 MR. SMITH: No, Your Honor. I'm citing only
3 First Amendment cases. I believe it is a First Amendment
4 concept that there are certain kinds of relationships or
5 certain kinds of institutions in which the amount of
6 speech that is being allowed is decided by the people who
7 are designated as professionals to run that institution.
8 For example --

9 QUESTION: So -- so your argument would be the
10 same if the -- if the State of California were doing it.
11 It's not just the Federal Government.

12 MR. SMITH: Yes, Your Honor.

13 If it was done by statute. But -- but, for
14 example, professors should set the curriculum at a public
15 university. I don't think that the Congress can say to
16 the universities of this country, we've given you money,
17 you therefore have to cut your departments. If you -- if
18 you take the money --

19 QUESTION: How about -- can the board of regents
20 set the curriculum?

21 MR. SMITH: I think it -- when you get to the
22 people who run the -- run the university as their job,
23 that's fine, yes, Your Honor.

24 QUESTION: I mean, that's pretty far-reaching.
25 It's very interesting. But the -- the question -- I'm --

1 I don't suppose you object to the Federal Government
2 saying, even if it's money to be spent on books, you
3 cannot spend this money for material that it is unlawful
4 for the student to see, such as child pornography. Are
5 you objecting to that? Suppose the Federal Government
6 were to say, no child pornography.

7 MR. SMITH: Certainly not, Your Honor.

8 QUESTION: Certainly not, okay. So then what
9 you're objecting to is we let them cut that stuff out, but
10 you're objecting to the requirement of a particular
11 technology where the technology may exclude some other
12 things.

13 MR. SMITH: Well --

14 QUESTION: That's your objection.

15 MR. SMITH: -- first of all, let me address the
16 book question. What this law is analogous to is, as
17 applied to the book context, a law where the Government
18 says we're going to help you buy books. Here's 10 percent
19 of your book budget a year, and it doesn't just say you
20 can't spend our money on books of a particular content.
21 It says you can't have in your library books of a
22 particular content. It starts to try to invade the
23 professional judgments of librarians about what books
24 would need to be to their patrons.

25 And we have here a situation where 93 percent of

1 the libraries have made a more liberal, more open policy
2 decision than the one that the Congress favors, and
3 they're now using the spending power to push them in --

4 QUESTION: Well, what if -- what if the Federal
5 Government said, we're going to give you 10 percent of
6 your annual appropriation and you can't use that money to
7 acquire a particular class of books?

8 MR. SMITH: I think as long as it was viewpoint
9 neutral, Your Honor, and otherwise a legitimate line, that
10 would be not a problem. But -- but here --

11 QUESTION: Well, supposing you -- you can't use
12 it to acquire soft pornography.

13 MR. SMITH: To the extent one could define that
14 concept, I think that generally the Government -- the
15 Court has said the Government can decide what -- what the
16 money that it uses to subsidize the -- the local
17 government with -- what it will be spent on, but it can't,
18 I think, then expand the subsidy into attempting to
19 regulate things like the other book decisions that the
20 library might make.

21 QUESTION: Well, even in areas where it's
22 already against the law to have materials that are obscene
23 or harmful to minors? You think the Government has no
24 authority to prohibit its aid to be used for that?

25 MR. SMITH: Of course not, Your Honor.

1 Certainly the Government can say that you shouldn't make
2 available materials to people that -- that -- for whom
3 they have no constitutional right to see them, obscenity
4 for adults --

5 QUESTION: Right. Now, should we make any
6 allowance here? Is there any leeway, if you will, simply
7 because the technology is not yet available to filter
8 perfectly where it's evident that there isn't a huge
9 percentage amount of things that are being excluded, but
10 the software isn't perfect?

11 MR. SMITH: Well --

12 QUESTION: Should -- should our doctrine take
13 that into account, do you suppose?

14 MR. SMITH: If -- if I might, just in answer to
15 that question, Your Honor, take a moment to describe what
16 -- what it really is that the record shows about how these
17 filters operate because I -- I think that that's really
18 very helpful.

19 What these -- these filters are, are lists of --
20 of sites that are banned for access in the -- in the
21 setting where they're -- where they're in effect, and the
22 -- the findings are that there's about 100,000 sexually
23 explicit sites on the Internet at the time of trial. And
24 so we can assume that some high percentage of that 100,000
25 are on the list, 90,000 perhaps, because there were some

1 that they missed constantly.

2 Now, in addition, the court found that the --
3 the very same list blocks at least tens of thousands of
4 additional sites that are not sexually explicit at all or,
5 if they have sexually explicit materials, are educational.
6 They -- they teach people about gay sexuality or they
7 teach them about safe sex techniques. And so we have --
8 on these lists is a proportion, a huge proportion, perhaps
9 25, perhaps 50 percent of the sites that are blocked that
10 are not illegal even for children.

11 Now, of the 90,000 or so that are blocked that
12 are sexually explicit, there isn't a shred of evidence in
13 this trial record that the Government attempted to put in
14 about whether any of those are obscene. There was no
15 showing of any kind that the filters ever actually find
16 speech that is illegal for adults. And there's good
17 reason to think that there isn't a lot of it on there
18 because clearly illegal material is distributed in a
19 different way than the -- than the way that would allow
20 the filtering --

21 QUESTION: Mr. Smith, you used -- you said
22 perhaps 50 percent. This -- and General Olson said tens
23 of thousands of pages, but consider the --

24 MR. SMITH: Well --

25 QUESTION: -- in relation to the Internet.

1 In this record, at least in this opinion, this
2 was the finding made more often than any other by that
3 three-judge court, but every time they used the word
4 substantial -- and they don't give us any 50 percent.
5 Substantial over-blocking is the word that's come up over
6 and over again. I think you must have said it in at least
7 a dozen findings.

8 MR. SMITH: If I could -- if I could address
9 that, Your Honor. The -- the court did say at least tens
10 of thousands and they used the word pages at that point.
11 But it's quite evident, if you look at the way they were
12 reasoning from the evidence, that they meant sites. And
13 the evidence is that there's about 11 million websites on
14 the Internet, in -- in the accessible part of the Internet
15 and that 100,000 of those are the sexually explicit ones
16 and that the -- there are at least tens of thousands more
17 that are on the list.

18 So it's -- the Government also says in their
19 brief that about one percent of the Internet is over-
20 blocked, which would be about 100,000 sites.

21 So it is a substantial percentage. It is also a
22 substantial amount. And most importantly, it's a very
23 large percentage of what they're blocking is not what they
24 intend to block.

25 QUESTION: Mr. Smith --

1 QUESTION: Oh, you mean the Government --

2 QUESTION: -- can I ask you a question about --
3 about the public forum doctrine? As I understood your
4 earlier answer, the Internet is not a public forum if a
5 library does not take all of it and chooses to exclude
6 chat boxes.

7 MR. SMITH: No, that is not my answer.

8 QUESTION: Oh, that isn't your answer.

9 MR. SMITH: No. Our answer is --

10 QUESTION: It -- it remains a designated public
11 forum even if you don't take all of it, you say. Chat
12 rooms. We don't want them.

13 MR. SMITH: The way for it not to be a public
14 forum is for them to decide affirmatively what they do
15 want to include, not simply to say we'll take the -- the
16 content of 400 million people contributing to the
17 Internet, but we'll carve out one thing. If you allow
18 that, then there is no designated public forum doctrine,
19 and the Court has repeatedly said the distinction between
20 a public forum and not is whether or not there's been
21 selective access, which -- by which it means case by
22 case --

23 QUESTION: Why isn't that selective access? I
24 -- we don't want chat rooms. And it's not a total free-
25 for-all, anybody wants to come in and talk. No, we don't

1 want chat rooms.

2 MR. SMITH: Maybe chat rooms are okay because
3 the question is whether that's a content-based exclusion.
4 But clearly, here you have a content-based exclusion.

5 QUESTION: It isn't content-based. No. Okay.
6 It's not a content-based --

7 MR. SMITH: And it --

8 QUESTION: Now, so if they say no chat rooms, it
9 doesn't become a designated public forum

10 Why does it remain a designated public forum if
11 what they say is, in addition to chat rooms, we don't want
12 that portion of the Internet that runs a risk of bringing
13 into our computers obscenity, child pornography, material
14 harmful to children? We don't -- I don't really know what
15 it is but it's not worth it to us. So we don't want chat
16 rooms and we don't want this -- you say it's over-
17 inclusive. It's not over-inclusive. It's whatever it
18 takes to keep out of what we're bringing into our library
19 those harmful materials. Now, why does that mean I've
20 created a public forum?

21 MR. SMITH: The fact that they may -- may or may
22 not think they have a good reason for doing it can't
23 factor into the analysis, Your Honor. The way the -- the
24 public forum doctrine works is you look at whether or not
25 they -- they have allowed access generally or not, and if

1 they have allowed access generally and then they say, but
2 we don't want this, then that's a violation or at least it
3 triggers strict scrutiny.

4 QUESTION: And that would also be a violation if
5 the Government paid for 100 percent of the cost of the
6 computer, both the hardware and the monthly billing for
7 the Internet.

8 MR. SMITH: Yes, because it lets in everything
9 in the world. Every commercial site, every catalog,
10 everybody's personal website, and a million other things I
11 can't even conjure up are all being allowed in and
12 provided to people in that setting. And then they're
13 saying, except you can't have this.

14 Now, if that's permitted under the forum
15 doctrine, how can Southeastern Promotions be right where
16 they said you can have any -- any play except Hair? We
17 don't like Hair.

18 QUESTION: Well, you can have it. You just have
19 to go up to the desk and ask for it.

20 MR. SMITH: And you have to deal with exactly
21 the -- the discretion of -- of the librarian and about
22 whether or not he or she is going to allow you -- allow
23 it. You have to deal with the stigma, and you have to
24 take the time out from your research session to go do that
25 if it turns out in the middle of your research session

1 that -- that some site that you need to go to. And you
2 have to decide to do it not seeing the site because you
3 can't see it to know whether it's valuable to you. So
4 when you're surfing the Internet, the vastly more likely
5 outcome will be that anything that's blocked people will
6 just bypass and go on to something else.

7 QUESTION: What would your response be if -- if
8 you start where Mr. Olson started and said, you don't have
9 to go through all of this? All you have to do is walk up
10 to the librarian and say, I'm an adult. I want it
11 unblocked. And it will be unblocked. Where -- where does
12 that leave your position?

13 MR. SMITH: Well, it's not clear that the
14 librarian would say yes. The librarian certainly doesn't
15 have to say yes.

16 QUESTION: I -- I think Mr. Olson's suggestion
17 was that the librarian, absent some extraneous reason,
18 would say yes. So -- so let's add that to the mix. The
19 librarian says yes, unblock. What is -- where's your
20 position?

21 MR. SMITH: It seems he's on a horn -- the horns
22 of a dilemma. Either that is something that has got a lot
23 of stigma to it that very few people are going to do, so
24 it has the -- the effect of suppressing speech, or
25 everybody --

1 QUESTION: Is that your position --

2 MR. SMITH: That is my position.

3 QUESTION: -- that even to do that would be

4 stigma?

5 MR. SMITH: Yes.

6 QUESTION: So that doesn't solve the problem

7 MR. SMITH: Sure. You've got to go up and say

8 please turn off the porn filter, Your Honor.

9 QUESTION: That isn't what he says.

10 MR. SMITH: Well, that's what it is.

11 QUESTION: He says, look, you block a lot of

12 stuff. Just please unblock it.

13 MR. SMITH: Well, if it turns out that people

14 wouldn't be stigmatized by that -- and I think the court

15 below was correct to conclude that they will be -- then --

16 then there's the second problem, which is what -- what is

17 the purpose that you've accomplished by requiring people

18 to go through this meaningless exercise other than to

19 deter them. That is apparently then the only purpose of

20 it and --

21 QUESTION: Well, it distinguishes an adult from

22 a child.

23 MR. SMITH: You can do that in many different

24 ways, Your Honor, that don't require anybody to approach

25 anybody. You simply have a -- a card that they put in the

1 computer that shows their age, and then it gives them
2 whatever access the library decides is appropriate or
3 whatever the parents may have decided is appropriate for
4 the children. There are many less restrictive
5 alternatives including use of the filtering technology as
6 an option, at the parents' option for different ages that
7 -- that can be considered and which were explored in depth
8 by the district court, which I must say looked at this
9 issue very carefully, was very sympathetic to the problems
10 that arise with the -- with the sexually explicit content.

11 It said the one thing we can't do is have one
12 across-the-board answer even in one library, especially
13 nationally, to have Congress which has no knowledge at all
14 about what conditions may prevail in any given library,
15 saying, well, we're going to push you, through the
16 budgetary process, toward our position even though 93
17 percent of the librarians have found a much more suitable
18 set of solutions in less restrictive, somewhat more
19 subtle, more mixed policies than the one that Congress
20 decided in its wisdom it should try to force on the
21 library community using the spending power.

22 QUESTION: Mr. Smith, this -- this law covers
23 elementary and secondary schools as well, but this
24 challenge relates only to libraries.

25 MR. SMITH: Only to public libraries, Your

1 Honor.

2 QUESTION: Thank you, Mr. Smith.

3 General Olson, you have 5 minutes remaining.

4 REBUTTAL ARGUMENT OF THEODORE B. OLSON

5 ON BEHALF OF THE PETITIONERS

6 MR. OLSON: I would like to invite the Court's
7 attention to page 37a of the appendix to the
8 jurisdictional statement which is the decision of the
9 court below. In the first full paragraph, the court found
10 approximately 95 percent of libraries with public Internet
11 access have some form of acceptable use policy or Internet
12 use policy governing patrons' use of the Internet.

13 Now, what the libraries are saying here is the
14 exercise of certain discretion violates the First
15 Amendment rights of their patrons, and therefore every
16 time they exercise that type of discretion in this
17 context, they're subject to strict scrutiny.

18 What this statute does is gives the libraries
19 the right, if they choose to accept Federal funds, to make
20 what kind of decisions, to exclude pornography which
21 there's no dispute in the record libraries have, from time
22 immemorial, chosen not to put in their libraries. So the
23 decision that they're making is the same one they have
24 already voluntarily made over the years.

25 It would inhibit their decisions to exclude

1 e-mail, chat, gambling, dating services, and the other
2 things that this part of the court below's decision held
3 that they are doing already. It's the traditional type of
4 discretion that libraries have exercised with respect to
5 whether they be -- want to be a fiction library or a
6 library that's specializing in this or that or technology
7 or anything along those lines. So the type of discretion
8 that the librarians are saying violate their First
9 Amendment rights are the types of discretion precisely
10 that they've been exercising for years.

11 QUESTION: General Olson, I hate to use part of
12 your rebuttal time. But would you tell me whether the
13 Government thinks we should address the unconstitutional
14 conditions issue that's discussed at length in the
15 footnote if we agree with you on your principal
16 submission?

17 MR. OLSON: I -- we have no problem if the Court
18 decides it, although it wasn't briefed and it wasn't the
19 decision below, but we don't think it's remotely possible
20 for this Court to decide that question in this context
21 against the Government. If -- if the libraries are right,
22 they're saying they don't have a First -- they can't have
23 it both ways. They don't have a First Amendment right to
24 make this discretion -- discretionary decision with
25 respect to their -- the -- the materials in their library,

1 and then they turn around and say, allowing us to make
2 that is an unconstitutional -- or giving us an incentive
3 to make that very decision is an unconstitutional
4 condition.

5 This is a condition that's connected with
6 libraries' traditional decisions. It's in an area where
7 the Government -- the Congress of the United States and
8 this Court has said the Government has a compelling
9 governmental interest already. It's a condition to the
10 use of the funds. This is not extracting from libraries
11 some separate, unconnected decision. It's connected with
12 the actual use of the funds.

13 And it does not say that libraries may not stock
14 pornography. If they want to abandon the years of
15 tradition of not stocking pornography on their bookshelves
16 or in some other form, movies, whatever it might be, they
17 can still do that without violating this condition.

18 So the libraries have plenty of choices. They
19 can not accept the public money. They can accept the
20 public money and use it in -- in the way that Congress
21 decided, which is consistent with their traditional
22 exercise of discretion.

23 There's many distinguishing factors between this
24 case and the cases in -- in which the Court has exercised
25 -- expressed some concern with respect to the First

1 Amendment issues here. It is not -- this case is not a
2 regulation of speech, but the actions of a Government
3 acting in a proprietary capacity -- a library to make its
4 own decisions, deciding what to subsidize, what speech to
5 have in that library, what speech not to have in that
6 library.

7 The Government is merely -- is making a content
8 decision, not a viewpoint decision. There's no contention
9 that there's a viewpoint decision. The type of decision
10 that they say is being forced upon them, which is actually
11 voluntary, is the same type of decision that libraries --
12 librarians customarily make.

13 The Federal statute and the library policy that
14 they're complaining about expands information, it doesn't
15 contract information. And this Court said in the Arkansas
16 Educational Television case, a jurisprudence that would
17 result in the constriction of speech, rather than the
18 expansion of speech, would be a repression of First
19 Amendment rights.

20 If Congress can't put this condition --

21 QUESTION: Thank you, General Olson.

22 MR. OLSON: Thank you.

23 CHIEF JUSTICE REHNQUIST: The case is submitted.

24 (Whereupon, at 11:26 a.m., the case in the
25 above-entitled matter was submitted.)