UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Parents, Families, and Friends of Lesbians and Gays, Inc., et al. Plaintiffs, v. Camdenton R-III School District, et al. Defendants.	Case No. 2:11-cv-04212 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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Camdenton R-III School District, et al.	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

The District frames this case as a false choice between either presumptively blocking all LGBT-supportive websites or else exposing students to a wide range of sexually explicit websites. These may be the two options available when the District uses the strange, inappropriate, and discriminatory set of blacklists created by URL Blacklist. But they are not the only two options facing the District. Thousands of other school districts filter sexually explicit content without blocking informational LGBT-supportive websites. Indeed, there are at least five reputable filtering companies that do not block any of Plaintiffs' websites or the other LGBT-supportive websites listed in the Amended Complaint. *See* Ex. 1 (Decl. of D. Hinkle) at ¶ 5-6. Instead of using these mainstream viewpoint-neutral filtering systems, the District has gone out of its way to use a filtering system with an unusual "sexuality" category that targets the Internet's most valuable, credible, and popular LGBT informational content and unnecessarily groups those websites together with sexually explicit websites. Defendants insist that this

viewpoint discrimination is justified by the District's overriding need to protect students from sexually explicit content under the Children's Internet Protection Act ("CIPA"). But URL Blacklist -- which never purports to comply with CIPA and apparently operates out of a home in the English countryside[1] -- actually is less effective at blocking pornography than the viewpoint-neutral software sold by mainstream filtering companies. *See* Ex. 1 (Decl. of D. Hinkle) at ¶¶ 11-14.

Each day that the District continues to censor websites in this viewpoint-discriminatory and palpably unreasonable manner, Plaintiffs continue to suffer irreparable harm. The District, in contrast, only stands to benefit from being ordered to purchase a filtering system that does a better job of blocking sexually explicit content without engaging in invidious and unnecessary discrimination against LGBT-supportive viewpoints. The Court should issue a preliminary injunction.

I. Plaintiffs Are Likely to Prevail on the Merits.

A party seeking a preliminary injunction without invalidating a duly enacted statute need only show a "fair chance" of prevailing on the merits. *See Planned Parenthood v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008). Here, Plaintiffs are likely to prevail because, under clearly established precedent, the Constitution forbids the kind of viewpoint-based discrimination caused by Defendants' use of the URL Blacklist filtering database.

[1] The URL Blacklist website contains no contact information for its operator. However, a WHOIS search of the registration of the domain name urlblacklist.com reveals that the address associated with the domain name registration is "49 Lipizzaner Fields\r\nWhiteley," in Fareham, United Kingdom. A Google Map search for "49 Lipizzaner Fields, Fareham, United Kingdom" turns up a pretty two-story brick home with a two-car garage and a small playground or swimming pool.

A. Plaintiffs Have Standing.

Plaintiffs' response to Defendants' arguments about standing are set forth in Section I of Plaintiff's Suggestions in Opposition to Defendants' Motion to Dismiss, incorporated herein by reference.

B. The District May Not Use a Filtering Database That Is Designed to Suppress Particular Viewpoints About LGBT People.

The discriminatory "sexuality" category created by URL Blacklist groups together two very different groups of websites. As designed by URL Blacklist, the category collects all LGBT-supportive websites and places them together with unrelated websites about fetishes, swinging, and other sexually explicit content. Instead of making any attempt to differentiate between sites like PFLAG and pornography, URL Blacklist simply states that the new "sexuality" category it has created "possibly includ[es] adult material." This methodology is a little like placing X-rated performances by comedians like George Carlin and Lenny Bruce together in the same category as *Captain Kangaroo* and *I Love Lucy* and then claiming that the whole category must be blocked because it includes adult content. Or, given the apparent political bias of the "sexuality" category, it is like deliberately categorizing Michael Moore's left-leaning documentaries together with violent R-rated movies, while classifying right-leaning documentaries like "Hillary: the Movie" together with G-rated movies.

Using a neutral-sounding title like "sexuality" cannot cure the inherent viewpoint discrimination of this blacklist. By design, informational content about LGBT issues, including even organizations that discuss religion from an inclusive and LGBT-supportive perspective, are grouped together with fetish and sexually explicit websites. In contrast, websites from groups like the Alliance Defense Fund (one of the amici for the District), which condemn the "radical homosexual agenda" and oppose legal protections for LGBT people, are not included in the

"sexuality" category. Such websites are instead placed in URL Blacklist's "religion" category, where their anti-LGBT viewpoints are made freely available to students.[2]

The viewpoint discrimination against LGBT-supportive websites does not disappear simply because those sites have been grouped with unrelated sexually explicit content. If any viewpoint may be censored simply by intentionally grouping it together with sexually explicit content, then any school or outside interest group could design a filtering system to suppress disfavored viewpoints in the name of blocking access to pornography. For example, under the District's theory, if URL Blacklist made a viewpoint-based decision to systematically group fetish websites together with websites supporting women's rights or evolution, the District could suppress the entire group of websites and its actions would be immune from constitutional review. Viewpoints that could not be suppressed directly could thus be suppressed indirectly by gerrymandering how the categories are drawn.[3]

The District never says whether it believes that websites should be presumptively suppressed based on their LGBT-supportive viewpoint. Instead, the District argues that it has unlimited discretion to select whatever filtering system it chooses, no matter how dramatically

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[2] To support its claims that its filtering system does not discriminate against LGBT-supportive viewpoints, the District points to 41 obscure website addresses about LGBT people that are not blocked by the District. Cowen Decl. at Ex. 1. Of those 41 website addresses, 40 are not blocked simply because they have not yet been added to the URL Blacklist database. *See* Exs. 2A and 2B (URL Blacklist screenshots) (showing "[n]o matches" for 40 of the 41 websites). The only reason why these websites are not blocked is that URL Blacklist has not yet gotten around to adding those websites to its database. If they are eventually categorized by URL Blacklist, they almost certainly will be placed in the "sexuality" category along with all the other LGBT-supportive websites. The remaining website on the District's list — www.rainbowdomesticviolence.itgo.com — is labeled by URL Blacklist as "sexuality," and has been manually unblocked by the District. *See* Exs. 2A and 2B (URL Blacklist screenshots); Cowen Decl. at ¶ 16.

[3] This is not a hypothetical possibility, According to a study published in 2002, several of the leading filtering companies in existence at that time either had formal partnerships with religious organizations or actively marketed themselves to those institutions by advertising that their software provided filtering in accordance with Christian values. *See* Ex. 3, Nancy Willard: Filtering Software: The Religious Connection (2002).

that system discriminates against disfavored viewpoints, and that its actions are immune from First Amendment scrutiny so long as the District employees are not themselves motivated by a desire to suppress the viewpoints that are targeted by the filtering software. Even if the Court were to accept the District's self-serving statements about its own motivations, the District's argument rests on the faulty premise that the government is free to enforce the invidious viewpoint discrimination designed by private parties. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that when government participates in conduct with a third party, it may not "effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be"); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) ("[I]t is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.").

The District cannot nullify students' First Amendment rights by contracting out decisionmaking to a private entity and then claiming it is not responsible for that entity's biased decisions. This Court rejected a similar attempt to contract around the First Amendment in *Wickersham* when a city sought to delegate to a private party the authority to determine who may be permitted on public property: "Can a city avoid its constitutional obligation merely by the formality of a contract without in fact disengaging itself from the substance of the event? A wink and a nod should not be enough to eliminate the protections of the Constitution." *See Wickersham v. City of Columbia, Mo.*, 371 F. Supp. 2d 1061, 1082 (W.D. Mo. 2005); *cf. Am. United for Separation of Church and State v. Prison Fellowship*, 509 F.3d 406 (8th Cir. 2007). This Court's statement in *Wickersham* is equally applicable to this case. For purposes of the

First Amendment, it makes no difference whether disfavored viewpoints are being suppressed by employees or an independent contractor because the District "cannot avoid its constitutional obligation by contracting out its decisionmaking to a private entity." *See Mainstream Loudoun v. Bd. of Trustees of Loudoun County Librar*y, 24 F. Supp. 2d 552, 569 (E.D. Va. 1998); *see generally* Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 Tex. L. Rev. 1117, 1149 (2000) (explaining that "the First Amendment would prohibit a library from avoiding constitutional scrutiny of intentional or unconscious viewpoint discrimination by abdicating full control over the filter it used to a private sector entity outside the state action domain").

In any event, even if the District was initially ignorant of the way that URL Blacklist is designed to block LGBT-supportive viewpoints, the District has given absolutely no explanation for why it chose to continue using the discriminatory filter once the issue was brought to its attention. One possibility is that the District in fact agrees with the designers of URL Blacklist that any websites that support the rights of LGBT people should presumptively blocked. Another possibility suggested by recent events is that the District fears that if it stops discriminating against LGBT websites it will incur a backlash from some of its constituents. "[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter." *Ass'n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D. P.R. 1990); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding that the government "may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic").

The factual circumstances of this case strongly support the inference that the District has left the discriminatory filter in place in order to appease -- or curry favor with -- constituents who believe LGBT-supportive materials should be excluded from public schools.[4] According to media reports, at the school board meeting in which the District's board members voted to authorize defending this litigation, about fifty people from the Lake Area Conservative Club ("LACC") attended to voice their support for blocking LGBT websites and to demand that that they be notified if a student attempts to access such information.[5] Members of the LACC, which has dedicated a section of its website to coverage of the lawsuit,[6] attended an additional meeting the following week where the attorney for the District gave assurances that the District would not "roll over" by fixing the discriminatory filter.[7] The LACC has warned the school board that an election will be held in the spring and that LACC members will vote against school board members who failed to uphold their values.[8] The LACC has also incorrectly argued that allowing access to LGBT-supportive websites would encourage students to engage in illegal

[4] Indeed, the District's amicus Alliance Defense Fund has long sought to prevent students from accessing information from PFLAG, GLSEN, and other "radical homosexual activists [who] are targeting children in public schools to accept, affirm, and be recruited into homosexual behavior." *See* Ex. 4, Excerpt from ADF's *The Homosexual Agenda*.

[5]Ex. 5, Joanna Small, "Camdenton Parents React to Lawsuit Over Blocked Homosexuality Websites at Schools," KSPR (Aug. 31, 2011) (quoting parent at meeting as saying: "If this is something the child wants to get into they should really talk to their parents"); Ex. 6, KRMS radio broadcast (Sept. 2, 2011) (LACC President Cliff Luber stating in a radio interview that probably fifty people from the LACC attended the meeting and that the majority of attendees were probably from the LACC).

[6] *See* Ex. 7, http://www.lakeareaconservativeclub.org/camdenton-r-iii-school-district-vs-the-aclu/.

[7] *See* Ex. 8, Deanna Wheeler, "Camdenton School Board Attorney Plans to Fight ACLU Lawsuit, Citizens Offer Opinions," LakeNewsOnline (Sept. 9, 2011) ("'There's no rollover in this board and there's no rollover in me,' Mickes said"). *See also* Ex. 9, Joanna Small, "Camdenton Addresses Internet Policy in Light of ACLU Federal Lawsuit," KSPR (Sept. 7, 2011) (quoting parents at meeting as saying that access to LGBT-supportive websites "shouldn't even be a part of education," and that ""When I was in high school I found myself on my own time, not on school time").

[8] *See* Ex. 6, KRMS radio broadcast (Sept. 2, 2011) (interview with president of LACC).

activity because Missouri statutes criminalize "sodomy."[9] In fact, criminal bans on consensual intimate conduct for same-sex couples were declared unconstitutional by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), but students at Camdenton R-III may have difficulty learning that information because one of the websites blocked by URL Blacklist is a URL link to the *Lawrence* decision. *See* First Amended Complaint at ¶ 52.[10]

Even without this additional evidence, the unconstitutional motivation of government decision makers can be inferred from their objectively discriminatory conduct. Because "'[t]he government rarely flatly admits it is engaging in viewpoint discrimination,'" the government's motivation must be inferred from objective evidence. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 2011 WL 3374079, *5 (3d Cir. Aug 05, 2011) (quoting *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004)); *see generally* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 452-53 (1996) ("The distinctions among viewpoint-based laws, other content- based laws, and content-neutral laws . . . create a set of presumptive conclusions about when improper motive has tainted a restriction on speech."). One of the strongest indications that the District intends to block LGBT websites based on their LGBT-supportive viewpoints is that they have insisted on using a filtering system that is designed to discriminate in that manner. "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Another

[9] *Id.*

[10] In addition to being unenforceable under *Lawrence*, Missouri's sodomy statute was repealed in 2006. *See* L.2006, Mo. H.B. Nos. 1698, 1236, 995, 1362 & 1290, § A.

indicator of unconstitutional motivation is the government's different treatment of similarly situated speakers: "'[W]here the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of under-inclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive.'" *Pittsburgh League of Young Voters Educ. Fund*, 2011 WL 3374079, at *5 (quoting *Ridley*, 390 F.3d at 87). Similarly, "'suspicion arises where the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue; where, in other words, the fit between means and ends is loose or nonexistent.'" *Pittsburgh League of Young Voters Educ. Fund*, 2011 WL 3374079, at *5 (quoting *Ridley*, 390 F.3d at 87). Improper motive can also be inferred from government's failure to use more sensitive tools that are capable of distinguishing between protected and unprotected content: "[T]he State must employ 'sensitive tools' in order to achieve a precision of regulation that avoids the chilling of protected activities . . . [T]he presence of such sensitive tools in [the school board's] decisionmaking process would naturally indicate a concern on their part for the First Amendment rights of [students]; the absence of such tools might suggest a lack of such concern." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 874 n.26 (1982) (plurality).

All of these factors create a strong presumption in this case that the District has retained its discriminatory filtering software at least in part because district officials feared that constituents who disapprove of homosexuality would object if the District was perceived to be making LGBT-supportive material more accessible to students.

C. The District's Filtering Is Not Reasonable in Light of the Purposes of the School Library.

In addition to engaging in unconstitutional viewpoint discrimination, the District's filtering policy is also unconstitutional because its reliance on URL Blacklist is not reasonable in

light of the purposes of the school library.[11] The District makes the circular argument that it is reasonable to block the "sexuality" category because URL Blacklist states that the category includes "adult" content. But the District offers no reason why it is reasonable for the District to use URL Blacklist in the first place. As the District notes, reasonableness must be assessed in light of "all the surrounding circumstances," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985), which include not only the decision to activate the "sexuality" filter, but also the underlying decision to use a discriminatory filtering database. To be sure, the District is not required to adopt "the most" reasonable method of filtering, but URL Blacklist falls below even the most minimal standards. Indeed, URL Blacklist never represents that it complies with CIPA or is suitable for an educational environment, and its website specifically warns users that URL Blacklist does not provide any warranty or guaranty of service. *See* Ex. 1 (Hinkle Decl.) at ¶ 11.

Although the District asks this Court to defer to its judgment that URL Blacklist is a reasonable method for excluding websites from the District's library, the District apparently lacks basic information about how the database operates. Indeed, its argument that the filtering is reasonable appears to be premised on the faulty assumption that URL Blacklist does not block LGBT-supportive content on the basis of its viewpoint, because a handful of obscure LGBT-supportive websites are not blocked by the software. As explained above, the websites listed by

[11] *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 208 (2003) (plurality) ("*ALA*") (holding that use of viewpoint-neutral filter for pornography is "entirely reasonable" in light of libraries' traditional practice of excluding pornographic materials for their collections); *id.* at 218 (Breyer, J., concurring in judgment) ("What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends -- a fit that is not necessarily perfect, but reasonable" (internal quotation marks omitted)). Indeed, even under the more deferential test for school-sponsored speech, the government must show that a restriction is "reasonably related" to legitimate pedagogical concerns. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see Borger by Borger v. Bisciglia*, 888 F. Supp. 97, 100-01 (E.D. Wis. 1995) (requiring school board to present evidence demonstrating that relying on MPAA ratings "is a reasonable way of determining which movies are more likely to contain harsh language, nudity, and inappropriate material for high school students").

the District are not blocked because they have not yet been added to URL Blacklist's database. *See supra* n.3 & Exs. 2A and 2B (URL Blacklist screenshots). The fact that a handful of less prominent LGBT websites are not yet categorized by URL Blacklist does not negate the invidious discrimination that occurs when the most prominent LGBT-supportive websites are blocked as a result of being placed in the "sexuality" category.[12] Moreover, the less prominent LGBT websites identified by the District may well be added to the URL Blacklist database in the future; all we know is that they have not yet been so categorized. If URL Blacklist ever gets around to categorizing those websites, there is every reason to expect that they will be placed in the "sexuality" category along with all the other LGBT-supportive websites. The District's refusal to acknowledge the viewpoint-discriminatory design of URL Blacklist severely undermines its claim that the Court should defer to its assertion that URL Blacklist is a reasonable filtering method.

Indeed, although the District and its amici ask the Court to defer to the professional judgment of school librarians, the District provides no indication that librarians or educational

[12] Camdenton has essentially (1) made anti-LGBT sites freely available, (2) classified the leading LGBT informational websites together with different material (swinging, bondage and fetish sites) under the title "sexuality," and (3) argued to excuse that classification by noting that a few peripheral non-sexual LGBT informational sites are (at least so far) not so classified. By analogy, that would be similar to arranging American political website references in the following manner:

- Sites of Republicans in Congress, such as Speaker John Boehner and Senate Minority Leader Mitch McConnell, would be classified together with Nazis, skinheads and white supremacists, under a "rightist" category, and all such classified sites would be presumptively blocked, available only if a student made a special request to unblock particular sites and that request was granted.
- Sites of Democrats in Congress, including Senate Majority Leader Harry Reid and House Minority Leader Nancy Pelosi, would be unclassified and freely available to all students.
- Because a few Republican sites, such as that of a Kansas State Representative, and the mayor of West Palm Beach, Florida, were not blocked, the District would argue that it really did not discriminate against Republican politicians.

As this analogy shows, clearly such an ideologically biased classification cannot be justified, nor can the blocking of leading sites on a particular subject and point of view be justified simply because a few peripheral sites with a similar point of view are not blocked.

professionals had any role in evaluating URL Blacklist's suitability for the school library environment. Far from reflecting legitimate collection-management criteria used by school librarians, "[t]he broad strokes of categorization of websites employed by URL Blacklist, with no criteria for determining quality or more precise subcategories, effectively remove a librarian's ability to apply professional collection development criteria." Ex. 10 (B. Stripling Decl.) at 4. As explained in the attached declaration of Dr. Barbara Stripling, an expert in school libraries, the lack of any neutral criteria or quality controls makes URL Blacklist a particularly unreasonable method of library collection management:

> No librarian would have the capacity to evaluate individually the vast quantity of resources and information available through websites on the Internet; therefore, librarians must depend on reliable categories, criteria, and reviews to determine the appropriateness of the resources for their student population. In other words, for categorization to be acceptable, it must be based on professional judgment. URL Blacklist appears to use no professional oversight or judgment in establishing its broad categories or assigning websites to categories.

Id. at 3; *see also id.* at 12-14 (providing additional details about various flaws in URL Blacklist's design). Unlike a viewpoint-neutral filter for pornography, a viewpoint-based filter of websites that are LGBT-supportive is not consistent with the traditional role of school libraries or basic principles of library collection management. *See id.* at 8-9 (explaining librarians' responsibility to ensure a "balanced collection" that "reflect[s] a diversity of political, economic, religious, social, minority, and sexual issues" (internal quotation marks omitted)).

Instead of using the discriminatory URL Blacklist database, the District could have purchased viewpoint-neutral filtering software from a reputable company. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 3, 5-8. Most Internet filtering programs today either classify LGBT-supportive websites under neutral categories for health, education, and social opinion, or they have a category for non-sexual LGBT websites that is kept completely separate from the categories for

adult and sexual content. *See* Ex. 1 (Decl. of D. Hinkle) at ¶ 6 and Exs. A-C thereto. Indeed, the District has at least five different types of viewpoint-neutral software to choose from that would block sexually explicit content without blocking any of Plaintiffs'' websites or the other LGBT-supportive websites cited in the Amended Complaint. *See* Ex. 1 (Decl. of D. Hinkle) at ¶¶ 5-6.[13]

The District has given absolutely no explanation for why it has decided not to use viewpoint-neutral software; indeed, the District has failed to provide any indication that it has considered using viewpoint-neutral alternatives at any point in time. "The government need not choose the least restrictive alternative when regulating speech in a nonpublic forum. . . . Nevertheless, the availability of simple alternatives which infringe much less on the First Amendment rights . . . further supports [the] conclusion that the challenged [restriction] is unreasonable." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (citations omitted); *cf. ALA,* 539 U.S. at 219 (Breyer, J., concurring in judgment) (concluding that it was reasonable for library to use software that accidentally overblocked because, in light of the current state of technology, "no one has presented any clearly superior or better fitting alternatives").[14]

[13] The District's amici note that, as part of its "Don't Filter Me" campaign, the ACLU has contacted school districts using other software programs that have improperly configured their software to block the category for non-sexual LGBT websites. Amicus Br. at 2. Those school districts have been able to respond to the problem simply by adjusting the settings on their software to stop blocking the non-sexual LGBT category. In contrast, URL Blacklist requires a user to block non-sexual LGBT materials in order to block access to sexually explicit fetish websites.

[14] No filtering software is 100% accurate. Even the most reputable software may from time to time incorrectly classify a non-sexual website as pornography or incorrectly classify a pornographic website as non-sexual. Ex. 1 (Hinkle Decl.) at ¶14 But if the underlying categories are viewpoint-neutral, those errors can be reported to the software company and then corrected. In contrast, URL Blacklist intentionally groups non-sexual LGBT-supportive websites together with sexually explicit content. When a non-sexual LGBT website is blocked by the "sexuality" filter, there is no "error" to report because, under the discriminatory design of URL Blacklist, the "sexuality" category is where non-sexual LGBT websites are supposed to be classified.

The District's claim that its overriding concern is to block all sexually explicit material, moreover, is belied by the facts. URL Blacklist's methodology for blocking pornographic websites is far less effective at preventing student access to sexually explicit content than the filtering technology used by reputable professional filtering providers. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 12-14. The District's use of the discriminatory URL Blacklist database is thus the worst of both worlds. It imposes a severe burden on students' First Amendment rights without any corresponding benefit in protecting them from actual pornography or other sexually explicit content. Such an ineffective and discriminatory system cannot be reasonable under any standard. And by using a demonstrably inadequate filter of sexually explicit websites, thereby acting against its own stated interests, the District has raised serious questions as to its motives. *Pittsburgh League of Young Voters Educ. Fund*, 2011 WL 3374079, at *5 ("'[S]uspicion arises where the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue; where, in other words, the fit between means and ends is loose or nonexistent.'") (quoting *Ridley*, 390 F.3d at 87).

D. The District's Policy of Anonymously Unblocking Websites on Request Does Not Mitigate Its Infringement of First Amendment Rights.

Even if the District were to unblock non-sexual LGBT websites upon request, requiring students to request special permission to access websites about particular disfavored viewpoints significantly impairs their freedom to receive ideas.[15] The LACC's demands for parental

[15] *See generally* Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss; *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 999 n.2 (W.D. Ark. 2003) (explaining that restriction of access on Harry Potter books burdens access because "browsers will not find the book on the shelves and those unaware of its existence would not know to ask for permission to check it out"); *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 550 (N.D. Tex. 2000) (explaining that removing books from the children's section burdened right to receive ideas because, even though books could still be located in the adult section, "they can only be located if a patron knows *in advance* that she wants those specific titles or authors"); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002); *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996).

notification of unblocking requests only illustrates how the preemptive blocking of all LGBT-supportive websites stigmatizes those websites and sends the message that there is something improper about requesting access to these websites. This stigma reflects the chilling effect that courts have warned about: "Actions such as these can too easily lead to suppression. They signal to the students and the teachers an official message that the ideas presented in those books are unacceptable, are wrong, and should not be discussed or considered. The chilling effect of this message on those who would express the idea is all too apparent." *Pico*, 638 F.2d 404, 434 (Newman, J., concurring); *accord Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.* 670 F.2d 771, 779 (8th Cir. 1982) ("The symbolic effect of removing the films from the curriculum is more significant than the resulting limitation of access to the story."); *Sund*, 121 F. Supp. 2d at 551 (restriction on access to book about gay and lesbian parents places "unconstitutional stigma to the receipt of fully-protected expressive materials").

Despite the burdens and stigma caused by the prior restraint of access to LGBT-supportive websites, the District argues that its unblocking procedure is immune from challenge under the plurality opinion in *ALA*. But the websites in *ALA* were being accidentally blocked by viewpoint-neutral software, so the overblocking did not place any uneven burdens or stigmas on particular disfavored viewpoints. In contrast, the blocking of LGBT-supportive websites at Camdenton R-III is part of the design of the "sexuality" blacklist. It imposes a unique burden on LGBT-supportive viewpoints and stigmatizes those viewpoints as presumptively dangerous and harmful. *See Denver Area Educ. Tel. Consortium, Inc.*, 518 U.S. at 754 (1996); *Sund*, 121 F. Supp. 2d at 551.

In any event, even if *ALA* applied to viewpoint-discriminatory blocking practices, *ALA* was decided in the context of a facial challenge, and the Justices specifically acknowledged that

although the statute was not facially invalid, requiring users to request that sites be unblocked could pose an unconstitutional burden on speech in particular cases. *See ALA*, 539 U.S. at 215 (Kennedy, J., concurring in the judgment); *id.* at 220 (Breyer, J., concurring in the judgment). The Supreme Court has repeatedly explained in the context of such facial challenges that "upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one." *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2821 (2010).[16] In this case -- unlike in *ALA* -- the unblocking requests concern materials about sexual orientation that could risk "outing" a student to teachers or classmates or may subject a vulnerable group of students to additional peer harassment. *Cf. id.* at 2822-24 (Alito, J., concurring) (arguing that citizens who signed petition to repeal law providing protections to same-sex domestic partners would experience a greater chilling effect from disclosure than people who sign less controversial petitions). Moreover, unlike in *ALA*, this case involves unblocking requests made by adolescent students, who may be more vulnerable to chilling effects than an adult would be. The Supreme Court has noted that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992) (holding that adolescent was unconstitutionally coerced by prayer held at school graduation even though prayer may not have been coercive for an adult in similar circumstances); *see also J.D.B.*

[16] The plaintiffs in *Reed* challenged the constitutionality of a Washington statute that required public disclosure of the names of people who sign petitions to put popular initiatives on the ballot. *Reed*, 130 S. Ct. at 2815. The plaintiffs had signed the petition for R-17, which would have repealed Washington's law recognizing civil unions for same-sex couples. *Id.* at 2816. The plaintiffs argued that disclosing their names would unconstitutionally burden their speech by subjecting them to harassment and reprisals. *Id.* The Court rejected the plaintiffs' claim that the statute's disclosure requirements were facially invalid, but explained that the plaintiffs could bring a separate challenge arguing that the statute was unconstitutional as applied to the anti-LGBT ballot initiative they signed. *Id.* at 2821. "The question before us . . . is not whether [the] disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions. The question instead is whether such disclosure in general violates the First Amendment rights of those who sign referendum petitions." *Id.* at 2820-21.

v. North Carolina, 131 S. Ct. 2394, 2402-2406 (2011) (holding that a reasonable minor may feel that he or she is not free to leave for purposes of triggering the protections of *Miranda* even though a reasonable adult would have felt free to leave in similar circumstances). In the context of adolescents requesting access to information about sensitive issues concerning sexual orientation, the District's unblocking procedures impose a significantly greater burden on access to information than the hypothetical unblocking requests considered in *ALA*. *See* Ex. 10 (B. Stripling Decl.) at 14-16 (describing how LGBT youth may be deterred from requesting access).

The District's assurances that it will unblock individual websites upon request do not cure URL Blacklist's invidious viewpoint discrimination. To the contrary, it perpetuates that discrimination by placing special burdens and stigma on a set of disfavored viewpoints.

II. The Remaining *Dataphase* Factors Favor Entry of a Preliminary Injunction.

Because Plaintiffs have demonstrated a likelihood of success on the merits, the Plaintiffs have also satisfied the remaining factors set forth in *Dataphase Systems, Inc. v. C.L. Systems, Inc.,* 640 F.2d 109, 114 (8th Cir. 1981). "In a First Amendment case …, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Even if examined separately, however, the remaining *Dataphase* factors also weigh in favor of a preliminary injunction in this case.

A. Irreparable Harm

It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality). "If [a plaintiff] can establish a sufficient likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the

deprivation." *Nixon*, 545 F.3d at 690; *accord United Coal. of Reason, Inc. v. Cent. Ark. Transit Auth.,* 2011 WL 3607580, at *5 (E.D. Ark. Aug. 16, 2011).

Defendants do not cite any cases in which a plaintiff who showed a likelihood of success on the merits of a First Amendment claim was not also found to have satisfied the irreparable harm factor of *Dataphase*. The two cases they cite are inapposite. *Rogers v. Scurr*, 676 F.2d 1211 (8th Cir. 1982), involved First Amendment claims in a prison context. The Court held injunctive relief was improper because the plaintiff failed to establish that any constitutional violation occurred. Here, this Court has not ruled against Plaintiffs on the merits. *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996), was an employment-discrimination case in which the plaintiff did not allege any constitutional violations and suffered only money damages, which could be fully compensated at a later date. Here, Plaintiffs are suffering an ongoing infringement of First Amendment rights.

B. Balance of Harms

The District argues that the balance of harms tips in its favor because removing the "sexuality" filter would expose students to sexually explicit content. As explained above, that is a false choice. There are numerous filtering systems available that neither engage in the viewpoint discrimination that harms Plaintiffs nor allow students access to harmful material. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 3, 5-8. These alternative filtering systems could be purchased and installed in as little as two or three hours. *See* Ex. 1 (Hinkle Decl.) at ¶ 8. Alternatively, if Defendants insist on continuing to use the discriminatory URL Blacklist database, then the District has the option of manually blocking any websites that should be blocked to comply with CIPA. This would permit Defendants to keep any harmful material from students without violating the First Amendment. Defendants cannot show that the burden caused by either of

these alternatives outweighs the ongoing harm caused by the violation of Plaintiffs' First Amendment rights.

Moreover, switching to a viewpoint-neutral filtering system from a reputable company would provide greater protection against pornography than currently provided by URL Blacklist. In addition to causing the viewpoint discrimination alleged in this case, URL Blacklist fails to block large amount of sexually explicit material. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 12-14. To the extent that the Court considers the risk of exposing students to pornography when balancing the relative harms, that risk weighs *in favor* of a preliminary injunction, not against it.[17]

C. Public Interest

Defendants cannot demonstrate how the public interest favors allowing them to engage in viewpoint discrimination. The District does not have to choose between complying with the First Amendment and blocking access to pornography. Defendants can disable the sexuality filter on URL Blacklist and manually block sexually explicit sites, or the District can use a viewpoint-neutral filtering system from a reputable company. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 3, 5-8.

By using URL Blacklist, the District is currently engaging in viewpoint discrimination *and* failing to protect students from pornography. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 12-14. The public interest is best served if Defendants are required to comply with both CIPA and the First Amendment.

[17] To be sure, no filtering software is perfect. Even the highest quality filtering software may fail to block some pornographic websites or may incorrectly classify a pornographic website in a non-pornographic category. But URL Blacklist is significantly less effective at blocking pornographic websites than the available alternatives. *See* Ex. 1 (Hinkle Decl.) at ¶¶ 12-14.

Conclusion

For the reasons set forth above and in Plaintiff's initial memorandum, and based on the submitted declarations and further evidence that Plaintiffs are prepared to present at hearing, a preliminary injunction should be issued.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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