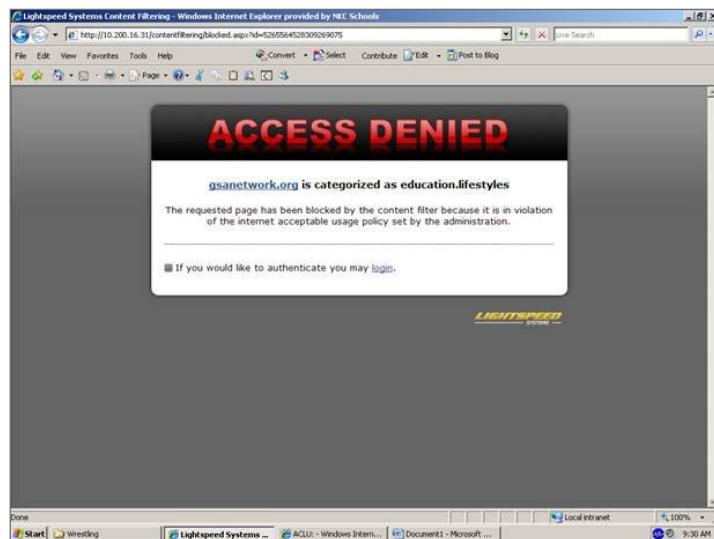


“Don’t Filter Me”

Final Report



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Don't Filter Me

FINAL REPORT

In February 2011, the American Civil Liberties Union launched our “Don’t Filter Me” campaign to stop public school districts from censoring student access to online information in school libraries about issues affecting lesbian, gay, bisexual, and transgender (“LGBT”) people and educational resources for LGBT students. We launched the campaign after hearing reports from students across the country that their schools’ web filtering software was programmed to block these LGBT-supportive resources while at the same time allowing free access to websites condemned homosexuality or opposed legal protections for LGBT people. This viewpoint discrimination violates the First Amendment. Last fall, we issued an [interim report](#) recounting the number of individual school districts that we reached through the “Don’t Filter Me” campaign and the progress we made in ensuring that students are able to access LGBT websites just as they can other informational websites. This final report summarizes the structural changes that the “Don’t Filter Me” campaign has achieved. This final report also includes resources for students to use if they encounter viewpoint-discriminatory filtering at their own public schools or libraries.

The Problem with Viewpoint-Discriminatory Filters

Thirty years ago, the Supreme Court held that, under the First Amendment, public schools can’t remove books from their libraries just because of the viewpoints and ideas in those books. Applying this principle, courts have struck down school attempts to restrict access to library materials ranging from Kurt Vonnegut novels to J.K. Rowling’s books about Harry Potter. This protection from viewpoint-based censorship has also ensured that students can access library materials that provide support for or reflect the viewpoints of LGBT people.

But in recent years, advances in technology originally designed to enhance students’ access to information have ironically threatened to restrict students’ ability to access ideas on a viewpoint-neutral basis. Under the Children’s Internet Protection Act (“CIPA”), which was signed into law in 2000, schools and libraries receiving certain federal funds must install web filtering software to block pornographic websites. But most web filtering software does much more than simply block pornography. Web filtering software frequently groups *all* websites—not just porn—into different categories based on the website’s content. Most of these categories are innocuous, such as “history” or “science” or “news.” But when websites are categorized based on their viewpoint, web filtering software can—intentionally or unintentionally—be used to block access to particular viewpoints in a discriminatory manner.

A few years ago, we began to hear complaints from students that their public school libraries were using web filtering software to block websites labeled as “LGBT” or “gay and lesbian and bisexual.” These schools had purchased filtering software packages that had viewpoint-neutral categories for pornographic or sexually explicit websites but also included another

special category for websites containing information about LGBT issues and organizations and aren't sexually explicit in any way. Even worse, many public school districts blocked these categories of websites that are supportive of LGBT people, while at the same time allowing access to anti-LGBT sites that condemn LGBT people or urge students to try to change their sexual orientation.

For students, the stigmatizing effect of these filters is not just an abstract First Amendment issue. At a time when bullying and suicide among LGBT youths is all too prevalent, blocking all LGBT-related websites—including websites that are not sexually explicit in any way—deprives students of access to anti-bullying resources, suicide hotlines, and religious organizations that help students and families. This is especially crucial to students in crisis or those who don't feel safe accessing such sites from their home computers. By blocking these sites, schools send a message that being gay, bisexual, or transgender is dirty or shameful. As one of the students we worked with told us, "Seeing all these websites that are considered somehow unacceptable because of something I am was really offensive to me."

Some schools think they can solve the problem by allowing students to ask for censored sites to be unblocked on a case-by-case basis. But making students seek special permission for a website to be unblocked still stigmatizes LGBT people and places a burden on particular viewpoints. If students suspect that a staff person disapproves of their research, or if students wish to seek support online without outing themselves, policies requiring special permission may discourage them from accessing the information they need. More than one student told us that he felt forced to come out over and over to school administrators or I.T. directors every time he went to report an improperly blocked site.

Why We Launched the “Don’t Filter Me” Campaign

As the reports of discriminatory filtering increased, we realized we could not solve this problem one school at a time. Responding to problems at individual districts was like playing a game of “whack-a-mole.” Instead, we decided to make sure that everybody knows that these viewpoint-discriminatory filters exist and seek solutions on a more systemic level.

At the beginning of the “Don’t Filter Me” campaign, one of the most important messages to get across was that the campaign wasn’t challenging traditional viewpoint-neutral filters that block pornography or sexually explicit content. Many schools mistakenly thought they were using viewpoint-neutral filters, and it was just an infrequent, harmless mistake when a non-sexual LGBT website was blocked. These schools were surprised to discover that their filters were designed specifically to identify non-sexual LGBT content, and that actual pornographic or sexual content was covered by completely different filtering categories.

Anti-gay organizations also tried to add to the confusion by spreading the lie that the “Don’t Filter Me” campaign was seeking to turn school computers into “porn portals” and quipping that the campaign should be named the “Public School Porn Initiative.” In fact, the filters

challenged by the ACLU were expressly designed to target LGBT websites that are not sexually explicit in any way. The outside groups encouraging schools to keep using these filters liked the fact that the filters blocked non-sexual websites of groups like the Gay, Lesbian, Straight Education Network ([GLSEN](#)), [GSA Network](#), or Parents, Families and Friends of Lesbians and Gays ([PFLAG](#)). Indeed, one group argued that the entire website for GLSEN—hundreds of pages of information for LGBT students—should be blocked because the group didn't like one book that GLSEN had included on a reading list.

Once school districts realized the filters didn't block actual pornography, the vast majority of schools agreed that the filters served no educational purpose and promptly disabled them. Most school administrators we spoke with said they had no need or desire to block non-sexual websites expressing an LGBT-supportive viewpoint. The schools simply wanted to use a software program that complied with CIPA and blocked sexually explicit content. For these schools, the anti-LGBT features were a booby trap that engaged in viewpoint discrimination for no reason.

In our interim report, we summarized the progress we made in drawing this problem to schools' attention and working with schools to disable the discriminatory filters in their software programs. After the interim report was issued, we continued to respond to reports of discriminatory filters at individual school districts, but our primary focus shifted to more structural reforms.

Victory in the Courts

As one school district after another agreed to adjust its filtering software in response to our letters bringing the issue to their attention, it began to look like we might be able to solve the problem without going to court. Then we met Camdenton R-III School District.

Camdenton R-III School District, located in Camdenton Missouri, was using a filtering software database called URL Blacklist. URL Blacklist is not a software company in the same sense that the other major filtering companies are; rather it's a database of URL's available for use by other software packages (e.g., locally-created, "homegrown" filtering packages like SquidGuard and DansGuardian). Some schools opt for creating their own filtering software using URL Blacklist because it's a cheaper option than commercial filtering software. URL Blacklist had a category called "sexuality." This category was worse than the anti-LGBT filters created by the other filtering companies because the "sexuality" filter grouped non-sexual, positive LGBT websites together with sexually explicit sites, making it more difficult for school districts to unblock the LGBT websites while still screening out sexually explicit content. While pro-LGBT sites were lumped in with porn, anti-gay websites were classified as "religion" and freely accessible to students. Even websites like [Evangelicals Concerned](#) or [DignityUSA](#) which are clearly religious in nature, were lumped into the "sexuality" category by URL Blacklist when those sites also support LGBT people.

After receiving complaints from students, we wrote to Camdenton R-III School District to alert

them to the viewpoint discrimination caused by their filtering software. We explained that if the school wished to continue using URL Blacklist, it needed to put in the extra work to separate sexually explicit content in the “sexuality” category from content that is not sexually explicit. If the school district was unwilling to put in the effort necessary to make URL Blacklist viewpoint neutral, it would have to switch to one of the many viewpoint-neutral filtering systems available on the market.

The school district refused, and we were forced to sue in order to bring the district’s filtering software in line with the First Amendment. We filed [PFLAG v. Camdenton R-III School District](#), on behalf of a student at Camdenton High School who wanted to access LGBT websites to help her friends who were being bullied for being gay, and on behalf of four organizations who seek to communicate with a student audience but were being blocked by Camdenton R-III School District’s software: [Campus Pride](#), [DignityUSA](#), the [Matthew Shepard Foundation](#), and [PFLAG](#).

The school district’s only defense for its discriminatory filtering was that CIPA required the district to block sexually explicit content. In response, we argued that the district could easily comply with CIPA by using one of the many viewpoint-neutral filtering programs available on the market. We presented evidence that by categorizing websites based on viewpoint, URL Blacklist failed to comply with professional standards of librarianship. We also showed the court evidence that the URL Blacklist filtering system actually did a poorer job at blocking real pornography than viewpoint neutral software did. By using its discriminatory software instead of a viewpoint-neutral one, Camdenton R-III School District was blocking access to nonsexual LGBT-supportive materials while at the same time exposing its students to more pornography.

The court agreed with us that Camdenton R-III School District’s discriminatory filtering violated the First Amendment and issued an order requiring the school district to adopt a filtering system that didn’t discriminate against LGBT-supportive viewpoints. In doing so, the court reaffirmed that it’s illegal for public schools to discriminate against LGBT-supportive viewpoints in the school library and that this principle extends to online materials. The court also made clear that school districts can’t insulate themselves from liability for viewpoint discrimination by passing the blame onto the filtering company. Schools have a responsibility to configure their filtering software in a manner that complies *both* with CIPA and with the First Amendment’s protections against viewpoint discrimination.

In addition to sending a clear legal message, our litigation also sent a financial message to school districts in similar situations. Refusing to reconfigure their software unless the ACLU took them to court made Camdenton R-III School District responsible for paying not only its own legal fees, but also another \$125,000 to cover the costs and attorneys’ fees incurred by the ACLU.

Our lawsuit also had a practical impact for all schools that use URL Blacklist. Because the owners of URL Blacklist are located outside of the U.S. with no listed phone number or

physical address, we had been unable to speak with them about their improper methodology of grouping sexually explicit websites together with non-sexual ones. But as a result of our lawsuit against the school district in Camdenton, URL Blacklist took another look at its categorization of LGBT websites. They ultimately removed thousands of non-sexual websites from the “sexuality” category so that the category now only blocks sexually explicit websites. These changes helped students in all school districts using URL Blacklist—not just Camdenton R-III School District.

Reforms from Software Companies

In addition to working with school districts, we also reached out to the software companies that design the filters and pushed those companies to take responsibility for viewpoint-based censorship caused by their products. Several companies agreed to eliminate their LGBT categories and place nonsexual LGBT websites in neutral categories such as social science, history, or other appropriate areas. Some businesses left the filter parameters unchanged, but agreed to issue public statements and enhanced customer guidance to make clear that websites identified in LGBT filters categories are non-sexual and should not be blocked by public schools.

Lightspeed Systems

Lightspeed Systems had a category for LGBT content called “education.lifestyles,” which included sites such as [GSA Network](#), [GLSEN](#), and the official website for the annual [Day of Silence](#) to protest anti-LGBT bullying. Even before we created the online petition, we were thrilled to learn that Lightspeed was the first software company to respond to the “Don’t Filter Me” campaign. In May 2011 Lightspeed announced that it would update its software to remove the “education.lifestyles” filter entirely. Now that the “education.lifestyles” category is gone, all websites, including those about LGBT people and issues, are categorized on a viewpoint-neutral basis. Lightspeed’s decision to remove its “education.lifestyles” category demonstrates that it’s easy for software companies to remove their anti-LGBT categories and better serve the needs of their customers by providing unbiased, viewpoint-neutral filtering.

Fortiguard

Fortiguard had a category called “homosexuality” that blocked access to websites such as [Youth Pride](#), [Lambda Legal](#), and Gay and Lesbian Alliance Against Defamation ([GLAAD](#)). After learning about the “Don’t Filter Me” campaign and the action taken by Lightspeed Systems, Fortiguard conducted a review of its own software and agreed to remove its software’s “homosexuality” category entirely. Websites that used to be in the “homosexuality” category have been reclassified on a viewpoint-neutral basis.

URL Blacklist

As we explained earlier in this report, URL Blacklist is a database of URLs some schools use with their own “homegrown” filtering packages. URL Blacklist’s “sexuality” category grouped non-sexual, positive LGBT websites together with sexually explicit sites, yet students still had

access to websites that condemn homosexuality because URL Blacklist categorized those sites as “religion.”

Prompted by our lawsuit in [PFLAG v. Camdenton R-III School District](#), URL Blacklist changed its categorization of LGBT websites and removed thousands of non-sexual websites from the “sexuality” category.

M86 Security

M86 Security’s “lifestyles” category included such sites as Human Rights Campaign ([HRC](#)), [GLAAD](#), and the [L.A. Gay & Lesbian Center](#). After learning about our campaign, M86 contacted us and made significant changes to ensure that its “lifestyles” filter no longer functions as an anti-LGBT filter. M86 changed the title of the category to “lifestyle and culture,” and changed the website examples used in the official description to more general cultural organizations, not just LGBT ones, so schools wouldn’t mistakenly assume the category contains sexually explicit websites that need to be blocked. Further, M86 agreed to conduct a comprehensive review of the “lifestyle and culture” category to ensure that LGBT-related websites are more accurately categorized.

Blue Coat

Blue Coat’s filtering software had a category called “LGBT” that identifies LGBT-related websites that aren’t sexually explicit, such as the [It Gets Better Project](#), [GSA Network](#), and HRC. Blue Coat created this category in 2007 to separate non-sexual LGBT websites from sexually explicit ones, in order to make the non-sexual LGBT content more accessible for students. But many public schools have blocked the “LGBT” category in the mistaken belief that the websites it filters are somehow sexually explicit or inappropriate for students.

Blue Coat agreed to help dispel this confusion by amending the official description of what types of websites are covered by the “LGBT” category. The new description for the category is:

Websites that provide reference materials, news, legal information, anti-bullying and suicide-prevention information, and other resources for lesbian, gay, bisexual, and transgender (“LGBT”) people or that relate to LGBT civil rights. The websites included in this category were selected because they do not contain sexually explicit content and are generally suitable for viewing by all age groups.

Blue Coat also issued a statement clarifying that schools seeking to comply with CIPA do not have to block the “LGBT” category to do so. The statement explains:

Customers—including schools, libraries, and other public institutions—do not need to block the LGBT category to prevent users from accessing sexually explicit content, whether LGBT-related or otherwise. WebFilter contains separate and distinct categories for sexually explicit content and other adult material (e.g., Adult/Mature Content,

Alternative Sexuality/Lifestyles, Nudity and Pornography), which can be blocked to prevent access to sexually explicit content. Further, blocking the LGBT category is not recommended as a tool for public institutions to comply with the Children's Internet Protection Act ("CIPA").

We continue to believe the ultimate solution to this problem is for software companies to stop setting aside websites into a separate category based on their LGBT-related viewpoints. These clarifying statements should, however, reduce the risk that public schools and libraries will mistakenly block the LGBT category without understanding what types of websites are—and are not—covered by the category.

Websense

Websense's software includes a category called "gay or lesbian or bisexual interest." Several school districts were blocking this category in the mistaken belief that it included sexually explicit material. As a result, these schools were inappropriately blocking students from accessing websites such as GSA Network and GLSEN.

Upon learning about the "Don't Filter Me" campaign, Websense told the media and its sales staff that schools don't have to block the "gay or lesbian or bisexual interest" category in order to block adult or pornographic websites. Websense also posted a similar clarification on its website. Websense said that it wouldn't eliminate the "gay or lesbian or bisexual interest" category because its private customers may wish to block the category.

We still believe that software companies simply should not set websites into a separate category based on their LGBT-related viewpoints. These clarifying statements from Websense should, however, reduce the risk that public schools and libraries will mistakenly block the LGBT category without understanding what types of websites are—and are not—covered by the category.

Toolkits for Students

The final phase of the "Don't Filter Me" campaign is to give students the resources to advocate on their own behalf if their local school or library is using a filtering program that blocks LGBT-supportive viewpoints. As an appendix to this report we have included a toolkit of materials, including a copy of the court's decision in PLFAG v. Camdenton R-III School District and a model letter from the ACLU explaining why discriminatory web filtering is illegal.

If you discover that your public school or library is using filtering software configured to discriminate against LGBT-supportive viewpoints, here are the steps you can take to fix it.

First, try to figure out the name of the software program and the reason why the software is blocking your website.

If the software program is Blue Coat, Websense, or M86, the factsheets attached to this report provide information about the categories used by those software companies and links to

official company statements explaining to school officials that the category for LGBT-supportive websites should not be blocked as part of complying with CIPA.

If the software is not on this list there are still things you can do.

If you're comfortable doing so, bring this issue to the attention of school officials. At the end of this report, we have provided a sample letter you or your parents can show to school officials explaining why viewpoint-discriminatory filtering is illegal.

If you think a website has been mischaracterized and school officials can't or won't solve the problem, you can also contact the filtering companies directly. Most software companies have webpages that allow you to notify the company if you think a website is being improperly blocked.

Last but not least, you can report the filtering to the [ACLU LGBT Project](#) or to [your local ACLU affiliate](#).

Findings

We learned two important lessons while working on the "Don't Filter Me" campaign. First, most public schools responded positively to our campaign and told us that they don't really need or want anti-LGBT web filters. Public schools buy filtering software to keep students from accessing pornography and to make sure the materials they access online at school are educationally appropriate. These schools depend on software companies to help them fulfill that educational mission, not to engage in viewpoint discrimination or to hurt their LGBT students. Software companies can and should provide these schools with unbiased, viewpoint-neutral web filters that help them serve their students' needs. Any software company whose filtering product includes an anti-LGBT category is doing a disservice to its public school customers and the students they serve.

The next lesson we learned is that public schools administrators and teachers must educate themselves about filtering software used by their districts, and they need to get actively engaged in configuring it. Filtering software is not foolproof, and some types of software do a better job than others. School officials need to "look under the hood" to make sure they are only using viewpoint-neutral categories and that students aren't being blocked from accessing important resources.

Acknowledgments

ACLU LGBT Project interns: Matthew Lifson, Matthew Paul, Liz Pinto

ACLU affiliates nationwide

Allied organizations, particularly [Campus Pride](#); [DignityUSA](#); [GLSEN](#); [GSA Network](#); [It Gets Better Project](#); [The Matthew Shepard Foundation](#); and [Parents, Families, and Friends of Lesbians and Gays](#)

The many individual and foundation supporters of the ACLU's LGBT rights work

Appendices:

<http://www.aclu.org/lgbt-rights/letter-school-officials-regarding-web-filtering>

<http://www.aclu.org/lgbt-rights/websense-filtering-fact-sheet>

<http://www.aclu.org/lgbt-rights/m86-filtering-fact-sheet>

<http://www.aclu.org/lgbt-rights/blue-coat-filtering-fact-sheet>

APPENDICES

13 | Bluecoat Fact Sheet

14 | M86 Fact Sheet

15 | Websense Fact Sheet

16 | Model Filtering Letter

19 | PFLAG v. Camdenton R-III School District - Order for Preliminary Injunction

Don't Filter Me!



When Your School Blocks LGBT Content with Blue Coat Filtering Software

Blue Coat's web filtering software has a category called "LGBT." Blue Coat created this category in 2007 to separate non-sexual LGBT websites from sexually explicit ones, in order to make the non-sexual LGBT content more accessible for students. But some schools and libraries have blocked this category in the mistaken belief that the category was designed to include sexually explicit websites.

In order to dispel this confusion, Blue Coat has updated its definition of the LGBT category. The LGBT category is now defined as:

Websites that provide reference materials, news, legal information, anti-bullying and suicide-prevention information, and other resources for lesbian, gay, bisexual, and transgender ("LGBT") people or that relate to LGBT civil rights. The websites included in this category were selected because they do not contain sexually explicit content and are generally suitable for viewing by all age groups.

Blue Coat also issued a statement clarifying that schools seeking to comply with CIPA do not have to block the "LGBT" category to do so. The statement explains:

Customers – including schools, libraries, and other public institutions – do not need to block the LGBT category to prevent users from accessing sexually explicit content, whether LGBT-related or otherwise. WebFilter contains separate and distinct categories for sexually explicit content and other adult material (e.g., Adult/Mature Content, Alternative Sexuality/Lifestyles, Nudity and Pornography), which can be blocked to prevent access to sexually explicit content. Further, blocking the LGBT category is not recommended as a tool for public institutions to comply with the Children's Internet Protection Act ("CIPA").

You can read the entire statement from Blue Coat at the following link:

<http://sitereview.bluecoat.com/LGBTStatement.jsp>

No filtering software is perfect. If your school or library's network administrator believes that sexually explicit material has been incorrectly placed in the "LGBT" category, the administrator should alert Blue Coat to the incorrect categorization. Errors can be reported to Blue Coat at the following address: <http://sitereview.bluecoat.com/sitereview.jsp>

Public schools and libraries must ensure that their Internet filtering software operates on a viewpoint-neutral basis. Blocking the "LGBT" category can lead to viewpoint discrimination because the category includes LGBT-supportive websites but not similar websites with anti-LGBT viewpoints.

Don't Filter Me!



When Your School Blocks LGBT Content with M86 Web Filtering Software

M86's web filtering software has a "Lifestyle & Culture" category, which until recently was called "Lifestyles." Some schools and libraries blocked this category in the mistaken belief that the category was designed to include sexually explicit websites. Some schools and libraries may not have updated their M86 software yet, so it's possible that this category is still being referred to as "Lifestyles."

M86 has made several recent changes to clarify for its customers that the "Lifestyle & Culture" category is not intended to capture sexually explicit websites and can be unblocked without exposing viewers to sexually explicit material. The company changed the name of the category from "Lifestyles" to "Lifestyle & Culture" and changed the official description of the category. The category is now defined as: "Sites that contain material relative to an individual's personal, community or cultural identity, or organizational/club affiliations." The definition is accompanied by examples of websites listed in the category, which make clear that the category refers to a wide variety of non-sexual cultural and community organizations.

M86's definition of the "Lifestyle & Culture" category can be found at the following link:
<http://www.m86security.com/resources/database-categories.asp#lifestyle>

M86 has also issued a public statement clarifying that "Lifestyle & Culture" category "is not designed to capture or block pornographic or sexually explicit content." You can read the entire statement from M86 at the following link: http://files.m86security.com/pdfs/M86_Statement_08.04.11.pdf

No filtering software is perfect. If your school or library's network administrator believes that sexually explicit material has been incorrectly placed in the "Lifestyle & Culture" category, the administrator should alert M86 to the incorrect categorization. Errors can be reported to M86 at the following link: <http://www.m86security.com/support/M86FilterCheck.asp>

Public schools and libraries must ensure that their Internet filtering software operates on a viewpoint-neutral basis. Blocking the "Lifestyle & Culture" category can lead to viewpoint discrimination because the category includes LGBT-supportive websites but not similar websites with anti-LGBT viewpoints.

Don't Filter Me!



When Your School Blocks LGBT Content with Websense Web Filtering Software

Websense's web filtering software has a "Gay or Lesbian or Bisexual Interest" category. Some schools and libraries block this category in the mistaken belief that the category was designed to include sexually explicit websites.

Websense defines its "Gay or Lesbian or Bisexual Interest" category as: "Sites that provide information about or cater to gay, lesbian, or bisexual lifestyles, but excluding those that are sexually or issue-oriented." Websense's definition of the "Gay or Lesbian or Bisexual Interest" category can be found at the following link: <http://www.websense.com/content/URLCategories.aspx>

Websense recently issued a public statement to clarify for its customers that the "Gay or Lesbian or Bisexual Interest" category is not intended to capture sexually explicit websites and can be unblocked without exposing viewers to sexually explicit material. The statement explained:

Out of the box, Websense filtering products do NOT block Lesbian, Gay, Bisexual and Transgender (LGBT) classified sites. But some system administrators override the default setting and block LGBT sites under the mistaken impression that they need to do so in order to block adult content or malware that might be hosted on such sites. Anyone who mistakenly blocked LGBT sites can just uncheck that selection.

It is important to note that Websense customers do NOT need to block access to sites classified as "Gay or Lesbian or Bisexual Interest" in order to ensure that their school networks are protected from undesirable adult content and malware. Adult content, pornography and malware have their own individual categories and are blocked if the organizations select those categories.

You can read the entire statement from M86 at the following link:

<http://community.websense.com/blogs/websense-insights/archive/2011/09/01/websense-comments-on-aclu-don-t-filter-me-campaign.aspx>

No filtering software is perfect. If your school or library's network administrator believes that sexually explicit material has been incorrectly placed in the "Gay or Lesbian or Bisexual Interest" category, the administrator should alert Websense to the incorrect categorization. Errors can be reported to Websense at the following address: suggest@websense.com

Public schools and libraries must ensure that their Internet filtering software operates on a viewpoint-neutral basis. Blocking the "Gay or Lesbian or Bisexual Interest" category can lead to viewpoint discrimination because the category includes LGBT-supportive websites but not similar websites with anti-LGBT viewpoints.

Open Letter to School Administrators, Superintendents, and Board Members

Re: Discriminatory Internet Filtering

You have been given this letter because the web filtering software used by your school district appears to be improperly configured – whether intentionally or unintentionally – to block websites providing information about lesbian, gay, bisexual, and transgender (“LGBT”) people and educational resources for LGBT students. Through our “Don’t Filter Me” campaign the American Civil Liberties Union (“ACLU”) has spoken with schools across the country that did not realize their software was improperly configured in this manner. This letter provides background information about how this type of improper filtering occurs and explains why you could be held legally liable if you do not reconfigure your software to filter in a viewpoint-neutral manner.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
LESBIAN GAY BISEXUAL
TRANSGENDER &
AIDS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2627
F/212.549.2650
WWW.ACLU.ORG/LGBT

SAN FRANCISCO OFFICE:
39 DRUMM STREET
SAN FRANCISCO, CA 94111

CHICAGO OFFICE:
180 NORTH MICHIGAN AVENUE
SUITE 2300
CHICAGO, IL 60601-7401

WASHINGTON, D.C. OFFICE:
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TREASURER

I. Factual Background

Many school officials are surprised to learn that some web filtering software contains a special category that specifically blocks websites about LGBT issues that are not sexually explicit in any way. Most types of web filtering software include viewpoint-neutral categories such as “pornography” or “adult” that block all sexually explicit material regardless of sexual orientation. But some software includes an additional category for LGBT-related websites that *are not sexually explicit in any way*. These categories usually have names like “LGBT,” or “gay or lesbian,” or “lifestyles.” These categories are not required by Children’s Internet Protection Act (“CIPA”) and are not designed to filter out sexually explicit or pornographic content.

As part of our “Don’t Filter Me” campaign we have reached out to many software companies to encourage them to eliminate their non-sexual LGBT categories or to clarify that the categories do not include sexually explicit content and should not be blocked by schools. In response, many companies have removed their non-sexual LGBT categories or released statements alerting their public- school customers that these non-sexually explicit categories do not have to be blocked in order to comply with CIPA. You can find links to several of these clarifying statements on the ACLU’s website: www.aclu.org/dont-filter-me-web-content-filtering-schools.

Because no filtering software is perfect, every now and then a website with sexually explicit material may be misclassified. If you have reason to believe that a non-sexual category in your web filtering software improperly includes

sexually explicit content, please alert your software company so the website can be properly categorized. Many software companies have online forms that allow customers to notify them when they believe a website has been placed in an improper category.

II. Legal Analysis

The First Amendment prohibits public schools and libraries from using web filtering software that is configured to discriminatorily block access to viewpoints that are supportive of LGBT people and their legal rights. Public school students have a First Amendment right to access ideas in a school library, including information that supports LGBT people. “[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality) (internal quotation marks and citations omitted); *see also Fricke v. Lynch*, 491 F. Supp. 381, 385 (D.R.I. 1980) (holding that First Amendment protects non-sexual expression of a student’s gay sexual orientation).

These First Amendment rights apply just as strongly when students seek to access ideas through the Internet in a school library. CIPA requires that public schools and libraries receiving certain federal funding must use Internet filtering software to block access to website that would be obscene with respect to minors. But at the same time, schools also have a constitutional obligation to ensure that their filtering software has been configured in a viewpoint-neutral manner in accordance with the First Amendment. *See Bradburn v. N. Cent. Reg’l Library Dist.*, 231 P.3d 166, 180 (Wash. 2010) (holding that web filters for pornography are constitutional only if they are “viewpoint neutral” and “make[] no distinctions based on the perspective of the speaker”); *cf. United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (plurality) (rejecting facial challenge to filtering system that blocked pornography on a viewpoint-neutral basis and not based on any viewpoint about sexuality).

A federal court recently reaffirmed that these principles in *Parents, Family, and Friends of Lesbians and Gays (“PFLAG”) v. Camdenton R-III School District*, 853 F. Supp. 2d 888 (W.D. Mo. 2012). The court held that Camdenton R-III School District violated students’ First Amendment rights by using web filtering software that was configured to systematically block websites that expressed positive viewpoints about LGBT people and their legal rights while allowing free access to websites that condemn homosexuality or oppose legal protections for LGBT people. The court also

rejected the school district's argument that it could avoid constitutional problems by unblocking LGBT-supportive websites on a case-by-case basis. Camdenton R-III School District ultimately paid \$125,000 for plaintiffs' costs and legal fees, on top of the money the district had already paid to its own attorneys for defending the case.

Allowing students equal access to LGBT-related websites is not just a legal duty; it also makes sense from a safety perspective, particularly in light of the epidemic of LGBT youth suicides and bullying. Blocking access to LGBT websites is especially problematic because many students do not have computers or Internet access at home and can access the Internet only at school. As one court put it, "as any concerned parent would understand, this case [holding that members of the Gay-Straight Alliance must be permitted access to the school's resources in the same way as other clubs], may involve the protection of life itself." *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000).

III. Conclusion

You can find more materials about the "Don't Filter Me" campaign and the improper use of discriminatory web filters on the ACLU's website: www.aclu.org/dont-filter-me-web-content-filtering-schools. We strongly encourage you to fix this problem and ensure that your software is filtering websites on a viewpoint-neutral basis. Please feel free to contact us if you have any questions.

Sincerely,

Joshua A. Block
Staff Attorney

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

PARENTS, FAMILIES, AND FRIENDS)
OF LESBIANS AND GAYS, INC., et al.,)
)
)
Plaintiffs,)
)
v.) Case No. 2:11-cv-04212
)
)
CAMDENTON R-III SCHOOL)
DISTRICT, et al.,)
)
Defendants.)

ORDER

Pending before the Court is Plaintiff Parents, Families, and Friends of Lesbians and Gays's ("PFLAG"), and others', Motion for Preliminary Injunction [Doc. #6] pursuant to Federal Rule of Civil Procedure 65(a). PFLAG claims that Defendant Camdenton School District, and others, implemented internet filtering software that systematically blocks websites expressing a positive viewpoint toward lesbian, gay, bisexual, and transgender ("LGBT") individuals, in violation of PFLAG's freedom of expression under the First Amendment. The Court held a hearing on October 27, 2011. For the following reasons, the Court GRANTS the motion.

I. Background

Plaintiffs are PFLAG, DignityUSA, the Matthew Shepard Foundation, and Campus Pride—all publishers of websites that provide supportive resources directed at

LGBT youth. Jane Doe, a student at Camdenton school district proceeding under a pseudonym, is also a Plaintiff. Defendants are Camdenton School District and Timothy Hadfield, as Superintendent of Camdenton School District.

Camdenton uses a custom internet-filter system based around a free product called URL Blacklist. URL Blacklist comprises several “filters” – lists of blocked websites arranged by subject matter – each of which network administrators can enable or disable to control the subject matter that their network users can access on the internet.

Camdenton’s internet-filter system enables the following URL Blacklist filters: advertisements, pornography, mixed adult, and sexuality. Camdenton claims that it uses the URL Blacklist to comply with the Children’s Internet Protection Act’s (“CIPA’s”). This requires schools to protect children using school computers from viewing visual depictions that are obscene, child pornography, or harmful to minors. 47 U.S.C. § 254(h)(6)(B)(i).

Camdenton also claims that its computer system is customized because its IT staff has manually created white lists and black lists to open or close certain websites. However, the URL Blacklist program is the default filter blocking all URL Blacklist sites until Camdenton’s staff intervenes. So Camdenton’s customization is only triggered once a student or school official asks to open or close a specific website. Otherwise, the URL Blacklist controls a student’s access to the internet. However, once a website is put on the white list by Camdenton, the URL Blacklist filter no longer controls and access is automatic thereafter.

Camdenton has two procedures in place by which a student can request access to a website that is blocked by a URL Blacklist filter. The first is to send an email to the school superintendent requesting permission to access the website. The second is through a request template presented to the user each time the user tries to access a blocked website. This template has a space for a username and a space for any comments. Camdenton responds to these requests by manually checking the requested site for appropriateness and then granting or denying access within twenty-four hours of the request. During the five or six years this procedure has been in place, Camdenton has received around 2,000 requests, and has granted around 80% of them. (Tr. 95).

PFLAG asserts that this system, as currently configured, systematically burdens websites expressing a positive viewpoint toward LGBT individuals. PFLAG requests: “An injunction prohibiting Defendants from continuing to use Internet filtering software that blocks access to LGBT-supportive viewpoints while permitting access to anti-LGBT viewpoints.” [Doc. # 1 at 35].

II. Findings of Fact

The Court finds the following facts for purposes of this motion. These facts are not binding at trial on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). But evidence received during the hearing for preliminary injunction “that would be admissible at trial becomes part of the trial record and need not be repeated at trial.” FED. R. CIV. P. 65(a)(2).

A. The Court Finds That URL Blacklist Discriminates Against Websites

That Express a Positive View Toward LGBT Individuals

The Court finds that URL Blacklist systematically blocks websites that express a positive view point toward LGBT issues.

The URL Blacklist website states that it compiles its lists of blacklisted internet domain names from other websites. The one website that URL Blacklist explicitly states that it draws from is dmoz.org. DMOZ is a volunteer-compiled directory of the highest quality informational websites, organized by subject matter. DMOZ is not designed for the purpose of blacklisting websites. DMOZ contains a “society” category of websites that contains a subcategory labeled “sexuality” and a separate subcategory labeled “gay, lesbian, and bisexual.” The “gay, lesbian, and bisexual” subcategory has sub-sub-categories such as “history,” “law,” “media,” “politics,” and “religion and spirituality.” The Court finds that URL Blacklist drew its list of blocked websites for its “sexuality” filter from both the websites in DMOZ’s “sexuality” subcategory and the websites in DMOZ’s “gay, lesbian, and bisexual” subcategory. Over 99% of the websites included in DMOZ’s “sexuality” subcategory appear in URL Blacklist’s “sexuality” filter. (Tr. 43). Over 99% of the websites included in DMOZ’s “gay, lesbian, and bisexual” subcategory appear in URL Blacklist’s “sexuality” filter. (Tr. 43).

Sexuality filters are normally used to filter out pornographic material, but the URL Blacklist filter has the affect of filtering out positive material about LGBT issues as well as pornographic material. PFLAG has identified forty-one websites blocked by URL

Blacklist’s “sexuality” filter that express a positive viewpoint toward LGBT individuals. (Tr. 33). PFLAG tested these forty-one websites on five different internet filter systems designed to help schools comply with CIPA. None of these five filter systems blocked any of these forty-one websites as prohibited by CIPA. (Tr. 34-35). On the other hand, URL Blacklist generally categorizes websites expressing a negative view toward LGBT individuals in its “religion” category, and does not block them with its “sexuality” filter. (Tr. 37). Thus, URL Blacklist systematically allows access to websites expressing a negative viewpoint toward LGBT individuals by categorizing them as “religion”, but filters out positive viewpoints toward LGBT issues by categorizing them as “sexuality”.

The Court’s finding of viewpoint discrimination is not undermined by Camdenton’s small list of websites expressing a positive view toward LGBT individuals that are currently “open,” or not blocked by any of URL Blacklist’s filters. (Tr. 99). First, Camdenton has not presented any evidence of the informational quality of the sites left open by URL Blacklist. In contrast, PFLAG has demonstrated that URL Blacklist, through its manipulation of DMOZ categories, systematically targets the highest-quality informational sites that express a positive viewpoint toward LGBT individuals. Second, Camdenton’s list of open websites does not refute PFLAG’s evidence that when URL Blacklist assigns a category to websites, it assigns websites expressing a positive view toward LGBT individuals to its “sexuality” category, which Camdenton blocks, while assigning websites expressing a negative view toward LGBT individuals to its “religion” category, which Camdenton does not block. In fact, the record reflects that when a

website identified as religious – such as Evangelicals Concerned – expresses a positive viewpoint toward LGBT individuals, URL Blacklist categorizes that website in its “sexuality” filter, rather than its “religion” filter. (Tr. 136); [Doc. # 1 at 15]. Third, Camdenton’s list of “open” websites could just as easily be explained by URL Blacklist’s general ineffectiveness at identifying and categorizing some websites. The record supports this interpretation because when tested on a random sample of 500 sexually explicit websites, URL Blacklist’s sexuality filter categorized thirty percent of them as “open,” even though they were sexually explicit. (Tr. 52). In contrast, CIPAFilter, an internet filter designed to help schools comply with CIPA, only failed to block 3.2% of these sites. (Tr. 52). Thus, although URL Blacklist allows access to some websites expressing a positive view toward LGBT individuals, whether by design or by error, it is clear that URL Blacklist systematically burdens access to this viewpoint, especially with regard to the highest quality information on the internet as defined by the industry standard DMOZ.

B. The Court Finds That by Continuing to use URL Blacklist, Despite Notice that URL Blacklist Discriminates Based on Viewpoint, Camdenton has Itself Intentionally Discriminated Based on Viewpoint

The Court finds Camdenton intended to discriminate based on viewpoint because Camdenton continues to use URL Blacklist despite being given notice by the ACLU of URL Blacklist’s viewpoint-discriminatory effects. The ACLU sent two letters to Camdenton officials explaining that URL Blacklist’s “sexuality” filter systematically blocks websites that express a positive view toward LGBT individuals and that are not

prohibited by CIPA. (Tr. 122-24). Although Camdenton agreed after the second letter to unblock four such websites that were specifically identified by the ACLU in those letters, Superintendent Hadfield testified at the hearing that he “didn’t take any other steps to make sure that other LGBT-supportive information would be unblocked...” (Tr. 124).

The Court’s conclusion is based in part on the demonstrated inability of URL Blacklist’s “sexuality” filter to effectively filter out content prohibited by CIPA, that is, visual depictions that are obscene, child pornography, or harmful to minors. This is important because Camdenton does not assert an interest in protecting its students from websites expressing a positive view toward LGBT individuals. Rather, Camdenton only asserts an interest in protecting its students from content prohibited by CIPA. Thus, Camdenton’s continued use of URL Blacklist, which does not effectively block content prohibited by CIPA, suggests an ulterior motive. David Hinkle, the developer of CIPAFILTER—an internet filter system designed to assist school districts in complying with CIPA while maximizing student access to otherwise-appropriate websites—found that CIPAFILTER only deemed 2.4% of the websites in URL Blacklist’s “sexuality” filter to be prohibited by CIPA. (Tr. 47). Further, when Mr. Hinkle tested 500 CIPA-prohibited websites on both internet filter systems, he found that URL Blacklist’s “sexuality” filter failed to block over 30% of CIPA prohibited sites, whereas CIPAFILTER failed to block only 3.2% of the CIPA prohibited sites. (Tr. 52). Thus, CIPAFILTER and its competitors are much more effective than URL Blacklist at achieving Camdenton’s stated goal of complying with CIPA, and do so without burdening websites that express a positive

viewpoint toward LGBT individuals. Camdenton's continued use of URL Blacklist in light of this demonstrated information shows an intent to discriminate based on viewpoint.

Camdenton's continued use of URL Blacklist likewise suggests an intent to discriminate based on viewpoint because URL Blacklist does not comply with professional standards of librarianship. Dr. Stripling, the Director of School Library Services in New York City, testified at the hearing that URL Blacklist failed to meet professional standards for several reasons. First, URL Blacklist lacks clear criteria for categorizing websites. (Tr. 10). Second, URL Blacklist lacks credibility because it does not disclose the names or qualifications of the people making its categorization judgments. (Tr. 10). In fact, the creator of URL Blacklist operates under the pseudonym "Dr. Guardian" out of a small residence in the United Kingdom countryside. (Tr. 26-27). Third, Dr. Stripling did not find URL Blacklist to be viewpoint-neutral. (Tr. 11). Dr. Stripling also testified that Camdenton's system of unblocking sites on an individual basis does not bring its system into compliance with professional standards. This, because students "can't know what sites are unavailable if they're blocked," because of the stigmatizing effect on information when students must specifically request access to it, and because of the negative effect on a school community of burdening alternative viewpoints. (Tr. 11-12).

Finally, the record contains direct evidence that Camdenton intended to discriminate based on viewpoint. Superintended Hadfield agreed at the hearing that

school board member John Beckett has expressed “concern with students accessing websites saying it’s okay to be gay.” (Tr. 76). At a public school board meeting, Mr. Beckett stated that “the amended policy may not have gone far enough,” and that he would like to require parental consent before allowing students to access these sites. (Tr. 67). Superintendent Hadfield also testified that thirteen individuals from the community spoke at a public meeting and that all thirteen “were supportive of the school district’s stance” on keeping the current filter in place. (Tr. 64). This, despite the ACLU’s warnings that the current system discriminated based on viewpoint. One such parent remarked: “If the parent allows this in the house, that’s one thing, but to do it outside the family circle, you usurp the authority of the parents.” (Tr. 66). These statements are direct evidence that Camdenton continued to use URL Blacklist, despite it being ineffective and falling below professional standards, out of an intent to continue to burden websites expressing a positive viewpoint toward LGBT individuals.

3. The Court Finds That Camdenton’s Internet-Filter System Stigmatizes, or at Least Burdens, Websites Expressing a Positive View Toward LGBT Individuals, Despite Its Procedure for Requesting That Individual Websites be Unblocked

First, it is not clear that Camdenton’s process for requesting that a website be opened is truly anonymous. In order to submit a request, students must fill out a form that pops up whenever they attempt to access a blocked site. There is a space on the request form for students to include their “Username.” Camdenton’s Network Administrator, Randal Cowen, testified at the hearing that students could enter any information they

want in this space, such as their dog's name or a number, and their request would be processed. (Tr. 101). But the form itself appears to require, or at least encourage, students to enter a username that is a derivation of their real name:

Please use your Novell Username Below. (Example: jdoe for John Doe, otherwise you will not receive email responses!)

Exh. D1 at 2.

Further, Mr. Cowan testified that students could visit a website where they could enter the "username" they had entered on the request form and see the status of all requests made under that username. (Tr. 101). But a student would have to enter the same username every time they made a request to take advantage of this system. Thus, if Camdenton became aware of the identity of a student using a computer when any single request was made, Camdenton would be aware of all the requests ever made by that student. Camdenton could become aware of which student made a particular request either through faculty monitoring of which student was present at a computer at a given time, or by encouraging students to sign on to computers using a user ID. In fact, Mr. Cowan testified that unless students sign on using a user ID assigned to them by the school, they will be limited to the strictest set of internet filters, designed for kindergartners. (Tr. at 108). There is little doubt that Camdenton can trace any student with a user ID to every request made by that student if it elects to do so. Finally, Camdenton's counsel has publicly stated that Camdenton's unblocking process would "involve identifying the student who wants to...open the material," although Hadfield

testified that Camdenton's counsel's statement was "not totally true." Exh. P33; (Tr. 70-72).

Second, for the reasons discussed immediately above, some students will likely perceive Camdenton's unblocking process as not anonymous and be deterred from using it for that reason. Thus, even if Camdenton's process for requesting that a website be opened is, in fact, anonymous, it still stigmatizes websites expressing a positive viewpoint toward LGBT individuals. This finding is supported by Plaintiff Jane Doe's testimony in her affidavit that she is "afraid" that requesting to have a site unblocked "will draw attention to [her] and make [her] the subject of further taunting." [Doc. # 28-2 at 2].

Third, even if Camdenton's unblocking process is, in fact, anonymous and is perceived by students as such, it still unnecessarily stigmatizes and burdens a single viewpoint on LGBT issues. Dr. Stripling testified that when a student is required to ask permission to access information, "even if it's anonymous that still the student feels stigmatized, that he's less than worthy, and the information that he's seeking is less than worthy." (Tr. 11). Further, Camdenton's internet-filter system is viewpoint discriminatory by design, so the unblocking process burdens only one viewpoint on LGBT issues by imposing a twenty-four hour wait and the risk of exposing one's identity only on access to information expressing the discriminated-against viewpoint. Thus, students may be deterred from accessing websites expressing a positive view toward LGBT individuals either by the inconvenience of having to wait twenty-four hours for access or by the stigma of knowing that viewpoint has been singled out as less worthy by

the school district and the community.

II. Discussion

Courts weigh the following factors when considering a plaintiff's motion for preliminary injunction: (1) whether the plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in the plaintiff's favor, and (4) whether an injunction is in the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

A. Whether Plaintiffs Are Likely to Succeed on the Merits

1. Likelihood of Success Needed

A party seeking a preliminary injunction regarding the implementation of anything but a “duly enacted state statute” must demonstrate a “fair chance” that it will succeed on the merits, “meaning something less than fifty percent.” *Planned Parenthood v. Rounds*, 530 F.3d 724, 730 (8th Cir. 2008). The Eighth Circuit requires a more rigorous showing, that the movant is “likely to prevail on the merits,” when challenging a duly enacted state statute because “governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic process are entitled to a higher degree of deference and should not be enjoined lightly.” *Id.* at 732 (citation omitted).

Camdenton argues its case under the assumption that the “likely to prevail” standard applies, but does not address PFLAG’s argument that the “fair chance” standard applies. The Court concludes that PFLAG must only show a fair chance of success on the

merits because a school board's selection of an internet filter does not appear to "represent[] the full play of the democratic process." *Planned Parenthood v. Rounds*, 530 F.3d 724, 733, n.6 (8th Cir. 2008) (internal quotes omitted). The Court also notes that the difference is not dispositive in this case, because the Court also finds PFLAG "likely to prevail" on the merits of its claim.

2. Standing

In order to meet Article III standing requirements, a plaintiff must show that she suffered "injury-in-fact," that is, injury that is concrete and particularized, as well as actual or imminent. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Camdenton argues that neither the organizational Plaintiffs nor the student Plaintiffs meet this requirement. The Court is not persuaded by these arguments.

a. Standing of Organizational Plaintiffs

Camdenton argues that the organizational Plaintiffs have no standing because they do not have a constitutional right ensuring that their websites reach students in a school library. Camdenton, in making this argument, relies heavily on the Supreme Court's holding in *ALA* that public libraries are not public forums. *United States v. Am. Library Ass'n* ("ALA"), 539 U.S. 194, 207 (2003) (plurality opinion). But PFLAG correctly argues that the state violates the First Amendment right of speakers when it denies them access to even a non-public forum if the state does so based on the speakers' viewpoint. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Because this is precisely what the organizational Plaintiffs in this claim allege, those Plaintiffs

have standing to bring this suit.

Camdenton also appears to argue that the right to challenge decisions regarding school-library materials is a right that belongs exclusively to the students. This argument is unpersuasive. Camdenton has not pointed to an analogous case that excludes web-publisher plaintiffs on standing grounds. In *ALA*, the plurality reached the merits of a claim by plaintiffs, some of whom were website publishers who challenged the filtering out of their websites from the non-public forum of library internet “collections.” *ALA*, 539 U.S. at 201-02. Thus, Camdenton is incorrect that website publishers cannot have standing to make such challenges.

Camdenton also argues that the organizational Plaintiffs lack standing because they cannot show injury in fact. Specifically, Camdenton argues that PFLAG has not alleged that any student has attempted to access the organizational Plaintiffs’ websites, as would be required to confer standing. Camdenton also argues that “there is not even a minimal guarantee that any student will ever seek access” to the organizational Plaintiffs’ websites. [Doc. # 34 at 10-11]. Camdenton’s argument is not persuasive. First, the injury claimed by organizational Plaintiffs is their exclusion on the basis of viewpoint, which logically exists independent of students’ desire to access the excluded resource. Regardless, Plaintiff Jane Doe, a student at Camdenton, has testified: “I want to be able to access information...but I am prevented from doing so by the software blocking sites on the Internet.” [Doc. # 28-2]. The most natural conclusion to draw from this statement is that Jane Doe would have accessed the organizational Plaintiffs’ websites but for her

knowledge that such websites were blocked. It is not reasonable to require that a student actually try to access a website that they know to be blocked in order for the website's publisher to be able to bring suit. This conclusion draws support from Camdenton's inability to identify precedent that would support its proposition, such as, for example, a book removal case discussing a requirement that a student request a book they knew to be removed as a condition of bringing suit. The Court finds that Camdenton's actions have, in fact, prevented the organizational Plaintiffs from reaching at least one student.

Accordingly, the Court finds that the injury that PFLAG alleges is both concrete and actual, and the organizational Plaintiffs have standing to bring this suit.

b. Standing of Jane Doe

Even if the organizational Plaintiffs did not have standing to sue, the lawsuit would still proceed because Jane Doe, a Camdenton student, also has standing to sue. Camdenton argues that Jane Doe lacks standing because she has not alleged any particular website that she wished to access, has attempted to access, or for which she has petitioned to gain access. But this argument only demonstrates the breadth of Jane Doe's injury. Camdenton's filter system deterred Jane Doe from even trying to access in her school library, websites expressing a positive viewpoint toward LGBT individuals, because she knew they were blocked. Camdenton's system thus chilled Jane Doe's search for information on that viewpoint. The Eighth Circuit has recognized this type of broader, stigmatic injury:

The symbolic effect of removing the films from the curriculum is

more significant than the resulting limitation of access to the story. The board has used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious.

Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982); *see also Bd. of Ed., Island Trees Un. Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion).

Camdenton argues that Jane Doe does not have standing to sue because Camdenton's filter system allows access to some websites expressing a positive viewpoint toward LGBT individuals. Camdenton appears to argue that because an attempt by Jane Doe to access any particular website expressing a positive viewpoint toward LGBT individuals might be successful, her injury is too speculative to satisfy Article III requirements. This argument also fails in light of the Eighth Circuit's statement in *Pratt* that the stigmatizing effect of condemning an idea by limiting access to it is more significant than the actual limitation of access. *See Pratt*, 670 F.2d at 779. This stigmatization is not speculative because it necessarily follows from Camdenton's viewpoint discrimination, which the Court has already found. That stigmatization is further evidenced by Jane Doe's testimony that she is afraid to access school websites expressing a positive viewpoint toward LGBT individuals.

c. Effect of Camdenton's Unblocking Procedure on Standing

Finally, Camdenton argues that its system allowing students to request that sites be unblocked renders PFLAG's injuries too hypothetical to satisfy standing requirements

and also moots the lawsuit. Camdenton argues that in order to have standing, Jane Doe would have had to exhaust her remedies by requesting access to a site and being denied under that system. This argument does not defeat standing for the organizational Plaintiffs because Camdenton's act of filtering the organizational Plaintiffs' websites based on viewpoint stigmatized a particular viewpoint. This is an injury by itself, regardless of whether students are eventually able to access any particular website expressing the discriminated-against viewpoint. *See Pratt*, 670 F.2d at 779.

As for the effect of Camdenton's procedure for unblocking a website on Jane Doe's standing, the Court is aware of two cases dealing with such a procedure—neither of which supports Camdenton's argument. In the first such case, *ALA*, the plurality considered the effects of an unblocking procedure in its discussion on the merits, but never indicated that the procedure was an obstacle to standing. 539 U.S. at 209. Because standing is a threshold question, this suggests that the existence of such a procedure is not a bar to standing. In the second such case, *Counts*, the Western District of Arkansas considered the effect on standing of a school library's decision to only allow students to check out copies of the book Harry Potter with the assistance of a librarian and with a letter of parental permission on file. *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d. 996, 999 (W.D. Ark. 2003). The *Counts* court found concrete injury, relying for that finding both on the stigmatization of the book—that students seen reading the book would be known to be reading a book disapproved of by the school—as well as the extra burdens of having to receive parental permission and librarian assistance to access the book. *Id.*

The *Counts* court also rejected the defendant school district's argument that the lawsuit was not ripe because the lawsuit was filed during summer break and, thus, the student plaintiffs could not have filed parental notes and requested librarian assistance in accessing the book before filing the lawsuit. *Id.* The court observed that "this is not a case where administrative exhaustion or development of the record is called for." *Id.*

The Court finds the reasoning in *Counts* both persuasive and consistent with the plurality decision in *ALA*. It would strain common sense for the Court to allow Camdenton to create a procedure, burdening only one viewpoint in a debate, and then require administrative exhaustion before a federal Court could consider the merits of the challenge. Such an approach would chill speech in a viewpoint-discriminatory fashion, which is the antithesis of the First Amendment.

This is especially true where the record supports a finding that the procedure to be exhausted stigmatizes protected speech. Although Camdenton argues that its procedure cannot stigmatize speech because it is anonymous, the Court has found that students will likely fear that Camdenton's unblocking procedure will not protect their anonymity. Thus, Jane Doe's testimony that she is "afraid" that requesting to have a site unblocked "will draw attention to [her] and make [her] the subject of further taunting" is justified. [Doc. # 28-2 at 2]. This fear is similar to that in *Roe v. City of New York*, where the court found a plaintiff's fear of arrest for attending a needle exchange reasonable, and also considered, for standing purposes, "that the fear itself cause[d] a distinct and palpable injury" by decreasing the use of needle exchanges and increasing the transmission of

diseases. 151 F. Supp. 2d 495, 506 (S.D. N.Y. 2001). Jane Doe's alleged injury to her First Amendment interest to receive information is sufficiently concrete and actual despite Camdenton's unblocking procedure and despite Jane Doe's failure to exhaust that procedure.

d. Applicability of Censorship Cases

Camdenton also claimed at oral argument that the censorship cases cited by the ACLU in support of standing are inapplicable to this case because they all involved the removal of a book previously included in a library collection. Camdenton apparently argues that the Court should extend *ALA*'s holding – that libraries do not violate the First Amendment by filtering out the subject of pornography from their patrons' internet access – to the facts of this case and deny standing. But even if *ALA* were on all fours with this case, it would not aid Camdenton's argument because the Supreme Court in *ALA* reached the merits of the claim before it. Thus, to the extent this case is analogous to *ALA*, it suggests that the Court should reach the merits of this case as well.

Regardless, the injury alleged in this case is more analogous to the injury in book-removal censorship cases than to the injury in *ALA*. The Supreme Court in *ALA* did not deal with viewpoint discrimination, but rather considered a librarian's decision to "exclude certain categories of content." *ALA*, 539 U.S. at 194. Thus, the plaintiffs in *ALA* could only allege the injury of denial of access to a particular subject. But here, the Court has found viewpoint discrimination. Thus, the Plaintiffs in this case claim both the denial of access to a particular viewpoint and the stigmatic effect of the state endorsing a

particular viewpoint over the other. The Eighth Circuit made clear in *Pratt* that this second, stigmatic injury is “more significant.” *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 779 (8th Cir. 1982). For all of these reasons, PFLAG likely has standing to bring its claim in federal court.

3. The Merits of PFLAG’s Claim

Camdenton’s internet access system in its library is neither a traditional nor a designated public forum. *United States v. Am. Library Ass’n* (“ALA”), 539 U.S. 194, 205 (2003) (plurality opinion) (internal quotes omitted). It is a nonpublic form. “Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and viewpoint neutral.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). But “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” *Id.* Federal courts “apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Because the Court has found that Camdenton’s internet filter system discriminates based on viewpoint, that system is invalid unless Camdenton can demonstrate that is narrowly designed to serve a compelling state interest. *See Brown v. Entm’t. Merch. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

Alternatively, Camdenton’s decision to deny its students access to websites

expressing a positive viewpoint toward LGBT individuals could be analyzed under the “right to receive information and ideas.” *Bd. of Ed., Island Trees Un. Free Sch. Dist. No.26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion). (“[T]he First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.” *Id.* at 866). “[School districts] possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.” *Id.* at 870. Because the Court has found that Camdenton’s internet-filter system discriminates based on viewpoint, that system must be struck down unless Camdenton can demonstrate that allowing access to websites expressing a positive viewpoint toward LGBT individuals would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 509 (1969); *see also Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 (8th Cir. 2008) (applying *Tinker*).

PFLAG is likely to succeed in challenging Camdenton’s internet-filter policy under either form of exacting scrutiny. First, Camdenton has repeatedly said that its goal is not to protect its students from websites expressing a positive view toward LGBT individuals, or that such websites interfere with the requirements of appropriate discipline. Rather, Camdenton has argued that its internet-filter system does not discriminate based on viewpoint. The Court has found otherwise. Thus, Camdenton’s only possible governmental objective is compliance with CIPA; i.e, protecting its students

from viewing, on school computers, images that are obscene, child pornography, or harmful to minors. The Court assumes that this interest is a compelling one, but Camdenton's internet-filter system is not narrowly tailored to achieve that interest. Rather, the record clearly demonstrates that Camdenton could either use a product like CIPAFILTER or reconfigure its own system to achieve viewpoint neutrality, and that doing so would maintain, if not increase, its effectiveness at blocking CIPA-regulated content. As shown by the evidence, URL Blacklist failed to block out 30 per cent of material forbidden by CIPA. Indeed, this evidence supports the Court's conclusion that Camdenton has continued to use the URL Blacklist as its primary filter because it discriminates against websites that discuss LGBT from a positive viewpoint.

Camdenton appears to argue that because it has in place a system for requesting that websites be unblocked, its internet-filter system is narrowly tailored to its interest in complying with CIPA. But the Court has explained elsewhere that Camdenton's unblocking procedure, as currently configured, burdens a particular viewpoint and thus has a stigmatizing effect. It is thus distinguishable from the unblocking system that the plurality in *ALA* found to be effective at curing the overbreadth of an internet filter in public libraries. 539 U.S. at 209. Because the plaintiffs in *ALA* did not allege that public libraries would filter out websites based on any particular viewpoint on the front end, the unblocking procedure employed there did not burden or stigmatize any particular viewpoint on the back end. Thus, the *ALA* court's analysis of the unblocking procedure in that case does not apply to the unblocking procedure in this case, and Camdenton's

internet filtering system is not narrowly tailored.

Camdenton argues that because this case involves the filtering out of websites, rather than the removal of books, that the Court should apply the “reasonableness” standard of *ALA* rather than the more exacting scrutiny applied in *Pico* and *Pratt*.¹ But Camdenton’s argument misinterprets these cases. The plurality in *ALA* held that where a library decides to “exclude certain categories of content” from its internet “collection” by using internet filters, that decision need only be reasonable in light of its “traditional role in identifying suitable and worthwhile material.” *ALA*, 539 U.S. at 208. The plurality thus upheld the right of libraries under the First Amendment to use an internet filter to exclude the subject of pornography from its collection. *Id.* The district court in *ALA* engaged in reasoning similar to that of Camdenton when it “reasoned that a public library enjoys less discretion in deciding which Internet materials to make available than in making book selections.” *Id.* at 207-08. But the Supreme Court did “not find this distinction constitutionally relevant,” and instead reasoned:

Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries’ judgments to block online pornography any differently, when these judgments are made for just the same reason.

Id. at 208. This language makes clear that it is the intention and effect of a library’s

¹Because Camdenton consistently asserts that it does not discriminate based on viewpoint, it is unclear whether Camdenton would argue that *ALA* should provide the standard for this case despite the Court having found viewpoint discrimination. Because Camdenton’s counsel at oral argument insisted that this is not a book “taking” or classic censorship case and that *ALA* controls, the Court addresses the following argument. (Tr. 145).

decision that controls the analysis, and not the medium of the resource nor whether the decision can be characterized as an addition or removal.

This conclusion is consistent with the plurality decision in *Pico*. There, having earlier noted that “the action before us does not involve the *acquisition* of books,” 457 U.S. at 862 (emphasis in original), the plurality later noted that:

nothing in our decision today affects in any way the discretion of a local school board to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books. In brief, we hold that the local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. Such purposes stand inescapably condemned by our precedents.

Id. at 871-72 (emphasis in original) (internal quotes and citations omitted). In *Pico*, the parties did not allege that the addition of a book amounted to viewpoint discrimination, but here the Court has found that Camdenton, by continuing to use URL Blacklist as currently configured, has sought to prescribe what shall be orthodox in matters of opinion. According to the plurality in *Pico*, it is that purpose that violates the First Amendment.

Thus, if the Court were examining a decision by Camdenton to exclude all resources on the *subject* of LGBT issues, whether by employing an internet filter or by book selection or removal, the Court would examine that decision under the standard articulated in *ALA*. But because here, the Court is examining Camdenton’s decision to exclude websites expressing a *viewpoint* that is positive toward LGBT individuals, the

Court must examine the decision under the exacting scrutiny of *Pico* and *Pratt*.

Finally, even if the Court were to examine Camdenton’s decision under the standard of ALA, PFLAG would likely prevail on the merits. Camdenton has not argued that its decision to systematically block access to websites expressing a positive viewpoint toward LGBT individuals is reasonable in light of a librarian’s “traditional role in identifying suitable and worthwhile material.” Rather, Camdenton has consistently denied that it discriminates on the basis of viewpoint. Because the Court has found otherwise, PFLAG is likely to succeed on the merits of its claim.

B. Whether PFLAG Will Suffer Irreparable Harm if Camdenton is not Enjoined

Injunctive relief in the federal courts is based on the threat of irreparable harm and the inadequacy of legal remedies. *Bandag, Inc. v. Jack’s Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Court has found PFLAG likely to succeed on the merits of its First Amendment claim, and thus a preliminary injunction will prevent irreparable harm to PFLAG.

C. Whether the Balance of Hardships Tips in PFLAG’s Favor

The balance of hardships tips in PFLAG’s favor. The Court’s failure to enjoin Camdenton’s internet-filter system, as currently configured, will lead to an ongoing violation of the First Amendment rights of website publishers and students. Camdenton

argues that requiring it to disable its “sexuality” filter will expose children to pornography and bring Camdenton into noncompliance with CIPA. But PFLAG does not ask that Camdenton merely disable its “sexuality” filter. Rather, PFLAG requests: “An injunction prohibiting Defendants from continuing to use Internet filtering software that blocks access to LGBT-supportive viewpoints while permitting access to anti-LGBT viewpoints.” [Doc. # 1 at 35].

The record reflects several viewpoint-neutral options that would allow Camdenton to continue its compliance with CIPA. For example, Camdenton could reconfigure its system, such as by adding to its white list all websites in DMOZ’s “gay, lesbian, and bisexual” subcategory that would not be regulated by CIPA. Camdenton has presented no evidence that this would be a hardship. Or Camdenton could employ one of the many filter services suggested by PFLAG that effectively filter pornography without discriminating based on viewpoint. Although such a service would presumably cost more than Camdenton’s URL Blacklist implementation, Camdenton has not presented evidence that this cost would be overly burdensome on Camdenton’s financial resources. In fact, the record reflects that a thousand school districts currently employ CIPAFILTER alone, which suggests that the cost of these products would not be overly burdensome on Camdenton. (Tr. 60). Further, the record indicates that Camdenton’s adoption of one of these services would substantially improve its ability to shield children materials prohibited by CIPA. Any small increase in price should be justified if Camdenton is concerned about filtering out pornographic material. The balance of hardships thus

weighs in favor of PFLAG.

D. Whether an Injunction is in the Public Interest

“[I]t is always in the public interest to protect constitutional rights.” *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Viewpoint discrimination by a state actor is antithetical to the First Amendment, one of our country’s most cherished constitutional rights. Enjoining this action is thus in the public interest.

III. Conclusion

For the foregoing reasons, the Court finds that PFLAG has established the requirements necessary for a preliminary injunction on its claim under the First Amendment of the U.S. Constitution. Accordingly, it is hereby ORDERED that Plaintiffs’ Motion for Preliminary Injunction [Doc. #6] is GRANTED. The Court orders Camdenton to discontinue, within 30 days, its internet-filter system as currently configured, and any new system selected must not discriminate against websites expressing a positive viewpoint toward LGBT individuals.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: February 15, 2012
Jefferson City, Missouri