UIC John Marshall Journal of Information Technology & Privacy Law

Volume 16
Issue 3 *Journal of Computer & Information Law - Spring 1998*

Article 7

Winter 1997

1997 John Marshall National Moot Court Competition in Information Technology and Privacy Law: Bench Memorandum, 16 J. Marshall J. Computer & Info. L. 685 (1998)

David E. Sorkin

Steven A. McAuley

David B. Nash III

MOOT COURT COMPETITION

BENCH MEMORANDUM

THE USE OF INTERNET BLOCKING SOFTWARE IN A PUBLIC FORUM: FIRST AMENDMENT AND FREEDOM OF INFORMATION ACT IMPLICATIONS

by DAVID E. SORKIN, STEVEN A. MCAULEY, & DAVID B. NASH, III†

THE SIXTEENTH ANNUAL JOHN MARSHALL LAW SCHOOL
NATIONAL MOOT COURT COMPETITION IN INFORMATION
TECHNOLOGY AND PRIVACY LAW
NO. 97-404
IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

Marshall Anti-Censorship Coalition, Inc.,	)	
Plaintiff-Appellant,	)	
v.	)	No. 97-404
The State of Marshall and Marshall Department of Education,	)	
Defendants-Appellees.	)	

† David E. Sorkin is an Assistant Professor of Law and Associate Director of the Center for Information Technology and Privacy Law, The John Marshall Law School; B.A.

I. INTRODUCTION

Marshall Anti-Censorship Coalition, Inc. v. State of Marshall is a dispute involving Internet filtering software installed on public-access Internet terminals located in public libraries. The State of Marshall enacted the Marshall Internet Child Protection Act[1] on January 6, 1997. The Act requires that Internet filtering software selected by the Marshall Department of Education ("MDOE") be installed on all public-access Internet terminals located in public libraries throughout the state. The Department selected NetChaperone, a program manufactured by Chaperone Systems, Inc. ("CSI"), and on February 17, awarded CSI a contract to provide libraries with the NetChaperone software in accordance with the Act.

The plaintiff-appellant, the Marshall Anti-Censorship Coalition ("MACC"),[2] filed a suit in the Princeton County Circuit Court challenging its validity under the state and federal constitutions.[3]

MACC contended that the filtering software requirement imposed by the Marshall Internet Child Protection Act violates the First Amendment rights of library patrons and persons who disseminate information using the Internet. MACC also filed a separate action, subsequently consolidated with its constitutional challenge, seeking disclosure of NetChaperone's database of blocked Internet sites, or "off-limits" list, under the Marshall Freedom of Information Act ("FOIA").[4]

The State of Marshall claimed that the Marshall Internet Child Protection Act is consistent with the First Amendment, because it merely prevents computers in public libraries from being used to access Internet sites deemed "patently offensive." The State claimed further that the NetChaperone "off-limits" list is proprietary information, privileged, and confidential, and thus exempt from disclosure under Marshall Code § 6-85-6(a)(6).

The trial court upheld the constitutionality of the Act, but determined that the NetChaperone "off-limits" list is subject to disclosure

---

1985, B.S. Bus. 1985, M.L.S. 1991, Indiana University; J.D. 1988, Harvard Law School. Steven A. McAuley is the Editor-in-Chief of *The John Marshall Journal of Computer & Information Law*, 1997-1998; B.S.M.E. 1995, Marquette University; J.D. 1998, The John Marshall Law School. David B. Nash, III is the Executive Production Editor of *The John Marshall Journal of Computer & Information Law*, 1997-1998; B.A. 1994, University of North Texas; J.D. 1998, The John Marshall Law School.

1. Marshall Internet Child Protection Act, Public Law 45-7098 (Appendix A).

2. The State has stipulated to MACC's standing to challenge the Act on constitutional grounds.

3. Marshall courts follow the "lockstep doctrine," construing the free speech clause of the Marshall Constitution to provide the same level of protection as the corresponding provision of the U.S. Constitution.

4. Marshall Code §§ 6-85-1 to 9 (1996) (Appendix B).

under FOIA, and ordered MDOE to disclose the list pursuant to MACC's request. The Marshall Court of Appeals upheld the constitutionality of the Act but reversed the trial court on the FOIA issue, holding that the NetChaperone "off-limits" list is not subject to disclosure under FOIA. MACC is appealing that decision to the Supreme Court of the State of Marshall.

II. STATEMENT OF THE CASE

Public libraries in Marshall began to install public-access Internet terminals in October 1995. These computers proved to be well received by patrons for educational, corporate, and recreational purposes, and nearly all public libraries in the state now make such computers available to patrons.

Problems quickly arose as a result of the availability of these public-access Internet terminals. Because these computers are frequently used by children, many libraries installed Internet terminals in areas devoted to children's books. Other libraries have chosen to install them near the reference desk, partly because patrons using the Internet are likely to request assistance from a reference librarian, and partly to discourage theft and vandalism of the computer equipment. Although some libraries ask patrons to sign in before using Internet terminals,[5] none of them restrict usage based upon the patron's age.[6]

Complaints concerning the public-access Internet terminals arose in several libraries because patrons were able to access Internet sites containing sexually explicit material. In some cases parents of children who had accessed such sites submitted formal complaints to librarians; in other cases, complaints came from patrons or library employees who were exposed to such materials while walking by computers in use by other patrons. Jamie Hatcher, a librarian at Englewood Public Library, stated at trial that "patrons were bringing up pornographic images on the access terminals, leaving them on the screen, and just walking away. I walked past five public access terminals, all of which had sexually explicit images on the screen." Ms. Hatcher stated that complaints escalated sharply after one patron wrote a letter to the local newspaper complaining that the sight of sexually explicit images on library computers constituted "sexual assault."

5. According to MDOE, three libraries permit patrons to reserve time on Internet terminals in advance, and require patrons to present identification before using the terminals. In each such instance, however, a library card is sufficient identification, and no identification is required to use an Internet terminal during a period for which it has not been reserved in advance.

6. While many libraries have a limited collection of materials which are kept in closed stacks, these items are generally not requested very often, and librarians will provide such items to anyone who requests them with a plausible explanation.

At least partly in response to these complaints, the State of Marshall enacted the Marshall Internet Child Protection Act, which was signed into law on January 6, 1997. The Act states in relevant part:

> (a) All public-access Internet terminals located within public libraries in the State of Marshall shall be equipped with filtering software designed to filter out patently offensive material. All public libraries in the State of Marshall shall install, maintain, and continuously operate such filtering software on all publicly accessible Internet terminals.
> (b) Libraries shall install the filtering software required by this Section within thirty days after such software is made available to them by the Marshall Department of Education.[7]

Chaperone Systems, Inc. ("CSI") manufactures and distributes a wide variety of computer software products. CSI released the first version of NetChaperone in January 1996. By February 1997, over two million copies of the NetChaperone program were in use.

NetChaperone is distributed with a license agreement that prohibits users from attempting to discover the contents of the "off-limits" list. The license agreement specifically prohibits users from reverse engineering the software in order to view the list, and from reconstructing "a substantial part" of the contents of the list using trial and error.[8]

CSI has spent over $140,000 developing the NetChaperone "off-limits" list, and continues to spend between $5,000 and $6,000 per month updating the list. This list is updated in three ways: first, by paying individuals (both CSI employees and independent contractors) to actively review Internet sites to add to the list; second, by considering Internet sites suggested to CSI by concerned Internet users for possible inclusion on the list; and third, by re-evaluating previously blocked sites based upon complaints received from the operators of such sites or from other Internet users. The list is updated on a daily basis, and changes are transmitted electronically to each computer on which the NetChaperone program is installed in a manner which is generally transparent to the user.

The speed at which the NetChaperone software functions is dependent in part on the size of the "off-limits" list. Rather than blocking access to each individual document which has been deemed objectionable, in many instances the list simply blocks access to all documents located on a particular site (such as "www.playboy.com," a site operated by Playboy Magazine) or to all documents whose address contains a particular

---

7. Marshall Internet Child Protection Act, § 3 (Appendix A).

8. It is possible, of course, to ascertain whether any particular site appears on the "off-limits" list simply by attempting to access the site from a computer on which the NetChaperone software is installed. However, even if it were permitted under the license agreement, it would be impractical to use this method to ascertain the entire contents of the list, because the list contains thousands of sites.

string of characters (such as the word "bondage"). Because many sites assign names to individual documents at the time that the document is requested, this capability is essential for filtering software to effectively control access to such sites.

In several cases, the NetChaperone "off-limits" list blocks access to all documents located on a particular site operated by an Internet Service Provider because several customers of the provider have posted objectionable files on the site, even though other customers have posted only files that would otherwise not be blocked.[9] In a few cases, NetChaperone has temporarily blocked access to sites that initially appeared to meet its criteria for blocking, but subsequently restored access to the sites after receiving complaints or unfavorable publicity.[10]

As part of the competitive bidding procedure, and at the specific request of MDOE, CSI provided MDOE with a printout of the "off-limits" list as it existed on January 15, 1997. The contract between CSI and MDOE also requires CSI to submit updated printed copies of this list to MDOE on a monthly basis. With each printed copy of the list, CSI has included a cover letter stating that the contents of the list are proprietary, privileged, and confidential information, and requesting that the list not be made available for viewing or copying by any third party.

MACC's FOIA request sought disclosure of the initial printout of the NetChaperone "off-limits" list provided to MDOE in January 1997.[11] MDOE denied the request on the basis that the information sought consisted of "trade secrets and commercial or financial information" exempt from disclosure under Marshall Code § 6-85-6(a)(6). Following exhaustion of its administrative remedies,[12] MACC sought judicial review of MDOE's denial of its FOIA request.

---

9. At one point MACC's own web site was blocked by NetChaperone because it resides on a server operated by MarshLink, a regional Internet service provider, and several of MarshLink's other subscribers had posted sexually explicit images on web pages located on the same server. MarshLink recently established a separate web server for subscribers wishing to post objectionable materials, and NetChaperone has removed MarshLink's main web server from the "off-limits" list.

10. Examples of sites that have been temporarily blocked by NetChaperone include discussions of AIDS treatment and prevention, feminist philosophy, animal rights, and the views of Louis Farrakhan. The parties stipulated at trial that the software has blocked access to many World Wide Web sites whose content was not obscene, including sites maintained or published by members of MACC.

11. MACC indicated at trial that it also seeks ongoing disclosure of the updated copies of the list provided by CSI to the MDOE each month. The courts below declined to address that issue because MACC had not yet formally sought such disclosures as required by FOIA.

12. MDOE's denial of the FOIA request was affirmed by Secretary of Education Hazel Bennington on February 28, 1997.

As already noted, the FOIA review was consolidated with MACC's earlier action challenging the constitutionality of the Marshall Internet Child Protection Act. MACC seeks declaratory and injunctive relief, asking that the Marshall Internet Child Protection Act be declared invalid and that MDOE be compelled to disclose the contents of NetChaperone's "off-limits" list.

The trial court upheld the constitutionality of the Act, determined that the NetChaperone "off-limits" list is subject to disclosure under FOIA, and ordered MDOE to disclose the list pursuant to MACC's request. The Marshall Court of Appeals upheld the constitutionality of the Act, but determined that the NetChaperone "off-limits" list is not subject to disclosure under FOIA. MACC is appealing that decision to the Supreme Court of the State of Marshall.

III. ISSUES PRESENTED

A. Whether a statute that mandates the use of Internet filtering software on public-access Internet terminals located in public libraries violates the Free Speech Clause of the First Amendment.

B. Whether the list of sites blocked by Internet filtering software procured by the state is subject to disclosure under the Marshall Freedom of Information Act.

IV. BACKGROUND

The Internet is a worldwide communications system that links millions of computers and computer networks together.[13] In its early years, the Internet was used predominantly for communications between large research institutions and the military. In recent years, however, the Internet has evolved into a multipurpose communications system that serves individuals and businesses as well as government agencies and academic institutions.[14]

The World Wide Web, a subset of the Internet, provides Internet users with access to a vast amount of information stored on disparate remote computers and delivered via the Internet.[15] Many public libraries provide free Internet access to patrons, largely for the purpose of accessing information available on the World Wide Web, and an increasing number of "computer coffee shops" provide Internet access for an hourly fee.[16]

The increasing popularity of the World Wide Web has been accompa-

13. *See* Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997).
14. *See* DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 15 (1994).
15. *See Reno*, 117 S. Ct. at 2335-36.
16. *See id.* at 2334.

nied by a great deal of controversy. The Communications Decency Act,[17] enacted by Congress last year and subsequently struck down by the United States Supreme Court,[18] represented one of many legislative attempts to regulate the content of information available online.

Due to the growing popularity of the Internet and the World Wide Web, there is a growing concern among the public about children browsing the Internet without adult supervision. Unsupervised Internet browsing allows children to view sexually explicit and other inappropriate material in the normal course of utilizing the Internet. In order to curb this type of use by children, various filtering software programs have been developed, including CyberPatrol, CyberSITTER, NetChaperone, NetNanny, SurfWatch, and X-Stop.[19]

Filtering software has a beneficial purpose for parents, teachers, library administrators and employers. It provides them with a measure of control over the content, type and in some cases even the quantity of information that children, library patrons and employees can access via the Internet.

Some filtering programs operate by performing various operations upon the text of documents—for example, by blocking access to documents containing certain words or phrases, or those containing certain combinations of words or phrases.[20] More common, however, are programs that either permit access only to documents or sites that appear in a database of pre-selected sites (sometimes referred to as a "safe" or "allow" list), or else block access to documents or sites that appear in a different database (a "stop" or "block" list). Some programs that use the blocking method sometimes permit the user to configure the program to select categories of sites to be blocked, such as sites with sexual content (often further divided into subcategories); gambling sites; sites with alcohol, tobacco, or drug references; sports and entertainment sites; sites containing extremist political and hate speech; and so on.[21]

---

17. Telecommunications Act of 1996, tit. V, Pub. L. 104-104, 110 Stat. 56, 133 (1998).

18. *See* Reno v. ACLU, 117 S. Ct. 2329 (1997).

19. *See generally* Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 455 (1997); Diane Roberts, *On the Plurality of Ratings*, 15 CARDOZO ARTS & ENT. L.J. 105, 117-20 (1997).

20. This method obviously has its disadvantages; for example, a program that blocks documents containing the word "sex" might block access to information about the Sussex County Fair, while permitting access to documents that use such phrases as "do the nasty" and "getting it on," and those that contain sexually explicit visual images not accompanied by textual descriptions.

21. Sites are evaluated and assigned to categories by professional "websurfers" employed by filtering software manufacturers and by independent contractors acting under their supervision. Parents can use these categories to set access restrictions individually for each child, depending upon the child's interests and maturity. Employers can block access to categories of sites which are unlikely to be work-related.

NetChaperone and most of the other programs employ the blocking method. NetChaperone's manufacturer refers to the program's database of blocked sites as an "off-limits" list, and provides users of the program with daily updates of the database. NetChaperone lacks the customization capability of many filtering programs; it blocks access to sites containing explicit sexual content (including but not limited to nudity), gross depictions, hate speech, and detailed discussions of illegal activities, and does not permit the user to select which categories of sites are to be blocked.

V. CONSTITUTIONALITY

MACC contends that the Marshall Internet Child Protection Act is an unconstitutional infringement of free speech under the First Amendment. MACC will likely argue that the Act is void for overbreadth because much of the speech that it restricts is protected by the First Amendment.[22] MACC may also claim that the installation of filtering software in libraries is akin to the removal of books from a library based upon their content, which has also been held to violate the First Amendment.

A. OVERBREADTH/LEAST RESTRICTIVE MEANS

The filtering software to be installed pursuant to the Marshall Internet Child Protection Act will restrict access to materials available on the Internet based upon their content. While obscene materials are generally beyond the scope of the First Amendment, NetChaperone will filter out a great deal of expression that is not legally obscene. A content-based regulation will withstand constitutional scrutiny only if it is the least restrictive means available to further a compelling state interest.[23]

The state interest involved here, protecting minors from sexually explicit and other objectionable materials, is sufficiently compelling.[24] Furthermore, the Act may also further other legitimate state interests,

22. MACC may also contend that the Act is void for vagueness, since it does not specify all the types of information that will be blocked by the software. It seems apparent, however, that constitutionally protected expression will almost certainly be among that blocked by the software, either because it is deemed "patently offensive" or otherwise objectionable by the software manufacturer, or because it exists on the same server as such material or otherwise satisfies the manufacturer's blocking criteria. The potential defect in the Act thus is probably better categorized as overbreadth rather than vagueness.

23. *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

24. *See, e.g., Reno*, 117 S. Ct. at 2340 n.30 (1997) (recognizing protection of minors from "indecent" and "patently offensive" speech as a compelling interest); *Sable Communications*, 492 U.S. at 126 (recognizing protection of "the physical and psychological well-being of minors" as a compelling interest).

such as reserving library resources for productive purposes, and protecting library patrons and employees from sexual and racial harassment.

MACC will contend that the mechanism chosen by the State of Marshall is not the least restrictive means of furthering the state's interest. In *Reno v. ACLU*,[25] the Supreme Court struck down provisions of the Communications Decency Act prohibiting the transmission of "indecent" and "patently offensive" communications to minors, in part because the Act's goal could be achieved more effectively by far less restrictive alternatives, such as the installation of Internet filtering software.

MACC may suggest alternative ways to protecting minors from being exposed to objectionable materials on public-access Internet terminals in public libraries. For example, library personnel could informally supervise the use of Internet terminals and actively discourage inappropriate uses, rather than installing filtering software. Another possibility would be for libraries to reserve some terminals for use by adults only, and install filtering software only on those terminals accessible by all patrons.[26] The State is likely to challenge the effectiveness of the first approach, and may dispute the practicality of the second.

MACC may also argue that circumvention and other inadequacies in the filtering software will substantially prevent the Act from achieving its goal of protecting minors.

The State will likely claim that the effect of the Act on protected speech is minimal or nonexistent, in that it merely prevents certain computers from being used to view selected materials and has no effect on the information available via the Internet from any other location. The primary effect of the Act is upon listeners rather than speakers, and their ability to access the affected speech is limited only within a single type of forum (public libraries). However, public libraries are an important public forum,[27] and for most people—particularly adults—they represent the only source for free access to the Internet.

B. Removal vs. Selection

Everyday, libraries decide which materials to purchase, based largely upon the content of the materials. Such decisions are inherent in the operation of a library, and clearly do not violate the First Amendment even though most libraries are governmental actors. The State

25. *Reno*, 117 S. Ct. at 2329.

26. *Cf.* Loving v. Boren, 956 F. Supp. 953, 955 (W.D. Okla. 1997) (discussing university's maintenance of two Internet news servers, one of which was uncensored and accessible only by users over 18).

27. *See* Brown v. Louisiana, 383 U.S. 131, 142 (1966); *cf.* Board of Education, Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (discussing unique role of school libraries).

will argue that filtering materials accessible over the Internet on library-owned computers is no more than a selection decision, and bears no First Amendment consequences. MACC, on the other hand, will likely characterize Internet filtering as analogous to the forced removal of library materials, an action which does implicate the First Amendment.

In *Board of Education, Island Trees Union Free Sch. Dist. v. Pico*,[28] the Supreme Court held that the First Amendment limits the ability of a school board to remove materials from high school and junior high school libraries based upon their content. Public-access Internet terminals without filtering software installed provide library patrons with access to all information available via the Internet. When filtering software is installed, as the Marshall Internet Child Protection Act requires, patrons no longer have such unfettered access. Therefore, MACC can argue that the installation of filtering software is functionally equivalent to mandating the removal of library books based upon their content, a practice prohibited by *Pico*.

The State, however, can offer several reasons why Internet filtering software is more akin to selection than to removal of library materials. First, information accessible via the Internet is not purchased or owned by the library, physically located within the library, nor otherwise in the library's possession or control, until the moment that it is accessed by a patron. Preventing a patron from accessing a blocked Internet site is little different from declining to purchase a book that a patron has requested. Second, selection decisions frequently involve a decision as to the medium in which a particular item will be purchased, such as print, microform, or via an on-line database. Installing filtering software on public-access terminals merely requires patrons to use alternative means of accessing certain materials—for example, by requesting that a librarian download and print them using a non-public terminal. Finally, Internet filtering software operates based upon predetermined criteria, like a library selection policy (though MACC may point out that sites tend to make it onto the list of blocked sites because of specific complaints, which is more like the manner in which library materials are removed).

MACC may argue that the budgetary constraints that require libraries to make traditional selection decisions are inapplicable to the Internet, because a library with Internet access can afford to "purchase" everything available on the Internet. However, resources such as the number of terminals available to patrons and even the bandwidth consumed by retrieving large images and other documents are limited. The State may compare these resource limitations with the budgetary constraints that necessitate selection decisions. Furthermore, libraries

28. *Pico*, 457 U.S. at 853.

make selection decisions for reasons other than economics. Few public libraries and school libraries would subscribe to explicit pornographic magazines or newsletters devoted to hate speech even if the publishers made them available to libraries at no cost, yet no one would seriously contend that such decisions violate the First Amendment.

Finally, MACC may challenge the delegation of selection authority to a private entity, NetChaperone's manufacturer. Yet libraries have relied on vendors to make similar selection decisions for many years.[29] The delegation of such authority itself is unlikely to raise any constitutional problems, although the State cannot circumvent the First Amendment simply by authorizing a private party to perform an act that the State itself could not legally perform.[30]

VI. FREEDOM OF INFORMATION ACT

MACC's second claim is that the contents of the "off-limits" list should be disclosed through a Marshall Freedom of Information Act ("FOIA") request. The Marshall FOIA is very similar to the federal FOIA, and many of the cases that analyze the latter may apply to the former.

A. APPLICABILITY OF THE MARSHALL FREEDOM OF INFORMATION ACT

The heart of the Marshall Freedom of Information Act is § 4(a):

> Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 6 of this Act.

To determine whether the FOIA applies to MACC's request for disclosure of the "off-limits" list, the court needs to consider three relevant definitions. The first is the definition of a public body.[31] Since the Marshall Department of Education is an administrative body of Marshall, it is a public body under the FOIA. The second is the definition of a person.[32] MACC is an incorporated association and therefore, is a person

29. *See* David Burt, *In Defense of Filtering*, AM. LIBR., Aug. 1997, at 46.

30. *See* Jonathan Wallace, *Purchase of Blocking Software by Public Libraries Is Unconstitutional* (last modified Nov. 9, 1997) <http://www.spectacle.org/cs/library.html> ("[A] library cannot block its users from accessing Internet sites based upon a vague or undisclosed set of standards implemented by the publisher of the blocking software.").

31. Marshall Freedom of Information Act, Marshall Code § 6-85-3(a) (1997):

> "Public body" means any legislative, executive, administrative, or advisory bodies of the State, . . . public libraries, . . . and any subsidiary bodies of any of the forgoing including but not limited to committees and subcommittees which are supported in whole or in part by revenue, or which expend tax revenue.

Id.

32. Marshall Freedom of Information Act, Marshall Code § 6-85-3(b) (1997):

> "Person" means any individual, corporation, partnership, firm, organization or association, acting individually or as a group.

under the FOIA and is able to make the FOIA request. The third is the definition of public records.[33] The printouts of the "off-limits" list are public records because they are recorded information that is possessed by and under the control of the MDOE. The MDOE has a printout of the "off-limits" list since Chaperone Systems, Inc. is obligated to provide it as a condition of the contract.

B. FOIA EXEMPTIONS

The Marshall FOIA lists seventeen exemptions to the general rule of disclosure,[34] most of which are clearly inapplicable here. Section 6(a)(11) appears to apply at first glance because it specifically mentions information about and generated by computer programs.[35] However, a closer examination reveals that not all such information receives a blanket exemption. The exemption applies only to information that "if disclosed, would jeopardize the security of the system of its data or the security of materials exempt under this Section." The clear thrust of the exemption is to prevent a hacker from learning the weaknesses of a government computer system by examining documents disclosed through a FOIA request. MACC will argue that the request in this case is nothing of the sort. Anyone learning the contents of the "off-limits" list will only have the knowledge of which Internet sites cannot be visited from a computer using NetChaperone. Knowledge of the contents of the list will not help anyone to circumvent the blocking software.

The most important exemption, the one fought over in the lower courts, is the sixth exemption:

> Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets

---

Id.

33. Marshall Freedom of Information Act, Marshall Code § 6-85-3(c) (1997):

> "Public records" means all records, reports, forms, writings, letters, memoranda, books, paper, maps, photographs, microfilms, cards, tapes recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body.

Id.

34. *See* Marshall Freedom of Information Act, Marshall Code § 6-85-6(a) (1997).

35. *See* Marshall Freedom of Information Act, Marshall Code § 6(a)(11) (1997). The full text of the exemption is:

> Administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.

Id.

> or information may cause competitive harm. Nothing contained in this paragraph shall be construed to prevent a person or business from consenting to disclosure.[36]

In *National Parks & Conservation Ass'n v. Morton*,[37] the Court of Appeals for the District of Columbia construed a similar exemption to the federal FOIA. The analysis for the federal FOIA splits the exemption into two parts. The first is that trade secrets are exempt. The second is that other information is exempt if it is "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential."[38]

1. *Trade Secret*

The State may argue that the NetChaperone "off-limits" list is a trade secret and thus is exempt from disclosure under FOIA. The "off-limits" list is information that has value because it has been kept secret.[39] CSI is able to block sites that are objectionable and competitors are not able to steal the entire list and thereby shortcut the expensive screening process. In addition, CSI has made other attempts to keep its "off-limits" list secret. With each copy of the list that it submitted to MDOE, CSI included a cover letter stating that the contents of the list are proprietary, privileged, and confidential information, and requesting that the list not be made available for viewing or copying by any third party." CSI also provides a license agreement with each copy of the software that prohibits the user from reverse engineering the software in order to obtain the list.

MACC will make two arguments against this. The first depends on the fact that the language of the statutes is different. The federal FOIA exemption can be fairly read to have a different analysis for both trade secrets and information. However, the Marshall statute repeats the words "trade secret" throughout the exemption and makes clear that trade secrets and information should not be treated differently. The second is that a narrower definition of trade secret should be applied for

---

36. Marshall Freedom of Information Act, Marshall Code § 6-85-6(a)(6) (1997). This is a more expansive exemption than the corresponding federal FOIA exemption. The federal FOIA exempts only "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

37. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

38. *Id.* at 766.

39. The State of Marshall has not adopted a statutory definition of trade secrets. Many states have adopted the Uniform Trade Secrets Act, which provides:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Uniform Trade Secrets Act § 1, 14 U.L.A. 433 (1997).

FOIA purposes. The D.C. Circuit, for example, has held that a trade secret under FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[40]

2. *Commercial Information*

The second category of FOIA cases under the federal analysis involves information that is "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential."[41]

Whether information is commercial or financial is an objective test.[42] The words commercial and financial do not have any special meanings, but should be used with their ordinary meanings.[43] Each side can argue whether or not the "off-limits" list is commercial. However, the "off-limits" list is the essence of NetChaperone. Without the list, the software is ineffective. In effect, it is the list that CSI is selling. Therefore, it is very likely to be commercial. In addition, the Marshall FOIA explicitly covers information "obtained from a person or business."

As for whether the information is confidential, the Marshall statute follows closely the two-part test set forth in *National Parks*:

> Commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[44]

The first prong of the test exists to protect the public's interest. The harm to the public's interest might be that MDOE could not get anyone to bid for the contract again in five years because the applicants would know that their lists will be available by a FOIA request. However, the true governmental interest in information that is required to be provided is the reliability and quality of the information. "[W]hen dealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible effect of disclosure on

40. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.D.C. 1983). The court rejected the Restatement's broader definition, holding that it would render the second prong of the exemption meaningless and did not adequately take into account FOIA's concern for governmental as well as private interests. *See id.* at 1289; *see also National Parks*, 498 F.2d at 767.

41. *National Parks*, 498 F.2d at 766.

42. *See id.*

43. *See Public Citizen*, 704 F.2d at 1290.

44. *National Parks*, 498 F.2d at 770 (footnote omitted).

its quality."[45] Note that the focus is on the quality, not continued availability. The "off-limits" list is not a set of objective reports that might be fudged if the submitter knew they could be disclosed;[46] rather, they are a list of facts (Internet site addresses). It is "when [the] information is volunteered [that] the Government's interest is in ensuring its continued availability."[47]

The second prong of the test is intended to protect the private interests of the submitter. In determining substantial competitive harm, "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure . . . [T]he parties opposing disclosure need not 'show actual competitive harm;' evidence revealing '[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality."[48] "Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."[49]

The State may argue that information provided voluntarily should always be exempt.[50] MACC will note, however, that CSI was contractually obligated to provide the list. Therefore, the argument collapses to whether releasing the information would substantially damage CSI's interests.

The State will argue that disclosure will substantially injure CSI because its competitors will have free access to the list, saving great time and expense by relying on CSI's efforts. MACC may respond that all of the information on the list is already easily obtained by the public, and therefore it is improper to consider the list confidential.[51] MACC will also argue that the actual competitive harm that CSI is trying to avoid is not that competitors would have a leg up, but that CSI would be embarrassed by the revelations that it is blocking legitimate sites. This is not

---

45. *Id.* at 878

46. *See id.* (citing Washington Post Co. v. HHS, 690 F.2d 252 (D.C. Cir. 1982)).

47. *Id.*

48. *Public Citizen*, 704 F.2d at 1291.

49. *Id.* at 1291 n.30 (citing Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WIS. L. REV. 207, 235-36.)

50. *See* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 878 (D.C. Cir. 1992).

51. *See* CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a sine qua non of [the confidential information exemption].").

the type of harm that is protected.[52]

Competitive injury does not require "a sophisticated economic analysis of the likely effects of disclosure."[53] Actual harm does not have to be shown. All that is required is that there is evidence of both actual competition and the likelihood of substantial competitive injury.[54]

The State may raise two policy arguments why the exemption should apply. The first is that the State should be permitted to honor an obligation it has undertaken in good faith not to disclose information.[55] However, the State has not undertaken any obligation to keep the "off-limits" list secret. All that CSI has done with the cover letter is to make clear that CSI considers the list secret. The second argument is that disclosure will discourage other companies from bidding when the contract is up for renewal, knowing that the successful bidder's "off-limits" list will be subject to disclosure at any time. MACC will respond that access by the public is not a threat to companies by competitors because the database can be protected by copyright law.

52. *See id.*; *Public Citizen*, 704 F.2d at 1291 n.30.
53. *Public Citizen*, 704 F.2d at 1291.
54. *See id.*
55. *See National Parks*, 498 F.2d at 768.

APPENDIX A

MARSHALL INTERNET CHILD PROTECTION ACT
PUBLIC LAW 97-3 (1997)

§ 1. Short Title.

This Act may be cited as the "Marshall Internet Child Protection Act."

§ 2. Definitions.

(a) Filtering software. "Filtering software" is computer software, hardware, or a combination thereof which prevents a computer on which it is installed from accessing certain information or other resources based upon predetermined criteria. The filtering function may be performed by blocking access to items listed in a database, by permitting access to only those items listed in a database, by automatically analyzing the content or other attributes of items, or by any other method.

(b) Public-access Internet terminal. A "public-access Internet terminal" is a computer or computer terminal which is available for use by members of the public and is capable of accessing the Internet by means of a dial-up telephone connection or otherwise. A computer accessible only by professional library employees shall not be considered a "public-access Internet terminal."

§ 3. Installation of Filtering Software.

(a) All public-access Internet terminals located within public libraries in the State of Marshall shall be equipped with filtering software designed to filter out patently offensive material. All public libraries in the State of Marshall shall install, maintain, and continuously operate such filtering software on all publicly accessible Internet terminals.

(b) Libraries shall install the filtering software required by this Section within thirty days after such software is made available to them by the Marshall Department of Education.

§ 4. Selection of Filtering Software.

(a) The Marshall Department of Education shall select appropriate filtering software for the purpose of reducing or eliminating access to patently offensive materials using public-access Internet terminals located within public libraries in the State of Marshall. The Department shall provide such software to each public library without cost. Each public library shall be responsible for installing, maintaining, and continuously operating the filtering software selected by the Department on all publicly accessible Internet terminals.

(b) The Department shall conduct a competitive bidding process to procure appropriate filtering software. The process shall be timed in such a manner as to make the software available to libraries within ninety days following enactment of this Act.

(c) The Department shall conduct a formal evaluation of the effectiveness and appropriateness of the filtering software it has selected at least once every two years, and shall solicit competitive bids for such software at least once every five years.

APPENDIX B

MARSHALL FREEDOM OF INFORMATION ACT
MARSHALL CODE CHAPTER 6, ARTICLE 85

§ 1. Short Title.

This Act may be cited as the "Marshall Freedom of Information Act."

§ 2. Public Policy.

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Marshall that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

This Act is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise, or to disrupt the duly undertaken work of any public body independent of the fulfillment of any of the aforementioned rights of the people to access to information.

This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law.

These restraints on information access should be seen as limited exceptions to the general rule that the people have a right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed to this end.

§ 3. Definitions.

As used in this Act:

(a) "Public body" means any legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts, public libraries, and all other municipal corporations, boards, bureaus, committees, or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue.

(b) "Person" means any individual, corporation, partnership, firm, organization or association, acting individually or as a group.

(c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body.

(d) "Copying" means the reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means.

(e) "Head of the public body" means the president, mayor, chairperson, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee.

§ 4. Requests for Inspection or Copying of Public Records.

(a) Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 6 of this Act.

(b) Subject to the fee provisions of Section 5 of this Act, each public body shall promptly provide, to any person who submits a written request, a copy of any public record required to be disclosed by subsection (a) of this Section and shall certify such copy if so requested.

(c) Each public body shall, promptly, either comply with or deny a written request for public records within 7 working days after its receipt. Denial shall be by letter as provided in Section 7 of this Act. Failure to respond to a written request within 7 working days after its receipt shall be considered a denial of the request.

(d) Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information. Repeated requests for the same public records by the same person shall be deemed unduly burdensome under this provision.

§ 5. Fees.

(a) Each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. Such fees shall exclude the costs of any search for and review

of the record, and shall not exceed the actual cost of reproduction and certification.

(b) Documents shall be furnished without charge or at a reduced charge, as determined by the public body, if the person requesting the documents states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest. Waiver or reduction of the fee is in the public interest if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit. In setting the amount of the waiver or reduction, the public body may take into consideration the amount of materials requested and the cost of copying them.

(c) The purposeful imposition of a fee not consistent with subsections (a) and (b) of this Section shall be considered a denial of access to public records for the purposes of judicial review.

§ 6. Exemptions.

(a) The following shall be exempt from inspection and copying:

(1) Information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.

(2) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

(3) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes.

(4) Records that relate to or affect the security of correctional institutions and detention facilities.

(5) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.

(6) Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm. Nothing contained in this paragraph shall be construed to prevent a person or business from consenting to disclosure.

(7) Test questions, scoring keys and other examination data used to administer an academic examination or determined the qualifications of an applicant for a license or employment.

(8) Library circulation and order records identifying individual library users with specific materials.

(9) Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

(10) Information received by a primary or secondary school, college or university under its procedures for the evaluation of faculty members by their academic peers.

(11) Administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.

(12) Documents or materials relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying.

(13) The records, documents and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated.

(14) Information concerning a university's adjudication of student or employee grievance or disciplinary cases, to the extent that disclosure would reveal the identity of the student or employee, and information concerning any public body's adjudication of student or employee grievances or disciplinary cases, except for the final outcome of the cases.

(15) Course materials or research materials used by faculty members.

(16) Information related solely to the internal personnel rules and practices of a public body.

(17) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of a public body responsible for the regulation or supervision of financial institutions or insurance companies, unless disclosure is otherwise required by State law.

(b) This Section does not authorize withholding of information or limit the availability of records to the public, except as stated in this Section or otherwise provided in this Act.

§ 7. Notice of Denial of Request.

(a) Each public body or head of a public body denying a request for public records shall notify by letter the person making the request of the decision to deny such, the reasons for the denial, and the names and titles or positions of each person responsible for the denial. Each notice

of denial by a public body shall also inform such person of his or her right to appeal to the head of the public body. Each notice of denial of an appeal by the head of a public body shall inform such person of his or her right to judicial review under Section 9 of this Act.

(b) When a request for public records is denied on the grounds that the records are exempt under Section 6 of this Act, the notice of denial shall specify the exemption claimed to authorize the denial. Copies of all notices of denial shall be retained by each public body in a single central office file that is open to the public and indexed according to the type of exemption asserted and, to the extent feasible, according to the types of records requested.

§ 8. Administrative Review.

(a) Any person denied access to inspect or copy any public record may appeal the denial by sending a written notice of appeal to the head of the public body. Upon receipt of such notice the head of the public body shall promptly review the public record, determine whether under the provisions of this Act such record is open to inspection and copying, and notify the person making the appeal of such determination within 7 working days after the notice of appeal.

(b) Any person making a request for public records shall be deemed to have exhausted his or her administrative remedies with respect to such request if the head of the public body affirms the denial or fails to act within the time limit provided in subsection (a) of this Section.

§ 9. Judicial Review.

(a) Any person denied access to inspect or copy any public record by the head of a public body may file suit for injunctive or declaratory relief.

(b) Where the denial is from the head of a public body of the State, suit may be filed in the circuit court for the county where the public body has its principal office or where the person denied access resides.

(c) Where the denial is from the head of a municipality or other public body, except as provided in subsection (b) of this Section, suit may be filed in the circuit court for the county where the public body is located.

(d) The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access. If the public body can show that exceptional circumstances exist, and that the body is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

(e) On motion of the plaintiff, prior to or after in camera inspection, the court shall order the public body to provide an index of the records to which access has been denied, including a description of the nature or contents of each document withheld, or of each deletion from a released document; and a statement of the exemption or exemptions claimed for each such deletion or withheld document.

(f) In any action considered by the court, the court shall consider the matter de novo, and shall conduct such in camera examination of the

requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act. The burden shall be on the public body to establish that its refusal to permit public inspection or copying is in accordance with the provisions of this Act.

(g) In the event of noncompliance with an order of the court to disclose, the court may enforce its order against any public official or employee so ordered or primarily responsible for such noncompliance through the court's contempt powers.

(h) Except as to causes the court considers to be of greater importance, proceedings arising under this Section shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(i) If a person seeking the right to inspect or receive a copy of a public record substantially prevails in a proceeding under this Section, the court may award such person reasonable attorneys' fees if the court finds that the record or records in question were of clearly significant interest to the general public and that the public body lacked any reasonable basis in law for withholding the record.

BRIEF FOR THE PETITIONER

No. 97-404

IN THE SUPREME COURT OF THE
STATE OF MARSHALL

MARSHALL ANTI-CENSORSHIP COALITION, INC.,
Petitioner,
v.
THE STATE OF MARSHALL
and
THE MARSHALL DEPARTMENT OF EDUCATION,
Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
MARSHALL, FIRST DISTRICT

BRIEF FOR PETITIONER

John Cartaina
Robert Dixon
Eric Rogers
Attorneys for the Petitioner
BOSTON UNIVERSITY SCHOOL OF LAW

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE MARSHALL INTERNET CHILD PROTECTION ACT, WHICH INSTALLS FILTERING SOFTWARE ON PUBLIC LIBRARIES' COMPUTERS TO RESTRICT ACCESS TO INTERNET SITES BASED ON THEIR CONTENT, DOES NOT VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE NETCHAPERONE "OFF-LIMITS" LIST, A COMPILATION OF PUBLICLY-AVAILABLE INTERNET ADDRESSES, IS EXEMPT FROM THE MANDATORY DISCLOSURE PROVISIONS OF THE MARSHALL FREEDOM OF INFORMATION ACT.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED 710
TABLE OF AUTHORITIES 714
OPINIONS BELOW 716
STATEMENT OF JURISDICTION 716
CONSTITUTIONAL AND STATUTORY PROVISIONS 716
STATEMENT OF THE CASE 717
SUMMARY OF THE FACTS 717
SUMMARY OF THE PROCEEDINGS 718
SUMMARY OF ARGUMENT 719
CONSTITUTIONAL 719
FREEDOM OF INFORMATION 719
ARGUMENT 720
I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S DECISION TO UPHOLD THE MARSHALL INTERNET CHILD PROTECTION ACT, BECAUSE PLACING FILTERING SOFTWARE ON PUBLIC-ACCESS INTERNET COMPUTERS LOCATED IN PUBLIC LIBRARIES VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT 720
A. MICPA violates the Free Speech Clause of the United States Constitution because, under strict scrutiny, it is not narrowly tailored to serve a compelling state interest 721
1. The Court should apply strict scrutiny since MICPA restricts access to Internet sites solely based on content 721
2. MICPA violates the First Amendment because placing filtering software on public-access Internet computers infringes adults' right to access the blocked sites 722
3. MICPA violates the First Amendment because Marshall's "patently offensive" definitionrestricts access to sites that do not contain "patently offensive" material 724
4. MICPA violates the First Amendment because MDOE's decision to install NetChaperone is not narrowly tailored to protect minors from "patently offensive" material 725
5. Protecting library employees and members of the public from exposure as bystanders to "patently offensive" material violates the First Amendment

because Marshall's interest does not constitute a compelling state interest 726
B. Placing filtering software on public-access Internet computers located in public libraries violates theFirst Amendment, because it censors free speech 727
1. Libraries may not prohibit Internet access because they disagree with the content of the material 727
2. Regardless of the libraries discretion to remove books, MICPA unconstitutionally delegates the library's discretion to the manufacturer of the filtering software 728
II. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S DECISION REQUIRING THE MARSHALL DEPARTMENT OF EDUCATION TO RELEASE THE NETCHAPERONE "OFF-LIMITS" LIST, BECAUSE THE LIST WAS NEITHER A "TRADE SECRET" NOR "COMMERCIAL OR FINANCIAL INFORMATION" 730
A. Exemption 6 must be narrowly construed to serve the MFOIA policy goal of ensuring full access to public information 730
B. The NetChaperone "off-limits" list is neither a "trade secret" nor "commercial or financial information" for purposes of MFOIA Exemption 731
1. The NetChaperone "off-limits" list is not a "trade secret" for purposes of MFOIA Exemption 731
a. The term "trade secret" must be narrowly construed to avoid rendering parts of MFOIA Exemption 6 inoperative and superfluous 731
b. The NetChaperone "off-limits" list is not a "trade secret" under the narrow definition announced by the Public Citizen court, because the list is CSI's final product 734
2. The NetChaperone "off-limits" list, a mere compilation of publicly-available Internet addresses, does not constitute protectable commercial or financial information" for purposes of MFOIA Exemption 6 merely because it was prepared by a commercial entity 735
C. The NetChaperone "off-limits" list was not received "from a person," because the list was prepared for the MDOE under a contract with the government ... 736

D. The NetChaperone "off-limits" list is neither "confidential," "privileged," nor "proprietary" for purposes of MFOIA Exemption 737
1. The NetChaperone "off-limits" list does not amount to "confidential information" under either of the recognized tests..... 737
a. The Critical Mass test does not apply because the MDOE compelled the submission of the "off-limits" list under both the MICPA and the contract bidding process 738
b. The release of compulsorily-submitted business data will not impair the government's ability to obtain the information in the future, because the government retains the ability to compel the submission of information again in the future 738
c. CSI's assertion of confidentiality is of no legal relevance..... 739
2. The NetChaperone "off-limits" list is not privileged because the contents of the list are not subject to any judicially-recognized "privilege"... 739
3. The NetChaperone "off-limits" list is not "proprietary" because the "off-limits" list is a collection of publicly-available information 740
E. The appellate court erred by concluding that disclosure of the NetChaperone "off-limits" list would cause competitive harm to CSI, because the government failed to carry its burden of showing that disclosure of the NetChaperone "off-limits" list "may cause competitive harm" 740
CONCLUSION..... 741

TABLE OF AUTHORITIES

PAGE

UNITED STATES SUPREME COURT CASES

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 727, 728
Bolger v. Young's Drug Prods. Corp., 463 U.S. 60 (1983) 723, 726
Boos v. Barry, 485 U.S. 312 (1988) 721
Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984) 721
Butler v. Michigan, 352 U.S. 380 (1957) 723
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 723
Cohen v. California, 403 U.S. 15 (1971) 726
Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374 (1996) 721
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 726
FCC v. Pacifica Found., 438 U.S. 726 (1978) 721, 724
Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) 740
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) ..728, 729
Miller v. California, 413 U.S. 15 (1973) 724
New York v. Ferber, 458 U.S. 747 (1982) 722
Reno v. ACLU, No. 96-511, 1997 U.S. LEXIS 4037 (June 26, 1997) ..... passim
Ruckleshaus v. Monsanto Corp., 467 U.S. 986, 1011-12 (1984) 732
Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 721, 722
Schneider v. State (Town of Irvington), 308 U.S. 147 (1939) 724
Stanley v. Georgia, 394 U.S. 557 (1969) 722

FEDERAL CIRCUIT COURT CASES

Anderson v. Department of Health & Human Servs, 907 F.2d 936 (10th Cir. 1990) 732, 733
Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392 (D.C. Cir. 1980) 735
Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) 737
Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) 735
Greenberg v. FDA, 803 F.2d 1213 (D.C. Cir. 1986) 740, 741
GSA v. Benson, 415 F.2d 878 (9th Cir. 1969) 737
Lehman v. Dow Jones & Co., Inc., 783 F.2d 285 (2d Cir. 1986) 734, 735
Minarcini v. Strongville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976) 727, 728

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) 737, 739
Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1990) ..... passim
Sharyland Water Supply Corp. v. Block, 755 F.2d 397 (5th Cir. 1985) 739
Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) 736
Washington Post Co. v. HHS, 690 F.2d 252 (D.C. Cir. 1982) ... 736, 739

FEDERAL DISTRICT COURT

ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) 722
Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463 (D. Kan. 1995) 728
Hawaiian Int'l Shipping Corp. v. Department of Commerce, 3 G.D.S. (P-H) ¶ 82,366 (D.D.C. 1982) 738
Indian Law Resource Ctr. v. Department of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979) 739
McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316 (D.D.C. 1995) 738
Miller, Anderson, Nash, Yerke & Wiener v. Department of Energy, 499 F. Supp. 767, 771 (D. Or. 1980) 739
Motion Picture Ass'n v. Spector, 315 F. Supp. 824 (E.D. Pa. 1970) 728, 729
Natural W. Life Ins. Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980) 736
Peckarsky v. American Broadcasting Co., 603 F. Supp. 688 (D.D.C. 1984) 734
Stewart v. Customs Serv., 2 G.D.S. (P-H) ¶ 81,140 (D.D.C. 1981) . 738
Swope v. Lubbers, 560 F. Supp. 1328 (W.D. Mich. 1983) 728

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I. 716, 721

STATUTES

Marshall Internet Child Protection Act, Pub. L. No. 97-3 §§ 1-4 (1997) ..... passim
Marshall Freedom of Information Act, Marshall Code §§ 6-85-1 to -6 (1996) ..... passim
Freedom of Information Act, 5 U.S.C. § 552 (1994) 716, 732, 734, 736, 738

LAW REVIEWS, PERIODICALS, AND TREATISES

37A *Am. Jur. 2d Freedom of Information Act* (1997) 731

56 F.C.C.2d 94 (1975) 724
Alois Valerian Gross, Annotation, *What is Computer "Trade Secret" Under State Law*, 53 A.L.R.4th 1046 (1987) 734
Burt A. Braverman & Frances J. Chetwynd, *Information Law* § 24-2.3.3, at 902 (1985) 732
Merriam-Webster's Collegiate Dictionary (10th ed. 1996) 740
Michael A. Epstein, *Modern Intellectual Property* (3d ed. 1995) 732, 733
Norman J. Singer, *Sutherland's Statutes and Statutory Construction* (5th ed. 1992) 731, 732, 733, 740
Office of Info. & Privacy, United States Dep't of Justice, *Freedom of Information Act Guide and Privacy Act Overview* (Sept. 1996 ed.) 738
Restatement of Torts (1939) 732

Petitioner, Marshall Anti-Censorship Coalition, Inc., respectfully submits this brief in support of its request that this Court reverse the appellate court's decisions upholding the constitutionality of the Marshall Internet Child Protection Act and refusing to order the release of the NetChaperone "off-limits" list under the mandatory disclosure provisions of the Marshall Freedom of Information Act.

OPINIONS BELOW

The opinion of the Princeton County Circuit Court is unreported. The opinion of the Court of Appeals of the State of Marshall, First District, is also unreported but appears in the record at pages 1-16.

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to § 1020(2) of the Rules for the Sixteenth Annual John Marshall Law School National Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory and constitutional provisions are particularly relevant to the determination of this case: the Marshall Internet Child Protection Act, Pub. L. No. 97-3 §§ 1-4 (1997); the First Amendment to the United States Constitution, U.S. Const. amend. I; the Marshall Freedom of Information Act, Marshall Code §§ 6-85-1 to -6 (1996); and the federal Freedom of Information Act, 5 U.S.C. § 552 (1994).

STATEMENT OF THE CASE

A. Summary of the Facts

Petitioner Marshall Anti-Censorship Coalition, Inc. ("MACC"), an association composed of Marshall public library patrons and persons who disseminate information using the Internet, oppose governmental restrictions of expression. (*See* R. at 2-3.) Respondents are the State of Marshall and the Marshall Department of Education ("MDOE"). (*See* R. at 1-2.)

In October of 1995, several public libraries in Marshall installed public-access Internet computers allowing their patrons Internet access. (*See* R. at 6-7.) The Internet is an international network of interconnected computers which allows its users to view any material on any computer connected to the network. (*See* R. at 4.) Patrons used the public-access computers for educational, corporate and recreational purposes. (*See* R. at 7.) Shortly thereafter, nearly all public libraries installed public-access computers. (*See* R. at 7.) The libraries do not restrict computer use by age. (*See* R. at 7.)

Some library patrons and employees began to complain about some patrons' use of the public-access computers to view sexually explicit material on the Internet. (*See* R. at 7-8.) Partly in response to these complaints, the State of Marshall enacted the Marshall Internet Child Protection Act ("MICPA") on January 6, 1997. (*See* R. at 8.) MICPA requires all public-access Internet computers located in public libraries to install filtering software designed to block patently offensive material. (*See* R. at 8.) MICPA further directs the MDOE to choose Internet filtering software after conducting a competitive bidding process. (*See* R. at 17-18.)

On February 17, 1997, the MDOE awarded Chaperone Systems, Inc. ("CSI") a contract to provide Marshall public libraries with CSI's NetChaperone filtering software. (*See* R. at 2.) NetChaperone employs a blocking method, which restricts access to Internet sites contained on an internal "off-limits" list. (*See* R. at 6.) The "off-limits" list includes sites containing explicit sexual conduct (including nudity), gross depictions, hate speech, and detailed discussions of illegal activities. (*See* R. at 6.) CSI updates the "off-limits" list by employing individuals to review Internet sites, by considering sites suggested by concerned users, and by re-evaluating previously blocked sites based on complaints received from operators of such sites. (*See* R. at 9.) NetChaperone does not allow MDOE to choose which sites to block. (*See* R. at 6.)

As part of the competitive bidding process, CSI provided MDOE with a copy of its "off-limits" list as it existed on January 15, 1997. (*See* R. at 10.) CSI also provides MDOE with an updated list on a monthly basis. (*See* R. at 10-11.)

B. Summary of the Proceedings

In January 1997—immediately after Marshall enacted MICPA—MACC filed suit in the Princeton County Circuit Court challenging MICPA's validity under the First Amendment of both the state and federal constitutions. (*See* R. at 3.) On February 18, 1997, MACC requested MDOE disclose CSI's "off-limits" list pursuant to the Marshall Freedom of Information Act ("MFOIA"). (*See* R. at 3.) After MDOE denied this request, MACC sought judicial review of MDOE's denial in the Princeton County Circuit Court. (*See* R. at 3.) The Circuit Court consolidated MACC's constitutional challenge and MFOIA request. (*See* R. at 3.)

MACC sought declaratory and injunctive relief, and asked the Circuit Court to declare MICPA invalid and compel MDOE to disclose CSI's "off-limits" list. (*See* R. at 11.) In response, MDOE claimed that MICPA was constitutional because it merely prevents library patrons from using library computers to access Internet sites containing patently offensive material. (*See* R. at 4.) In addition, MDOE claimed that CSI's "off-limits" list was either a trade secret or commercial or financial information, and that the list was therefore exempt from disclosure under MFOIA. (*See* R. at 11.)

The Circuit Court held that MICPA did not violate the First Amendment of the United States Constitution. (*See* R. at 1.) Nevertheless, the Circuit Court ordered MDOE to disclose CSI's "off-limits" list. (*See* R. at 1-2.) The Circuit Court held the "off-limits" list did not constitute a trade secret because any Internet user could ascertain whether a site appeared on the "off-limits" list. (*See* R. at 14-15.) The Circuit Court also held the "off-limits" list did not constitute commercial or financial information because it amounted to a simple collection of publicly-available Internet addresses. (*See* R. at 15.)

On appeal, the Court of Appeals affirmed the Circuit Court's holding that MICPA did not violate the First Amendment. (*See* R. at 13.) Accordingly, the Court of Appeals held that MICPA did no more than apply traditionally accepted library selection principles to the Internet. (*See* R. at 13.) Moreover, MICPA served Marshall's legitimate interests in protecting children from patently offensive material and protecting the public from exposure to offensive material. (*See* R. at 13.)

The Court of Appeals reversed the Circuit Court's order requiring disclosure of The NetChaperone "off-limits" list. (*See* R. at 15.) Specifically, the Court of Appeals held the list constituted commercial information due to CSI's effort and expense required to develop and maintain a reasonably reliable "off-limits" list. (*See* R. at 15.)

On July 18, 1997, this Court granted Petitioner leave to appeal and assigned the appeal to docket number 97-404. (*See* R. at 25-26.)

SUMMARY OF ARGUMENT

I. CONSTITUTIONAL

The First Amendment prohibits the state from restricting free speech based on its content. The Marshall Internet Child Protection Act ("MICPA") attempts to restrict Internet sites based on their content. Thus, this Court should strictly scrutinize MICPA to ensure it is narrowly tailored to serve a compelling state interest. While protecting minors from patently offensive material constitutes a compelling state interest, protecting adults from exposure to such material does not.

Although protecting minors is a compelling state interest, MICPA violates the First Amendment because it is not narrowly tailored to serve that interest. First, MICPA impermissibly infringes Marshall adults' right to receive constitutionally protected material. Other less restrictive means exist to protect minors without restricting adults' access, such as restricting access only to library computers in the children's section or requiring parental consent to use the libraries' computers. Second, MICPA fails to properly define "patently offensive" to examine the material in context. Without any limitations, MICPA's "patently offensive" definition allows NetChaperone to restrict access to material having literary, social, artistic, and historic value. Third, due to NetChaperone's lack of specialization, it blocks sites that do not contain "patently offensive" material.

Besides not being narrowly tailored, Marshall's decision to install NetChaperone does not constitute a traditional library selection procedure. Just as libraries may not remove books from shelves because they disagree with their contents, libraries may not restrict access to Internet sites merely because they disagree with the sites contents. In addition, MICPA impermissibly delegates to Chaperone Systems, Inc. the authority to determine "patently offensive" material.

II. FREEDOM OF INFORMATION

To establish that the NetChaperone "off-limits" list is exempt from disclosure under the Marshall Freedom of Information Act ("MFOIA"), the Marshall Department of Education ("MDOE") must show that (1) the information consists only of "[t]rade secrets and commercial or financial information;" (2) the information is "obtained from a person;" and (3) the information is either (a) "proprietary, privileged or confidential," or (b) "disclosure . . . may cause competitive harm." Marshall Code § 6-85-6(a)(6). To prevent disclosure, MDOE must show that the "off-limits" list satisfies each of the three prongs of the MFOIA exemption.

The Court must narrowly interpret the term "trade secrets" as used in MFOIA to avoid rendering the balance of the exemption's language

either inoperative or superfluous. As such, this Court should adopt the prevailing view with respect to the federal Freedom of Information Act such that a "trade secret" would be a commercially valuable plan for use in a production process. Consequently, because the "off-limits" list was the product, and not the process, this Court must hold that the list can not constitute a trade secret.

Similarly, because information submitted by a business entity is not per se "commercial or financial," and because the "off-limits" list was a mere collection of publicly-available information, this Court should hold that the list was neither "commercial" nor "financial."

Chaperone Systems, Inc. ("CSI") operated as a contractor to MDOE. Accordingly, CSI was, in effect, an employee of MDOE. Thus, because CSI provided the "off-limits" list to MDOE while CSI was working for government, this Court must hold that MDOE did not receive the information from a person outside the government.

CSI's "off-limits" list is not "confidential," because MDOE compelled the submission, because MDOE retains its ability to compel the submission of the "off-limits" list, and because CSI's assertion of confidentiality is of no legal relevance. Similarly, the "off-limits" list is neither "privileged" nor "proprietary," because the contents of the list are not subject to a judicially recognized "privilege," and because CSI does not own the list to the exclusion of others.

Finally, even if this Court were to conclude—against the weight of authority—that MDOE has met its burden of proof with regard to all other elements of the MFOIA exemption, the Court should nonetheless remand the case to the trial court for a determination of the amount of competitive harm, if any, that CSI would suffer by disclosure of the "off-limits" list.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S DECISION TO UPHOLD THE MARSHALL INTERNET CHILD PROTECTION ACT, BECAUSE PLACING FILTERING SOFTWARE ON PUBLIC-ACCESS INTERNET COMPUTERS LOCATED IN PUBLIC LIBRARIES VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The Marshall Anti-Censorship Coalition, Inc. ("MACC")[1] seeks to enjoin the State of Marshall from enacting the Marshall Internet Child Protection Act ("MICPA"), Pub. L. No. 97-3 §§ 1-4 (1997), because

1. Marshall has stipulated to MACC's standing to challenge MICPA on constitutional grounds. (*See* R. at 3 n.3.)

MICPA violates the Free Speech Clauses of both the Marshall Constitution and the United States Constitution. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."). Marshall courts follow the "lockstep doctrine" and construe the Free Speech Clause of the Marshall Constitution to provide the same level of protection as the United States Constitution. (*See* R. at 3 n.4.) Accordingly, this Court should accept federal decisions that interpret the Free Speech Clause of the United States Constitution as persuasive authority in the present case.

When reviewing the constitutionality of government action under the Free Speech Clause of the First Amendment, courts employ a *de novo* standard of review. *See Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984).

A. AMICPA Violates the Free Speech Clause of the United States Constitution Because, Under Strict Scrutiny, MICPA is not Narrowly Tailored to Serve a Compelling State Interest.

1. *The Court should apply strict scrutiny since MICPA restricts access to Internet sites solely based on content.*

The Supreme Court traditionally analyzes constitutional challenges under the Free Speech Clause according to the medium of expression the government attempts to regulate. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."). The level of scrutiny that the Supreme Court applies depends on the type of communication involved. *See, e.g., Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374, 2385-86 (1996) (balancing between government interest in protecting minors, programmers' and cable operators' interests, and the flexibility inherent in editorial decisions of cable operators when analyzing regulation of cable television leased access and public-access channels); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that the government must use the "least restrictive means" to serve a "compelling interest" when regulating dial-a-porn telephone services); *Pacifica Found.*, 438 U.S. at 748 (holding that broadcast media receives the most limited First Amendment protection).

Under MICPA, all Marshall libraries must install filtering software to block Internet sites containing "patently offensive" material. *See* Marshall Internet Child Protection Act, Pub. L. No. 97-3 § 3(a) (1997). MICPA directly restricts access to Internet sites based on their content. As a content-based restriction, the Court must review MICPA under strict scrutiny. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating that "[r]egulations that focus on the direct impact of speech on its audience"

should be analyzed under strict scrutiny.). Furthermore, the Supreme Court established that Internet regulation must survive "the most stringent review of its provisions." *See Reno v. ACLU*, No. 96-511, 1997 U.S. LEXIS 4037, at *42 (June 26, 1997). *See also ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996), *aff'd Reno v. ACLU*, No. 96-511, 1997 U.S. LEXIS 4037 (June 26, 1997) (stating that the Communications Decency Act, which regulated the Internet, was "patently a government-imposed content-based restriction on speech . . . . [a]s such, the regulation is subject to strict scrutiny.").

In holding that strict scrutiny applies to Internet regulation, the Supreme Court distinguished the Internet from broadcast media.[2] Unlike broadcast media, the Internet has not historically been subject to government regulation, is not as invasive as radio and television, does not invade a person's home like radio and television, and does not suffer any scarcity problems. *See Reno v. ACLU*, 1997 U.S. LEXIS 4037, at *43-*46. Thus, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet. *Id.* at *47.

2. *MICPA violates the First Amendment because placing filtering software on public-access Internet computers infringes adults' right to access the blocked sites.*

Under strict scrutiny, the state must prove placing filtering software on public-access Internet computers located in public libraries serves a compelling state interest and is narrowly tailored to achieve that interest. *See Sable Communications*, 492 U.S. at 126. The State asserts MICPA serves the compelling state interest of protecting minors from exposure to "patently offensive" material on the Internet. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (upholding a statute that prohibited persons from knowingly promoting sexual performances by children under 16 and distributing material depicting such performances). Nevertheless, a statute that serves a compelling state interest while regulating free speech must still be "narrowly drawn" and constitute the "least restrictive means" available. *Sable Communications*, 492 U.S. at 126.

Besides prohibiting the government from restricting speech, "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "Patently offensive" material,

2. Broadcast media receives the most limited protection because (1) it is readily accessible to children, (2) it invades the privacy of the home, (3) it transmits material without any warning, and (4) it has a scarce amount of frequencies to use. *See Pacifica Found.*, 438 U.S. at 731 n.2.

while objectionable to some, still receives constitutional protection under the First Amendment. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("Where obscenity is not involved, we have consistently held that the fact protected speech may be offensive to some does not justify its suppression."); *see also Sable Communications*, 492 U.S. at 126 (noting that sexual expression which is indecent but not obscene is protected by the First Amendment). Marshall adults have a constitutional right to receive information over the Internet which the State deems "patently offensive".

Pursuant to MICPA, *all* libraries in the State of Marshall must install filtering software on *all* public-access Internet computers. *See* Marshall Internet Child Protection Act, Pub. L. No. 97-3 § 3(a). This complete ban of Internet sites containing "patently offensive" material impermissibly infringes Marshall adults' free speech right. Despite the compelling state interest of protecting minors, the Supreme Court has consistently held that this "interest does not justify an unnecessarily broad suppression of speech addressed to adults." *See Reno v. ACLU*, 1997 U.S. LEXIS 4037, at *54; *see also Bolger v. Young's Drug Prods. Corp.*, 463 U.S. 60, 75 (1983) (holding unconstitutional a ban on mailing unsolicited advertisements for contraceptives); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (holding unconstitutional a law banning adults from buying books deemed harmful to children). Marshall can not install filtering systems on public-access Internet computers in libraries and thereby "reduce the adult population . . . to . . . only what is fit for children." *Butler*, 352 U.S. at 383.

While MICPA constitutes a complete ban, other less restrictive means exist to protect minors. Marshall could have required public libraries to install filtering software only on those computers located in the children's section or require minors to get parental permission to use the public-access Internet computers.[3] Since MICPA restricts adults' access to the Internet, it violates the First Amendment because it fails to employ the least restrictive means necessary to protect minors. Further, MICPA does not constitute a narrowly drawn free speech regulation. "Surely [MICPA] burns the house to roast the pig." *Butler*, 352 U.S. at 383.

Moreover, the fact some adults may receive Internet access outside the library does not cure MICPA's constitutional violation. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno*

3. Three libraries allow patrons to reserve time on the Internet and require identification to use the public-access computers during the reserved times. (*See* R. at 7 n.13.) Also, many libraries have a limited collection of materials kept in closed stacks. (*See* R. at 7 n.14.)

v. ACLU, 1997 U.S. LEXIS 4037, at *63 (rejecting an argument that the ban of indecent material on the Internet is constitutional because individuals can receive the same material from the World Wide Web) (quoting *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939)).

3. *MICPA violates the First Amendment because Marshall's "patently offensive" definition restricts access to sites that do not contain "patently offensive" material.*

MICPA violates the First Amendment because Marshall's failure to properly define "patently offensive" restricts access to material having literary, social, artistic, and historic value. MICPA requires libraries to install "filtering software designed to filter out patently offensive material." *See* Marshall Internet Child Protection Act, Pub. L. No. 97-3 § 3(a). However, MICPA places no limitations on the term "patently offensive." Instead, MICPA directs the Marshall Department of Education ("MDOE") to "select appropriate filtering software for the purpose of reducing or eliminating access to patently offensive materials." *See id.* § 4(a). Therefore, MICPA defines "patently offensive" as the filtering software's "off-limits" list. In this case, NetChaperone blocks access to sexual content (including but not limited to nudity), gross depictions, hate speech, and detailed discussions of illegal activities. (*See* R. at 6.)

Based on this "patently offensive" definition, MICPA is not narrowly tailored to protect minors because it restricts access more broadly than necessary. The Supreme Court has consistently required "patently offensive" speech to be judged in light of the applicable contemporary community standards. *See Reno v. ACLU*, 1997 U.S. LEXIS 4037, at *48 n.35 ("'Patently offensive' is qualified only to the extent that it involves 'sexual or excretory activities or organs' taken ' in context' and 'measured by contemporary community standards.'"); *see also Pacifica Found.*, 438 U.S. at 743 (Stevens, J., concurring) ("[I]ndecency is largely a function of context—it cannot be judged in the abstract."); *Miller v. California*, 413 U.S. 15, 24 (1973) (including in the Court's obscenity test a requirement that the work depict or describe, in a "patently offensive" way, sexual conduct specifically defined by the applicable state law). Even the federal government examines "patently offensive" material in context. *See* 56 F.C.C.2d 94, 98 (1975) ("The concept of indecency is intimately connected with the exposure of children to language that describes, in terms patently offensive *as measured by contemporary community standards* for the broadcast medium." (emphasis added)). Though Marshall should examine "patently offensive" material in context, MICPA defines "patently offensive material" without any reference to its context or community standards.

Without any context limitations, MICPA restricts access to Internet sites that Marshall residents, including minors, have a constitutional right to receive. NetChaperone blocks all sites containing material or information containing sexual content, gross depictions, hate speech, and detailed discussions of illegal activities. Nevertheless, not all material and information falling within these categories constitute "patently offensive" material as judged in the light of contemporary community standards. Information concerning AIDS, teen age pregnancy, and homosexuality will be blocked by NetChaperone under MICPA's definition of "patently offensive" material.[4] However, this information can play a valuable role in educating minors, as well as adults. Similarly, nude paintings, sculptures and historical literature discussing the Holocaust will also be blocked, despite their literary, social, artistic, or historic value. MICPA's overreaching can not and does not serve a compelling state interest, nor is it narrowly tailored. *See Reno v. ACLU*, 1997 U.S. LEXIS 4037, at *53 (invalidating the Communications Decency Act, *inter alia*, for failing to define "patently offensive material" by applicable state law) ("Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection.").

4. *MICPA violates the First Amendment because MDOE's decision to install NetChaperone is not narrowly tailored to protect minors from "patently offensive" material.*

Due to NetChaperone's limited capabilities, it restricts access more broadly than necessary to protect minors. NetChaperone restricts access to sites that Chaperone Systems, Inc. ("CSI") has placed on an "off-limits" list. Instead of blocking access to each document individually, NetChaperone often blocks access to all documents on a particular site or all documents whose address contains a particular word. (*See* R. at 10.) Further, NetChaperone does not allow Marshall to choose which sites to block, but restricts access to the entire "off-limits" list. (*See* R. at 6.)

As the Court of Appeals recognized, "NetChaperone lacks the customization capability of many filtering programs." (*See* R. at 6.) By filtering entire sites that may contain "patently offensive" and acceptable material, NetChaperone restricts access to documents on that site which individuals have a right to receive. Other filtering systems exist that can restrict access more narrowly to ensure Marshall blocks only those documents deemed "patently offensive." (*See* R. at 5-6.) Moreover, since

4. Sites NetChaperone has temporarily blocked before include discussions on AIDS treatment and prevention, feminist philosophy, animal rights, and the views of Louis Farrakhan. (*See* R. at 10 n.17.) These materials are not obscene, indecent, nor patently offensive when judged in light of contemporary community standards.

NetChaperone prohibits Marshall from selecting the sites to block, NetChaperone may restrict access to sites that Marshall may not find "patently offensive." Since other alternatives exist which better serve Marshall's goal of protecting minors, Marshall's decision to use NetChaperone fails strict scrutiny. (*See* R. at 9-10.)

5. *Protecting library employees and members of the public from exposure as bystanders to "patently offensive" material violates the First Amendment because Marshall's interest does not constitute a compelling state interest.*

Besides protecting minors from "patently offensive" material, Marshall installed filtering software to protect library patrons passing by the computers from exposure to "patently offensive" material. Librarians received several complaints from library patrons after they were exposed to "patently offensive" material on the public-access Internet computer screens. (*See* R. at 7-8.)

Nevertheless, protecting people from exposure to material they find offensive does not constitute a compelling state interest. In fact, the Supreme Court has consistently held that prohibiting offensive material based on complaints of unwilling viewers violates the First Amendment. *See Bolger*, 463 U.S. at 75 (holding unconstitutional a ban on the mailing of unsolicited advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (holding that a law that prohibited movies from depicting nudity at drive-in theaters violated the First Amendment); *Cohen v. California*, 403 U.S. 15, 26 (1971) (invalidating the conviction of man wearing a jacket into courthouse with the words "fuck the draft"). When the government prohibits one kind of speech on the ground it is more offensive than other kinds, "the First Amendment strictly limits its power." *Erznoznik*, 422 U.S. at 209. The government may only regulate speech based on other persons' objections when such speech intrudes on the privacy of the home or the degree of captivity makes the material avoidable. *See id.*

However, neither category applies to the Internet. First, MICPA regulates material accessed on the Internet in public libraries and not in the privacy of the home. Second, a computer screen is hardly so pervasive that an unwilling viewer can not avoid exposure to Internet material. Unwilling viewers can protect their sensibilities "simply by averting [their] eyes." *Cohen*, 403 U.S. at 21.

B. Placing Filtering Software on Public-Access Internet Computers Located in Public Libraries Violates the First Amendment, Because it Censors Free Speech.

1. *Libraries may not prohibit Internet access because they disagree with the content of the material.*

"A library is a mighty resource in the free marketplace of ideas." *Minarcini v. Strongville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976). The appellate court upheld MICPA's installation of filtering software because it did "no more than apply traditionally accepted library selection principles to a new medium." (R. at 13.) These principles allow libraries to consider a variety of criteria when determining whether to remove a book, including (1) budgetary and space requirements, (2) the availability of comparable materials, (3) assessments of the authority or reliability, and (4) the perceived value of an item. (*See* R. at 12-13.)

Nevertheless, Marshall decided to install filtering software on public-access computers solely to censor Internet sites. First, since the Internet is without limits, public libraries need not worry about budgetary or space constraints. A public library installing computers with full Internet access has, in effect, acquired the entire contents of the Internet. Second, the Internet is as "diverse as human thought" and contains much more than information comparable to library books. *See Reno v. ACLU*, 1997 U.S. LEXIS 4037, at *46-*47. Third, because the Internet acts as more than a source of information, an assessment of the authority or reliability of Internet material is of lesser importance.

Finally, while libraries may assess the perceived value of a book, the First Amendment limits their discretion to remove a book. *See Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion). Marshall's blocking sites on the Internet is the same as a library's decision to remove a book from a shelf. A library's intent to suppress particular speech or ideas by denying access to certain on-line materials violates the First Amendment. *See id.*

Although a plurality of the Court has stated a legal standard for book removal, a majority of the Court has stated that the trial court must examine the motivation behind removing material from the library. *See id.* at 871 (plurality opinion) ("If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioner disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."); *Pico*, 457 U.S. at 879 (Blackmun, J., concurring in part) ("[S]chool officials may not remove books for the *purpose* of restricting access to the political or social perspectives discussed in them, when that

action is motivated simply by the officials' disapproval of the ideas involved."). The Supreme Court will not uphold all motivations by the library to remove material. The plurality held that the library may not remove books with the intention to restrict individuals access to ideas with which the library disagrees. *See id.*; *see also Minarcini*, 541 F.2d at 582 (holding that a school library may not remove books based on motivations that violate the First Amendment).

Although the Supreme Court failed to establish a binding precedent, "the majority of courts faced with a book banning issue have held that the removal of a book was unconstitutional." *Case v. Unified Sch. Dist. No. 233*, 895 F. Supp. 1463, 1469 (D. Kan. 1995) (collecting cases). These cases have recognized that libraries play an essential and valuable role in educating people and expanding the limits of their minds and ideas. In order for libraries to serve this valuable function they must remain free and open for people to receive information. *See Pico*, 457 U.S. at 868 ("'[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' The school library is the principal locus of such freedom." (footnote omitted)).

Similar to keeping books on the shelves of libraries, Internet access must remain free of any attempts to censor the information adults and minors can receive. "Our Constitution does not permit the official suppression of *ideas*." *Id.* at 871. MICPA attempts to deny minors, and likewise adults, material and ideas on the Internet with which Marshall disagrees. Moreover, restricting Internet access offends the Constitution more than removing a book, because the Internet puts an unlimited amount of information and resources at the individual's fingertips. *See Reno v. ACLU*, 1997 U.S. LEXIS 4037, at *46-*47. MICPA will limit individuals from inquiring, studying, evaluating and expanding their minds and understandings in a way that violates the First Amendment's guarantee of free speech.

2. *Regardless of the library's discretion to remove books, MICPA unconstitutionally delegates the library's discretion to the manufacturer of the filtering software.*

Marshall does not avoid the exacting requirements of the First Amendment by delegating responsibility to CSI. Marshall cannot relegate to CSI the authority to determine what materials its public library patrons can see. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (holding that a state may not enact laws that levy fines against movie distributors based on a private rating system); *Swope v. Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) (same); *Motion Picture Ass'n v. Spector*, 315 F. Supp. 824 (E.D. Pa. 1970) (same). Under MICPA, MDOE selects the "appropriate filtering software" to reduce or eliminate

"access to patently offensive materials using public-access Internet computers located within public libraries." *See* Marshall Internet Child Protection Act, Pub. L. No. 97-3 (1997) § 4(a). Pursuant to MICPA, MDOE chose NetChaperone, CSI's filtering program that blocks sites containing sexual content (including but not limited to nudity), gross depictions, hate speech, and detailed discussions of illegal activities. (*See* R. at 8-9.)

CSI updates its list of blocked sites in three ways. First, CSI employs people to review Internet sites to add to the list. (*See* R. at 9.) Second, CSI considers site suggested by concerned Internet users. (*See id.*) Third, CSI re-evaluates previously blocked sites upon complaints received from operators or other Internet users. (*See id.*)

Essentially, Marshall delegates to CSI the duty of determining what constitutes "patently offensive" material. In so doing, Marshall replaces the public library's discretion to remove material with CSI's determination of "patently offensive" material. Even if Marshall public libraries have the discretion to restrict Internet access, MICPA does not fall within the libraries' discretionary powers because CSI and not the library determines what constitutes "patently offensive" material.

In *Interstate Circuit*, the Supreme Court struck down a Dallas municipal ordinance which attempted to fine motion picture distributors for exhibiting films classified as "not suitable for young persons" without stating or posting the film's classification. *See Interstate Circuit*, 390 U.S. at 680. The ordinance established a Motion Picture Classification Board, composed of nine appointed members who simply graded movies according to their own reactions. *See id.* at 686. The Supreme Court invalidated the ordinance because it failed to stipulate precise criteria for classifying films as "not suitable for young persons." Instead, the ordinance delegated to the board members the power to rate the films. *See id.* at 686.

Similarly, Marshall cannot block access to Internet sites based upon a vague or undisclosed set of standards implemented by NetChaperone. Like the ordinance involved in *Interstate Circuit*, MICPA does not provide precise criteria for determining "patently offensive" material. In effect, Marshall citizens may be denied access to certain Internet sites because a few Internet users find these sites offensive. NetChaperone's methods for blocking Internet sites depend upon individuals' reactions to a given site at a given time. Marshall cannot restrict the rest of society based on a few individuals' sensitivities. *See Interstate Circuit*, 390 U.S. at 676.

II. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S DECISION REQUIRING THE MARSHALL DEPARTMENT OF EDUCATION TO RELEASE THE NETCHAPERONE "OFF-LIMITS" LIST, BECAUSE THE LIST WAS NEITHER A "TRADE SECRET" NOR "COMMERCIAL OR FINANCIAL INFORMATION."

The Marshall Freedom of Information Act ("MFOIA") requires that "[e]ach public body shall make available to any person . . . all public records, except as otherwise provided in Section 6 of this Act." Marshall Code § 6-85-4(a) (1996). The Marshall Department of Education ("MDOE") is a "public body" because the MDOE is an "administrative . . . bod[y] of the State." *Id.* § 6-85-3(a). The NetChaperone "off-limits" list qualifies as a "public record" under the Act, because the list constitutes a "record[ ] . . . having been prepared, or having been or being used, received, possessed or under the control of any public body" *Id.* § 6-85-3(c).[5]

The controversy below was limited to the application of Marshall Code § 6-85-6(a)(6),[6] which states that "[t]rade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm" are exempt from MFOIA's otherwise mandatory disclosure requirements. *Id.* The Court of Appeals incorrectly applied Exemption 6 to conclude that the NetChaperone "off-limits" list was exempt from disclosure because the list is "commercial" and because disclosure "would cause competitive harm" to Chaperone Systems, Inc. ("CSI"). (R. at 15.)

MDOE's decision not to disclose the "off-limits" list is subject to plenary, *de novo* review. *See* Marshall Code § 6-85-9(f). Moreover, "[t]he burden shall be on the public body to establish that its refusal to permit public inspection and copying is in accordance with the provisions of this Act." *Id.*

A. EXEMPTION 6 MUST BE NARROWLY CONSTRUED TO SERVE THE MFOIA POLICY GOAL OF ENSURING FULL ACCESS TO PUBLIC INFORMATION.

When Marshall promulgated MFOIA, it announced that "[p]ursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Marshall

5. The parties have stipulated that the list qualifies as a "public record" under § 6-85-3(c). (*See* R. at 14 n.20.)

6. This brief will refer to Marshall Code § 6-85-6(a)(6) as "Exemption 6."

that all persons are entitled to full and complete information regarding the affairs of government . . . ." Marshall Code § 6-85-2, para. 1. According to MFOIA, "[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments, and monitoring government to ensure that it is being conducted in the public interest." *Id.*

MFOIA exceptions should be construed narrowly to achieve the goal of full disclosure. *See id.* para. 4 (stating that the "restraints on information access should be seen as limited exceptions to the general rule that the people have a right to know the . . . aspects of government and the lives of any or all of the people," and that "[t]he provisions of this Act shall be construed to this end"). Accordingly, "state agency records are presumptively available for public inspection and copying under a state freedom of information law." 37A *Am. Jur. 2d Freedom of Information Laws* § 74, at 113 (1994); *see also id.* at 113 n.17 (collecting state cases).

Under any rational interpretation, MFOIA Exemption 6 consists of three prongs. To establish that the disputed information is exempt from disclosure, the government must show that (1) the information consists only of "[t]rade secrets and commercial or financial information;" (2) the information is "obtained from a person;" and (3) the information is either (a) "proprietary, privileged or confidential," or (b) "disclosure . . . may cause competitive harm." Marshall Code § 6-85-6(a)(6). If the government fails to establish any of these three prongs, this Court must reverse the appellate court and remand the case with an order to disclose the contents of the "off-limits" list.

B. THE NETCHAPERONE "OFF-LIMITS" LIST IS NEITHER A "TRADE SECRET" NOR "COMMERCIAL OR FINANCIAL INFORMATION" FOR PURPOSES OF MFOIA EXEMPTION 6.

1. *The NetChaperone "off-limits" list is not a "trade secret" for purposes of MFOIA Exemption 6.*

a. *The term "trade secret" must be narrowly construed to avoid rendering parts of MFOIA Exemption 6 inoperative and superfluous.*

"It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 46.06, at 119 (5th ed. 1992). Accordingly, this Court should construe Exemption 6 "so that effect is given to all its provisions, [and] so that no part will be [rendered] inoperative or superfluous." *Id.*

The State of Marshall has not implemented a Trade Secrets Act. Accordingly, Marshall trade secrets law must arise from the common law, rather than a statutory law. In most of the states that lack a statutory

trade secrets act, the law is based on the state courts' adoption and application of the definition of trade secrets found in the first *Restatement of Torts*. *See* Michael A. Epstein, *Modern Intellectual Property* § 1.02, at 1-4 (3d ed. 1995). Similarly, because there is no federal Trade Secrets Act, federal courts routinely turn to the Restatement definition to resolve trade secret issues. *See, e.g.*, *Ruckleshaus v. Monsanto Corp.*, 467 U.S. 986, 1011-12 (1984) (applying the *Restatement* definition of trade secret to conclude that a trade secret could constitute a property right).

The *Restatement of Torts* provides, in relevant part, that "[a] trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Restatement of Torts* § 757 cmt. b (1939). In other words, "for information to be a trade secret it must (1) be used in one's business, (2) provide a competitive advantage, and (3) be secret." *See* Epstein, *supra* § 1.02(B)(1), at 1-10.

Despite the widespread use of the *Restatement* definition, this Court should refuse to apply it in the present case, because application of the *Restatement* definition would render most of the words in MFOIA Exemption 6 "inoperative or superfluous." Singer, *supra* § 46.06, at 119. Exemption 6 applies to "*[t]rade secrets* and commercial or financial information obtained from a person or business where the *trade secrets* or information are proprietary, privileged or confidential, or where disclosure of the *trade secrets* or information may cause competitive harm." Marshall Code § 6-85-6(a)(6) (emphases added). Under the broad *Restatement* definition of "trade secrets," there would be no information that falls within the category of "commercial or financial information" that would also fall outside the category of "trade secrets."

Two federal courts of appeals have considered a similar issue arising under the federal Freedom of Information Act ("federal FOIA"), 5 U.S.C. § 552 (1994). *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288-89 (D.C. Cir. 1990) (adopting a narrower definition of "trade secrets"); *Anderson v. Department of Health & Human Services*, 907 F.2d 936, 944 (10th Cir. 1990) (adopting the *Public Citizen* definition). In both cases, the courts of appeals concluded that the *Restatement* definition of "trade secrets" was far too broad to apply to disputes involving the federal FOIA business information exemption, 5 U.S.C. § 552(b)(4).[7]

7. The federal FOIA business information exemption applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Because the business information exemption of the MFOIA largely parallels the business information exemption of the federal Freedom of Information Act, *compare* Marshall Code § 6-85-6(a)(6) *with* 5 U.S.C. § 552(b)(4), this Court should recognize the inherent value of the precedent that interprets the federal FOIA business information exemption. *See* 2 Burt A. Braverman & Frances J. Chetwynd, *Information Law* § 24-2.3.3,

In *Public Citizen*, the D.C. Circuit expressly rejected the broad *Restatement* definition of trade secrets, preferring instead a "narrower common law" definition of the term. *See Public Citizen*, 704 F.2d at 1288. Accordingly, the D.C. Circuit defined the term "trade secret," solely for the purpose of the federal FOIA business information exemption, as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be the end product of either innovation or substantial effort." *Id.* The *Public Citizen* court based its decision, in part, on its view that "the *Restatement* definition renders meaningless the ['business or financial information'] prong of [the federal FOIA business information exemption]." *Id.* at 1289; *see also Anderson*, 907 F.2d at 944 (stating that "adoption of the *Restatement* definition of 'trade secrets' would render superfluous the 'commercial or financial information' prong of [the federal FOIA business information exemption] because there would be no category of information falling within the latter but outside the former").

Even though *Public Citizen* does not bind this Court, it nonetheless demonstrates that the broad *Restatement* definition of "trade secrets" is an inappropriate interpretation for purposes of MFOIA Exemption 6, because the *Restatement* view would render the use of the phrase "business or financial information" superfluous. In addition, the broad *Restatement* definition of "trade secrets" would also render other parts of MFOIA Exemption 6 inoperative. Because the *Restatement* view incorporates elements of "competitive advantage" and "secrecy," *see* Epstein, *supra* § 1.02(B)(1), at 1-10, the *Restatement* definition is at odds with both the "proprietary, privileged or confidential" and "competitive harm" prongs of MFOIA Exemption 6.

Thus, because the broad *Restatement* definition violates the statutory construction maxim that "effect must be given, if possible, to every word, clause and sentence of a statute," Singer, *supra* § 46.06, at 119, this Court should instead apply the narrow definition of "trade secrets" announced by the D.C. Circuit in *Public Citizen*. Accordingly, this Court should find that the NetChaperone "off-limits" list constitutes a "trade secret" for purposes of MFOIA Exemption 6 only if the list constitutes "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be the end product of either innovation or substantial effort." *Public Citizen*, 704 F.2d at 1288.

---

at 902 (1985) ("Many state courts have recognized the close relationship between the Federal Freedom of Information Act and their states' [freedom of information] laws and have noted the value of federal precedents in construing parallel provisions in state access laws."); *see also id.* at 903 n.46 (collecting state cases).

b. The NetChaperone "off-limits" list is not a "trade secret" under the narrow definition announced by the Public Citizen court, because the list is CSI's final product.

The NetChaperone "off-limits" list is not "a secret, commercially valuable plan, formula, process, or device *that is used for* the making, preparing, compounding, or processing of trade commodities." *Id.* at 1288 (emphasis added). Rather, the list is the final result of CSI's "making, preparing, compounding, or processing . . . trade commodities," *id.*, and as such, the list can not constitute a protectable "trade secret" under the narrow *Public Citizen* definition of the term. *See Lehman v. Dow Jones & Co., Inc.*, 783 F.2d 285, 297 (2d Cir. 1986) (holding that information provided by a "finder" of corporate acquisitions did not qualify for trade secret protection because the information was the end product of the finder's activities); *see also Peckarsky v. American Broadcasting Co.*, 603 F. Supp. 688, 697 (D.D.C. 1984) (holding that a reporter's article was not entitled to trade secret protection, in part because "[t]he compilation of facts was not used by the plaintiff as a *means* for conducting his business as an investigative reporter; rather, it was the *product* of his efforts as a reporter" (emphasis added)).[8]

The NetChaperone "off-limits" list is the end product of CSI's commercial effort. As the appellate court pointed out, there are only two types of Internet filtering programs: (1) "programs [that] operate by performing operations upon the text of documents;" and (2) programs that either permit or block access to documents or sites that appear in a database of preselected sites. (R. at 5.) NetChaperone is the latter type of program because it blocks access to sites that appeared in the "off-limits" limits.

It is well-accepted that computer software may be protected as a trade secret. *See* Alois Valerian Gross, Annotation, *What is Computer "Trade Secret" Under State Law*, 53 A.L.R.4th 1046, 1054 (1987) ("Where there may have been a question in the past as to whether computer software is susceptible to protection as a trade secret, it is clear that such protection is available today in practically all jurisdictions . . . ."). Accordingly, the source code that the NetChaperone software uses to reference the "off-limits" list, and to block access to sites that appear on the list, is probably protectable as a trade secret. *See id.*

The process of compiling the "off-limits" list is also probably protectable as a trade secret, because CSI constructs the "off-limits" list by em-

8. Even though the *Lehman* and *Peckarsky* courts were interpreting and applying the broad *Restatement* definition of "trade secrets," and not the narrower *Public Citizen* definition of the term, this Court should still accept the logic of *Lehman* and *Peckarsky* as sound. As the *Lehman* court observed: "[t]he [end product] information at issue here does not fall within even the broadest definition of a trade secret." *Lehman*, 783 F.2d at 298.

ploying professional "websurfers" to evaluate available Internet sites. (*See* R. at 6 n.12; R. at 9.) As such, the compilation process amounts to "a secret, commercially valuable plan, formula, process, or device *that is used for* the making, preparing, compounding, or processing of trade commodities." *Public Citizen*, 704 F.2d at 1288 (emphasis added).

The "off-limits" database is not subject to trade secret protection because the database is the final product that CSI is selling. The NetChaperone software is the means of accessing and processing the "off-limits" data, while CSI's method of assembling the data constitutes a commercially viable plan for preparing the "off-limits" list. As the *Lehman* court noted, "[i]nformation . . . used in *running* [a] business" may be protectable as a trade secret, even though information as a product is not subject to trade secret protection. *Lehman*, 783 F.2d at 298. In the present case, as in *Lehman*, "the information at issue was not used to run [the] business but was its *product*: like the car that rolls off the production line, this information was what [CSI] had to sell." *Id.*

Therefore, because the "off-limits" database is CSI's final product, and because trade secrets law does not offer protection for final products, this Court must find that the "off-limits" list does not and can not constitute a protectable trade secret.

2. *The NetChaperone "off-limits" list, a mere compilation of publicly-available Internet addresses, does not constitute protectable "commercial or financial information" for purposes of MFOIA Exemption 6 merely because it was prepared by a commercial entity.*

When construing the terms of the federal FOIA's business information exemption, 5 U.S.C. § 552(b)(4), courts "consistently [hold] that the terms 'commercial' and 'financial' in the exemption should be given their ordinary meanings." *Public Citizen*, 704 F.2d at 1290; *accord Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980). As such, federal courts construe the term "commercial or financial information" to include any information in which a submitter has a "commercial interest." *See, e.g., Public Citizen*, 704 F.2d at 1290.

Taken on its face, the *Public Citizen* categorization of "commercial or financial information" would seem to include every piece of information ever submitted by a commercial entity. Nevertheless, courts have recognized that such a *per se* categorization would defeat the "primary purpose" of the federal FOIA, "to increase the citizen's access to government record." *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971) (internal quotation marks omitted). Accordingly, courts frequently require disclosure of employee information possessed by the federal government. *See, e.g., id.* at 673 (disclosing union membership lists and stating that,

"[o]bviously, a bare list of names and addresses of employees which employers are required by law to give the [NLRB] cannot be fairly characterized as . . . 'financial' or 'commercial' information"); *Natural W. Life Ins. Co. v. United States*, 512 F. Supp. 454, 462 (1980) (disclosing a list of postal employee names, addresses and job titles upon a finding that the list could not constitute "commercial information"); *see also Washington Post Co. v. HHS*, 690 F.2d 252, 260 (D.C. Cir. 1982) (stating, in dicta, that "[w]e do not see . . . how the list of non-federal employment . . . can be 'commercial or financial information.'").

The preceding cases demonstrate that the NetChaperone "off-limits" list can not constitute "commercial or financial information" merely because the list was prepared by a private, commercial entity. CSI may have a "commercial interest" in protecting its information, (*see* R. at 9 (stating that "CSI has spent over $140,000 developing the 'off-limits' list"); R. at 14 (noting that CSI wishes to prevent disclosure, in part, "to prevent competitors from copying and incorporating the databases into their own filtering products")), but the information can not be construed as either "commercial" or "financial." The Internet is free for all to use, and an Internet address is publicly available information. CSI does not "own" the Internet address information any more than a telephone book publisher "owns" a listing of telephone numbers. Accordingly, the "off-limits" list is neither "commercial" nor "financial" information.

Thus, because information submitted by a commercial entity is not necessarily "commercial or financial" by its association with the commercial entity, and because the "off-limits" list is comprised solely of freely available information, the information can be neither "commercial" nor "financial" for purposes of MFOIA Exemption 6.

C. THE NETCHAPERONE "OFF-LIMITS" LIST WAS NOT RECEIVED "FROM A PERSON," BECAUSE THE LIST WAS PREPARED FOR THE MDOE UNDER A CONTRACT WITH THE GOVERNMENT.

To prevent disclosure under MFOIA Exemption 6, the government must demonstrate that it obtained the NetChaperone "off-limits" list "from a person or business." Marshall Code § 6-85-6(a)(6). The courts that have construed the identical language in the business information exemption of the federal FOIA have unanimously concluded that "[t]he exemption . . . is available only with respect to information received from sources *outside the government*." *Soucie v. David*, 448 F.2d 1067, 1079 n.47 (D.C. Cir. 1971). The federal courts further hold that information prepared for the government under a contract with the government is the same as information prepared by the government itself. *See id.* (noting that the "from a person" requirement would be satisfied if an individual gave information to the government, in confidence, on a non-

contractual basis); *see also GSA v. Benson*, 415 F.2d 878, 881-82 (9th Cir. 1969) (holding that an appraisal of goods prepared by an independent government contractor was not information "from a person").

There is a distinct difference between information that the government purchases and information that the government simply possesses. When an independent party contracts with a government agency, the information provided under the terms of the contract undeniably belongs to the agency, because the independent party is doing the work of the agency. If this were not the case, a government agency could cloak its actions in secrecy merely by subcontracting all of its work to private, commercial entities. Accordingly, if this Court were to hold that the MDOE may cover its tracks merely by delegating its work to independent contractors, the Court would thwart the purpose of MFOIA: "that all persons are entitled to full and complete information regarding the affairs of government." Marshall Code § 6-85-6(a)(6).

Thus, because CSI prepared the "off-limits" list for the government under a contractual agreement, and because information prepared by government contractors is essentially another form of information from the government as opposed to information received "from a person," the "off-limits" list fails the second prong of MFOIA Exemption 6, and this Court must therefore order the MDOE to disclose the list.

D. THE NETCHAPERONE "OFF-LIMITS" LIST IS NEITHER "CONFIDENTIAL," "PRIVILEGED," NOR "PROPRIETARY" FOR PURPOSES OF MFOIA EXEMPTION 6.

1. *The NetChaperone "off-limits" list does not amount to "confidential information" under either of the recognized tests.*

The courts have created a pair of categorical tests to determine whether information is "confidential" for purposes of the federal FOIA business information exemption, 5 U.S.C. § 552(b)(4). For information that is submitted voluntarily, the federal courts hold that the information is "confidential" so long as the it is comprised solely of information that the submitter would not "customarily" disclose to the public. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (holding that nuclear power plant safety reports that were submitted voluntarily by an industry group were exempt from release). If, on the other hand, the government compels the submission, the federal courts will hold the information "confidential" if disclosure "is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498

F.2d 765, 770 (D.C. Cir. 1974) (remanding for a determination of whether the release of contract information would harm the submitters).

The two prongs of the *National Parks* test are routinely referred to as the "impairment prong" and the "competitive harm prong." *See* Office of Info. & Privacy, United States Dep't of Justice, *Freedom of Information Act Guide and Privacy Act Overview* 128 (Sept. 1996 ed.) [hereinafter "*FOIA Guide*"]. Under MFOIA—as opposed to the federal FOIA—the "competitive harm prong" can not be a part of the confidentiality test, because MFOIA Exemption 6 incorporates a separate, more inclusive "competitive harm" as an alternative basis for withholding release. *See* Marshall Code § 6-85-6(a)(6).

a. The Critical Mass test does not apply because the MDOE compelled the submission of the "off-limits" list under both the MICPA and the contract bidding process.

The federal courts have refused to extend the *Critical Mass* test to information submitted in conjunction with a government contract. *See, e.g., McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 316, 318 (D.D.C. 1995) (concluding "as a matter of law" that "the price elements necessary to win a government contract are not voluntary"). *See generally FOIA Guide, supra* at 136-37 (collecting and discussing cases). As such, information submitted pursuant to a government contracting process is not subject to the "customarily disclosed to the public" test of *Critical Mass*.

The Marshall Internet Child Protection Act ("MICPA") requires the MDOE to "conduct a competitive bidding process to procure appropriate filtering software." Pub. L. No. 97-3, § 4(b). MICPA also requires the MDOE to conduct a continuing, formal evaluation to determine the "effectiveness and appropriateness of the filtering software." *Id.* § 4(c). This Court must therefore conclude that the MDOE compelled CSI to submit the NetChaperone "off-limits" list as part of the contracting process. Accordingly, the *Critical Mass* test does not apply.

b. The release of compulsorily-submitted business data will not impair the government's ability to obtain the information in the future, because the government retains the ability to compel the submission of information again in the future.

When the government has compelled the submission of business information, the government is estopped from claiming that disclosure will limit the government's ability to obtain that same information again in the future. *See Hawaiian Int'l Shipping Corp. v. Department of Commerce*, 3 G.D.S. (P-H) ¶ 82,366 (D.D.C. 1982) (stating that an impairment argument does not apply when information is submitted in order to gain the benefit of a contract); *cf. Stewart v. Customs Serv.*, 2 G.D.S. (P-

H) ¶ 81,140 (D.D.C. 1981) (holding that, for required submissions, there is a rebuttable presumption of no impairment). This position is only logical, as the government retains—by force of law—the power to compel the submission of the data again in the future.

Therefore, because MDOE retains the ability to re-compel the "off-limits" list, this Court must hold that the MDOE is estopped from raising this argument in favor of non-disclosure in the present case.

c. CSI's assertion of confidentiality is of no legal relevance.

Where, as here, the government compels the submission of business information, the submitter's mere assertion of confidential status will not render the document "confidential." *See National Parks*, 498 F.2d at 767 (stating that "[w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether the information is 'confidential'"). When CSI submitted a copy of the "off-limits" list to MDOE, it "included a cover letter stating that the contents of the list are proprietary, privileged, and confidential information, and requesting that the list not be made available for viewing or copying by any third party." (R. at 11.) Accordingly, this Court must hold that CSI's mere request of confidentiality can not, in and of itself, render the "off-limits" list "confidential."

2. The NetChaperone "off-limits" list is not privileged because the contents of the list are not subject to any judicially-recognized "privilege."

In construing the federal FOIA business information exemption, 5 U.S.C. § 552(b)(4), courts recognize that "privileged" is not synonymous with "confidential." *See Washington Post*, 690 F.2d at 267 n.50. Courts relegate the term to "privileges" created by the Constitution, by statute, or by common law. *See Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399-400 (5th Cir. 1985) (refusing to recognize an implied lender-borrower privilege). Accordingly, "privileged" usually refers to material subject to doctor-patient or attorney-client privileges. *See, e.g., Miller, Anderson, Nash, Yerke & Wiener v. Department of Energy*, 499 F. Supp. 767, 771 (D. Or. 1980) (holding that a legal memorandum prepared for an utility company was exempt from release); *Indian Law Resource Ctr. v. Department of the Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979) (holding that law firm vouchers of work done were exempt from release).

The NetChaperone "off-limits" list is not the subject of any judicially-recognized privilege. Accordingly, this Court must hold that the "off-limits" list is not "privileged" for purposes of MFOIA Exemption 6.

3. *The NetChaperone "off-limits" list is not "proprietary" because the "off-limits" list is a collection of publicly-available information.*

The courts have not considered the definition of the term "proprietary" with respect to freedom of information or open records laws. Accordingly, when construing this word for the first time, this Court should adhere to the so-called "plain meaning rule": "'Where the words of the statute are clear and free from ambiguity, the letter of the statute may not be disregarded . . . .'" Singer, *supra* § 46.01, at 81-82.

When used in its everyday sense, "proprietary" refers to "something that is used, produced, or marketed under exclusive legal right of the inventor or maker." *Merriam-Webster's Collegiate Dictionary* 936 (10th ed. 1996); *see also* Singer, *supra* § 47.07, at 153 (stating that dictionary definitions may be used as an intrinsic aid to statutory interpretation). As noted previously, the NetChaperone "off-limits" list is merely a compilation of publicly-available Internet site addresses. CSI does not *own* the information; on the contrary, the company merely *possesses* the "off-limits" list. The mere possession of publicly-available information can not constitute an exclusive, legal, proprietary right. *Cf. Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362-64 (1991) (holding that a telephone book was not entitled to copyright protection because it lacked the requisite originality).

Thus, because CSI does not possess an exclusive right of ownership with respect to the "off-limits" list, this Court must hold that the list is not proprietary with respect to MFOIA Exemption 6.

E. THE APPELLATE COURT ERRED BY CONCLUDING THAT DISCLOSURE OF THE NETCHAPERONE "OFF-LIMITS" LIST WOULD CAUSE COMPETITIVE HARM TO CSI, BECAUSE THE GOVERNMENT FAILED TO CARRY ITS BURDEN OF SHOWING THAT DISCLOSURE OF THE NETCHAPERONE "OFF-LIMITS" LIST "MAY CAUSE COMPETITIVE HARM."

The record shows only meager evidence with respect to whether "disclosure of the trade secrets or other information may cause competitive harm." Marshall Code § 6-85-6(a)(6). Under the comparable federal test, the courts "must analyze '(1) the *commercial value* of the requested information, and (2) the *cost of acquiring* the information through other means.'" *Greenberg v. FDA*, 803 F.2d 1213, 1218 (D.C. Cir. 1986) (emphasis in original). MDOE has utterly failed to satisfy either of these competitive harms tests.

The evidence in the record indicates only that "CSI has spent over $140,000 developing the NetChaperone 'off-limits' list," and that the company "continues to spend between $5,000 and $6,000 per month updating the list." (R. at 9.) The record also demonstrates that CSI was

motivated to protect its "off-limits" database "to prevent competitors from copying and incorporating the database into their own filtering products." (R. at 14.) From these two facts, the appellate court concluded that "[a] list of Internet file addresses may well be the most valuable commercial asset of a company that manufactures Internet filtering software," and that "disclosure [of the list] would cause competitive harm to CSI." (R. at 15.)

These meager shreds of evidence do not support the appellate court's conclusion. In a case such as this, the trial and appellate courts should have considered evidence with respect to the relative ease or difficulty of copying the list. *Cf. Greenberg*, 803 F.3d at 1218 (remanding, in part, because the lower court had failed to determine a competitor's cost of acquiring the sought-after information). In addition, the lower courts should have taken evidence with respect to the current, actual value of the "off-limits" list. After all, the sought-after list is now over eight months old, (*see* R. at 10), and its value must certainly be greatly reduced now that its contents are no longer current.

Thus, even if this Court were to conclude, against the weight of the authority presented here, that the government has carried its burden with respect to all of the other elements, the Court must still remand this case with orders to conduct further fact-finding with respect to the competitive harm prong of MFOIA exemption 6.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse both decisions of the Marshall Court of Appeals.

Respectfully submitted,

Attorneys for Petitioner
John Cartaina
Robert Dixon
Eric Rogers

BOSTON UNIVERSITY SCHOOL OF LAW
BOSTON UNIVERSITY

BRIEF FOR THE RESPONDENT

No. 97-404

IN THE SUPREME COURT OF
THE STATE OF MARSHALL

MARSHALL ANTI-CENSORSHIP
COALITION, INC.,

Petitioner,

v.

THE STATE OF MARSHALL and
MARSHALL DEPARTMENT OF EDUCATION,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF THE STATE OF MARSHALL

BRIEF FOR RESPONDENTS

Michelle Regal Herrmann
Jennifer L. Johnson
Candace A. Ourso
Attorneys for the Respondents
SOUTH TEXAS COLLEGE OF LAW

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE MARSHALL INTERNET CHILD PROTECTION ACT IS CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE NET-CHAPERONE OFF-LIMITS DATABASE IS EXEMPT FROM DISCLOSURE UNDER THE MARSHALL FREEDOM OF INFORMATION ACT.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED 744
TABLE OF AUTHORITIES 747
OPINIONS BELOW 750
STATEMENT OF JURISDICTION 750
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 750
STATEMENT OF THE CASE 751
A. SUMMARY OF THE FACTS 751
B. SUMMARY OF THE PROCEEDINGS 753
SUMMARY OF THE ARGUMENT 753
ARGUMENT AND AUTHORITIES 754
I. THE CHILD PROTECTION ACT IS CONSTITUTIONAL BECAUSE THE RESTRICTIONS PLACED ON PUBLIC INTERNET ACCESS IN MARSHALL PUBLIC LIBRARIES IS CONSISTENT WITH FIRST AMENDMENT LAW AND POLICY 753
A. Previously Developed Law And Established Social Policy Call For Precisely This Type Of Regulation... 756
1. The Internet's unique characteristics 758
2. Actual and potential reach of the Internet 759
3. Social Value: Protecting children or playboy 759
4. Scope of restriction and its remedy 759
B. The Child Protection Act Is A Zoning Law Which Respects The Constitutional Rights Of Adults And Children 760
1. The Child Protection Act does not unduly restrict adult access to patently offensive material 761
2. The Child Protection Act does not affect minors' First Amendment rights in a real and substantially overbroad manner 762
C. The Child Protection Act Advances A Compelling Government Interest And Is A Narrowly Tailored Means Of Regulation 763
1. Filtering software directly advances a compelling government interest by protecting children from harmful materials 764
2. Filtering software specifically restricts material that is harmful to children; thus, the statute is narrowly tailored 765
II. THE OFF-LIMITS LIST OF BLOCKED WEB-SITES CONSTITUTES CONFIDENTIAL BUSINESS INFORMATION AND IS THUS EXEMPT FROM

DISCLOSURE UNDER THE MARSHALL FREEDOM OF INFORMATION ACT 754
A. The Off-Limits Database Is A Trade Secret 768
1. CSI has gone to great lengths to keep its database a secret 769
2. The off-limits database is unique and therefore gives CSI an advantage over its competitors..... 770
B. CSI's Off-Limits Database Is Commercial Or Financial Information That Is Confidential And Proprietary, And Its Disclosure Will Cause Competitive Harm To CSI 771
1. CSI's off-limits list is confidential and proprietary because it was submitted voluntarily and it is not information CSI would customarily release to the public 773
2. Disclosure of the off-limits database will diminish CSI's competitive position while enhancing the position of other filtering software producers 774
CONCLUSION..... 775

TABLE OF AUTHORITIES

PAGE

UNITED STATES SUPREME COURT CASES

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 762, 765
Brown v. Louisiana, 383 U.S. 131 (1966) 754, 763
Butler v. Michigan, 352 U.S. 380 (1957) 760, 761
Cantwell v. Connecticut, 310 U.S. 296 (1940) 756, 765
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 764
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 755
Connally v. General Constr. Co., 269 U.S. 385 (1926) 766
Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) 756
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 765
Erznoznik v. Jacksonville, 422 U.S. 205 (1975) 762
FCC v. Pacifica, 438 U.S. 726 (1978) 757, 759, 764
Ginsberg v. New York, 390 U.S. 629 (1968) 759, 761, 762, 764, 766, 767
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 764
Griswold v. Connecticut, 381 U.S. 479 (1965) 756
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 769, 770
Kovacs v. Cooper, 336 U.S. 77 (1949) 756
Kunz v. New York, 340 U.S. 290 (1951) 765
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 756
Meyer v. Nebraska, 262 U.S. 390 (1923) 754
Miller v. California, 413 U.S. 15 (1973) 756
Near v. Minnesota, 283 U.S. 697 (1931) 756
New York v. Ferber, 458 U.S. 747 (1982) 754, 756, 764
Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) 755
Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983) . 763
Prince v. Massachusetts, 321 U.S. 158 (1944) 764
Reno v. ACLU, 117 S. Ct. 2339 (1997) ..... *passim*
Roth v. United States, 354 U.S. 476 (1957) 762
Ruckelhaus v. Monsanto Co., 467 U.S. 986 (1984) 769, 770
Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 756, 758, 762, 764, 765, 766
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 756
United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) 765

UNITED STATES COURT OF APPEALS CASES

Action for Children's Television v. F.T.C., 58 F.3d 654 (D.C. Cir. 1995) 764
Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1975) 768
Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) 772, 773
FMC Corp. v. Taiwan Tainan Giant Indus. Co., 730 F.2d 61 (2d Cir. 1984) 769
GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109 (9th Cir. 1994) 774
Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970) 772
Integrated Cash Management Servs., Inc. v. Digital Transactions, Inc., 920 F.2d 171 (2d Cir. 1990) 769
International Soc'y for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth., 691 F.2d 155 (3d Cir. 1982) 763
Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992) 763
Mai Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) 770
National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) 773
Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983) 772, 774
Shermco Indus., Inc. v. Secretary of the Air Force, 613 F.2d 1314 (5th Cir. 1980) 768
Softel, Inc. v. Dragon Med. & Scientific Communications, Inc., 118 F.3d 955 (2d Cir. 1997) 770
Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991) 763
United Technologies Corp. v. FAA, 102 F.3d 688 (2d Cir. 1996) ... 774
W.R. Grace & Co. v. Hargadine, 392 F.2d 9 (6th Cir. 1968) 768-69

UNITED STATES DISTRICT COURT CASES

ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) 758
American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) 759
Benson v. General Servs. Admin., 289 F. Supp. 590 (W.D. Wash. 1968) 772
Comdisco, Inc. v. General Servs. Admin., 864 F. Supp. 510 (E.D. Va. 1994) 773
Fisher v. Renegotiation Bd., 355 F. Supp. 1171 (D.D.C. 1973) 774

Mood for a Day v. Salt Lake County, 953 F. Supp. 1252 (D. Utah 1995) 763
Nadler v. FDIC, 899 F. Supp. 158 (S.D.N.Y. 1995) 773
Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996) 761

STATE COURT CASES

Encore College Bookstores, Inc. v. Auxiliary Serv. Corp. of the State Univ. of N.Y., 663 N.E.2d 302 (N.Y. 1995) 774
Morlife, Inc. v. Perry, 66 Cal. Rptr. 2d 731 (Ct. App. 1997) 769, 770
Sublette County Rural Health Care Dist. v. Miley, 942 P.2d 1101 (Wyo. 1997) 773

CONSTITUTION

U.S. Const. amend. I 750, 756
U.S. Const. amend. XIV 750, 756

FEDERAL STATUTES:

Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1988) 768
18 U.S.C. §§ 1464-1465 (1994) 757

STATE STATUTES

Colo. Rev. Stat. § 18-7-502(2) (1986) 761
Del. Code Ann. tit. 11, § 1365(I)(2) (1995) 761
D.C. Code Ann. § 22-2001(b)(1)(B) (1996) 761
Haw. Rev. Stat. § 712-1215(1)(b) (1994) 761
Ga. Code Ann. § 16-12-103(b) (1994) 761
Marshall Freedom of Information Act, Marshall Code ch. 6, art. 85 (1997) .....*passim*

LEGISLATIVE HISTORY

H.R. Rep. No. 105-37 (1995), 1995 WL 376908 772
141 Cong. Rec. S8330 (daily ed. June 14, 1995) 755

LAW REVIEWS

Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Pornographers*, 13 No. 7 Computer Law. 1 (1996) 758
Marci A. Hamilton et al., *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel Discussion*, 14 Cardozo Arts & Ent. L.J. 343 (1996)..... 758
Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (1996)..... 761

Robert W. Peters, *There Is a Need to Regulate Indecency on the Internet*, 6 Cornell J.L. & Pub. Pol'y 363 (1997) 754

SECONDARY AUTHORITIES

ACLU, *Cyber-Liberties* (last modified June, 1997), <http://www.aclu.org/issues/cyber/censor/stbills.html> 755
Jerry Bergman, Ph.D., *The Influence of Pornography on Sexual Development: Three Case Histories*, IX Family Therapy 3, 1982 ... 759
Brief for Appellants, *ACLU v. Reno*, 117 S. Ct. 2329 (1997) (No. 96-511) 758
James T. O'Reilly, *Federal Information Disclosure* (2d ed. 1995) 768
Restatement of Torts § 757 (1939) 768, 769, 770
Michelle Slatalla, *Plugged In*, Newsday, Mar. 30, 1997 755

Respondents, State of Marshall and Marshall Department of Education, respectfully submit this brief in support of their request that this Court affirm the judgment of the court of appeals.

OPINIONS BELOW

The order of the Princeton County Circuit Court held in part for the State of Marshall and in part for the Marshall Anti-Censorship Coalition, Inc. The circuit court's opinion is unreported. The opinion of the Court of Appeals of the State of Marshall affirmed the circuit court's holding for the State of Marshall and reversed the lower court's holding for the Marshall Anti-Censorship Coalition, Inc. The appellate court decision is likewise unreported and is in the Transcript of Record, (R. at 1-16, Ct. App. Op.).

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is omitted in accordance with section 1020(2) of the 1997 Rules of the John Marshall National Moot Court Competition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions are relevant to the determination of the present action: U.S. Const. amends. I, XIV, and the Free Speech Clause of the Marshall Constitution.

The following statutory provisions are relevant to the determination of the present action: Marshall Internet Child Protection Act, Public Law 97-3 (1997), and Marshall Freedom of Information Act, Marshall Code Chapter 6, Article 85.

STATEMENT OF THE CASE

A. Summary of the Facts

The State of Marshall has passed legislation requiring the Marshall Department of Education (MDOE) to select filtering software to be installed on all computer terminals featuring the Internet in Marshall public libraries. (R. at 2.) The State litigated this claim for MDOE in the lower courts; therefore, both are collectively referred to as "the State of Marshall" or "Respondents." (R. at 2.)

Petitioner, the Marshall Anti-Censorship Coalition (MACC), is an incorporated association whose members advocate unrestricted expression on the Internet, regardless of any harm caused to the citizens of Marshall by such Internet anarchy. (R. at 2.) Among its members are library patrons and persons who disseminate information using the Internet. (R. at 3.)

In October of 1995, the State of Marshall began installing public-access Internet terminals in its public libraries. (R. at 6-7.) Such access was well received by patrons for educational, corporate, and recreational purposes, and as a result, today almost all public libraries in the state have Internet capability. (R. at 7.)

Despite the warm reception, arrival of the Internet in Marshall public libraries has not been without complaint. (R. at 7.) Some library patrons are using the Internet terminals to access patently offensive materials such as pornography. (R. at 7.) Even more alarming is the fact that among the patrons using the Internet in this manner are children. (R. at 7.)

Many parents submitted formal complaints to the library when they learned that their children had access to sexually explicit materials via the public library. (R at 7-8.) In addition, library patrons and employees have complained about unsolicited exposure to sexually explicit materials while walking by other patrons accessing such material. (R. at 7-8.) One librarian informed the trial court that patrons were bringing up pornographic images on the access terminals, leaving them on the screen, and just walking away. (R. at 8.) She said that at one point, she walked past five public-access terminals, all of which had sexually explicit images on the screen. (R. at 8.) Publicity of the concern has escalated complaints, and one patron even characterized the exposure to the sexually explicit images on library computers as a form of "sexual assault." (R. at 8.)

On January 6, 1997, the Marshall Internet Child Protection Act ("Child Protection Act") went into effect. (R. at 8.) The Child Protection Act requires all public libraries in the State of Marshall to install, maintain, and continuously operate filtering software designed to filter out

"patently offensive" material on all publicly accessible Internet terminals. (R. at 17.)

As directed by the Act, the Marshall Department of Education (MDOE) conducted an investigation of the software packages available, considering both the Internet sites each package blocks and the prices of the software. (R. at 2.) Most of the software considered by MDOE employs the blocking method of filtering Internet materials which prevents access to selected sites containing information deemed offensive or inappropriate. (R. at 5, 6.) To assist in its evaluation of various filtering software, MDOE was provided with a printout of the database of sites blocked by the program. (R. at 10.) Specifically, MDOE received a copy of NetChaperone's blocked list. (R. at 10.)

On February 17, 1997, MDOE awarded the contract to provide the filtering software to Chaperone Systems, Inc. (CSI), producers of NetChaperone software. (R. at 2.) The contract between CSI and MDOE requires CSI to submit updated copies of the list of blocked web-sites to MDOE on a monthly basis. (R. at 10-11.) With each printed copy of the list, however, CSI sends a cover letter stating that the contents of the list are proprietary, privileged, and confidential information, and requesting that the list not be made available for viewing or copying by any third party. (R. at 11.)

Upon purchase of NetChaperone software, its users agree not to attempt to discover the contents of the off-limits list, as required by a licensing agreement. (R. at 6, 8-9.) This license agreement specifically prohibits users from reverse engineering the software in order to view the list, and from reconstructing "a substantial part" of the contents of the list using trial and error. (R. at 9.)

NetChaperone blocks offensive sites, including but not limited to pornography, gross depictions, hate speech, and detailed discussions of illegal activities. (R. at 6.) CSI has spent over $140,000 developing the NetChaperone list of blocked Internet sites, and continues to spend in excess of $5,000 monthly keeping it updated. (R. at 9.) Moreover, accurately and seasonably updating the list requires extensive manpower. (R. at 9.) CSI has full-time employees as well as independent contractors continuously working on the list. (R. at 9.) On a daily basis, CSI employees electronically update user-based NetChaperone software. (R. at 9.) This is done by transmitting revised blocked lists to each computer on which the NetChaperone program is installed. (R. at 9.)

On February 18, the day after the NetChaperone contract was awarded, MACC filed a request with MDOE under the Marshall Freedom of Information Act (Marshall FOIA), seeking disclosure of the NetChaperone off-limits list. (R. at 3.) MDOE denied the disclosure request, asserting that the list is confidential business information and not

subject to disclosure under the Marshall FOIA. After exhausting its administrative remedies, MACC sought judicial review of the MDOE's denial in the Princeton County Circuit Court.

Immediately after the Child Protection Act was signed into law, MACC also brought a facial challenge to the Act in the Princeton County Circuit Court, questioning its validity under state and federal constitutions. (R. at 3.) MACC contends that the Act violates the Free Speech Clause of the First Amendment as an unreasonable content-based restraint on speech by requiring filtering software in Marshall public libraries. (R. at 3.)

The FOIA claim and the constitutional challenge were subsequently consolidated in the circuit court. (R. at 3.)

B. Summary of the Proceedings

This action was originally brought in the Princeton County Circuit Court. (R. at 1.) That court considered the constitutionality of the Marshall Internet Child Protection Act and found the Act to be within the confines of federal and state constitutions. (R. at 1.) In addition, the court held that the NetChaperone off-limits database is subject to disclosure under the Marshall Freedom of Information Act. (R. at 2.) Both parties appealed this decision to the Court of Appeals of the State of Marshall, First District. (R. at 12-15.)

Petitioner contends that the Marshall Internet Child Protection Act violates the Free Speech Clause of the First Amendment by mandating the installation and use of filtering software on public-access Internet terminals located in public libraries. (R. at 12.) Likewise, the State of Marshall and the Marshall Department of Education contend they should not be compelled under the Marshall FOIA to disclose the off-limits list as it is commercial information and thus excluded from disclosure. (R. at 13-14.) The Marshall Appellate Court affirmed the circuit court order upholding the constitutionality of the Marshall Internet Child Protection Act; however, it reversed the circuit court's order denying disclosure of the off-limits list. (R. at 15.) It is from this decision that Petitioner appeals.

SUMMARY OF THE ARGUMENT

I.

The Marshall Court of Appeals correctly held that the State of Marshall may constitutionally regulate Internet access on Marshall public library terminals. The Child Protection Act duly respects the constitutional rights of adults and minors and is thus constitutional in accordance with zoning laws and policy. Further, public libraries are public

forums and can regulate the First Amendment activities permitted within. Patently offensive materials can be constitutionally regulated because the state has a compelling interest in protecting its children. Additionally, the Act is suitably limited to achieve this compelling interest. Thus, the court of appeals correctly held that the Child Protection Act is constitutionally sound.

II.

The court of appeals was correct when it denied Petitioner's request for disclosure of NetChaperone's off-limits list under the Marshall FOIA. The list is exempt from disclosure because it is confidential business information. The off-limits list is a trade secret *and* commercial information as defined by section 6(b)(6) of the Marshall Freedom of Information Act. Furthermore, the commercial information is confidential and proprietary, and will cause competitive harm to CSI if it is disclosed to the public. Therefore, the off-limits list is exempt from disclosure, and the appellate court's judgment in favor of Respondents should be affirmed.

ARGUMENT AND AUTHORITIES

I. THE CHILD PROTECTION ACT IS CONSTITUTIONAL BECAUSE THE RESTRICTIONS PLACED ON PUBLIC INTERNET ACCESS IN MARSHALL PUBLIC LIBRARIES IS CONSISTENT WITH FIRST AMENDMENT LAW AND POLICY.

Our nation's duty to protect children from harm and equip them for the future is a paramount obligation. *See New York v. Ferber*, 458 U.S. 747, 753, 758 (1982). Generally, public libraries have provided a safe haven for children as "place[s] dedicated to quiet, to knowledge and to beauty." *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). Unfortunately, parents, educators, and child advocates now view the once-edifying institutions as red-light districts, unsafe and undesirable for children, and, at times, adults. The source of their trepidation is the unrestricted, unfiltered, and unmonitored Internet access available in many Marshall public libraries.

Parents and children have a First Amendment right to receive information and acquire knowledge. *See Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923). The Internet has vast potential to facilitate that interest, but if untamed, it also has potential for great harm. *See* Robert W. Peters, *There Is a Need to Regulate Indecency on the Internet*, 6 Cornell J.L. & Pub. Pol'y 363, 363 (1997). Legislators have warned that the most hardcore, perverse types of pornography (photos and stories featuring torture, child abuse, and bestiality) are only a few clicks away from any

child with a computer. *See* 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon).

Parents, educators, and legislators alike are scrambling to protect children from the boundless information available on the Internet. Already, libraries in Texas, Boston, Florida, and New York have purchased filters for computer terminals. *See* Michelle Slatalla, *Plugged In*, Newsday, Mar. 30, 1997, at A39. Furthermore, eleven states have passed legislation aimed at regulating on-line content. *See* ACLU, *Cyber-Liberties* (last modified June, 1997), <http://www.aclu.org/issues/cyber/censor/stbills.html>. Unfortunately, the urgent nature of the problem has led to hastily drafted legislation which courts have found to tread on First Amendment rights. *See Reno v. ACLU*, 117 S. Ct. 2339 (1997).

The Marshall legislature enacted the Marshall Internet Child Protection Act of 1997 (Child Protection Act) to protect children from patently offensive materials now disseminated on the Internet and readily available in most Marshall public libraries. (R. at 8.) The State's legislature has drafted a constitutionally sound statute which protects children in a narrowly tailored manner. In addition, the Child Protection Act accounts for the special characteristics of the medium while protecting children from a plethora of patently offensive communications and also furthering the educational goals of public libraries. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986).

In this case, the Princeton County Circuit Court and the Court of Appeals of the State of Marshall upheld the constitutionality of the Child Protection Act. (R. at 1, 13.) The courts concluded that the Act's filtering software requirement furthers the compelling interest of protecting children, yet remains within the purview of the free speech clauses of the federal and state constitutions.[1] (R. at 1, 13.) In reviewing Petitioner's appeal of these holdings, this Court should exercise *de novo* review over First Amendment issues. *See Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

The courts below correctly held that the Child Protection Act is consistent with the First Amendment because the Act does not abridge free speech. Importantly, the Act is suitably limited to achieve the State's compelling interest of protecting children from exposure to harmful material. For these reasons, the State of Marshall requests that this Court affirm the decisions of the courts below.

---

1. The "free speech clause" and the "constitution" will collectively refer to both the State of Marshall Constitution and the United States Constitution, as each provides the same level of protection. (R. at 3 n.4.)

A. Previously Developed Law And Established Social Policy Call For Precisely This Type Of Regulation.

The United States Constitution provides that Congress shall make no law that abridges the freedom of speech.[2] *See* U.S. Const. amend. I; *see Reno*, 117 S. Ct. at 2334 n.1. This Amendment protects the right to express and receive ideas. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). As history has confirmed, while the "speech" component to this constitutional right is far-reaching, it is a limited right. *See Near v. Minnesota*, 283 U.S. 697, 716 (1931).

Obscenity is one such limitation. *See Ferber*, 458 U.S. at 747; *Miller v. California*, 413 U.S. 15 (1973). This form of speech is illegal and is not constitutionally protected. In fact, the government can ban obscenity outright, on the Internet, and otherwise. *See* 18 U.S.C. §§ 1464-1465 (1994); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996).

In addition, the government can also regulate what has come to be commonly known as "patently offensive" speech. *See Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Patently offensive speech includes that which is arguably suitable for adults, however has been deemed harmful and thus inappropriate for children. *See id.* Depending on the context, this speech can be regulated with suitably limited legislation. *See Reno*, 117 S. Ct. at 2347.

Nearly fifty years ago, the Supreme Court recognized that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself." *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). Since that time, the Court has expressed this sentiment time and again, and differential treatment of communications technology has become established First Amendment doctrine. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 623-24 (1994); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500-01 (1981) (plurality opinion).

Although no test has been set forth, the Supreme Court has provided constitutional guidance for regulation of new communication media. New forms of communication—specifically the Internet—command a new legal approach, an approach merely *guided* by prior law and social policy, not *subsumed* by it.

In *Reno v. ACLU*, the Supreme Court acknowledged that the Internet is a fundamentally different medium and will require a new legal approach. 117 S. Ct. at 2351. In *Reno*, the Court evaluated the constitu-

2. The United States Constitution is applicable to the states via the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

tionality of the Communications Decency Act (CDA), which created *criminal liability* for the *creation*, *transmission*, and *display* of *obscene*, *indecent* and *patently offensive* materials to minors over the Internet. *Id.* The majority struck down the overbroad statute as an unconstitutional ban on protected speech; however, the Court refused to affirm the district court's holding that the Internet is immune from regulation. *Id.* at 2340 n.30. Thus, the opinion clearly establishes that the Internet is a fundamentally different medium, requiring narrowly tailored legislation for regulation to be constitutional. *Reno*, 117 S. Ct. at 2329.

Many years before the evolution of the Internet, the Supreme Court considered the constitutionality of content-based regulation of radio speech. *See FCC v. Pacifica*, 438 U.S. 726, 730 (1978). The *Pacifica* Court upheld a declaratory order of a federal agency holding that the broadcast of a recording entitled "Filthy Words" could have been the subject of administrative sanctions. *Id.* The court noted that the use of certain words in an afternoon broadcast when there are children in the audience is patently offensive. *Id.* In short, the Court found that the ordinance could regulate otherwise protected expression for two reasons: 1) the ease with which children may obtain access to broadcasts coupled with 2) the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority." *Id.* at 749.

Although the *Pacifica* Court emphasized the importance of the context of its decision, *Pacifica* and its progeny point out the following principles which should be considered when sizing up a new medium of communication: 1) the unique characteristics of the technology;[3] 2) the actual and potential reach of the medium;[4] 3) the social value of the competing interests;[5] and 4) the scope of the restriction and its remedy.[6] Using these principles to evaluate Internet regulation utilizes Supreme Court findings without trying to fit a square peg into a round hole.[7]

---

3. *See Reno*, 117 S. Ct. at 2329 (Internet); *Sable*, 492 U.S. at 115 ("dial-a-porn" communications); *Pacifica*, 438 U.S. at 726 (considering the constitutional implications of the radio).

4. *See Reno*, 117 S. Ct. at 2342 (Internet); *Sable*, 492 U.S. at 127-28 ("dial-a-porn"); *Pacifica*, 438 U.S. at 729-30 (discussing the pervasiveness of the radio).

5. *See Pacifica*, 438 U.S. at 750-51 (balancing the social value of the broadcast with the social interest in order and morality).

6. *See Reno*, 117 S. Ct. at 2342; *Sable*, 492 U.S. at 127-28 (refusing to ban certain speech on medium); *Pacifica*, 438 U.S. at 739.

7. Using such broad-based principles will also lay the groundwork for the legislature and judiciary alike, when considering whether certain restrictions on new communications impinge on First Amendment rights.

1. *The internet's unique characteristics.*

The Internet's "special attributes" have not gone unnoticed by the Supreme Court, Congress, and the general public. *See Reno*, 117 S. Ct. at 2340 n.30. Courts have noted the extremely low barriers to entry, and that by virtue of these low barriers, Internet users have access to a complicity of diverse information. *See id.* Hence, the Internet places the power of a mass medium into the hands of anyone who has access to a desktop computer. *See* Marci A. Hamilton et al., *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel Discussion*, 14 Cardozo Arts & Ent. L.J. 343, 347 (1996).

Another fundamental characteristic of on-line communication which sets it apart from other forms of communication is the inability of the communicator to select the audience. Traditional modes of communication such as radio, television, and even dial-a-porn services permit the communicator to choose its audience. *See Sable*, 492 U.S. at 125. This is not true of on-line communications. Importantly, these characteristics indicate the propriety of regulating the Internet from the end-user computer, a task the Child Protection Act purports to accomplish.

The lower court in *Reno* unrealistically argued that Internet regulation is not necessary because it is unlikely that a child will be exposed to patently offensive materials on-line. *See ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). The court reasoned that the affirmative steps necessary to get information and the sophistication and ability required to retrieve materials minimize the chance that a child will inadvertently discover such indecency. *See id.* This conclusion is patently flawed for two reasons.

First, the extent to which children will affirmatively search for or inadvertently observe patently offensive pictures is irrelevant to the compelling interest in protecting them from seeing such material. *See id.* at 883. Second, and more importantly, these conclusions ignore the low barriers to entry and the prevalence of the Internet in today's society, as succinctly pointed out by that same court. *See id.* at 877-82.

Today, most children can maneuver computers with ease and sophistication, especially in the point-and-click icon format of the World Wide Web which demands neither computer nor English literacy. *See* Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Pornographers*, 13 No. 7 Computer Law. 1, 2 (1996). In reality, once on line, children have unlimited access to patently offensive materials. As previously stated, the communicator cannot control whether it is a five-year-old or a fifty-year-old receiving the "little women" web cite—a site featuring "hot pictures of naked women." *See* Brief for Appellants at 24a, *ACLU v. Reno*, 117 S. Ct. 2329 (1997) (No. 96-511). Accordingly, the only

way to regulate the materials being received is through the end-user computer: a goal the Marshall Act vigorously attempts to accomplish.

2. *Actual and potential reach of the internet.*

The nature of the Internet makes it very difficult, if not impossible, to determine its size at any given moment. As many as forty million people worldwide currently enjoy access to the Internet's rich variety of resources, and that number is expected to grow to 200 million by the year 1999. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997). The massive reach of the Internet bolsters support for localized regulation through filtering software. The faster and more complex the Internet becomes, the more patently offensive material will be available on the Internet, and the more difficult it will be to implement any regulation at all. As such, legislation fashioned to regulate the end-user computer is currently the only feasible form of regulation and should be permitted in order to protect children from harm.

3. *Social Value: Protecting children or playboy?*

Patently offensive materials can no doubt have harmful effects on children. *See* Jerry Bergman, Ph.D., *The Influence of Pornography on Sexual Development: Three Case Histories*, IX Family Therapy 3, 1982, at 265. Thus, the social value of protecting children from harmful materials must be balanced with the right of adults to receive patently offensive speech through on-line communications. *Pacifica*, 438 U.S. at 751-52.

Whatever slight social value which may arise out of access to pornography and patently offensive communications in public libraries is certainly outweighed by the compelling interest of protecting children from irreparable harm. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (indicating moral and ethical development of children outweighed other constitutional interests); *Pacifica*, 438 U.S. at 749 (concluding that any social value of the broadcast was clearly outweighed by the social interest in order and morality). Order and morality are values society expects in the sanctity of public libraries; constitutional rights must therefore give way to these values and expectations in order to protect children.

4. *Scope of restriction and its remedy.*

The Supreme Court has pointed out these two considerations can affect the constitutionality of content-based restrictions placed on speech. *See Reno*, 117 S. Ct. 2339. In *Reno*, the Court discussed the scope of the CDA and also considered the severity of its remedies. 117 S. Ct. at 2341. The *Reno* Court specifically distinguished its findings in *Pacifica* upon evaluation of the CDA. The Court insisted that there are

significant differences between the order upheld in *Pacifica* and the CDA. *Reno*, 117 S. Ct. at 2341. The court pointed out that the order in *Pacifica* was only a restriction on when—rather than whether—it would be permissible to air an offensive program in that particular medium. In addition, the *Reno* Court pointed out that the agency's declaratory order in *Pacifica* was not *punitive*, while condemning the CDA for its threatened criminal prosecution. *Id.*

Similar to the ordinance in *Pacifica*, the Child Protection Act is only a restriction on where—rather than whether—it is permissible to access patently offensive materials on the Internet. Likewise, the Act does not impose any sanctions for noncompliance—criminal or otherwise. (R. at 17-18.) Therefore, because the Act does not ban protected speech nor does it impose any sanctions which could have a chilling effect on speech, it is constitutionally sound.

Clearly, the Internet is unlike any other form of communication, having little or no barriers on the amount or type of speech available. Filtering software such as NetChaperone protects children from patently offensive Internet speech. Moreover, restricting such speech from public libraries assures that children will not be inadvertently exposed to harmful materials sought by other library patrons. Accordingly, the Child Protection Act accommodates the new medium of communication and also directly advances the government interest in protecting children; thus, it is constitutional.

B. The Child Protection Act Is A Zoning Law Which Respects The Constitutional Rights Of Adults And Children.

Patently offensive expression, while engrafted with First Amendment protection, is nevertheless subject to zoning laws. Prior use of those laws in this country requires zoning laws to respect the constitutional rights of adults *and* minors in order to survive First Amendment scrutiny. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957). The Constitution requires that zoning laws 1.) not unduly restrict adult access to speech; and 2.) respect the First Amendment rights of minors to read or view the banned material. *See Reno*, 117 S. Ct. at 2352 (O'Connor, J., concurring in part and dissenting in part).

Petitioner bases its First Amendment claims on the unrestricted right to send and receive patently offensive speech on the Marshall public library Internet terminals. (R. at 12.) This right to access patently offensive speech in public libraries is overridden, however, by the government's interest in protecting children from this speech. The Child Protection Act satisfies both First Amendment zoning requirements; therefore, the judgment of the court of appeals should be upheld.

1. *The Child Protection Act does not unduly restrict adult access to patently offensive material.*

The creation of "adult zones" is not a novel concept. *See Reno*, 117 S. Ct. at 2352. States have long denied children access to certain establishments frequented by adults. *See id.* at 2352 n.1. States have also denied children the right to expression deemed "harmful to minors." *See id.* at 2352 n.2.

Zoning laws are valid as long as adults still have access to the regulated expression. *See Butler*, 352 U.S. at 383; *Ginsberg*, 390 U.S. at 634. A prime example of adult zones are movie theaters. While there are "family" theaters, others are "adult" theaters, in which children are not allowed. *See, e.g.*, Colo. Rev. Stat. § 18-7-502(2) (1986) (no minors in places displaying movies that are harmful to children); Del. Code Ann. tit. 11, § 1365(i)(2) (1995) (same); D.C. Code Ann. § 22-2001(b)(1)(B) (1996) (same); Ga. Code Ann. § 16-12-103(b) (1994) (same); Haw. Rev. Stat. § 712-1215(1)(b) (1994) (same). These laws have been upheld despite the fact that an adult in a family theater is not able to receive "adult entertainment."

In *Ginsberg v. New York*, the Court upheld a state law that barred stores from selling pornographic magazines to children, in part because adults could still buy those magazines. 390 U.S. at 634. The Court noted that, on its face, the law denied access only to children—hence creating an adult zone. *Id.* Once created, that adult zone would successfully preserve adults' access while denying children's access to regulated speech. *See Reno*, 117 S. Ct. at 2353 (O'Connor, J., concurring in part, dissenting in part).

Previously, courts have only considered laws that operate in the physical world. *Id.* In the physical world, geography and identity make it possible to create "adult zones" which enable store owners to prevent children from entering the establishment, but let adults inside. *See Reno*, 117 S. Ct. at 2353; Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869, 886 (1996).

The electronic world, however, is fundamentally different. Users can transmit and receive messages on the Internet without revealing anything about their identities or ages; thus, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity. *See Reno*, 117 S. Ct. at 2353.

Although better accommodating regulation might be available in the future, the constitutionality of the Child Protection Act must be evaluated as it applies to the Internet as it exists today. *See Shea v. Reno*, 930 F. Supp. 916, 933-34 (S.D.N.Y. 1996).

The Act has effectively deemed the Marshall public libraries to be "family" Internet providers. Importantly, as the Internet is widely avail-

able in the privacy of a home, in coffee shops, schools, businesses, and universities as well as libraries, adults have numerous other means of obtaining unrestricted Internet access. *See Reno*, 117 S. Ct. at 2334. Because the Act does not purport to ban patently offensive material from adults who have a First Amendment right to obtain this speech, it is constitutional and should be upheld. *Sable*, 492 U.S. at 126.

2. *The Child Protection Act does not affect minors' First Amendment rights in a real and substantially overbroad manner.*

The United States Supreme Court has explained that children may be constitutionally denied access to materials that are obscene as to minors. *See Ginsberg*, 390 U.S. at 633. The Court indicated that state law determines what is obscene as to minors. *See id.* In addition, statutes regulating speech are not invalidated even if minors have a right to a diminutive amount of speech to which they are being denied. Proof that the denial is both real and substantial is required to invalidate a statute. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In *Ginsberg*, the Supreme Court sustained a state law which prohibited selling magazines to minors that were "harmful to minors" only if they were obscene as to minors. 390 U.S. at 632-33. The Court noted that obscene speech is not protected by the First Amendment and that states are constitutionally free to adjust the definition of obscenity for minors. *Id.*; *see Roth v. United States*, 354 U.S. 476, 485 (1957). The Court concluded that the law did not "invad[e] the area of freedom of expression constitutionally secured to minors" and, therefore, the state did not infringe upon the First Amendment rights of minors. *Cf. Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975) (striking down city ordinance that banned nudity that was not "obscene even as to minors").

Likewise, the State of Marshall has determined that patently offensive materials on the Internet are obscene as to minors. (R. at 17.) As required by statute, the Marshall Department of Education (MDOE) determines what expression is patently offensive by its choice of filtering software. (R. at 17-18.) The filtering software, on rare occasion, may restrict some speech that is not considered obscene to minors; however, this universe of speech is neither real nor substantial. *See Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part, dissenting in part).

MDOE will facilitate the children's interests through its choice of software, specifically by choosing software that accommodates sites which are blocked by mistake. In fact, the software currently chosen by MDOE has the capability and is maintained in a manner designed to reverse-block sites which have mistakenly been restricted. (R. at 10.) Accordingly, minors are denied access only to speech to which they do not have a constitutional right.

The undeniable purpose of the Child Protection Act is to segregate patently offensive materials on the Internet so that they are not accessible to minors visiting Marshall public libraries. In doing so, the Act succeeds in tacitly respecting the rights of both adults and children. The Act creates an adult zone within the confines of the First Amendment, and therefore should be upheld.

C. The Child Protection Act Advances A Compelling Government Interest And Is A Narrowly Tailored Means Of Regulation.

Public libraries have been deemed limited public forums for the purpose of First Amendment analysis. *See International Soc'y for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982); *see also Brown v. Louisiana*, 383 U.S. 131 (1996). Content-based restrictions in a limited public forum must be narrowly drawn to constitutionally effectuate a compelling state interest. *See Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983).

Public libraries are only required to permit the exercise of First Amendment rights consistent with the nature of the library and the government's intent in creating that limited public forum. *See id.*; *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688 (2d Cir. 1991). Other activities need not be tolerated. *See Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 (3d Cir. 1992); *Travis*, 927 F.2d at 688.

In *Mood for a Day, Inc. v. Salt Lake County*, the court considered whether the state could expel a booth from the state fair, a limited public forum, because it advocated drug use. 953 F. Supp. 1252, 1261 (D. Utah 1995). The court noted the purpose of the fair was to provide a place to display livestock, agriculture, crafts, and the like in the setting of a family-oriented event. *Id.* at 1261. The court held that such a content-based exclusion of the booth was permissible. *Id.* The promotion of illegal activities was contrary to the purposes of the fair, and expelling the booth advanced a compelling government interest in a narrowly tailored manner. *Id.* In dicta, the court stressed that even if the speech were of the nature deserving of First Amendment protection, it could still be banned as contrary to the purpose of the fair without offending strict scrutiny standards. *Id.*

The purpose of a public library is to facilitate the acquisition of knowledge through reading, writing, and quiet contemplation. *See Kreimer*, 958 F.2d at 1261. Acquisition and display of patently offensive expression is contrary to the library's stated purpose. Such speech has proven to be offensive, distracting, and harmful to a variety of age groups using the library. (R. at 7-8.) Accordingly, despite any First Amendment protection, this speech is subject to regulation.

Additionally, the state's regulation of patently offensive speech is constitutional because the Child Protection Act is narrowly tailored to achieve Marshall's compelling interest in protecting children from harm. *See Sable*, 492 U.S. at 126. Therefore, this Court should affirm the decision of the appellate court.

1. *Filtering software directly advances a compelling government interest by protecting children from harmful materials.*

Protection of the physical and psychological well-being of youth has long been regarded as a compelling government interest as it is one of society's highest priorities. *See New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Importantly, legislation aimed at protecting the physical and emotional well-being of children has long been upheld, even when the laws have burdened constitutionally protected rights. *See Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

The Supreme Court has recognized that children can be harmed by sexual or excretory speech that is "vulgar, offensive, and shocking," even though it is not prurient and may have serious value for adults. *See, e.g.*, *Pacifica*, 438 U.S. at 747. The Court has further recognized that any slight benefit that may be derived from such speech is clearly outweighed by the social interest in order and morality. *See id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Intertwined with the government's interest in the well-being of children is the government's interest in supporting the primary responsibility of parental supervision of children and to what they are exposed. *See Ginsberg*, 390 U.S. at 639; *Action for Children's Television v. F.T.C.*, 58 F.3d 654, 660 (D.C. Cir. 1995). Indeed, the Supreme Court has repeatedly emphasized the government's fundamental interest in helping parents exercise their "primary responsibility." *See Ginsberg*, 390 U.S. at 639.

In *Reno*, the Supreme Court acknowledged the government has an interest in protecting children from harmful materials, and specifically from patently offensive materials. 117 S. Ct. at 2346. The Court noted, however, that the government interest does not justify an unnecessarily broad suppression of speech addressed to adults. *See Reno*, 117 S. Ct. at 2346. Accordingly, when restrictions do not unnecessarily suppress adult speech, but instead are suitably limited, the government's interest is justified.

The Child Protection Act directly advances the government's interest in protecting children from the harms visited on them from exposure to patently offensive material. Filtering software blocks patently offensive sites and therefore protects children from direct and indirect expo-

sure to those materials. The Act also directly advances the government's interests in aiding parental supervision of their children, while upholding the sanctity of public libraries. These state interests are constitutionally sound and are advanced by the Child Protection Act. Therefore, the Act should be upheld.

2. *Filtering software specifically restricts material that is harmful to children; thus, the statute is narrowly tailored.*

A statute which regulates speech should be narrowly tailored to achieve a legitimate government interest. *See Sable*, 492 U.S. at 126. If a statute can be narrowly construed so as to avoid constitutional problems, the court should read the statute as such. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A state's duty to pursue its compelling interests cannot be denied simply because a statute may infringe on protected speech to an unknown degree. *See Broadrick*, 413 U.S. at 615. In order to overcome a First Amendment challenge, Internet regulation must comport with the overlapping doctrines of overbreadth and vagueness. *See Reno*, 117 S. Ct. at 2344-51. The Marshall Internet Child Protection Act comports with both.

3. *The Child Protection Act Is Not Overbroad.*

Under the First Amendment, a statute will be deemed overbroad if its proscriptions reach expression protected by the guarantee of free speech. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). To be deemed overbroad, the statute must infringe upon an unacceptable level of protected expression and the overbreadth of a statute must be "real" and "substantial," judged in relation to the statute's plainly legitimate sweep. *See Kunz v. New York*, 340 U.S. 290 (1951). Therefore, even if there is some protected speech on which a statute encroaches, it should not be invalidated if it covers a whole range of legitimate restrictions. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580-81 (1973).

In *Reno v. ACLU*, the Supreme Court held that criminalizing the transmission of patently offensive materials over the Internet to children amounted to an unconstitutional ban on protected speech. 117 S. Ct. at 2346, 2348. The Court noted that the government failed to show that the ban was the least restrictive means of accomplishing the government's interest. *See id.* Significantly, a less restrictive means of protecting children from patently offensive materials does exist, was even acknowledged by the *Reno* Court, and it is fully presented by the facts of this case. *See id.* at 2348.

The Act is not overbroad because it does not act as a total *ban* on patently offensive communication. *See Sable*, 492 U.S. at 126. Outside of the public library setting, all of the obscenity and indecency one could fathom is only a "click" away. Just because a library patron must obtain patently offensive materials outside of the library,[8] or because he must pay for it himself, does not outweigh the paramount interest in protecting children in the sanctity of public libraries from materials which produce real and substantial harm.

Furthermore, filtering software is the least restrictive way for the State to serve its intended goal of protecting children. The prospects for eventual zoning of the Internet appear promising; however, the courts must evaluate the constitutionality of the Act as it applies to the Internet today. *See Reno*, 117 S. Ct. at 2354. Today, filtering the Internet through individual terminals is the only plausible means of protecting children from patently offensive materials. *See id.* Because the Act accomplishes the State of Marshall's compelling interest without unduly impinging on First Amendment rights of Internet users, it should be upheld.

4. *The Child Protection Act Is Not Vague.*

A statute will be held void for vagueness if the proscribed activity is so unclearly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Conversely, if the statute is explicit enough to serve as a guide to those who must comply with it, it is not vague. *See id.*

In *Reno v. ACLU*, the Supreme Court considered the vagueness of the term "patently offensive" as used in the Communications Decency Act (CDA). 117 S. Ct. at 2345. The Court concluded that in the CDA, the term was unconstitutionally vague; however, the Court suggested that if the proscribed material were adequately defined by state law, such requirement would reduce the vagueness inherent in the term "patently offensive." *Id.*

For example, in *Ginsberg v. New York*, the Court upheld a state law that barred stores from selling "obscene" magazines to children. 390 U.S. 629, 634 (1968). The Court noted that the state was constitutionally free to adjust the definition of obscenity for minors. *Id.* at 638. Because the state law adequately defined the term "obscene as to minors" so that those who had to could comply with it, the law was not vague. *Id.* at 633.

Likewise, the Child Protection Act is not vague as it is explicit enough to provide guidance to those who must comply with it. The Act

8. Internet access is now available at many "Internet coffee shops" for an apparently very low hourly cost.

imposes a requirement that MDOE select filtering software for the purpose of "reducing or eliminating" access to patently offensive materials on library terminals. (R. at 17.) MDOE, as the Department of Education, is qualified to determine what constitutes patently offensive materials in accordance with Marshall community standards and will choose the appropriate software accordingly. As previously discussed, the Supreme Court grants deference to parents and educators for guidance in defining community standards of decency. *See Ginsberg*, 390 U.S. at 639. Accordingly, so should this Court.

The State of Marshall submits that this Court should interpret and declare the restrictions of the Marshall Internet Child Protection Act constitutional and enforceable. Failure to recognize the power of the Marshall legislature to extend reasonable protection of minor children to public library Internet access would result in a serious departure from law and cause a fundamental reversal in the way in which law and society handle the access children have to patently offensive material. Because the Act is suitably limited to achieve the State's compelling interest, the lower courts were correct in finding the Marshall Act comports with the First Amendment.

II. THE OFF-LIMITS LIST OF BLOCKED WEB-SITES CONSTITUTES CONFIDENTIAL BUSINESS INFORMATION AND IS THUS EXEMPT FROM DISCLOSURE UNDER THE MARSHALL FREEDOM OF INFORMATION ACT.

The most valuable, and arguably the sole asset an Internet filtering software company owns is its off-limits list. Manufacturers of filtering software attempt to protect these off-limits lists primarily to prevent competitors from copying and incorporating the lists into databases in their own filtering software. (R. at 14.) Moreover, concealing the list discourages inadvertent uses such as using lists of blocked sites to seek out pornography. Also, defamation suits and unfavorable publicity would inevitably result from public disclosure. (R. at 14.) Federal and state legislatures are sensitive to these confidentiality concerns and have drafted appropriate legislation in response.

The Marshall Freedom of Information Act (Marshall FOIA) provides that all government documents shall be made available to the public. *See* Marshall Freedom of Information Act, Marshall Code ch. 6, art. 85, §§ 2, 4 (1997). Section 6(a)(6) of the Marshall FOIA, however, exempts the following from disclosure: "Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged, or confidential, or where dis-

closure of the trade secrets or information would cause competitive harm." Marshall Code ch. 6, art. 85, § 6(a)(6).

Importantly, the phrasing of this exemption is more expansive than its federal counterpart. The Federal Freedom of Information Act (Federal FOIA) exempts only "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *See* Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1988). Thus, the Marshall FOIA encompasses the Federal FOIA in its entirety; however, the Marshall Act further protects information obtained from a person or *business* where that information is *proprietary* or where *disclosure* of which would cause *competitive harm*. Marshall Code § 6(a)(6). To the extent possible, the Federal FOIA should act as guidance for construing the Marshall FOIA due to the want of precedence addressing the Marshall Act.

Information that does not constitute a trade secret, but is nonetheless commercial or financial information, is treated separately under the confidential business information exception. *See* 5 U.S.C. § 552(b)(4); James T. O'Reilly, *Federal Information Disclosure* § 14.06 (2d ed. 1995). The purpose of the exception is to protect the competitive position of citizens who offer the fruits of their labor to assist government policy makers, and to ensure that the government will be able to obtain confidential information in the future. *See Shermco Indus., Inc. v. Secretary of the Air Force*, 613 F.2d 1314, 1317 (5th Cir. 1980); *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935 (D.C. Cir. 1975).

In this case, the court of appeals denied Petitioner's FOIA disclosure request. (R. at 13-15.) That court concluded that the off-limits list qualifies as commercial business information and is thus exempt from disclosure under section 6(a)(6) of the Marshall FOIA. (R. at 15.) As Petitioner appeals this decision, this Court should exercise *de novo* review of this matter pursuant to section 9(f) of the Marshall FOIA. Marshall Code § 9(f).

The appellate court was correct to deny Petitioner's request for CSI's off-limits list. The State of Marshall has met its burden to establish that the list of blocked web-sites falls under the protective umbrella of section 6(a)(6) of the Marshall FOIA because it is both a trade secret and confidential commercial information. Therefore, the off-limits list is not subject to public disclosure and the decision of the court of appeals should be upheld.

A. The Off-Limits Database Is A Trade Secret.

The controlling definition of a trade secret is the common-law definition found in the Restatement of Torts. *See* Restatement of Torts § 757 cmt. b (1939); *see W.R. Grace & Co. v. Hargadine*, 392 F.2d 9, 14 (6th Cir.

1968). According to the Restatement, a trade secret is "any formula, pattern, device or *compilation of information* which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use [the information]." Restatement of Torts § 757 (emphasis added). Forty-two states have codified the common-law definition, thus indicating its widespread acceptance. *See Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 734 (Ct. App. 1997).

CSI's list is a compilation that meets the common-law definition of a trade secret. The list is secret information that is used in CSI's business to gain a competitive advantage over companies that have not compiled a similar database. Because the list qualifies as a trade secret, it is exempt from disclosure under section 6(a)(6) of the Marshall FOIA. Thus, this Court should deny Petitioner's disclosure request.

1. *CSI has gone to great lengths to keep its database a secret.*

The intangible nature of a trade secret requires that the extent of that property right be defined by the extent to which the owner of the secret protects his interest from disclosure to others. *See Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984). Importantly, the element of secrecy is *not* lost when the trade secret is revealed to another party in confidence or when the secret can be uncovered by improper means. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). In such cases, the property right is not lost either.

Information that is public knowledge or that is generally known in an industry cannot be a trade secret. *See* Restatement of Torts § 757 cmt. b; *Ruckelhaus*, 467 U.S. at 1002. A compilation of public data, however, can still be a trade secret as long as the *combination* of information is a secret. *See Integrated Cash Management Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990).

In *Integrated Cash Management Services*, the Second Circuit considered whether a compilation of public information could enjoy trade secret protection when it is arranged to create a computer software product. *See id.*; *see also FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984). The court concluded that the compilation was a trade secret, noting that the manufacturer did *not* actively disclose the program compilation. *See Integrated Cash*, 920 F.2d at 174. The court remarked that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." *See id.* In other words, a compilation can enjoy trade secret protection.

Accordingly, CSI's compilation of blocked web-cites should be upheld as a trade secret. Although the off-limits database contains a list of in-

formation containing web-sites which exist in the public domain, it is the amalgamation of selected sites that is unique and therefore protectable.

CSI has *not* made its off-limits list available; rather, it has gone to great lengths to keep its database a secret from the public and its competitors. (R. at 6, 8, 10-11, 14-15.) Primarily, NetChaperone software is distributed with a license agreement that provides for contractual assurance that the off-limits list will remain confidential. (R. at 8-9.) The agreement explicitly prohibits its users from attempting to discover the contents of the off-limits list. (R. at 8-9.) The fact that discovery of the list can be cultivated through inadvertent methods does not place the list in the public domain. *See Kewanee Oil*, 416 U.S. at 475.

Because the off-limits list is updated electronically, most NetChaperone users are unaware of the content of the blocking database. (R. at 9.) Although CSI is contractually required to submit updated copies of the off-limits list to MDOE, CSI has included a cover letter with each update stating that the contents of the list are "proprietary, privileged, and confidential information," *and* requesting that the list not be made available for viewing or copying by any third party. (R. at 10-11.) In addition, an initial disclosure of the list pursuant to the competitive contractual negotiations is not a waiver of secrecy. (R. at 10, 17-18.)

CSI carefully guards its database of blocked sites. Accordingly, CSI has an extensive property right that should be treated with the respect accorded a trade secret. CSI's database remains a secret to this day and should not be disclosed to Petitioner.

2. *The off-limits database is unique and therefore gives CSI an advantage over its competitors.*

Trade secret information derives its value in the competitive marketplace from secrecy. *See Ruckelhaus*, 567 U.S. at 1002. As a general principle, the more time and resources expended in gathering information, the more likely a court will find such information constitutes a trade secret. *See* Restatement of Torts § 757 cmt. b; *Morlife*, 66 Cal. Rptr. 2d at 736. Notably, however, the secret does not have to be novel or inventive in order to be protected. *See Softel, Inc. v. Dragon Med. & Scientific Communications, Inc.*, 118 F.3d 955, 969 (2d Cir. 1997).

For a compilation to enjoy common-law trade secret protection, it must be used to gain a competitive business advantage. *See* Restatement of Torts § 757. Hence, customer lists are held to be trade secrets, despite the fact that the individual facts are public knowledge, and that the method of obtaining the information is not a secret. *See Mai Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993).

In *Morlife, Inc. v. Perry*, the court held that customer lists enjoy trade secret protection. 66 Cal. Rptr. 2d at 734. The court noted that it

was the *time* and *effort* that went into creating the list that was valuable. *See id.* at 735. Thus, trade secret protection ensures that the right of free competition does not include the right to use the confidential work product of others. *See id.*

CSI's database is very similar in form and function to a customer list. First, both are compilations of public data accumulated through great time and effort. Such efforts to create a list that is extensive, thorough, and unique should be protected. Otherwise, the list is worthless.

CSI has spent over $140,000 developing the list and continues to spend at least $5,000 per month updating the list. (R. at 9.) The list is updated by 1.) paying CSI employees and independent contractors to review sites; 2.) reviewing sites as suggested by its customers; and 3.) reevaluating previously blocked sites upon request. (R. at 9.)

Second, both lists are valuable to their owners because in order to possess a comparable list a competitor would have to invest the same time and effort as the original creator. Obviously, the more thorough and extensive a particular software's filtering capabilities, the more attractive the software will be to potential customers. In fact, MDOE, upon viewing a copy of CSI's list in confidence, awarded the contract to CSI over its competitors. (R. at 3, 10-11.)

Finally, disclosure of both a customer list and an off-limits list would allow parasitic competitors to derive economic benefit from the time and efforts of the owner. Requiring disclosure of the off-limits list will stunt competition because all of the providers will offer similar, if not identical, software products. Therefore, CSI's efforts and investment into the creation of the off-limits database is of great value and should be protected, just as customer lists are protected.

CSI has treated its database as a secret and continues to guard it as such in its day-to-day operations. The database is the product of considerable time, effort, and money. (R. at 9.) Part of CSI's success is its ability to impress potential customers with its vast filtering capabilities, and it should be allowed to continue to use its database to gain a competitive advantage. CSI has earned that right. Consequently, CSI's off-limits database is a trade secret and is exempt from disclosure under section 6(a)(6) of the Marshall FOIA. Hence, the appellate court's decision should be upheld.

B. CSI's Off-Limits Database Is Commercial Or Financial Information That Is Confidential And Proprietary, And Its Disclosure Will Cause Competitive Harm To CSI.

The confidential commercial information exemption under the FOIA recognizes the need of government policy makers to have access to com-

mercial and financial data. *See* H.R. Rep. No. 105-37, at 16 (1995), 1995 WL 376908; *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877 (D.C. Cir. 1992). The purpose of the exception is to encourage cooperation with the government by persons having information useful to officials. *Id.*

The Marshall FOIA provides that information obtained from a private source is exempt from disclosure under the confidential commercial information exception if it is 1.) commercial or financial information, 2.) obtained from a person or business and 3.) proprietary, privileged or confidential, or where disclosure may cause competitive harm. *See* Marshall Code ch. 6, art. 85, §§ 2, 4 (1997).

Commercial and financial information are given their ordinary meanings in the context of the FOIA. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286 (D.C. Cir. 1983). In *Public Citizens*, the court considered whether information must be primarily concerned with profit to fall within the realm of commercial or financial information. *Id.* at 1290. That court explained that a commercial interest must eventually flow from the information; however, the interest did not have to concern profits to qualify as commercial and financial information. *Id.*

In addition, courts have recognized that the exception condones an agency's withholding of information only when such information was originally obtained from a person *outside* the government. *See Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970). In *Benson v. General Servs. Admin.*, the government agency denied disclosure of information, claiming the confidential commercial information exception. 289 F. Supp. 590, 593 (W.D. Wash. 1968). That court held that the commercial business exception does not apply, indicating the exemption is meant to protect information that a private entity wishes to keep confidential, not that which the agency wishes to keep private. *See id.*

MDOE has obtained commercial or financial information from a person outside the government. Specifically, CSI submitted its off-limits database to MDOE, a record in which CSI has a substantial commercial interest. (R. at 10-11.) The database is key to the blocking feature of NetChaperone software, and its accuracy and specificity are what attract its customers. (R. at 6.) Thus the off-limits list qualifies as "commercial and financial information."

Moreover, the State of Marshall is asserting the confidential commercial exception on CSI's behalf, as it is CSI that wishes the information to be kept confidential. Because the information at issue clearly satisfies the first two requirements of the commercial information exception, the issue becomes whether the record sought is proprietary, privileged, or confidential; or whether it may cause competitive harm. *See*

Marshall Code ch. 6, art. 85, § 6(a)(6). CSI's off-limits list is confidential and proprietary, and it also causes competitive harm to CSI under the Marshall FOIA; therefore, its disclosure to Petitioner should be denied.

1. *CSI's off-limits list is confidential and proprietary because it was submitted voluntarily and it is not information CSI would customarily release to the public.*

The D.C. Circuit established a widely accepted two-part test defining as "confidential" any financial or commercial information whose disclosure would likely either 1.) impair the government's ability to obtain information in the future, or 2.) cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *but see Critical Mass*, 975 F.2d at 872. Importantly, although the *Critical Mass* court reaffirmed the two-prong *National Parks* test, it confined the test to the category of cases in which a FOIA request is made for information a person was *obliged* to furnish the government. *Critical Mass*, 975 F.2d at 879; *see Sublette County Rural Health Care Dist. v. Miley*, 942 P.2d 1101, 1104 (Wyo. 1997) (adopting the *Critical Mass* limitation of the *National Parks* test for information that is compelled). By contrast, all *voluntary* submissions to the government *will be considered confidential* under the commercial business exception if the information is "of the kind not customarily released to the public." *Critical Mass*, 975 F.2d at 879; *Lee v. FDIC*, 923 F. Supp. 451, 454 (S.D.N.Y. 1996); *Comdisco, Inc. v. General Servs. Admin.*, 864 F. Supp. 510 (E.D. Va. 1994).

In *Critical Mass*, the D.C. Circuit considered whether reports supplied voluntarily to a government agency must be disclosed under the FOIA. *Id.* at 871. Without repudiating any part of the *National Parks* test, the court reasoned that unless voluntarily obtained data is preserved as confidential, persons having information useful to officials would be discouraged from sharing that information with government officials in the future. *Id.* at 878; *see Nadler v. FDIC*, 899 F. Supp. 158 (S.D.N.Y. 1995). Thus, voluntarily disclosed information is confidential if it is typically kept a secret by its owner. *Critical Mass*, 975 F.2d at 879.

In this case, CSI's off-limits list was submitted to MDOE voluntarily, and it is therefore exempt from disclosure under section 6(b)(6) of the Marshall FOIA. (R. at 11.) Petitioner seeks disclosure of only the initial off-limits database list which was merely requested by MDOE as part of the initial competitive bidding process. (R. at 10-11.) An entity that submits to a mere request for information does so voluntarily. Voluntari-

ness is to be construed broadly under the FOIA. *See Critical Mass*, 975 F.2d at 877-78.

As previously established, CSI goes to great length to keep its off-limits list a secret from the public and its competitors. Therefore, the list is not only confidential but proprietary, as information is proprietary when it is kept secret from the public. *See United Technologies Corp. v. FAA*, 102 F.3d 688, 689 (2d Cir. 1996). Accordingly, Petitioner's disclosure request should be denied, and the decision of the court of appeals should be affirmed.

2. *Disclosure of the off-limits database will diminish CSI's competitive position while enhancing the position of other filtering software producers.*

Competitive harm occurs when 1.) an entity faces competition within its industry, and 2.) if competitive injury is likely to occur. *See GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994). A contractor must show merely the potential of substantial competitive harm to its business for the disclosure exemption to apply. *See Public Citizen*, 704 F.2d at 1290-91.

The court in *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of the State University of New York* considered whether a bookstore would suffer competitive harm from disclosure of a specifically compiled list of textbooks. 663 N.E.2d 302, 304 (N.Y. 1995). The court held that because the booklist was from a commercial enterprise and information of the kind not typically revealed to the public, it was confidential. *Id.* at 306. Further, the *Encore* court indicated that the bookstore adequately established the potential for substantial harm by indicating 1.) disclosure of the information would greatly assist other bookstores in competition with the submitter; and 2.) the submitter would be put at a competitive disadvantage in the textbook market where it competes with bookstores not required to disclose. *Id.* at 307. Accordingly, the information was exempt from disclosure as confidential. *Id.* at 308; *see Fisher v. Renegotiation Board*, 355 F. Supp. 1171, 1174 (D.D.C. 1973).

Likewise, disclosure of the off-limits list "may cause competitive harm" to CSI. *See* Marshall Code ch. 6 art. 85, § 6(a)(6). Primarily, CSI faces severe competition in the filtering software industry. (R. at 5.) NetChaperone and many of its competitors produce blocking software which runs off of a database compiled by each particular software company. (R. at 6.) The only significant difference in the companies' software is the composition of those databases. Accordingly, the database compilations must remain confidential.

Publishing CSI's off-limits list will cause substantial competitive injury. First, competitors will capitalize on CSI's work efforts, depleting

CSI of its most cherished asset. Second, web-site operators will change their addresses in order to avoid being blocked. Providing the blocked sites with a detour thwarts the entire purpose of the filtering software and renders the NetChaperone program useless to CSI's customers. (R. at 14.) Finally, Internet users will use the list to identify and locate sexually explicit web-sites. This activity will no doubt stigmatize CSI as a porno-site provider, and is contrary to the purpose of the software as marketed. (R. at 14.) Accordingly, because CSI will suffer substantial competitive harm from disclosure of its database, the list qualifies for protection under section 6(a)(6) of the Marshall FOIA.

CSI's database is protected under the Marshall FOIA because trade secrets and commercial and financial information are exempt from disclosure pursuant to section 6(b)(6). Accordingly, Petitioner's request for CSI's off-limits list should be denied, and the court of appeals' decision should be affirmed.

CONCLUSION

The Internet provides a gateway to a universe that would no doubt fluster even the most worldly library cardholder. Other media of communication also access that universe; however, expression in those contexts is tempered when children are likely to be harmed. The Internet should also be so tempered.

This Court should adhere to prior First Amendment limitations on speech in keeping adult expression in appropriate places where children will not be harmed by it. This can be accomplished by upholding the Child Protection Act and protecting the rights of those who are necessary for the Act's implementation. For these reasons, the State of Marshall requests that this Court affirm the decision of the court of appeals.

Respectfully submitted,

Attorneys for the Respondents
Michelle Regal Herrmann
Jennifer L. Johnson
Candace A. Ourso
SOUTH TEXAS COLLEGE OF LAW