

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 4**

KATHLEEN R., *et al.*,

Plaintiff and Appellant,

vs.

CITY OF LIVERMORE,

Defendant and Respondent.

No. A086349

Alameda County Superior Court
Case No. V-015266-4
(Hon. George C. Hernandez, Jr.)

**AMICUS CURIAE BRIEF ON BEHALF OF
THE CALIFORNIA STATE ASSOCIATION OF COUNTIES,
48 CALIFORNIA CITIES,
THE PALOS VERDES LIBRARY DISTRICT,
AND THE LODI PUBLIC LIBRARY BOARD OF TRUSTEES
IN SUPPORT OF DEFENDANT-RESPONDENT CITY OF LIVERMORE**

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INTERESTS AND DESCRIPTION OF AMICI CURIAE

The California State Association of Counties (CSAC), 48 California cities, the Palos Verdes Library District, and the Lodi Public Library Board of Trustees join this brief as amici curiae because the case before the court has important implications for government entities' discretion in formulating policies governing access to information on the Internet. Plaintiff is attempting to hold the City of Livermore liable for alleged psychological and emotional harm to her son resulting from his accessing and downloading material from the Internet at the city's public library.

CSAC is a non-profit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all counties.

The California cities joining the brief include: Albany, Benicia, Berkeley, Capitola, Carlsbad, Corcoran, Delano, Dinuba, Glendale, Gustine, Hollister, Huron, Lathrop, Lompoc, Los Gatos, Merced, Modesto, Monterey, Monterey Park, Moreno Valley, Mountain View, Oceanside, Orange Cove, Palm Desert, Palm Springs, Pico Rivera, Pleasant Hill, Pleasanton, Redlands, Rialto, San Bernardino, San Bruno, San Buenaventura, San Diego, San Francisco, San Luis Obispo, San Mateo, San Pablo, San Rafael, Santa Clara, Santa Cruz, Santa Monica, Santa Paula, Sunnyvale, Tiburon, Tracy, Walnut, and Wasco.

The Palos Verdes Library District is the second largest independent

library district in California. Its three branch libraries serve 71,000 people residing in the cities of Rancho Palos Verdes, Palos Verdes Estates, Rolling Hills, and Rolling Hills Estates, and a portion of unincorporated Los Angeles County called Eastview. It is an independent district, not governed or controlled by a particular city or county. The District has an annual budget exceeding \$3 million. It maintains over 283,000 items and 15 computer terminals with public access to the Internet. The District's Board of Trustees has adopted an Internet use policy that provides unrestricted use of the libraries' Internet connections for all adults and any minor with parental permission.

The Lodi Public Library serves approximately 80,000 people. The Library's Board of Trustees is comprised of five members who establish rules, regulations and policies governing the Library's operation. The Board is also a liaison between the community and the library and local governmental authorities. The Library's annual budget exceeds \$1 million. It maintains over 150,000 items and four computer terminals with public access to the Internet. The Board has an Internet use policy in place that is essentially the same as that of the Palos Verdes Library District.

INTRODUCTION

Plaintiff Kathleen R. sued the City of Livermore for declaratory and injunctive relief after her son Brandon P. downloaded allegedly offensive material from the Internet using a city-owned computer at the Livermore Public Library. (JA¹ at pp. 0001-0006 [original complaint], 0111-0113 [amended complaint].) In her original complaint, plaintiff alleged state-law claims for public nuisance, waste of public funds, and premises liability,

¹ The abbreviation JA, used throughout this brief, refers to the Joint Appendix in Lieu of Transcript previously filed with this court by Appellant and Respondent.

and in her amended complaint, she added a federal claim for violation of the right to substantive due process pursuant to 42 U.S.C. section 1983. (*Ibid.*)

Livermore's library board had considered the issue of Internet access and, in its legislatively authorized discretion, publicly adopted a policy that allowed all users unrestricted access. (JA at pp. 0063, 0065.) This policy expressly warned users of the possibility of encountering controversial material and emphasized the responsibility of parents to monitor and supervise their children's use of the Internet in selecting material consistent with their personal and family values. (JA at p. 0065.)

The superior court sustained Livermore's demurrers to the original and amended complaint and dismissed the case. (JA at pp. 0109, 0190-0192.) Plaintiff noticed this appeal from the judgment of dismissal. (JA at pp. 0193-0194.)

Amici make two arguments in support of the judgment dismissing plaintiff's claims. First, under 47 U.S.C. section 230, part of the federal Communications Decency Act, a government entity is immune from state-law liability arising from exposure to allegedly offensive third-party material on the Internet, where the government entity follows a constitutionally sound policy regarding use of the Internet services it provides.² Second, plaintiff does not state a claim under the Civil Rights Act, 42 U.S.C. section 1983, in alleging that her son was harmed by material he accessed using the Internet at a municipal library.

The judgment implements the important principle that government

² For economy of expression, amici refer generically to government entities throughout their argument. Cities, counties, independent library districts, library boards, and other public entities that provide access to the Internet all enjoy immunity under section 230.

entities be allowed to exercise discretion in setting policies governing access to information on the Internet based on local values expressed through democratic processes. A government entity cannot be enjoined or otherwise held liable for emotional or psychological harm to an individual caused by exposure to third-party content on the Internet, regardless of the particular Internet policy the government entity chooses to follow. Allowing injunction actions like this one to go forward would enable individuals to disrupt the democratic policy-setting process with civil litigation and would authorize courts to substitute their judgment for that of legislative and executive policymakers.

ARGUMENT

I. PLAINTIFF'S STATE-LAW CLAIMS ARE PREEMPTED BY SECTION 230 OF THE FEDERAL COMMUNICATIONS DECENCY ACT, 47 U.S.C. SECTION 230.

In 1996, Congress enacted the Communications Decency Act (CDA), which defines the scope of federal regulation of the Internet. One section of the CDA, 47 U.S.C. section 230, grants immunity to providers of Internet services for liability arising from material originating with a third party.³ Section 230 provides in pertinent part: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴

³ In 1997, the United States Supreme Court invalidated other sections of the CDA as unconstitutional. (See *Reno v. ACLU* (1997) 521 U.S. 844 [138 L.Ed.2d 874, 117 S.Ct. 2329].) However, section 230 was not at issue in *Reno* and has been invoked as controlling authority in recent cases. (See *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, cert. den. (1998) ___ U.S. ___ [118 S.Ct. 2341, 141 L.Ed.2d 712]; *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44; *Doe v. America Online, Inc.* (Fla. Ct. App. 1998) 718 So.2d 385, review granted (Fla. 1999) 729 So.2d 390.) A copy of the *Doe* opinion is included in the separately-bound Appendix of Authorities filed herewith.

⁴ 47 U.S.C. § 230(c)(1). A copy of section 230 is included in Appendix B, attached hereto.

Plaintiff's state-law claims are preempted by section 230. Under the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2 ["the Laws of the United States . . . shall be the supreme Law of the Land"]) and the corollary clause in the Constitution of California (Cal. Const., art. III, § 1 ["the United States Constitution is the supreme law of the land"]), section 230 invalidates any conflicting state law within the section's scope. Plaintiff's state-law theories of liability are based on Livermore's provision of Internet access and seek to treat the city as a publisher or speaker of third-party content, so the claims fall within the scope of section 230. Because plaintiff's attempt to impose liability on this basis conflicts with the immunity Congress granted to providers of Internet services in section 230 and the purposes of that statute, her claims are preempted.

A. Plaintiff's State-Law Claims Are Expressly Preempted Because They Conflict With The Language, Structure, And Purposes Of Section 230.

In express preemption cases, courts look to a federal statute's language, structure, and purposes to determine whether preemption was intended and, if so, the scope of preemption. (See *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 484-486 [135 L.Ed.2d 700, 116 S.Ct. 2240]; *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 96 [120 L.Ed.2d 73, 112 S.Ct. 2374].) Congress evidenced its preemptive intent via an express preemption provision in section 230: subdivision (e)(3) explicitly provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."⁵ Under section 230(c)(1), "[n]o provider or user of an

⁵ In amendments to section 230 passed in October 1998, Congress added a new subsection (d) and redesignated former subsections (d) and (e) as (e) and (f), respectively. (Pub.L. No. 105-277, Title XIV, § 1404(a), 112

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

Plaintiff’s state-law causes of action are expressly preempted by the plain language of section 230 because Livermore is the “provider . . . of an interactive computer service,” the suit concerns “information provided by another information content provider,” and plaintiff’s claims seek to “treat[] [Livermore] as the publisher or speaker” of this third-party information. (See 47 U.S.C. § 230 (c)(1).) The immunity provided by section 230’s plain language is reinforced by the statute’s structure and underlying purposes.

1. The Plain Language Of Section 230 Provides Livermore Immunity.

a. Livermore Is A Provider Of An “Interactive Computer Service.”

The statute defines “interactive computer service” to mean “*any* information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, *including specifically* a service or system that provides access to the Internet and *such systems operated or services offered by libraries* or educational institutions.” (*Id.*, § 230(f)(2) [emphasis added].) By the statute’s terms, the immunity provided by section 230(c)(1) applies broadly to *any* provider of Internet access, including any government entity. Libraries are expressly included within the definition. By providing access to the Internet using computers located at its library, Livermore falls squarely within the defined category of “interactive computer service” immunized from liability under subsection (c)(1).

Stat. 2681-739.) This brief cites to these statutory subsections in their current, amended form.

b. The Allegedly Harmful Material Was “Information Provided By Another Information Content Provider.”

The statute defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” (*Id.*, § 230(f)(3).) There has never been any allegation that Livermore created or developed the content at issue in this case. To the contrary, plaintiff’s complaint states that library “users can request text, images, and other computerized information from computers in *other* locations” (JA at p.0002 [emphasis added].) The library’s policy also explains that “[t]he Internet allows users to connect to networks of resources outside the library” and that the library “does not monitor and has no control over the information accessed through the Internet.” (*Id.* at p.0065.) The allegedly harmful material that Brandon P. accessed and downloaded originated with a third party, and is therefore the type of content for which section 230 immunizes Internet service providers such as the library.

c. Plaintiff’s Claims Seek To Treat Livermore As The “Publisher Or Speaker” Of The Information Transmitted By A Third Party.

Livermore’s allegedly wrongful activity – providing unrestricted Internet access – is encompassed by section 230’s broad grant of immunity. Section 230 expressly preempts any state-law claims that attempt to treat a passive intermediary as an active publisher or speaker of the allegedly harmful content. (See 47 U.S.C. § 230(c)(1) [“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”]; *id.*, § 230(e)(3) [“No cause of action may be brought

and no liability may be imposed under any State or local law that is inconsistent with this section.”].)

Livermore’s statutory immunity is reaffirmed by the two leading cases in which courts have examined the language of section 230 in the tort-claim context. In the Fourth Circuit’s rigorously reasoned opinion in *Zeran, supra*, the court held:

By its plain language, [section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.

(129 F.3d at p. 330 [holding that section 230’s immunity provisions preempted defamation action against America Online (AOL) for postings on an electronic bulletin board by a third party].) Similarly, the district court in *Blumenthal, supra*, explained that

[Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others. In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.

(992 F.Supp. at pp. 49, 53 [holding that “the statutory language is clear” and that section 230 preempted an action against AOL for providing a defamatory gossip column on its service, even if AOL did not “do[] anything whatsoever to edit, verify, or even read” the content].) As the

courts examining section 230 have made clear, providers of Internet service such as Livermore have immunity from state-law liability, regardless of notice, in claims arising from content transmitted by third parties.

2. Livermore's Immunity Is Reinforced By The Structure And Purposes Of Section 230.

Federal law is preemptive when enforcement of state law would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (*Barnett Bank v. Nelson* (1996) 517 U.S. 25, 31 [134 L.Ed.2d 237, 116 S.Ct. 1103] [quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67-68 [85 L.Ed. 581, 61 S.Ct. 399]]), or “when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively” (*Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287 [131 L.Ed.2d 385, 115 S.Ct. 1483]). “Section 230 represents the approach of Congress to a problem of national and international dimension.” (*Zeran, supra*, 129 F.3d at p. 334.) “[Congress’s] exercise of its commerce power is clear” and therefore state law conflicting with its legislative objectives must not be enforced. (See *ibid.*)

Section 230 is structured to immunize service providers from two types of claims: those alleging inadequate affirmative attempts to block, screen, or edit offensive third-party content, and those alleging failure to take any action with respect to offensive content. Congress intended service providers such as Livermore to be immune under the bright-line rule of subsection (c)(1), even when they have notice of the allegedly offensive nature of the third-party content and do not attempt to block, screen, or edit the material.

This statutory structure in part reflects Congress's response to the courts' prior treatment of cases dealing with the responsibility and liability of intermediaries that provide access to third-party material on the Internet. One of section 230's purposes was to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y. Sup. Ct. May 24, 1995) No. 31063/94, 1995 WL 323710, motion for renewal den. 1995 WL 805178 (Dec. 11, 1995).⁶ (H.R. Conf. Rep. No. 104-458, p. 4 (1996), reprinted in 1996 U.S. Code Cong. & Admin. News, at pp. 207-208; *Zeran, supra*, 129 F.3d at p. 331; *Blumenthal, supra*, 992 F.Supp. at p. 52, fn. 13.) The *Stratton Oakmont* court held Prodigy, a provider of Internet service, liable for a defamatory message posted on an electronic bulletin board by a third party. The court reasoned that because Prodigy actively screened messages to exclude content it deemed inappropriate for family audiences, it should be held to the same standard of liability as a traditional publisher. (1995 WL 323710, *supra*, at pp. *3-*5.) Congress eliminated such disincentives to "Good Samaritan" actions. (H.R. Conf. Rep. No. 104-458, *supra*, at p. 4; accord *Zeran, supra*, 129 F.3d at p. 331.) Section 230(c)(2) thus grants immunity from liability for specific affirmative acts.

Congress also chose to confer greater protection than had been afforded by *Cubby, Inc. v. CompuServe, Inc.* (S.D.N.Y. 1991) 776 F.Supp. 135. The court in *Cubby* treated the interactive computer service CompuServe as a distributor of information and granted summary judgment for CompuServe because there was no evidence that it knew or had reason

⁶ The *Stratton Oakmont* case has since been overruled as a matter of state law. (See *Lunney v. Prodigy Services Co.* (N.Y. App. Div. 1998) 250 A.D.2d 230, 236-237 [explaining overruling as "being in complete harmony with the expanding body of case law," including *Zeran, supra*, and *Blumenthal, supra*].) Copies of the *Stratton Oakmont* and *Lunney* opinions are included in the separately-bound Appendix of Authorities filed herewith.

to know of allegedly defamatory statements in a third-party news publication in its electronic library. (*Id.* at pp. 140-141.) Section 230(c)(1) creates a bright-line rule of immunity from tort liability, even in situations where an interactive computer service is informed that certain content is offensive and takes no action to edit or remove the offensive content. (See 1 Sack, Sack on Defamation: Libel, Slander, and Related Problems (3d ed. 1999) § 7.3.1, pp. 7-6 to 7-7 [section 230 exempts service providers from liability even “in situations where they *are* aware of the nature of the material being challenged”].) As *Zeran* confirmed, section 230 forecloses theories based on both “publisher liability” and its subset, “distributor liability.” (129 F.3d at pp. 331-332.)

Holding government entities liable for providing access to Internet content originating with third parties would also conflict with the express Congressional objective of “preserv[ing] the vibrant and competitive free market . . . for the Internet and other interactive computer services, unfettered by Federal or State regulation.” (47 U.S.C. § 230(b)(2).) In its statutory findings, Congress recognized that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” (*Id.*, § 230(a)(3).) The rule of immunity for third-party content enhances the interests of free speech and vibrant discourse, which would be chilled by the threat of litigation.

Consider a situation in which, much like here, an offended public library patron informs library officials of the purportedly false and defamatory nature of information which the library distributes but does not itself publish. Subsequently the patron attempts to hold the library liable in tort for continuing to provide the information.

[T]he potential for use of that tactic to turn financially vulnerable distributors into censors, combined with the ability of the publisher to answer for any actionable defamation, argues strongly for a complete distributors' immunity from suit.

(Sack, *supra*, § 7.3.1, pp. 7-8 to 7-9; see also Prosser & Keeton, *Torts* (5th ed. 1984) § 113, p. 811 [suggesting that distributors should have a “special privilege to transmit defamatory matter known to be false” and remarking that “[i]t would be rather ridiculous, under most circumstances, to expect a bookseller or a library to withhold distribution of a good book because of a belief that a derogatory statement contained in the book was both false and defamatory of the plaintiff”].)

In the absence of the bright-line immunity rule of section 230, given the staggering volume of content that traverses the Internet and online services each day and the inevitable stream of complaints that some particular content was tortious, service providers would have little choice but to censor on demand or face potential liability.

(Carome & Jain, *Immunity from Tort Liability for Online Services: Why the Decision in Zeran v. America Online is Good Public Policy* (1998) 2 *Cyberspace Law*. 13, 14.) Placing local policymakers or library officials in the position of censoring on demand for fear of civil liability would fundamentally conflict with the federal objective set forth in section 230(b)(2).

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. . . . None of this means, of course, that the original culpable party who posts [harmful material] would escape accountability. . . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on

[Internet service providers] that serve as intermediaries for other parties' potentially injurious messages.

(*Zeran, supra*, 129 F.3d at pp. 330-331.)

B. Plaintiff's Arguments That Livermore Is Not Immune Under Section 230 Are Meritless.

Although plaintiff concedes section 230's "broad protection for online service providers" (see OB⁷ at p. 5), she contends that (1) the case of *Mainstream Loudoun v. Board of Trustees* (E.D. Va. 1998) 2 F.Supp.2d 783, "rejected library immunity," (2) Livermore's activities in this civil case fall under the statutory section disallowing immunity for behavior that is criminal, and (3) this case is somehow about "public exhibitor" liability, from which section 230 purportedly offers no immunity (see OB at pp. 5-8.) Each contention is meritless.

The *Loudoun* case does not support the notion that public libraries lack immunity under section 230 or that section 230 does not apply to plaintiff's action for injunctive and declaratory relief. *Loudoun* involved different issues and is completely consistent with statutory immunity in situations where, as here, a city has adopted a constitutionally sound policy relating to Internet access.

In *Loudoun*, adult patrons of a county library brought an action against the library board for violation of their First Amendment rights. The alleged constitutional violation was based on the board's policy of installing Internet-site-blocking (or "filtering") software on its computers. (2 F.Supp.2d at p. 787.) The library board raised section 230 as one of its defenses in support of a motion to dismiss. The court held that the action was not barred. (*Id.* at p. 790.)

⁷ The abbreviation OB, used throughout this brief, refers to the Opening Brief of Appellant Kathleen R. previously filed with this court.

First, *Loudoun* is distinguishable because it involved subdivision (c)(2) of section 230 rather than subdivision (c)(1) as applies here.⁸ The Loudoun library board argued that subdivision (c)(2) – not (c)(1) – provided immunity from plaintiffs’ First Amendment claim arising from the library’s filtering. (*Id.* at p. 789.) Accordingly, the court based its denial of the defense on subdivision (c)(2) (*ibid.*), and specifically reaffirmed its holding on this basis in a subsequent opinion (24 F.Supp.2d 552, 561). In a footnote in this subsequent opinion, the court also demonstrated its understanding of the differences between (c)(1) and (c)(2). Recognizing that the library board might have a “concern [] with its own criminal liability,” the court cited *Zeran*’s discussion of subdivision (c)(1) to indicate that the board would be immune. (*Id.* at p. 565 fn. 15 [“the Fourth Circuit has clearly stated that service providers are not liable ‘for information originating with a third-party user of the service’” [quoting *Zeran, supra*, 129 F.3d at p. 330]].)

Second, the court rejected the library board’s section 230 defense on grounds wholly inapplicable here. The essence of its holding is that section 230 cannot preempt or supersede the First Amendment or the injunctive remedies required to protect First Amendment rights. Thus, it is unsurprising that the court wrote that section 230 cannot “insulate government regulation of Internet speech from judicial review.” (2 F.Supp.2d at p. 790.) It was in this constitutional context that the court distinguished the immunity sought by the library board from “the ‘tort-

⁸ As discussed in section I.A.2, *supra*, subdivision (c)(2) immunizes service providers when they attempt to block, screen, or edit offensive material, and subdivision (c)(1) immunizes service providers for offensive third-party material that the provider does not attempt to block, screen, or edit.

based’ immunity to ‘civil liability’ described by [section] 230.’⁹ (See *ibid.* [citing *Zeran, supra*, 129 F.3d at p. 330].) Neither the holding of *Loudoun* nor any other principle precludes a government entity from immunity under section 230 when such immunity is consistent with the First Amendment.

Not only do constitutionally sound Internet access policies fall within the broad Congressional grant of immunity afforded by section 230(c), but plaintiff’s state causes of action do not fall within any of the narrow exceptions to that immunity found in subsection (e). For example, this case does not involve an expansion or limitation of rights and obligations under intellectual property or communications privacy law, and therefore the related statutory exceptions are not implicated.¹⁰

Plaintiff tries to squeeze her state causes of action into an erroneous construction of subsections (e)(1) and (e)(3).¹¹ Subsection (e)(1) provides that section 230 shall not be construed to impair the enforcement of federal criminal statutes. The provision includes particular reference to statutes

⁹ Plaintiff’s treatment of *Loudoun* is such that a reader is scarcely able to divine the constitutional nature of the case. Presenting *Loudoun* in this relative vacuum allows plaintiff to make the misguided suggestion that the court held section 230 inapplicable to any case seeking declaratory or injunctive relief, as opposed to relief in the form of money damages. But section 230 provides immunity to tort-based civil liability regardless of the form of relief requested, and it defies common sense that courts would make it easier for plaintiffs to seek the more severe remedy of an injunction than to maintain a damages action. The only coherent reading of the *Loudoun* court’s holding is that section 230 was inapplicable there not because of the form of relief requested per se, but because the requested remedy was based on an alleged violation of the First Amendment.

¹⁰ See 47 U.S.C. §§ 230(e)(1), (e)(4). In keeping with this statutory structure, Congress later dealt with the intellectual property exception by passing 17 U.S.C. section 512, which limited liability of passive intermediaries for copyright infringement in the online environment. Congress has not, however, passed any legislation in an attempt to hold cities liable for the transmission over the Internet of material originally provided by a third party.

¹¹ For purposes of clarification, the court may wish to note that in plaintiff’s opening brief, she cites current subsection 230(e) as 230(d) and cites (e)(3) as (d)(4). (See OB at pp. 6-7.)

governing obscenity and sexual exploitation of children. (See *id.*, § 230(e)(1).) Subsection (e)(3) provides, in addition to the statement of preemption, that section 230 “shall [not] be construed to prevent any State from enforcing any State law that is consistent with this section.” (See *id.*, § 230(e)(3).) Plaintiff writes that

[t]he gravamen of this suit is that the defendant library [sic] is knowingly soliciting, aiding the transmission of, and providing obscene and harmful images, transmitted from both within the state and from without the state, to minors.

(OB at p. 7.) Then plaintiff argues that because

[section] 230 is intended to have no effect on state laws consistent with section 230, it is clear that Congress did not intend to abolish federal or state actions and statutes which prohibited obscenity and lewdness. Thus, the state-law causes of actions [sic] in the complaint are entirely consistent with Congress’ exemptions.

(*Ibid.*)

Plaintiff’s reasoning is a transparent attempt to overcome the fact that section 230(e)(1) creates an exception only for *federal criminal* statutes, not *state civil* causes of action. Section 230(e)(3) cannot reasonably be read to mean that *merely alleging facts* involving obscenity in some way will turn a state *civil* cause of action into one falling outside section 230’s preemptive scope. *At best*, under plaintiff’s tortured statutory analysis (with which amici do not agree), only state *criminal* statutes prohibiting obscenity in a manner identical to a federal statute would be unaffected (assuming they are not themselves otherwise preempted). Plaintiff should not be allowed to make an end run around section 230’s broad grant of immunity by crafting strained causes of action or by framing civil actions as criminal. Courts must look behind the form of pleadings to

determine the true thrust of the allegations, disallowing plaintiffs to evade legal principles that would prevent their success. (See *Hustler Magazine v. Falwell* (1988) 485 U.S. 46 [99 L.Ed.2d 41, 108 S.Ct. 876] [applying defamation law analysis to claim for intentional infliction of emotional distress]; *Zeran, supra*, 129 F.3d 327 [applying defamation law analysis to claim for negligence].) Here plaintiff has alleged what is essentially a tort claim, alleging that the City's actions (adopting and implementing the Internet policy) caused harm to her son.¹² Section 230 provides immunity from such tort-based liability under state law.

Plaintiff's "public exhibitor" argument is similarly unconvincing. Plaintiff suggests that for one to argue for Livermore's immunity under section 230 in this case is also to argue that under no circumstances could a library patron be held liable for locating obscenity on the Internet and exhibiting the obscenity to a minor. (See OB at p. 7.) Plaintiff offers two hypothetical scenarios. In the first an adult library user entices "an 11 or 12 year old child" to look at "utterly debased and vile obscene images, such as forceful sexual assault" on his computer screen. (*Id.* at pp. 7-8.) The second involves a man who invites children to view pornography on his cable television. (*Id.* at p. 8.) Plaintiff implies that in order for one to argue that section 230 provides immunity under the facts of this case, one must also be committed to the proposition that the man in these examples is immune from any civil or criminal liability. (*Id.* at pp. 7-8.)

Amici are not committed to any such proposition. There may very well be liability imposed on an intervening library patron who, beyond merely "using" the Internet, takes active steps to locate obscene material

¹² Even if plaintiff's civil claims could be characterized in some way as criminal in nature, there is still no reason to allow plaintiff to exercise essentially public prosecutorial powers under the guise of civil pleading.

and actively lures a minor into viewing it. An individual may be criminally or civilly liable for bringing children to his home and showing them pornographic images. However, these scenarios are far different from one in which, as here, a government entity enacts a policy simply allowing library users to access the Internet.¹³ The government entity falls squarely within the terms of immunity, whereas plaintiff's hypothetical individual does not, because the government is merely a passive intermediary – one of the very roles Congress intended to protect by passing section 230.

C. Holding The State-Law Claims To Be Preempted By Section 230's Immunity Provisions Also Harmonizes With Related Constitutional Principles.

1. Immunity Harmonizes With The Separation of Powers Doctrine.

Holding government entities immune under section 230 in cases arising from their Internet access policies harmonizes with the separation of powers doctrine. In California, the separation of powers doctrine is embodied in the state constitution, which places limits on the actions of each governmental branch with respect to the other branches. (Cal. Const., art. III, § 3; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53 [51 Cal.Rptr.2d 837, 913 P.2d 1046]; see also *Board of Supervisors v. Superior Court* (1995) 32 Cal.App.4th 1616, 1623 [38 Cal.Rptr.2d 876] [doctrine implied in federal constitution by its distribution of legislative, executive, and judicial powers].)

¹³ Plaintiff suggests that Livermore Public Library personnel would provide “one-on-one help” to “facilitate” minors’ access to obscenity. (See *id.*, p. 8.) Amici possess no information to support such an allegation. Furthermore, courts have held librarians acting in the discharge of their duties (including the distribution of library materials) to be immune from liability under the very statute cited by plaintiff in her brief, section 313.1 of the Penal Code, dealing with exhibition of obscenity harmful to minors. (See *Moore v. Younger* (1976) 54 Cal.App.3d 1122 [127 Cal.Rptr. 171].)

In accordance with this doctrine, courts possess a limited power of judicial review, but they “may not reevaluate the wisdom or merits of statutes which have [been enacted]” (*Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1212 [28 Cal.Rptr.2d 822]; accord *County of Mendocino, supra*, 13 Cal.4th at p. 53 [“[t]he judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation”].) “[I]n the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation.” (*City & County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 915 [120 Cal.Rptr. 707, 534 P.2d 403].) This principle fully applies to legislative actions of local government. (*Id.* at p. 915, fn. 7.)

City library boards derive their authority to set library policy from state statute. The state legislature has delegated its authority to set legislative policy for municipal libraries to boards of library trustees, which must be appointed by each city’s executive branch with the consent of the city’s legislative body. (Ed. Code, § 18910.) “The board of library trustees may make and enforce all rules, regulations, and bylaws necessary for the administration, government, and protection of the libraries under its management, and all property belonging thereto.” (*Id.*, § 18919.) The Livermore library board and amicus Lodi Public Library Board of Trustees adopted their Internet policies pursuant to this discretionary authority.

Authority to set policy for county libraries also derives from the Legislature. The Education Code authorizes a county board of supervisors to establish a library and directs the board to appoint a county librarian who has graduated from a library school program accredited by the American Library Association. (*Id.*, §§ 19100, 19140, 19142.) The county librarian

has the statutory authority to manage the library, subject to the board of supervisors' general rules. This authority includes the determination of what library materials should be purchased. (*Id.*, § 19146.)

Likewise, the Legislature has statutorily provided for the formation of independent library districts. (See *id.*, §§ 19600-19614.) A district's board of trustees, appointed by municipal supervisors, is given broad discretion to set policy. (See, e.g., *id.*, §§ 19611, 19645, 19652.) The Board of Library Trustees of amicus Palos Verdes Library District adopted its Internet use policy pursuant to this delegation of legislative power.

In keeping with this democratic structure, local legislative action is the appropriate vehicle for setting library Internet policies. Local citizens may exercise their rights to petition and to vote in order to influence local policy according to their values. Courts are constitutionally ill-positioned, and pragmatically ill-equipped, to make policy judgments about how much or how little Internet access or filtering is appropriate in municipal libraries across the state.¹⁴

“When the legislature has committed to a municipal body the power to legislate on given subjects . . . , courts of equity have no power to interfere Whether, in the exercise of legislative powers, a board acts wisely or unwisely is no concern of the courts”

¹⁴ Local communities have already begun dealing with these very issues. As a Senate witness testified earlier this year, “many libraries and schools have found effective, community-based mechanisms to deal with children’s Internet safety, and . . . others are seeking, through local consultation and experimentation, the best solutions for their communities.” (See Statement of Jerry Berman, Exec. Dir. of the Center for Democracy & Technology, Mar. 4, 1999, Hearing on S. 97 Before Sen. Com. On Commerce, Science & Transportation (visited Oct. 13, 1999) <<http://www.cdt.org/speech/statement/statement.shtml>>.) A “one-size-fits-all” solution is unwise when libraries have “approximately 90 different tools available in the market to help parents, teachers, and librarians protect children online.” (See *ibid.*)

(*City & County of San Francisco, supra*, 13 Cal.3d at p. 915, fn. 7 [quoting *Nickerson v. San Bernardino County* (1918) 179 Cal. 518, 522-523 [177 P. 465]].) The choice among competing policy considerations in enacting laws is a legislative function. (*County of Mendocino, supra*, 13 Cal.4th at p. 53.) Failing to stop tort claims from moving beyond an early dismissal in the trial courts would enable individuals, via litigation and the threat of litigation, to shape the Internet content mix accessible to all library users, outside the deliberative and representative democratic process.

2. Immunity Harmonizes With First Amendment Principles.

Holding Livermore immune from liability arising from its Internet access policy also harmonizes with First Amendment principles. Government entities have discretion, subject to the First Amendment, to fashion a variety of policies affecting access to information on the Internet. The Livermore library board exercised its discretion by adopting a policy affording unrestricted access to all users of the Livermore Public Library. (JA at p. 0065.) This particular policy involves no governmental regulation of Internet speech and hence harmonizes with the First Amendment, which is only implicated if a government regulates speech.¹⁵

Public policy considerations militate against requiring Livermore, by mandatory injunctive order, to embark on a policy of restricting access to Internet information. The superior court would find itself in the position of

¹⁵ For opinions examining the First Amendment implications of government regulation of the Internet, see, e.g., *Reno v. ACLU* (1997) 521 U.S. 844 (federal Communications Decency Act); *ApolloMedia Corp. v. Reno* (N.D. Cal. 1998) 19 F.Supp.2d 1081, *affd. mem.* (1999) 119 S.Ct. 1450 (same); *ACLU v. Reno* (E.D. Pa. 1999) 31 F.Supp.2d 473 (federal Child Online Protection Act); *Mainstream Loudoun v. Board of Trustees* (E.D. Va. 1998) 24 F.Supp.2d 552 (county library board's Internet access policy); *Mainstream Loudoun v. Board of Trustees* (E.D. Va. 1998) 2 F.Supp.2d 783 (same).

compelling a public library to abandon a policy clearly consistent with the First Amendment and to replace it with a policy subject to challenge as an imposition of government regulation on Internet speech, all subject to strict-scrutiny review in the appellate courts.¹⁶

II. PLAINTIFF FAILED TO STATE A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT, 42 U.S.C. SECTION 1983.

The sole basis for plaintiff's purported claim under the Civil Rights Act, 42 U.S.C. section 1983,¹⁷ is the alleged violation of her son's right to substantive due process as guaranteed by the Fourteenth Amendment.¹⁸ (See OB at p. 14; JA at p. 0113.) She must show (1) that her son possessed a constitutional right, (2) that the municipality acted arbitrarily in policy or custom, and (3) that the policy or custom caused the deprivation of the right. (See 42 U.S.C. § 1983; *County of Sacramento v. Lewis* (1998) ___ U.S. ___ [140 L.Ed.2d 1043, 118 S.Ct. 1708, 1716]; *Monell v. Dept. of Social Services* (1978) 436 U.S. 658, 691-694 [56 L.Ed.2d 611, 98 S.Ct 2018].) Plaintiff argues that Livermore violated Brandon P.'s "liberty interest in personal security and freedom from restraint and infliction of pain" by failing to prevent him from accessing offensive content on the Internet, thereby causing emotional and psychological harm. (See OB at pp. 14-16; see also JA at p. 0112.)

¹⁶ Indeed, the *Loudoun* court held that a public library is a limited public forum, so that any content-based restriction of Internet access will only survive strict scrutiny if narrowly tailored to effectuate a compelling governmental interest. (*Loudoun, supra*, 24 F.Supp.2d 552.)

¹⁷ Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory. . . , subjects, or causes to be subjected, any citizen . . . to the deprivation of any right, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured" (42 U.S.C. § 1983.)

¹⁸ The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., amdt. 14, § 1.)

Plaintiff's allegations, however, do not implicate any right protected by substantive due process and, even if such a right were established, the City has not acted unconstitutionally. Despite plaintiff's assertion that her son's liberty interest is "fundamental," which would subject Livermore's actions to strict scrutiny under substantive due process doctrine, the Supreme Court has never recognized such a fundamental right. Brandon P. has no right, much less a fundamental one. The circumstances here are not even closely comparable to the limited circumstances in which government entities have an affirmative constitutional duty to protect individuals from third-party harm. Moreover, the library board acted not unconstitutionally but reasonably in providing Internet access for its patrons in pursuit of legitimate educational and civic goals. Even if plaintiff's cause of action could survive these fatal flaws, her claim is further vitiated by the absence of facts showing that Livermore's Internet policy or related customs proximately caused Brandon P.'s alleged harm.

A. The Facts Alleged Do Not Implicate Any Right That Is Constitutionally Protected Under Substantive Due Process Doctrine.

1. This Case Does Not Involve A Fundamental Right That Would Trigger Strict Scrutiny.

Plaintiff invokes her son's purported "liberty interest of personal security and freedom from infliction of pain," characterizing it – without citing any authority – as a "fundamental right." (See OB at p. 15.) On this basis, she urges strict-scrutiny review. (See OB at pp. 14-16.) Her bald assertion is untenable. There is no precedent for recognizing freedom from exposure to offensive speech to be a fundamental right under the Due Process Clause.

In *Washington v. Glucksberg* (1997) 521 U.S. 702 [138 L.Ed.2d 772,

117 S.Ct. 2258], the Supreme Court summarized the “two primary features” of its “established method of substantive-due-process analysis”:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. . . . Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

(521 U.S. at pp. 720-721 [internal quotation marks and citations omitted].)

The Court identified the fundamental rights it has recognized, and the rights to “personal security and freedom from restraint and infliction of pain” or to protection from offensive speech were not among them.

The [Due Process] Clause [] provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children,^[19] to marital privacy, to use contraception, to bodily integrity, and to abortion.

(*Id.* at p. 720 [citations omitted].) Beyond these rights, the Court has suggested only that the right to refuse unwanted lifesaving medical treatment is similarly protected. (*Ibid.*) The Supreme Court has never suggested that the liberty interest plaintiff urges here is “fundamental.”

¹⁹ Ironically, while plaintiff complains that her son’s fundamental right was violated and notes “that parents have the constitutional right to direct the upbringing of their children” (OB at p. 16, fn. 1), it is the very abdication of parenting responsibility – which Livermore’s policy expressly addressed – that led to Brandon P.’s exposure to the material Kathleen R. finds so harmful.

Consistent with the Court’s substantive due process jurisprudence, no case to which plaintiff obliquely or overtly refers in her opening brief has recognized such a fundamental right. Plaintiff cites *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, 589, cert. den. (1990) 498 U.S. 938 [112 L.Ed.2d 305, 111 S.Ct. 341] and states that the *Wood* court “summarizes Supreme Court authority” that a child has a “liberty interest in personal security and freedom from restraint and infliction of pain.” (See OB at p. 14.) In *Wood*, the court never even considered whether the right to “personal security and freedom from restraint and infliction of pain” is fundamental, and did not treat it as such. Furthermore, the authority to which *Wood* refers, but which plaintiff does not cite – *Ingraham v. Wright* (1977) 430 U.S. 651, 674-675 [51 L.Ed.2d 711, 97 S.Ct. 1401] – was a *procedural* due process case, *not* a *substantive* due process case. The Court therefore employed the “familiar two-stage analysis” for such cases: determining whether a liberty interest is implicated, then deciding what process is due. (See *id.* at p. 672.) The Court never addressed substantive due process. The *Wood* court distinguished *Ingraham* on this basis:

In *Ingraham*, the Court considered only a procedural due process challenge based on the lack of a hearing before corporal punishment was meted out. . . . [S]ubstantive due process violations comprise those acts by the state that are prohibited “regardless of the fairness of the procedures used to implement them.”

(879 F.2d at p. 589 [quoting *Daniels v. Williams* (1986) 474 U.S. 327, 331 [88 L.Ed.2d 662, 106 S.Ct. 662].) Thus, neither *Wood* nor *Ingraham* supports the notion that there is a fundamental right implicated here.²⁰

²⁰ Moreover, plaintiff’s claim is in direct conflict with *Brown v. Hot, Sexy and Safer Productions, Inc.* (1st Cir. 1995) 68 F.3d 525, cert. den. (1996) 516 U.S. 1159 [134 L.Ed.2d 191, 116 S.Ct. 1044]. In *Brown*, two public high school students and their parents sued school officials under

This court should not expand the limited number of fundamental rights the Supreme Court has previously recognized. The Supreme Court “has always been reluctant to expand the concept of substantive due process” (*Collins v. City of Harker Heights* (1992) 503 U.S. 115, 125 [117 L.Ed.2d 261, 112 S.Ct. 1061].)

By extending constitutional protection to an asserted right or liberty interest, [courts], to a great extent, place the matter outside the arena of public debate and legislative action. [Courts] must therefore exercise the utmost care whenever [they] are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [courts].

(*Washington, supra*, 521 U.S. at p. 720 [internal quotation marks and citations omitted].)

Because no fundamental right is implicated here, Livermore’s actions “need only have a rational basis to be upheld against a substantive due process attack.” (*Kim v. United States* (9th Cir. 1997) 121 F.3d 1269, 1273.) Amici argue in section II.B, *infra*, that Livermore has acted rationally. However, the court need not even reach the question of rationality in this case unless it first finds a protected interest. In the following section, amici demonstrate that plaintiff cannot establish even a non-fundamental right to protection from third-party speech encountered on the Internet.

section 1983 for deprivation of the minors’ substantive due process rights, allegedly caused by a mandatory AIDS and sex education program that included sexually explicit monologues and skits with minors chosen from the audience. (*Id.* at p. 529.) The court held that minors have no right to be free from offensive speech. (*Id.* at pp. 532-534 [further holding that parents have no “fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children”].) Indeed, recognizing such a right would provoke claims that are incompatible with the extensive leeway for controversial speech under the First Amendment. (E.g., *Hustler Magazine v. Falwell, supra*, 485 U.S. 46; *Terminello v. City of Chicago* (1949) 337 U.S. 1 [93 L.Ed. 1131, 69 S.Ct. 894].)

2. **Plaintiff Has No Right To Protection From Harmful Materials On The Internet Transmitted By Third Parties.**

The Due Process Clause limits the government's power to act, but generally does not obligate the government to guarantee its citizens freedom from harm by private actors. As the United States Supreme Court has explained,

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . [I]t was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' [citations]. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.

(*DeShaney v. Winnebago County Dep't of Social Services* (1989) 489 U.S. 189, 195-196 [103 L.Ed.2d 249, 109 S.Ct. 998] [holding that a county had no duty under the substantive component of the Due Process Clause to protect a child from his father despite having received repeated reports of possible abuse and having voluntarily undertaken to protect the child].)

The Court in *DeShaney* explained that only "in certain limited circumstances [does] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."²¹ The

²¹ *Id.* at p. 198. When amici discuss whether government entities have a duty of protection in the substantive due process context, they are also implicitly discussing whether an individual has a right to protection, since legal duties and rights are correlative. (See Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning* (1913) 23 Yale L.J.

Court wrote that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” (*Id.* at pp. 199-200.) This is sometimes referred to as the “special relationship” exception. (See *L.W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119, 121, cert. den. (1993) 508 U.S. 951 [124 L.Ed.2d 660, 113 S.Ct. 2442].) Some courts have also allowed section 1983 liability on substantive due process grounds when a government entity places the plaintiff in physical danger and fails to fulfill the resulting constitutional duty to protect the plaintiff from that danger, an exception known as the “danger creation” exception.²² A government entity’s provision of Internet services is not one of the limited circumstances that falls under these exceptions.

A government entity does not enter into a “special relationship” with Internet users simply by virtue of the government’s provision of Internet access. Courts have found a special-relationship duty only in situations

16, 30-32]; *O’Brien v. Leidinger* (E.D. Va. 1978) 452 F.Supp. 720, 726 fn. 5 [“Whenever there exists a right in any person, there also exists a correlative duty in some other person or persons not to abridge or interfere with the exercise of that right.” [citing Hohfeld]].)

²² See, e.g., *Grubbs, supra*, 974 F.2d at p. 121. The validity of a broad “danger creation” exception is questionable in the wake of the Supreme Court’s opinion in *DeShaney*. Some courts have continued to develop the doctrine, the Ninth Circuit prominently among them. (See, e.g., *Grubbs, supra*, 974 F.2d 119; *Wood, supra*, 879 F.2d 583.) Other courts have declined to follow the doctrine, taking the position that it is inconsistent with *DeShaney*. (See, e.g., *Foy v. City of Berea* (6th Cir. 1995) 58 F.3d 227, 230-232 [following *DeShaney* in finding there to be no affirmative duty of care and protection in the absence of custodial restraint]; *Was v. Young* (E.D. Mich. 1992) 796 F.Supp. 1041, 1050 fn. 5 [declining to follow *Wood* in light of *DeShaney*]; see also *Wood, supra*, 879 F.2d at pp. 599-600 [Carroll, J., dissenting] [arguing that the majority’s danger creation holding extends substantive due process rights beyond the limits set by *DeShaney*].) Because plaintiff appears to argue for a danger-created duty in her opening brief (see OB at p. 19), amici will demonstrate why the facts of this case do not fit within the exception as it has been defined by the case law. In so doing, amici do not mean to suggest that such an exception is sound law or policy after *DeShaney*.

where the plaintiff was essentially helpless, “as in the case of custody or involuntary hospitalization.” (*Grubbs, supra*, 974 F.2d at p. 121.) For instance, a government entity has a duty to protect involuntarily committed mental patients from violence caused by others. (*DeShaney, supra*, 489 U.S. at p. 199 [discussing *Youngberg v. Romeo* (1982) 457 U.S. 307, 314-325 [73 L.Ed.2d 28, 102 S.Ct. 2452].) “The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” (*Id.* at p. 200.) “[T]he key concept is the exercise of coercion, dominion, or restraint by the state over the victim, and no special relationship has been found where the state has not taken the victim into custody or otherwise assumed responsibility for his or her welfare.” (*Buenavista v. City & County of San Francisco* (1989) 207 Cal.App.3d 1168, 1175 [255 Cal.Rptr. 329] [internal citations and quotation marks omitted] [examining federal precedents on “special relationship” exception].)

Kathleen R. has made no showing that the City of Livermore took Brandon P. into custody or rendered him helpless. In fact, Kathleen R. makes only the allegation “that the library invites, encourages, and entices children to come to the library and use the resources at the library, including the computers.” (JA at p. 0112.) Encouraging children to use library resources does not “restrain[] [children’s] freedom to act on [their] own behalf,” (see *DeShaney, supra*, 489 U.S. at p. 200) or parents’ freedom to supervise and guide their children’s Internet usage. Since the City has not restrained Brandon’s – or anyone’s – liberty, the City has no duty on the basis of a “special relationship.”

Similarly, Livermore did not incur any danger-created duty by virtue of making the Internet accessible and encouraging library patrons to use it because the alleged danger does not rise to the level of constitutional deprivation. The emotional and psychological harm alleged by plaintiff in this case is plainly distinguishable from the physical harm at issue in *Wood* and other “danger creation” cases.

In *Wood*, plaintiff, a woman, presented evidence that the defendant police officer stopped a car in which plaintiff was a passenger, arrested the driver, impounded the car, and left plaintiff stranded in a high-crime area at 2:30 a.m., where she was subsequently raped. (879 F.2d at pp. 586, 590.) The court reversed a grant of summary judgment for the defendant because plaintiff had raised a genuine factual dispute whether the officer, by acting “in callous disregard for [plaintiff’s] *physical* security,” had violated her constitutional right. (*Id.* at pp. 589, 596 [emphasis added].)

In another case examining a danger-creation claim under section 1983, *L.W. v. Grubbs, supra*, 974 F.2d 119, the court found that a valid claim existed against a supervisor at a state facility who placed the plaintiff in danger by assigning her to work with an inmate sex offender who had a history of violent assaults against women. The inmate subsequently assaulted, battered, kidnapped, and raped the plaintiff. (*Id.* at p. 120.)

The unspecified psychological and emotional harm Kathleen R. alleges is not of the same magnitude or physical nature as the harm suffered by the plaintiffs in these danger-creation cases. In a telling Ninth Circuit case subsequent to *Wood* and *Grubbs*, the court summarized the rationale for the “danger creation” exception: the government’s duty to protect an individual from harm attaches “because the individual has been placed in a

dependent and helpless position” (*United States v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1447 [emphasis added] [police officers inflicted physical injuries on plaintiff during arrest] revd. in part on other grounds (1996) 518 U.S. 81 [135 L.Ed.2d 392, 116 S.Ct. 2035]; see also *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 740-741 [268 Cal.Rptr. 779, 789 P.2d 960] [distinguishing *Wood* from *DeShaney* because in *Wood*, “defendant physically limited the plaintiff’s ability to act on her own behalf” and “left her in a much worse position than before”].) Brandon P.’s alleged emotional and psychological injuries are, by definition, not physical. They did not arise from his being placed in a dependent or helpless position. Brandon P. voluntarily came to the library on 10 occasions to download sexual content from the Internet. (JA at p. 0003.) Plaintiff’s allegations are insufficient to create a duty on this theory.

Furthermore, there is an insufficient nexus between the government’s actions and the alleged danger to Brandon P. to give rise to a duty of protection. In order to base a claim on a “danger creation” theory, there must be direct affirmative conduct on the part of the state in placing plaintiff in danger.²³ (*Grubbs, supra*, 974 F.2d at p. 121.) The case of *Carlton v. Cleburne County* (8th Cir. 1996) 93 F.3d 505, demonstrates how closely a government entity’s conduct must be connected to the resulting harm. In *Carlton*, plaintiffs sued a county for injuries they sustained when a bridge collapsed during their sightseeing visit. Plaintiffs argued that the county had “created [a] danger by impliedly assuring them of the bridge’s

²³ The requirement of direct affirmative conduct overlaps conceptually with the requirement in all section 1983 cases of proximate causation. Plaintiff’s inability to make a showing of proximate cause is fatal to her claim. Amici address causation here in the danger-creation context, but also address the issue more generally in section II.C, *infra*. The causation requirements set forth in section II.C apply equally to all civil rights claims, whether based on a danger-creation theory or any other theory.

safety and encouraging them to be on the bridge, and therefore . . . the [county] had an affirmative duty to protect against such harm.” (*Id.* at p. 509.) In rejecting this argument, the court offered the following analysis:

Even if we accept as true that the County owned the bridge and knew the bridge was deteriorating but refused to provide any maintenance or repair, we must conclude that no constitutional violation occurred. Mere knowledge of danger to the individual does not create an affirmative duty to protect. [Citation.] Simply offering a location as a tourist attraction is not the type of affirmative governmental action that creates a duty to protect under *DeShaney*. Appellants allege no affirmative act on the part of government officials directly placing them on the bridge. Nor did the County appellees’ actions ‘create the danger’ causing the bridge to collapse. To the contrary, . . . the bridge cables broke because of internal corrosion caused by rust. . . . [N]either the County appellees’ actions nor inaction place these particular individuals in a position of danger. [Citations.] Instead, any action on the party of the County appellees was directed toward members of the general public. There simply was no constitutional deprivation under [section] 1983 in this case.

(*Ibid.*)

The *Carlton* court’s analysis is strikingly applicable to the facts alleged here. Kathleen R. alleges only that Livermore provided Internet access and made a general invitation to the public, including children, to use the library computers. “But recovery under section 1983 has not been authorized where the victim is a member of the general public.” (*Buenavista, supra*, 207 Cal.App.3d at p. 1175.) Furthermore, Brandon P. searched the Internet and downloaded the material of his own volition. (JA at p. 0003.) The City of Livermore did not directly place him in front of a computer and choose the sites he would access. Nor did the City uniquely create the situation that allegedly injured Brandon P., who could have accessed the same Internet materials from any other computer with an

Internet connection. There is insufficient government action to give rise to a duty of protection under the Due Process Clause. (Cf. *Doe v. Hillsboro Independent School District* (5th Cir. 1997) 113 F.3d 1412, 1415-1416 [rejecting section 1983 substantive-due-process claim against public school officials arising from school custodian’s rape of student, in part because of plaintiffs’ “inability to show a nexus between” the alleged government action and the assault; “[p]arents remain the primary source for the basic needs of their children”].)

Because there is no identifiable substantive due process right implicated by Livermore’s alleged actions in this case, plaintiff fails to state a claim under the federal Civil Rights Act. However, as amici argue next, even if there were such a right, this claim cannot stand because the alleged facts do not support a finding that Livermore acted unconstitutionally.

B. The City Has Not Acted In An Unconstitutionally Arbitrary Manner.

Even assuming the existence of some substantive due process right – and, as amici have shown, there is no such right – the civil rights claim must fail. To establish a violation of substantive due process, “a plaintiff is ordinarily required to prove that a challenged government action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” (*Patel v. Penman* (9th Cir. 1996) 103 F.3d 868, 874, cert. den., 520 U.S. 1240 [137 L.Ed.2d 1048, 117 S.Ct. 1845] [internal quotations marks omitted].) The Supreme Court has “emphasized time and again that “[t]he touchstone of due process is protection of the individual against arbitrary action of government[.]”” (*County of Sacramento v. Lewis, supra*, 118 S.Ct. at p. 1716 [quoting *Wolff v. McDonnell* (1974) 418 U.S. 539, 558 [41 L.Ed.2d 935, 94 S.Ct.

2963]].) Plaintiff has not shown that Livermore acted in an arbitrary or unreasonable manner in either its legislative or executive capacity.

1. The Library Board's Internet Access Policy Is Reasonably Related To Legitimate Educational And Civic Goals.

The legislative discretion exercised by the library board was not arbitrary or irrational and therefore the board has not violated substantive due process by adopting its access policy. "Legislative acts that do not impinge on fundamental rights . . . are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality." (*Kawaoka v. City of Arroyo Grande* (9th Cir.) 17 F.3d 1227, 1234, cert. den. (1994) 513 U.S. 870 [130 L.Ed.2d 125, 115 S.Ct. 193] [internal quotation marks omitted].) When a "plaintiff's claim is not based on a fundamental right, [courts] do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." (*Hoeck v. City of Portland* (9th Cir. 1995) 57 F.3d 781, 786, cert. den. (1996) 516 U.S. 1112 [133 L.Ed.2d 842, 116 S.Ct. 910] [internal quotation marks omitted].)

The Library Board's policy, far from being irrational or arbitrary, reflects a reasonable exercise of discretion in the pursuit of clearly articulated goals. The policy states that

[t]he Board of Trustees supports the idea that all members of the community have free and equal access to the entire range of library resources, regardless of content, approach, format or amount of detail. . . . Access to information . . . helps guarantee an informed citizenry.

(JA at p. 0065.) The policy sets forth the library's mission:

to encourage the development of a lifelong interest in reading and learning by providing materials and services of popular

interest, emphasizing and encouraging reading by children, supplementing the educational needs of the community and furnishing timely, accurate information.

(*Ibid.*) The policy also provides a rationale for the library's mission:

Electronic information resources provide the library with an unprecedented opportunity to fulfill the library's mission and to expand the scope of information available to Livermore citizens. Electronic databases and networks such as the Internet are supplementing and sometimes taking the place of the printed resources traditionally found in libraries. Electronic information research skills are increasingly important to students, workers and ordinary citizens.

(*Ibid.*) To further these goals, the policy provides that "Internet access is available to all users of the Livermore Public Library." (*Ibid.*) Along with this provision of unrestricted Internet access, the policy also emphasizes the responsibility of individual users, encourages parents to supervise their children's use, and offers guidelines for uses that would be considered unacceptable. (JA at pp. 0065-0066.)

Livermore's policy is based on the important goals of education and citizen empowerment, and the policy is well-tailored to achieve those goals. Since the library board had legitimate reasons for adopting the policy, plaintiff is unable to overcome the presumption of the policy's validity.

2. The City's Executive Actions Do Not Shock The Conscience.

As with Livermore's legislative actions, the executive actions plaintiff alleges are not unconstitutionally arbitrary. "[I]n a due process challenge to executive action, the threshold question is whether [government conduct] is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." (*County of Sacramento, supra*, 118 S.Ct. at p. 1717 fn. 8.)

[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. . . . [C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.

(*Id.* at p. 1718.) Plaintiff has not alleged any executive conduct that rises to the conscience-shocking level. There is no allegation of intentionally injurious conduct. Moreover, library officials acted in furtherance of the legitimate governmental objectives set forth by the library board. (See section II.B.1, *supra*.)

Even if library officials knew generally that some material on the Internet would be considered offensive by some users and that children would likely use the Internet, they have not engaged in conduct that “violates the ‘decencies of civilized conduct.’” (See *id.* at p. 1717 [quoting *Rochin v. California* (1952) 342 U.S. 165, 173 [96 L.Ed. 183, 72 S.Ct. 205] [holding police officers not liable under section 1983 for death of motorcycle passenger during pursuit].) “[F]oreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship.” (*Graham v. Independent School District* (10th Cir. 1994) 22 F.3d 991, 994 [holding that public school officials who had knowledge of death threats made by one student against a fellow student were not liable under section 1983 due-process theory when the threatened student was ultimately shot and killed].)

Likewise, even if library officials had failed to warn Internet users of potentially offensive content, there would be no constitutional violation. (See *Collins v. City of Harker Heights, supra*, 503 U.S. at p. 128 [holding that city’s alleged failure to warn employees about known risks of harm was not arbitrary or conscience-shocking].) Plaintiff cannot state a section

1983 claim merely by recasting her preempted state-law tort claims as federal constitutional violations. The Due Process Clause “does not transform every tort committed by a state actor into a constitutional violation.” (*DeShaney, supra*, 489 U.S. at p. 202; accord *Garcia v. Superior Court, supra*, 50 Cal.3d at pp. 738-741 [holding that although children of woman who was killed by convicted murderer on parole may have had a state-law tort claim against the parole officer who supervised the murderer, they had no federal civil rights claim].)

Section 1983 was not designed to give parents a federal civil right to control how public libraries are run or how government entities choose to govern public access to the Internet. Indeed, in *Collins, supra*, the Supreme Court’s denial of the civil rights claim at issue “rest[ed] on the presumption that the administration of government programs is based on a rational decision making process that takes account of competing social, political, and economic forces” and that such policy choices “must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.” (503 U.S. at pp. 128-129.) This court should abide by the same considerations here in affirming the dismissal of Kathleen R.’s claim.

C. Any Harm Brandon P. Suffered Was Not Proximately Caused By The City’s Policies Or Customs.

Municipal liability under section 1983 attaches only “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . .” (*Monell, supra*, 436 U.S. at p. 694 [holding that a municipality cannot be liable for its employees’ actions under section 1983 on a respondeat superior theory].) The “first inquiry in

any case alleging municipal liability under [section] 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.”²⁴ (*City of Canton v. Harris* (1989) 489 U.S. 378, 385 [103 L.Ed.2d 412, 109 S.Ct. 1197].) Plaintiffs must show that the policy was the “moving force [behind] the constitutional violation.” (*Id.* at p. 389 [quoting *Monell, supra*, 436 U.S. at p. 694].) These alternative constructions can be read as requiring proof of proximate cause. (1B Schwartz & Kirklin, Section 1983 Litigation: Claims and Defenses (3d ed. 1997) § 7.12, p. 36.)

The library’s policy of affording Internet access and encouraging its use was not the proximate cause of the harm Brandon allegedly suffered from viewing material transmitted by a third party.²⁵ Plaintiff cannot establish but-for causation, much less proximate causation. The policy expressly states that “[p]arents are expected to monitor and supervise children’s use of the Internet in selecting material that is consistent with personal and family values.” (JA at p. 0065.) Library board members and personnel do not, and cannot, control the content transmitted over the Internet. (See JA at p. 0065 [policy states that the library “has no control over the information accessed”]; *ACLU v. Reno* (E.D. Pa. 1996) 929 F.Supp. 824, 832 [finding that “it would not be technically feasible for a single entity to control all of the information conveyed on the Internet”].)

Even assuming, *arguendo*, that the City knew the precise nature of the millions of possible Internet sites Brandon might visit, which particular images he would choose to access, and the harmful effect viewing those

²⁴ Amici assume, *arguendo*, that plaintiff has alleged facts sufficient to establish a policy or custom.

²⁵ See also the discussion of causation in the danger-created-duty context, *supra*, section II.A.2.

images would have, the City still has not caused the harm simply by offering Internet access as a matter of general policy. The cause of the harm, if any, to Brandon P. is more directly imputable to the third party who transmitted the material over the Internet, or to Brandon's mother, who apparently failed to recognize that he "returned to the library . . . to download sexually explicit images . . . approximately 10 times" (see JA at p. 0003). (Cf. *Bradberry v. Pinellas County* (11th Cir. 1986) 789 F.2d 1513 [examining "yet another attempt to litigate a state law tort claim in federal court under the guise of a [section 1983] suit" in which a mother sued a county after her son drowned at a public beach, and holding that the county's failure to provide adequately trained lifeguards did not violate the Due Process Clause because decedent entered the water voluntarily; "[t]he state did not kill [decedent], the ocean did".])

The Internet is a vast sea of information and images transmitted by literally millions of users. (See generally *ACLU v. Reno, supra*, 929 F.Supp. at pp. 830-832, 836-838, 842-844.) The responsibility for helping children navigate safely through these waters must rest primarily with parents. Kathleen R. cannot allow Brandon P. to visit the library repeatedly and search the Internet unsupervised, then sue the government for failing to prevent him from encountering sexually-related speech. (Cf. *Sargi v. Kent City Board of Education* (6th Cir. 1995) 70 F.3d 907, 910-913 [holding that school board policy or custom did not cause substantive-due-process violation where a child with known medical problems died on a school bus; "parents, not the state, remain the child's primary caretakers".])

CONCLUSION

The Internet is a unique medium of worldwide human communication that is revolutionizing the way people share and receive information. Congress has addressed the issue of Internet service providers' liability on a national level, providing through 47 U.S.C. section 230 immunity for material originating with third parties. Government entities cannot be held liable under state-law claims which, as here, fall within section 230's preemptive scope. Neither can individuals interfere with local government policy regarding access to the Internet by repackaging state tort claims as federal civil rights claims. The Due Process Clause offers protection from egregiously arbitrary exercise of governmental power, not from local democratic policy choices with which individuals disagree. Because plaintiff's state-law claims cannot trump conflicting federal law governing this matter, and her federal claim cannot trump local policymaking discretion, the judgment of dismissal below should be affirmed.

Dated: November 4, 1999

Respectfully submitted,
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