UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTER FOR DEMOCRACY & TECHNOLOGY,
on behalf of itself,

AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA, on behalf
of its members, and

PLANTAGENET, INC., on
behalf of itself and its customers,

Plaintiffs,

v. No. _____

MICHAEL FISHER, Attorney General of the
Commonwealth of Pennsylvania,

Defendant.

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER
AND FOR EXPEDITED DISCOVERY

Plaintiffs Center for Democracy and Technology ("CDT"), the American Civil Liberties Union of Pennsylvania ("ACLU-PA"), and Plantagenet, Inc., hereby offer this Memorandum in support of their motion for a temporary restraining order to enjoin the secret Internet censorship scheme operated by Defendant Fisher, the Pennsylvania Attorney General, and for expedited discovery in this case. By secretly demanding that Internet Service Providers ("ISPs") block access to hundreds of Internet web sites, with no public notice or hearing whatsoever and no opportunity for judicial review, Defendant Fisher's actions constitute a classic unconstitutional prior restraint on speech. Although he asserts that his secret censorship scheme seeks to enforce

a Pennsylvania statute first passed in February 2002, 18 Pa. Stat. Ann. §§ 7621-7630,[1] that law does not sanction or support the Defendant's secret censorship. Furthermore, a significant amount of *wholly innocent* web site content is being blocked today because of Defendant Fisher's secret censorship scheme, and Plaintiffs seek expedited discovery to obtain information from third parties that will establish the magnitude of the problem and Plaintiffs' entitlement to additional injunctive relief.

The Pennsylvania law imposes potential liability on ISPs for child pornography available anywhere on the Internet, even if the ISPs are not hosting the offending content and have no relationship whatsoever with the publishers of the content. The goal of the law – the elimination of child pornography from the Internet – is laudable. However, as set out in Plaintiffs' Complaint in this case, the law violates due process principles and the First Amendment because of its woefully inadequate procedures. Worse yet, as a result of the technical architecture of the Internet, enforcement of the Pennsylvania law will necessarily result in the blocking of wholly innocent and fully lawful web sites, just as Defendant Fisher's secret censorship scheme has.

Plaintiffs' Complaint challenges both the Pennsylvania law itself and the Attorney General's *ultra vires* secret censorship process, which bypasses even the inadequate procedures created by the statute he purports to enforce. This Motion for a Temporary Restraining Order seeks immediate relief only against issuance by the Attorney General of additional prior restraint orders issued to ISPs with no judicial oversight or review and no notice to the web site operator. Plaintiffs also plan to seek preliminary injunctive relief against the statute itself and against the secret orders that the Attorney General has already issued, but first Plaintiffs seek focused and

[1] The law was originally enacted at 18 Pa. Stat. Ann. § 7330, but was re-codified at 18 Pa. Stat. Ann. §§ 7621-7630 in December 2002.

expedited discovery so that they can demonstrate to the Court, as soon as possible, the full breadth of innocent web sites that have been blocked.

I. FACTUAL BACKGROUND

In February 2002, the Pennsylvania legislature enacted a statute that imposed potential liability on ISPs for child pornography available on the Internet, even if the ISPs are not hosting the offending content and have no relationship whatsoever with the publishers of the content. *See* Pa. Stat. Ann. Title 18, §§ 7621-7630. As detailed more fully in Plaintiff's Complaint, that law permits the entry of a court order requiring an ISP to block or disable Pennsylvanians' ability to access specified content alleged to be child pornography. *See* Compl. ¶¶ 52-62. The entire court proceeding can go forward on an *ex parte* basis, with no prior notice to the ISP or the web site owner required, and no post-hearing notice to the web site owner, and the court order is based on a constitutionally insufficient finding.

Although the procedures set out in the Pennsylvania statute are quite limited and constitutionally insufficient, Defendant Fisher – the Pennsylvania Attorney General – decided to bypass even those procedures to implement the law. Instead of obtaining court orders as set out in that law, he devised a system of "informal" orders that he alone issues to ISPs without any judicial or public oversight. In each of the more than 300 "informal" orders he has issued since the spring of 2002, the Attorney General has instructed an ISP to block access to one or more specific sites on the Internet's World Wide Web, designated by the site's "Uniform Resource Locator" (or URL, such as http://www.cdt.org or http://www.attorneygeneral.gov). *See* Plaintiffs' Exh. 1 (containing redacted versions of the orders issued by the Attorney General's Office that were provided in response to a "Right to Know Law" request). In these prior restraint notices, the Attorney General generally informs the ISPs:

> You must remove or disable access to those items identified as child pornography to your subscribers who subscribe to your service from an address located within the Commonwealth of Pennsylvania within five business days of receipt of this notice.
>
> You must ensure that: 1. access to [redacted URL] be denied to your subscribers to your services from an address located within the Commonwealth of Pennsylvania. 2. that the Pennsylvania Attorney General or his designated agent is notified in writing (e-mail, fax) that you have complied with this Informal Notice within five business days of said compliance. Accompanying this compliance notification should be a screen shot of the resource locator demonstrating that access has been disabled.

See id. The Attorney General operates his system of prior restraints with complete secrecy. He issues the orders without any judicial review of his assertion that the web sites targeted in the orders are unlawful, either before or after they are issued. No ISP or web site receives any prior notice before the Attorney General issues these orders, and no ISP or web site is afforded an opportunity to participate in any adversarial proceeding prior to the issuance of an order. The Attorney General provides no notice to the affected web sites even after the issuance of a prior restraint order.

Furthermore, Defendant Fisher has refused to inform the public what Internet content he has blocked. In February 2003, Plaintiff CDT assisted in the submission of a Pennsylvania Right to Know Law[2] request to the Attorney General, seeking the identity of the URLs that he had blocked using the secret prior restraint orders. The Attorney General produced copies of the prior restraint orders but redacted the URLs from those orders. *See* Plaintiffs' Exh. 1. Although Plaintiffs believe that Defendant's refusal to disclose the URLs violates the Right to Know Law, Plaintiffs are not in this action raising that state law issue.

[2] *See* 65 Pa. Stat. Ann. §66.1 *et seq*.

The Attorney General has also maintained his system of secret prior restraint orders through intimidation of ISPs. For example, after one ISP wrote to the Attorney General's Office to suggest that it should use the statutory procedures instead of the secret prior restraint orders, the Attorney General issued a press release accusing the ISP of refusing to block child pornography. *See* Plaintiffs' Exh. 2. Since the issuance of that press release, no ISP has refused to follow any of the secret prior restraint orders.

Finally – and crucially – as a result of the technical architecture of the Internet, the only effective method for most ISPs to block access to URLs has two major side effects: It blocks web sites wholly unrelated to the challenged content but that share the same Internet Protocol ("IP") address with the blocked web site, and the blocking also cannot be confined to Pennsylvania. Typically, many unrelated URLs can share the same IP address, and the only effective way to block a URL is to block the entire IP address. For more detail on the technical reasons for this, *see* Complaint ¶¶ 30-36, 63-83.

Accordingly, the ultimate effect of the blocking orders is to prevent Internet users both inside and outside of Pennsylvania from accessing Internet content that is wholly innocent. Plaintiffs have attempted to obtain information about the innocent web sites that have been blocked both from Defendant Fisher and from ISPs who have received Defendant's censorship orders, but both have declined to provide that information. The ISPs decided not to respond to Plaintiffs' request because they were concerned that if they did, the Attorney General would attack them in the media, just as he did the one ISP that challenged his secret scheme.

II. THIS COURT SHOULD GRANT PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PUT A STOP TO DEFENDANT FISHER'S SECRET CENSORSHIP SCHEME.

Plaintiffs are plainly entitled to a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure to halt the use of the Attorney General's secret and *ultra vires* censorship scheme.

Specifically, this Court must grant Plaintiffs' motion for a temporary restraining order ("TRO") because: (1) there is a reasonable probability that they will succeed on the merits; (2) they will suffer irreparable harm in the absence of relief; (3) there will be little or no harm to the defendant if relief is granted; and (4) the public interest supports a grant of relief. *See, e.g., Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002); *Alessi v. Pennsylvania Dep't of Public Welfare*, 893 F.2d 1444, 1447 (3d Cir. 1990); *Prison Health Servs., Inc. v. Umar*, Civil Action No. 02-2642, 2002 U.S. Dist. LEXIS 12267 (E.D. Pa. May 8, 2002). The standard for a preliminary injunction and a TRO is the same. *Mertz v. Houstoun*, 155 F. Supp. 2d 415, 425 n.12 (E.D. Pa. 2001); *Bieros v. Nicola*, 857 F. Supp. 445, 446-47 (E.D. Pa. 1994). While the degree of probability of success on the merits required to obtain such relief varies among federal courts of appeals, the U.S. Court of Appeals for the Third Circuit requires only a "reasonable likelihood" of success. *See Johnson & Johnson Orthopaedics, Inc. v. Minnesota Mining & Mfg. Co.*, 715 F. Supp. 110, 112 n.1 (D. Del. 1989). Plaintiffs easily meet each of the four requirements for a temporary restraining order.

A. Plaintiffs Have A Very Strong Likelihood Of Success In Challenging The Attorney General's Secret Scheme Of Prior Restraint Orders.

Plaintiffs have a very strong likelihood of success. The secret censorship system of the Attorney General is remarkably similar to the government scheme struck down in the landmark 1963 Supreme Court decision in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); indeed, the

primary difference is that the Attorney General's scheme is more egregious than that in *Bantam Books*.

In *Bantam Books*, a Rhode Island state commission used "informal" notices to advise book distributors that certain books and materials were deemed "objectionable" by the commission. The commission asked for the distributors' "cooperation" in removing the material from their news stands, without opportunity for judicial review, and advised them of the commission's duty to recommend prosecution. The Supreme Court held that this form of informal censorship violated the First and Fourteenth Amendments because "it provide[d] no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter." *Bantam Books*, 372 U.S. at 71. That the government censorship came in the form of an "informal" notification did not affect the First Amendment analysis because courts must "look through forms to the substance" of government conduct. *Id*. at 67. As the Supreme Court explained:

> It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody *the most rigorous procedural safeguards* is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.

Id. at 66 (internal citations omitted) (emphasis added). Accordingly, *Bantam Books* relied on a "heavy presumption against [the] constitutional validity" of the prior restraint of speech at issue there. *Id.* at 70; *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Gascoe, Ltd. v. Newtown Township*, 699 F. Supp. 1092, 1098 (E.D. Pa. 1988).

The Pennsylvania Attorney General censorship system is directly parallel to the "informal" system struck down forty years ago in *Bantam Books*. The Attorney General alone

decides what web sites should be taken down and notifies the ISPs (the "distributors" in the Internet context) to remove them, without any prior notice or opportunity for judicial review. The Attorney General himself calls his system an "informal" one, but his notices implicitly threaten further action if the offending web site is not taken down within five days and if the ISP does not provide proof that it has been taken down. The Attorney General is not "advising the [ISPs] of their legal rights and liabilities," *Bantam Books*, 372 U.S. at 72, which is the type of informal contact that would be permissible; rather, he is *ordering* them to block Internet content – and they are complying, which further demonstrates the coercive nature of those notices. Thus, just as in *Bantam Books*, the Attorney General's form of "informal censorship . . . sufficiently inhibit[s] the circulation of publications to warrant injunctive relief." *Bantam Books*, 372 U.S. at 67 (citations omitted). *See also White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("This court has held that government officials violate [the First Amendment] when their acts 'would chill or silence a person of ordinary firmness from future First Amendment activities.'") (quoting *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)); *Rattner v. Netburn*, 930 F.2d 204, 208-210 (2d Cir. 1991) ("'where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim for violation of First Amendment rights can be stated'") (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)).

That direct parallel to *Bantam Books* is all that is needed to meet the "reasonable likelihood of success" prong of the TRO analysis. But the Attorney General's scheme also does not satisfy the specific procedural requirements laid out in a long line of the Supreme Court's post-*Bantam Books* cases. The Supreme Court held in *Freedman v. Maryland* that to impose a

prior restraint of speech, even on allegedly illegal speech like obscenity or child pornography, the government must institute safeguards that include, *inter alia*, placing the burden of proving that the content in question is unprotected on the censor, and providing for expeditious judicial review. *See Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965); *see also Southeastern Promotions*, 420 U.S. at 560; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990). Not only does the Attorney General's informal notice scheme provide *no* opportunity for judicial review, but also it includes no procedure whatsoever for determining whether the affected web site constitutes unprotected speech – it is left to the sole discretion of the Defendant. Indeed, neither the web site operator nor the public is ever informed that Defendant Fisher has required that a web site be blocked, making it virtually impossible to challenge Defendant Fisher's decision. This not only impermissibly places the burden of proving legality on the speaker, it prevents the speaker from knowing that such a burden has been placed on it in the first place.

In addition, the Attorney General's censorship scheme is in several respects far worse than that struck down by *Bantam Books* – further demonstrating Plaintiffs' strong likelihood of success on that claim. First, the Defendant refuses to reveal what web sites have been blocked. The public must rely solely on the Attorney General's word that the URLs he has ordered be blocked contain illegal materials. But "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *see also Wood v. Georgia*, 370 U.S. 375, 392 (1962) ("[T]he purpose of the First Amendment includes the need . . . to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.") (citation and internal quotation marks omitted). If the public never learns (and can

never learn) what web sites the government is censoring, this core check on the exercise of government power – public review, discussion and criticism – is utterly disabled.[3]

Second, the Attorney General has engaged in aggressive public intimidation of those who challenge his secret censorship scheme. In the one case where an ISP wrote a letter requesting that Defendant Fisher not bypass the procedures established by the statute, the Attorney General's Office issued a press release accusing the ISP of refusing to block child pornography. *See* Plaintiffs' Exh. 2. And because Plaintiff Center for Democracy & Technology has been raising public questions about Defendant Fisher's actions, the Defendant joined in another official's public attack on ISPs for supporting CDT (even though in fact the ISPs have not cooperated with CDT in these efforts). *See* Plaintiffs' Exh. 3. These "other means of coercion, persuasion, and intimidation" further demonstrate that the Attorney General's informal orders violate the First Amendment. *Bantam Books*, 372 U.S. at 67 n.8. Third, due to the technical architecture of the Internet, when ISPs comply with Defendant Fisher's informal censorship orders, they inevitably block some wholly innocent and fully lawful content that even the Attorney General has never claimed should be blocked. *See supra*; Compl. ¶¶ 63-83. Each of these circumstances makes this case an even more egregious violation of the First and Fourteenth

---

[3] Criminal trials are open to the public for these same reasons:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (footnotes omitted). The public's interest in knowing what actions the government is taking in its name is even stronger here, where neither the constraints of the criminal process, nor the judicial process more generally, apply.

Amendments than the government action struck down by *Bantam Books*.

The fact that the Attorney General's goal is to combat child pornography does not alter this analysis. As the Supreme Court made clear in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), traditional First Amendment analysis applies to child pornography statutes because courts must assess their impact on *protected* expression. Child pornography is a significant problem and legislators should be applauded for addressing it. But it is vital that adequate safeguards are in place to ensure that protected speech is not banned, including a judicial determination that a particular web site constitutes child pornography. *See Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 568 (E.D. Va. 1998) ("even unprotected speech cannot be censored . . . absent sufficient standards and adequate procedural safeguards"). The Attorney General's scheme has none of the "rigorous procedural safeguards" required by the Supreme Court and is therefore unconstitutional.

Plaintiffs' claim more than satisfies the Third Circuit's requirement that success be reasonably probable.

B. Plaintiffs Will Suffer Irreparable Harm In The Absence Of Immediate Injunctive Relief.

Plaintiffs also easily meet the second prong of the temporary restraining order test because they will suffer irreparable harm in the absence of relief. Each plaintiff faces significant harms. Plaintiff CDT obtains its Internet access from WorldCom, an ISP that has received both secret prior restraint orders issued by the Attorney General and an order issued under the statute. Thus, even though the operations of CDT are almost entirely outside of the state of Pennsylvania, the ability of CDT and its employees to access lawful content over the Internet is directly harmed by the blocking of lawful content that has resulted from the Attorney General's scheme. CDT also has been subject to negative publicity because it has questioned the

constitutionality of the Pennsylvania statute. *See* Plaintiffs' Exh. 3. Plaintiff ACLU-PA and its Pennsylvania members who use online communications obtain their Internet access from ISPs that have received or may receive either secret prior restraint orders issued by the Attorney General or orders issued under the statute. Thus, the ability of ACLU-PA and its Pennsylvania members to access lawful content over the Internet is directly harmed by the blocking of lawful content resulting from the Attorney General's orders. Plaintiff Plantagenet, Inc., is an ISP providing Internet access to customers in Pennsylvania and fears it will receive a blocking order from the Attorney General. Because of the structure of its operations, Plantagenet has no direct ability to comply with any such order, and would thus be at risk of criminal liability if it receives one.

Generally, "in a First Amendment challenge, a plaintiff who meets the first prong of the test . . . will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *ACLU v. Reno*, 929 F. Supp. 824, 866 (E.D. Pa. 1996) (opinion of Dalzell, J.), *aff'd*, 521 U.S 844 (1997). Indeed, the Supreme Court has explicitly stated that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Attorney General's censorship scheme is precisely the kind of "purposeful unconstitutional government suppression of speech which constitutes irreparable harm" for purposes of a temporary restraining order. *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (citation and internal brackets omitted).

The harms here are particularly serious. First, a necessary byproduct of requiring ISPs to block web sites that they do not host themselves is that wholly innocent and lawful web sites also will be blocked. *See* Compl. ¶¶ 63-83. From a technical perspective, most ISPs cannot simply block a single URL. They have to block an entire "Internet Protocol" address, which often

supports many different and wholly unrelated web sites. Thus, innocent web sites are being blocked as a result of the Attorney General's censorship scheme. That arbitrary prior restraint of wholly innocent content is a First Amendment harm of the highest magnitude.

Second, Defendant Fisher censors web sites without the knowledge of the web site operators or the citizenry, making it impossible for anyone to challenge directly their deprivation of First Amendment rights. In sum, in the absence of early injunctive relief, Plaintiffs, other ISPs, web site operators around the world, and the public both inside and outside of Pennsylvania all face irreparable harm in the form of the deprivation of their First Amendment rights.

C. There Will Be Little Harm To The Defendant If Relief Is Granted.

In the immediate future, granting Plaintiffs' motion for a temporary restraining order will result in no harm to Defendant Fisher or the citizens of Pennsylvania because he will remain free to combat child pornography *directly*, at the source. The Attorney General can: (a) prosecute those responsible for the alleged child pornography, and/or (b) contact ISPs who are *hosting* offending web sites, and the local authorities with jurisdiction over the child pornographers (or, in the case of a web site originating overseas, by asking the U.S. Customs Service to contact foreign authorities). Relying on such traditional criminal procedures results in no First Amendment harms – and has a far greater impact against the serious problem of child pornography than the current scheme.

D. The Public Interest Supports A Grant Of Relief.

Plaintiffs meet the fourth prong of the temporary restraining order test, as well, because the public interest supports the request for immediate relief. There is no public interest whatsoever in the Attorney General's unconstitutional censorship scheme. *Cf. ACLU v. Reno*,

929 F. Supp. at 866 (opinion of Dalzell, J.) ("neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law"). Furthermore, neither the people of Pennsylvania nor the state legislature has approved that scheme.[4] Nor does the public have any interest in the blocking of wholly innocent web sites, which is the inevitable result of the Attorney General's system. Rather, the Pennsylvania citizenry has a strong interest in knowing what censorship is being done in its name, and in an effective and constitutionally appropriate system of combating child pornography. The public's interest in protection from child pornography can be vindicated far more effectively and in a more targeted way if the Attorney General's Office worked with hosting ISPs, other state and local authorities, and the U.S. Customs Service to combat child pornography at its source by taking down individual sites altogether, rather than requiring non-hosting ISPs to block access to those sites for their own subscribers only.

E. Conclusion

This Court should issue a temporary restraining order that prohibits the Attorney General from issuing any further secret "informal notices" to ISPs requiring them to block web sites alleged to contain child pornography. Plaintiffs have demonstrated a very strong likelihood of success that this secret censorship scheme violates the First and Fourteenth Amendments; Plaintiffs will suffer in the absence of such relief irreparable injury to their First Amendment rights; there is little harm to Defendants or the public because far more effective ways of combating child pornography would still be available to the Attorney General; and the public interest would be served by eliminating a secret censorship scheme that results in the blocking of wholly innocent web sites. Without question, the fight against child pornography should be a

[4] Plaintiffs do not, however, challenge the Attorney General's actions on state law grounds.

critical governmental priority. But while the Attorney General has a laudable goal, the system he has set up constitutes a blatant violation of the First Amendment and must be enjoined immediately.

III. THIS COURT SHOULD GRANT PLAINTIFFS' REQUEST FOR EXPEDITED DISCOVERY.

Plaintiffs also seek leave from this Court to begin discovery immediately so that Plaintiffs can demonstrate to the Court, as part of preliminary injunction proceedings, the full extent of the innocent web sites that are being blocked as a result of the Attorney General's orders. Plaintiffs believe that a significant number of innocent web sites – web sites that the Attorney General has never asserted are illegal – have been blocked because of the technical architecture of the Internet. It is crucial that Plaintiffs obtain unredacted copies of the orders identifying the URLs that the Attorney General has ordered be blocked, as well as information from ISPs about innocent sites that have also been blocked, so that it can pursue injunctive relief as soon as possible against this ongoing violation of the First Amendment.[5]

Courts have authorized expedited discovery on good cause shown, notwithstanding the strictures of Rule 26(d) of the Federal Rules of Civil Procedure (that no discovery shall take

[5] In denying the Right to Know request for unredacted copies of the censorship orders, Defendant Fisher asserted that the disclosure of a blocked web site's URL would itself be a violation of Section 6312(c) of 18 Pennsylvania Statutes, which prohibits the distribution of child pornography. Defendant's claim is unsupported. First, Section 6312(c) prohibits only the distribution of "depictions" of minors engaged in a sexual act. Plaintiffs' discovery requests will not seek "depictions" of any kind – instead, the requests will seek only documents created by the Defendant himself. No statute of which Plaintiffs are aware would prohibit the disclosure of government-created documents, or the disclosure of Internet addresses that may (or may not) contain child pornography. Simply stated, the URLs themselves are not illegal, and there are no grounds on which to block the production of government documents that reference the URLs. Moreover, Defendant cannot obstruct discovery on a theory that the documents sought reference content that is alleged to be illegal, when the Defendant has failed to obtain any *judicial* determination that any particular content is illegal. To the extent the court has any concerns on this point, the court could consider entering a confidentiality order restricting the dissemination of the URLs.

place until the parties have conferred pursuant to Rule 26(f)). Indeed, the Third Circuit has emphasized that "[u]nder the Federal Rules of Civil Procedure and our jurisprudence, district courts have broad discretion to manage discovery." *Sempier v. Johnson & Higgins*, 45 F.3d 724, 734 (3d Cir. 1995). Specifically, in the context of expedited discovery sought for purposes of a preliminary injunction motion, courts have inquired as to the "reasonableness of the request in light of all the surrounding circumstances." *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 624 (N.D. Ill. 2000); *see also Educational Comm'n for Foreign Sch. Med. Graduates v. Repik*, Civil Action No. 99-1381, 1999 U.S. Dist. Lexis 7185, at *7 (E.D. Pa. May 14, 1999) ("Expedited discovery in connection with a preliminary injunction motion is appropriate."). In *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001), in ruling on a motion to permit expedited discovery in advance of a Rule 26(f) scheduling conference, the court stated that "[a]bsent credible authority to the contrary, the Court adopts a good cause standard." *See also Pod-Ners, LLC v. Northern Feed & Bean*, 204 F.R.D. 675, 676 (D. Colo. 2002).[6]

The reasons furnished by Plaintiffs in support of their request pass any of the legal thresholds used by district courts in assessing motions to expedite discovery. Here, there is good cause for discovery to begin immediately. Plaintiffs believe that, at this moment, there are a significant number of innocent web sites that have been blocked as a result of Defendant Fisher's censorship scheme, and that enforcement of the statute as enacted also would necessarily result

[6] Although older cases followed *Notaro v. Koch*, 95 F.R.D. 403 (S.D.N.Y. 1982), which applied a four-part test largely tracking the test necessary for entry of a preliminary injunction, these more recent cases have eschewed *Notaro*. *See, e.g., Philadelphia Newspapers, Inc. v. Gannett Satellite Information Network, Inc.*, Civil Action No. 98-CV-2782, 1998 U.S. Dist. LEXIS 10511, at *5 n.1 (E.D. Pa. July 15, 1998). Nonetheless, Plaintiffs easily meet the *Notaro* standard as well, as demonstrated in the next paragraph.

in the blocking of innocent sites. Given that this core "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373, it is crucial that Plaintiffs be able to identify those web sites and demonstrate to this Court in full detail the harmful effect of the Defendant's blocking orders and the Pennsylvania law.

Plaintiffs' request also works no prejudice or unfairness to the Defendant because Plaintiffs' expedited discovery requests are not aimed at him. Rather, Plaintiffs seek leave to request specific information only from third parties, as discussed below. Furthermore, because of the Right to Know request made by Plaintiff CDT and the report that Plaintiff CDT issued earlier this year outlining its constitutional concerns about the Pennsylvania law, the Defendant is well aware of the issues in this case. *See* Plaintiffs' Exh. 4 (CDT Report). As for the ISPs who will receive Plaintiffs' discovery requests, Plaintiffs have already approached those ISPs, but they declined to provide Plaintiffs with copies of the secret orders or other relevant information because they did not wish to subject themselves to a public attack from the Attorney General like another ISP endured when it suggested that the Attorney General use the statutory procedures instead of his secret notice process. Accordingly, all relevant third parties that would receive discovery requests from Plaintiffs under an expedited schedule are apprised of the nature of this action and the reason Plaintiffs are seeking the information in question.

Finally, Plaintiffs' discovery request is narrowly tailored to obtain only the information it needs to pursue preliminary injunctive relief against the statute and against the orders already issued by the Attorney General. Plaintiffs respectfully request that they be permitted as soon as possible: (1) to serve subpoenas on the leading ISPs that have received blocking orders from Defendant Fisher requesting unredacted copies of those orders; and (2) to serve notices of Rule 30(b)(6) depositions on those ISPs to obtain information about the technical manner in which the

ISPs complied with the blocking orders and about the innocent web sites that they have blocked as a result of attempting to comply with the blocking orders. Plaintiffs may seek further discovery in the course of this litigation, but Plaintiffs believe that those two focused requests, if served immediately, would allow it to seek further preliminary injunctive relief against a scheme that is, today, in violation of the First Amendment.

IV. CONCLUSION

This Court should grant Plaintiffs' request for a temporary restraining order and should allow focused discovery to begin immediately.

Respectfully Submitted,

_____
John B. Morris, Jr., Esq.
Lara M. Flint, Esq.
Center for Democracy & Technology
1634 I Street, NW, Suite 1100
Washington, D.C. 20006
(202) 637-9800

_____
Stefan Presser, Esq.
Bar No. 43067
Legal Director
American Civil Liberties Union
of Pennsylvania
125 South Ninth Street
Suite 701
Philadelphia, PA 19107
(215) 592-1513 ext. 116

Dated: September 9, 2003