NO. 82200-0

SUPREME COURT OF THE STATE OF WASHINGTON

SARAH BRADBURN, PEARL CHERRINGTON, CHARLES HEINLEN and the SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

NORTH CENTRAL REGIONAL LIBRARY DISTRICT,

Defendant.

On Certification from the United States District Court
for the Eastern District of Washington
No. CV-06-327-EFS

The Honorable Edward F. Shea

CORRECTED PLAINTIFFS' OPENING BRIEF

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INTRODUCTION

Plaintiffs are adult library patrons and an online publisher who wish to engage in constitutionally-protected communication over the Internet. Defendant, the North Central Regional Library District (NCRL), filters access to all Web sites it deems unsuitable for children and refuses to disable the filter at the request of adults.

NCRL's policy prevents Plaintiffs and other adult residents of a largely rural five-county area who rely on the public library for Internet access from researching academic assignments, locating businesses and organizations, and simply engaging in study or leisure reading on constitutionally-protected subjects. NCRL's filter wrongly identifies many sites as "harmful to minors," and thus prevented adults from viewing the MySpace pages of presidential candidates, the Seattle Women's Jazz Orchestra website, and a wide range of other sites offering constitutionally-protected speech. The policy has also prevented the Plaintiff publisher from communicating with its audience in NCRL's service area.

Washingtonians have the right to "freely speak, write and publish on all subjects." Const. art. I, § 5. This guarantee "assure[s] the public the right to receive information in an open society." *Fritz v. Gorton*, 83 Wn.2d 275, 297, 517 P.2d 911 (1974). "Freedom of speech without the

corollary—freedom to receive—would seriously discount the intended purpose and effect" of free speech protections. *Id.* While NCRL's policy also violates the federal First Amendment, "article I, section 5 provides greater protection of speech than the first and fourteenth amendments to the United States Constitution . . ." *O'Day v. King County*, 109 Wn.2d 796, 802, 749 P.2d 142 (1988). This Court should uphold Washington's "preferred right" of free speech, *State v. Coe*, 101 Wn.2d 364, 375, 679 P.2d 353 (1984), by declaring NCRL's censorship a violation of the state constitution.

NCRL's policy of full-time Internet filtering for adults is unconstitutional for at least two reasons. *First*, it is overbroad because it blocks vast swaths of constitutionally-protected information. Indeed, NCRL's policy is so overbroad that is rises to the level of a prior restraint. *Second*, it is content-based, but NCRL has not provided a compelling or significant reason for its censorship. NCRL's policy is unable to withstand even rational-basis scrutiny because NCRL has no reasonable justification for denying its adult library patrons access to the substantial amount of information it blocks. This Court should declare NCRL's policy unconstitutional under Const. art. I, § 5, and reaffirm the right of Washingtonians to speak, write, publish and read freely on all subjects.

STATEMENT OF THE ISSUE

Whether a public library violates Article I, Section 5 of the Washington State Constitution by refusing an adult library patron's request to disable an Internet filter that blocks constitutionally-protected speech.

JURISDICTION AND STANDARD OF REVIEW

"This court may accept certified questions of unsettled state law from other courts. The certified question presents only questions of law. Review is de novo." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003). The Government "bears the burden of justifying a restriction on speech." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154 (1997).

STATEMENT OF CASE

Charles Heinlen wanted to view websites about firearms and dating, so he went to an NCRL library to use its internet connection. (CP 96 at 3-4.) He discovered that he could not view the information he wanted on these subjects because NCRL's filter blocked his access. (*Id.*) Later, Mr. Heinlen sought access to websites about fine art, but NCRL's filter prevented him from viewing those sites as well, along with many others. (*Id.* at 4.) Mr. Heinlen has only sporadic Internet access outside the library. (CP 41 at 3, ¶ 10.)

Sarah Bradburn needed information about youth tobacco usage for an academic assignment, but her access to this information was blocked, she believes, by NCRL's filter. (CP 96 at 2; CP 41 at 2-3, ¶ 5.) Because she has no internet access at home, (CP 41 at 2, ¶ 3), she had to travel to Spokane and use that library's computers to gain access to the constitutionally-protected information she sought. (*Id.* at 2-3, ¶ 5).

Pearl Cherrington does not have internet access at home. (CP 41 at 3, ¶ 6). Ms. Cherrington wanted to research health and art topics on NCRL's computers, but NCRL's filters prevented her from doing this research. (CP 96 at 3.) Ms. Cherrington also sought access to the Web site YouTube, but NCRL's filters prevented her from accessing this site. (*Id.*)

Mr. Heinlen, Ms. Bradburn, and Ms. Cherrington all wish to have unfiltered Internet access for lawful purposes at their local libraries. (CP 96 at 2-6.)

NCRL's Internet filter blocked access to *www.womenandguns.com* ("The World's First Firearms Publication For Women"), one of the websites maintained by Plaintiff Second Amendment Foundation, a non-profit organization focusing on the constitutional right to bear arms. (CP 96 at 5.)

NCRL is a publicly-funded inter-county rural library district operating 28 branch libraries in Chelan, Douglas, Ferry, Grant and Okanogan Counties. (CP 96 at 6.) As part of its mission to promote reading and lifelong learning, it provides public Internet access at all its library branches. (*Id.* at 6-7.) The Internet allows libraries to expand dramatically the amount of information they can supply to their patrons. (CP 41 at 7, ¶ 36.) A recent study found that more than 75 percent of rural Americans, like Plaintiffs Heinlen, Bradburn, and Cherrington, lack Internet access at home. Pew Internet and American Life Project, Rural Broadband Internet Use (2006), http://www.pewinternet.org/pdfs/PIP_Rural_Broadband.pdf.

Public Internet access at all NCRL branches is filtered at all times, and NCRL will not disable the Internet filter for any reason, even for adult library patrons' bona fide research projects or other lawful purposes. (CP 96 at 10.) There is no technological impediment to disabling NCRL's Internet filter at the request of an adult. (CP 41 at 15, ¶ 80.)

If the filter denies access to a website or page, the computer user receives a message to that effect. (CP 96 at 11.) If access to an embedded image is denied, the user receives no message; instead, a blank image is substituted for the blocked image. (*Id.*) According to NCRL's expert,

Paul Resnick, a computer user denied access to an embedded image "may not even realize that some things have been blocked." (CP 41 at 15, ¶ 79.)

When NCRL's filter blocks access to a particular website, access to the *entire* website is denied. (CP 41 at 18, ¶ 97.) Thus, when NCRL blocks sites like MySpace, NCRL's patrons are denied access to millions of individual web pages.

Although NCRL's policy governing content to be blocked has not changed, the content that NCRL blocks has varied substantially over time. (CP 41 at 15-16, ¶¶ 83-87.) Categories of websites that NCRL used to block but was not blocking as of February 4, 2008 (when Plaintiffs moved for summary judgment) included Drug Abuse, Illegal or Unethical, Web Translation, Personal Relationships, and Plagiarism. (*Id.*)

NCRL has also set its filter to block access to an ever-shifting list of specific websites, including YouTube. (CP 96 at 3, 12; CP 41 at 17-18, ¶¶ 90-96.) Specific sites NCRL blocked as of February 4, 2008 included runescape.com (an online adventure game), easyriders.com (an online motorcycling magazine), various image search engines, and craigslist.org/cgi-bin/personals.cgi (a personals site). (CP 96 at 12 n.2; CP 41 at 17, ¶ 91.)

At other times, NCRL has blocked and unblocked MySpace and Craigslist. (CP 96 at 13 n.2; CP 71 at 15, ¶ 57.) Millions of people have

profiles on MySpace—including every 2008 presidential candidate. (CP 41 at 18, ¶ 93.) The terms of use for MySpace do not allow the posting of obscene material on the site. (CP 41 at 18, ¶ 94.) Although users of NCRL's computers could access both MySpace and Craigslist (except the personals section) as of February 4, 2008, Library Director Dean Marney testified that NCRL could block MySpace again in the future. (CP 41 at 18, ¶ 95.)

NCRL has adopted a policy of blocking access to all online material—even for adults—that it considers inappropriate for children. (CP 41 at 10, ¶¶ 51-52; *see also id.*, Exs. CC, DD (explaining that NCRL blocked access to MySpace and Craigslist on ground that some Web pages on those sites contained images determined by NCRL to be "harmful to minors."); *id.*, Ex. EE (explaining that NCRL currently blocks access to image search sites such as Google Image Search and Yahoo! Image Search because those sites allow access to images that NCRL believes could be "harmful to minors".))

NCRL concedes that its filter overblocks (that is, blocks sites not fitting the category definitions established by FortiGuard, the company that provides NCRL's filter). (Def.'s. Br. at 15.) Most significantly, the filter blocks access to a broad array of content that NCRL does not intend for it to block. (CP 96 at 14.)

Plaintiffs' expert Bennett Haselton tested the filter's accuracy. (CP 96 at 14-15.) Mr. Haselton started with 100,000 randomly-selected ".com" domains and 100,000 randomly-selected ".org" domains. (*Id.* at 15.) Of the .com domains, Mr. Haselton determined that the filter blocked 536 Web pages as Pornography or Adult Materials, of which 64 were not pornographic, for an error rate of 11.9 percent. (*Id.*) Of the .org domains, the filter blocked 207 Web pages as Pornography or Adult Materials, of which 49 were not pornographic, for an error rate of 23.6 percent. (*Id.*)

Examples of non-pornographic .com sites that Mr. Haselton found to have been blocked erroneously by the filter included:

- *www.acceptpregnancy.org* (website of organization encouraging pregnant women to carry to term by creating "a supportive environment for women in crisis situations to be introduced to the love of Christ");
- *www.markrudd.com* (website of former Weather Underground member Mark Rudd);
- *http://www.renaissancevoices.com* (website of chamber choir specializing in Renaissance music);
- *www.alcohol-abuse.org* (website of organization dedicated to "spear-heading a movement which helps those affected by alcoholism, in order to reverse the addictive process");
- *www.kindnessusa.org* (website of organization encouraging individuals to commit "random acts of kindness");
- *www.faithchurchofdavis.org*, (website of Faith Church of Davis, Illinois); and

- *www.swojo.org* (website of Seattle Women's Jazz Orchestra).

(CP 41 at 19-20, ¶¶ 106, 109.)

NCRL's expert, Paul Resnick, conducted his own study of the filter's overblocking rates, concluding that approximately 5-10 percent of Web *pages* (Mr. Haselton tested web*sites*) blocked by the filter are blocked in error. (CP 41 at 20, ¶ 111.) Dr. Resnick also found that the filter erroneously blocks access to web pages or portions of web pages over 40,000 times a year. (CP 57 at 17-19, ¶ 35; CP 96 at 15.)

NCRL allows patrons only to request that an individual blocked website or web page be unblocked. (CP 96 at 13.) If the request is approved, then access to the site is allowed continuously on all library computers in all branches. (*Id.*)

NCRL will not allow access to sites that it considers to be "harmful to minors," even if such sites contain speech that is entirely appropriate for adults. (CP 41 at 10, ¶¶ 51-53.) For example, NCRL will not unblock the Craigslist personals site because some pages on those sites contain images determined by NCRL to be "harmful to minors." (CP 41 at 10, ¶ 52.)

Individuals are reluctant to identify themselves and what they like to read to library employees. (CP 41 at 9, ¶ 45.) It takes hours, and often days, for NCRL to resolve requests by library patrons to access particular

websites. (CP 41 at 9, ¶ 49.) Between October 1, 2007 and February 20, 2008, NCRL received at least 90 automated requests to unblock access to websites. (CP 96 at 13.) Of those, it responded within less than an hour to only eight, on the same day to 19, on the next day to 29, within three days to another 20, and after more than three days to 5. (*Id.* at 13-14.) The record does not show whether NCRL responded to the remaining 11 requests. (*Id.* at 14.)

Alternatives to filtering include privacy screens, monitor hoods, recessed desks, and reconfiguring the locations or directions of computer equipment to make the screens or printouts less visible to passers-by. (CP 41 at 21, ¶ 120.) "Tap-and-tell" policies permit librarians to correct those rare computer users who actually abuse the right of free speech on library grounds. (CP 41 at 21, ¶ 120.)

In conjunction with all, some or none of the foregoing measures, many libraries have chosen to forego filters entirely, or to institute a disabling policy similar to the relief sought by Plaintiffs. (CP 41 at 21, ¶ 121.)

The Fairbanks North Star Borough Library in Fairbanks, Alaska, has adopted a policy identical to the one Plaintiffs seek, and has configured its computer monitors to maximize privacy. (CP 41 at 21-22, ¶¶ 121-122.)

The Stark County (Ohio) District Library filters Web content by default, but adult patrons may elect to bypass the filter upon logging on. (CP 41 at 22, ¶ 124.) Patrons are precluded from viewing images that are obscene, illegal or harmful to minors, and can be asked to stop if they are doing so. (CP 41 at 22, ¶ 125.)

At the Jefferson County Library District in Madras, Oregon, Internet access is never filtered. (CP 41 at 22, ¶ 127.) The library takes no special precautions with respect to the privacy of library patrons. (*Id.* at 22, ¶ 128.) Library patrons who are viewing inappropriate material online can be asked to cease their activities or leave the premises. (*Id.* at 22, ¶ 129.)

The foregoing library systems have not had problems with patrons viewing obscene or harmful-to-minors material online. (*Id.* at 22-23, ¶¶ 123, 126, 130-31.)

NCRL has rejected these alternative measures. (CP 96 at 15-16.) NCRL installed privacy screens on terminals in its Wenatchee branch in 1999, but removed them shortly thereafter. (*Id.*) Since then, NCRL has not installed privacy screens on any of its computers, or investigated the possibility of doing so. (CP 41 at 20, ¶ 114.) NCRL decided not to invest in recessed desks (*Id.* at ¶ 115; *see also* CP 71 at 19, ¶ 71); not to substitute a "tap-and-tell" policy for its current filtering policy (CP 41 at

21, ¶ 116; CP 71 at 19, ¶ 72); and not to hire security guards (CP 41 at 21, ¶ 118; CP 71 at 19, ¶ 72.) NCRL has not considered any other alternatives to full-time filtering. (CP 41 at 21, ¶ 119; CP 71 at 19, ¶ 73.)

NCRL accurately summarizes the procedural posture of this case, with one exception. NCRL fails to note that the District Court held as a matter of law that Plaintiffs Pearl Cherrington, Charles Heinlen and The Second Amendment Foundation have standing to assert facial and as-applied challenges to the policy, and Plaintiff Sarah Bradburn has standing to assert a facial challenge. (CP 96 at 22-24.)

ARGUMENT

This case involves two information sources that enjoy special protection in free speech jurisprudence: public libraries and the Internet. Both are inhospitable venues for government actions designed to restrict access to expression.

Public libraries are vital to a self-governing democracy that relies on a well-informed citizenry. To that end, the library is a "mighty resource in the free marketplace of ideas. It is specially dedicated to broad dissemination of ideas." *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582-83 (6th Cir. 1976). "[P]ublic libraries are places of freewheeling and independent inquiry." *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783, 795 (E.D. Va.

1998) (*Loudoun I*). While public librarians have latitude to exercise their best professional judgment in selecting a library collection, removal of material from a library for censorious purposes is constitutionally suspect. *See Loudon I*, 2 F. Supp. 2d at 793-94; *Bd. of Educ. v. Pico*, 457 U.S. 853, 872, 879, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (plurality decision).

Perhaps because the Internet is "'the most participatory form of mass speech yet developed,'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 863, 117 S. Ct. 2329, 138 L. Ed. 2d. 874 (1997) (internal citation omitted), it is the declared policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Further, the "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." 47 U.S.C. § 230(a)(3). As a result, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 870 (invalidating an Internet censorship statute because, in the name of protecting children, it "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 874).

Both libraries and the Internet share an important feature: they facilitate expression at relatively low cost, and hence are available on an equal basis to the rich and the poor. The constitution provides especially strong protection to modes of communication that are accessible to all. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 146, 63 S. Ct. 862, 87 L. Ed. 1313 (1943) (finding that door-to-door distribution of literature is "essential to the poorly financed causes of little people"); *City of Ladue v. Gilleo*, 512 U.S. 43, 57, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (finding that residential signs are especially important for "persons of modest means").

Although it has already paid for Internet access, NCRL deliberately blocks access to ideas that would otherwise be available to library patrons, solely because of a preference that patrons not be exposed to them. By preventing adults from accessing a substantial amount of constitutionally-protected Internet speech due to its content, NCRL's filtering policy dramatically limits opportunities for education and discourse in the precise locations where those values should be most carefully protected.

I. NCRL'S FILTERING POLICY IS OVERBROAD AND AN IMPERMISSIBLE CONTENT-BASED RESTRICTION ON SPEECH.

NCRL's policy violates two well-established free speech doctrines. The policy is *overbroad* because it reduces adults to reading only what is fit for children, and because it blocks a substantial amount of protected expression that is harmful to no one. Indeed, under this Court's precedent, the policy is so overbroad that it rises to the level of a prior restraint. The policy is also unconstitutional as a *content-based* system of censorship that is not justified by any governmental interest and is not narrowly-tailored to the interests asserted.

A. Const. Art. I, § 5 Is More Protective Of Speech Than The First Amendment.

"[T]he concept of free speech is interpreted more broadly under the state constitution than under the federal constitution." *Ino Ino, Inc.*, 132 at 116 (*quoting State v. Reece*, 110 Wn.2d 766, 778, 757 P.2d 947 (1988); *see also O'Day v. King County*, 109 Wn.2d 796, 802, 749 P.2d 142 (1988) (same); *Collier v. City of Tacoma*, 121 Wn.2d 737, 747-48, 854 P.2d 1046 (1993) (same). In particular, the "Washington Constitution is less tolerant than the First Amendment of overly broad restrictions on speech . . ." *O'Day*, 109 Wn.2d at 804. *Accord Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 493-94, 513, 166 P.3d.

1174 (2007); *Ino Ino, Inc.*, 132 Wn.2d at 117; *Soundgarden v Eikenberry*, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994).

Washington's greater protection against overbreadth is so well established that *Gunwall* analysis is no longer necessary. *Voters Educ. Comm.*, 161 Wn.2d at 494 n.16. Plaintiffs nonetheless provide one in the spirit of Const. art. I, § 32, which urges "frequent recurrence to fundamental principles" as a means to achieve "the security of individual right and the perpetuity of free government."

Each of the six factors from *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986) weighs in favor of finding that, in the context of Internet filtering by public libraries, the Washington State Constitution "should be considered as extending broader rights to its citizens than does the United States Constitution." *Id.* at 61.

This Court has frequently held that the first two *Gunwall* factors—the text of the state constitution and textual differences with the federal constitution—favor a broad reading of free speech rights. For example, this Court has concluded that the "broad language of Const. art. I, § 5 justifies a more protective standard for evaluating governmental restrictions on political speech." *Ino Ino*, 132 Wn.2d at 116-7.

The framers of the state constitution rejected the phrasing of the First Amendment, choosing instead more specific and forceful language.

The Washington constitutional convention "said it as clearly as they possibly could—the right to free speech and press in the State of Washington is a privilege guaranteed to all, and so long as it is not abused is absolute." *State v. Rinaldo*, 36 Wn.App. 86, 93-94, 673 P.2d 614 (1983).

Washington's constitutional history and preexisting state law—*Gunwall* factors three and four—also favor an expansive interpretation of Const art. I, § 5. As noted above, this Court has issued several decisions interpreting Const art. I, § 5 more broadly than the First Amendment. *See, e.g., Ino Ino*, 132 Wn.2d at 116-17; *Reece*, 110 Wn.2d at 778; *O'Day*, 109 Wn.2d at 802.

Even when applying the First Amendment, Washington courts have historically been solicitous of individual speech rights. *See, e.g., Washington ex rel. Bolling v. Superior Court for Clallam County*, 16 Wn.2d 373, 133 P.2d 803 (1943) (recognizing right of school children to refrain from pledge of allegiance before *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

The fifth *Gunwall* factor—the structural differences between the state and federal constitutions—always favors greater protections under the Washington constitution. The purpose of Washington's government is "to protect and maintain individual rights," Const art. I, § 1, and the lack

of a corresponding federal provision highlights Washington's vigilant protection of individual rights. Section 32's emphasis on the sanctity of individual rights provides an "interpretive mechanism" securing a broad recognition of individual liberties. *Seeley v. State*, 132 Wn.2d 776, 811-12, 940 P.2d 604 (1997).

Because this case presents matters of particular state interest or local concern, the final *Gunwall* factor also weighs in favor of finding greater protections. Plaintiffs note two matters of special interest that the Court should consider:

First, as the legislature has recognized (*see, e.g.*, RCW 43.105.350. 2008 c. 262, § 3(1)) (finding that "[c]ontinued progress in the deployment and adoption of high-speed internet services . . . is vital to ensuring Washington remains competitive and continues to create business and job growth"), Washington's economy depends on the state remaining at the forefront of the information age, a position that requires the free flow of information between adults. Washington can hardly expect to attract the founders of the next Amazon, have corporations like Google or Microsoft house their Internet server warehouses in our state, or incubate the next wave of information technology innovations if local governments in Washington censor adult access to the Internet.

Second, federal courts' guidance here is inadequate. A fragmented, plurality opinion by the U.S. Supreme Court has made it difficult to discern fundamental principles, much less clear rules governing the ability of public libraries to filter Internet access. Plaintiffs are confident that *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (*ALA*) supports them under the First Amendment, but the Supreme Court's failure to provide clear guidance puts a great burden on lower courts and government officials trying to determine the scope of the protections afforded. By clarifying Washington law, this Court can provide the guidance local governments and individual Washingtonians need to navigate the twenty-first century world of information successfully. This Court has a duty to "furnish a rational basis for counsel to predict the future course of state decisional law." *O'Day*, 109 Wn.2d at 802 (internal citation omitted). NCRL has tried to turn murky guidance from the U.S. Supreme Court into a right to censor. This Court should make clear that censorship is wrong under the Washington State Constitution.

All the *Gunwall* factors weigh in favor of construing Const. art. I, § 5 more broadly than the First Amendment on the facts of this case. For the reasons below, NCRL's policy of denying access to constitutionally-protected speech violates the Washington State Constitution.

B. NCRL's Internet Filtering Policy Is An Overbroad Restriction On Adult Speech.

In cases involving overbreadth or prior restraint, Const. art. I, § 5 provides greater protection than the First Amendment. *O'Day*, 109 Wn.2d at 803-04 (citations and internal punctuation omitted). *Accord Voters Educ. Comm.*, 161 Wn.2d at 494-94, 513; *Ino Ino*, 132 Wn.2d at 116-17; *Soundgarden*, 123 Wn.2d at 764. *See also In re Marriage of Suggs*, 152 Wn.2d 74, 93 P.3d 161 (2004) (finding overly broad sweep of injunction contributes to its invalidation as a prior restraint).

NCRL's filtering policy blocks a substantial amount of protected speech. The restriction on speech here arises from two main sources. *First*, NCRL prevents adults from viewing any Internet material that the library does not consider suitable for children. *Second*, NCRL's configuration and operation of the filter inevitably results in denial of access to tens of thousands of websites that enjoy constitutional protection. Both sources of overbreadth can easily be corrected by disabling the filter upon the request of an adult.

1. NCRL Limits Adults To Viewing Only What It Considers Fit For Children.

The government may not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957). NCRL's policy is plainly

unconstitutional because under it, no person, no matter how mature or responsible, can access online material that NCRL decides is inappropriate for a child.

In *Butler*, the Supreme Court overturned a conviction under a Michigan law criminalizing the distribution of literature that could have "a potentially deleterious influence upon youth." 352 U.S. at 382-83. The Supreme Court held that the government could not "quarantine the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." *Id.*[1]

Washington courts have long enforced the *Butler* principle. When Washington enacted a statute that forbade the sale of comic books because they contributed to juvenile delinquency, this Court followed *Butler*,

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[1] Since *Butler*, the Supreme Court has consistently struck down laws that reduce adults to viewing only that which is fit for children, even where the government has a legitimate or even compelling interest in protecting children. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563, 121 S. Ct. 2404, 150 L. Ed. 2d. 532 (2001) (finding government has interest in reducing underage smoking, but holding government may not place excessive restrictions on outdoor tobacco advertising near schools); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814, 120 S. Ct. 1878, 146 L. Ed. 2d. 865, (2000) (finding government has interest in shielding children from "unwanted, indecent speech that comes into the home," but holding government may not require scrambled broadcast signals); *Reno*, 521 U.S. at 874 (finding government has interest in "protecting children from harmful materials," but holding government may not criminalize placement of "indecent" materials on the Internet); *Sable Communications of California v. FCC*, 492 U.S. 115, 131 109 S. Ct. 2829, 106 L. Ed. 2d. 93 (1989) (finding government has interest in "protecting the physical and psychological well-being of minors," but holding government may not ban indecent telephone messages); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 95 S. Ct. 2268, 45 L. Ed. 2d. 125 (1975) (finding government has "undoubted police power to protect children," but holding government may not ban all nudity from drive-in movie theaters).

striking down the statute in part because it limited adults' access to protected speech. *Adams v. Hinkle*, 51 Wn.2d 763, 783, 322 P.2d 844 (1958). More recently, the "Erotic Sound Recordings" statute at issue in *Soundgarden* forbade, on pain of contempt, the sale to minors of recorded music deemed "harmful to minors." 123 Wn.2d at 757. Even when sold to adults, such recordings needed to be marked "adults only." *Id.* at 766. The statute had a severe chilling effect: music store owners cancelled orders from distributors and refrained from selling many recordings to minors even if they had not been deemed erotic, and musicians feared they would need to curtail their protected speech to ensure that their works would be sold. *Id.* Employing less-protective federal analysis, this Court found the statute unconstitutional. *Id.*

Bering v. SHARE, 106 Wn.2d 212, 721 P.2d 918 (1986), is not to the contrary. That case allowed an injunction against a group of demonstrators whom the trial court found to have engaged in "aggressive, disorderly, and coercive" actions, which "gave rise to a clear and present danger to patients" seeking services at the clinic. *Id.* at 219. Part of the injunction prevented the protesters from shouting words that might cause psychological harm to children when children were present, but the Court insisted that the demonstrators be allowed to say what they want at other times. *Id.* at 242. The Court further allowed, at all times, the display of

visual information on signs or leaflets, because children can avert their eyes even if they cannot block their ears. *Id.* at 241. Here, the requested relief would allow adults to read visual material privately on a screen, and not expose children to anything. And the defendants in *Bering* had been found at trial to have previously abused the right of free speech, while, in contrast, Plaintiffs here seek to engage in lawful speech. *See* Const. art. I, § 5 (Every person may freely speak . . . *being responsible for the abuse of that right*" (emphasis added).

Loudoun is the only reported decision to consider the constitutionality of a library's Internet filtering policy similar to the one here: that is, one that did not permit unfiltered access for adults. The *Loudoun* court found overbreadth because the library reduced adults to reading only what was fit for children. *Loudoun I,* 2 F. Supp. 2d 783 (denying Library's motion for summary judgment); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998) (*Loudoun II*) (granting plaintiffs' motion for summary judgment). Citing to much of the above-referenced case law, Judge Brinkema, herself a former reference librarian,[2] held that the library's policy was "overinclusive because, on its face, it limits the access

of all patrons, adult and juvenile, to material deemed fit for juveniles." *Loudoun II*, 24 F. Supp. 2d at 567.

This Court should follow suit. NCRL half-heartedly attempts to distinguish *Loudoun I* and *II* in a footnote, suggesting that the case has been abrogated by *ALA*. (Def.'s Br. at 34-35, n.12) *Loudoun* is still good law, however, because the *ALA* court assumed the very thing that is missing here: that adults would be given unfiltered access to the Internet upon request. *See also* § D(1), below (discussing *ALA*).

2. NCRL's Filtering Blocks A Substantial Amount Of Protected Speech.

NCRL blocks tens of thousands of constitutionally-protected websites. This overbreadth problem arises in three major ways: filtering errors; categorization that fails to track constitutional requirements; and NCRL's policy of blocking entire websites when a single page is deemed "harmful to minors."

- *NCRL's Filter Makes Mistakes.*

NCRL concedes that its filter incorrectly lumps many inoffensive websites into its prohibited categories, a problem known as "overblocking." (Def.'s Br. at 27-28.) Overblocking means that NCRL prevents access to material that no one—not even NCRL's librarians or

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[2] Richard J. Peltz, Use the Filter You Were Born With, 77 Wash. L. Rev. 397, 450

administrators—believes is improper. By analogy, NCRL is not simply tearing out disfavored pages from the *Encyclopedia Britannica*, but it is also randomly tearing out a great number of others. *See Loudoun I*, 2 F.Supp.2d at 793-96.

Although there is some variation in their research methods, both party's experts concluded that at any given time, NCRL's filter erroneously labels an enormous amount of information as Pornography or Adult Materials. (CP 41 at 19-20.) Plaintiffs' expert, looking at web*sites*, determined that the filter has an error rate between 11 and 23.6 percent. (CP 96 at 15.) NCRL's expert, after conducting his own study, concluded that the filter erroneously blocks approximately 5-10 percent of web *pages*. (CP 41 at 20, ¶ 111.)

By its own expert's methodology, NCRL wrongly blocks websites or portions of web pages over 40,000 times a year. To support its claim that overblocking is "not substantial," NCRL relies chiefly on Dr. Resnick's conclusion that during the week of August 23-29, 2007, NCRL patrons made requests to see only 20 websites that were blocked in error. (Def.'s Br. at 27-28.) But even if Dr. Resnick's methods were reliable and accurate (and they are not, *see* CP 53 at 10-11; CP 57 at 16-19), 20

(2002).

websites per week would result in approximately 1,040 instances of overblocking per year. Dr. Resnick's concedes that while 20 entire websites (top-level domain names) were wrongly blocked, an even larger number of individual web pages had graphics or images wrongly blocked, including 24 large images and 744 smaller "helper" images. (CP 96 at 15.) Thus, in the test week, NCRL patrons requested but were not allowed to view over 788 wholly innocuous URLs. Over the course of a year, this would amount to 40,976 wrongful blockages. Even through the eyes of NCRL's expert, the overblocking is widespread; through the lens of the constitution, the overblocking is fatal to NCRL's policy.

- *FortiGuard's Categories Do Not Track Constitutional Requirements.*

Even if NCRL's filter properly assigned websites to its own categories, those categories do not track constitutional requirements, and thus the filter blocks a substantial amount of material that is constitutionally protected for adult viewing. For example, FortiGuard's "Gambling" category includes not only sites facilitating wagering, but also any sources of "gaming information, instruction, and statistics." (Def.'s Br. at 13.) In the area of sexually-oriented expression, FortiGuard's categories do not match the constitutional definition of obscenity set out in *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d. 419

(1973) or of "girlie" magazines that can be lawfully denied minors under *Ginsberg v. New York*, 390 U.S. 629, 633, 88 S. Ct. 1274, 20 L. Ed. 2d. 195 (1968). Both constitutional categories require an appeal to prurient interest, but that element is missing from FortiGuard's definitions. (Def.'s Br. at 13.) FortiGuard's definition of "Pornography" omits the constitutionally critical element that the site lack serious literary, artistic, political, or scientific value. (*Id.*)

The same concern applies to the categories of Image Search and Video Search that NCRL blocks. These services can locate and display images of the Seattle Public library for a patron with an interest in architecture, or find a video of Martin Luther King's "I Have a Dream" speech. NCRL's overbroad filter denies adult library patrons the use of these search services merely because some constitutionally-proscribable needles may be lurking within a constitutionally-protected haystack.

- *NCRL Blocks Entire Websites.*

Whether relying on FortiGuard's categories or a list of its own creation, NCRL blocks entire websites, not the specific pages that contain allegedly inappropriate material. This problem is particularly acute for "Web 2.0" sites that host user-generated content. For example, NCRL has in the past blocked MySpace, and reserves the right to block it in the

future.[3] (CP 41 at 17-18.) If a handful of MySpace entries contained improper material, NCRL could block every single MySpace page—silencing millions of voices at the flick of a switch, and eliminating everything from social gossip to pages maintained by every major candidate for President in 2008. The same principle applies to YouTube, which NCRL has blocked in the past. (CP 96 at 3.) Such "[b]road prophylactic rules in the area of free expression are suspect." *Turner Broad. Sys, Inc. v. FCC*, 512 U.S. 622, 683, 114 S. Ct. 2445, 129 L. Ed. 2d. 497 (1994) (O'Connor, J., dissenting) (internal citation and quotation omitted).

- *Site-By-Site Unblocking Is An Inadequate Alternative.*

Even when adults have fully legitimate to view blocked sites, NCRL will not allow them access. At most, NCRL will consider requests to unblock individual sites on a permanent basis for all viewers. The only sites that will be permanently unblocked are those the library deems to be appropriate for children. (CP 41 at 8, ¶¶ 43-44.)

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[3] While NCRL now allows at least partial access to MySpace, NCRL has stated it could be blocked again in the future. (CP 41 at 18, ¶ 95.) NCRL's voluntary cessation of its censorship—especially combined with explicit reservation of the right to revisit policy—is insufficient to cure the constitutional defect. *See United States v. W.T. Grant Co.* 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (holding that voluntary cessation of wrongful activity would only moot an action if "the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated" because otherwise the defendant is "free to return to his old ways") (internal citations omitted).

NCRL's policy is also too slow and unreliable to be a viable alternative to disabling the filter at the request of an adult. Only two NCRL personnel are authorized to rule on a request to access a blocked website. (CP 41 at 9, ¶ 48). It often takes days for NCRL to respond to an unblocking request. (CP 96 at 13-14). The Internet provides instant information, while, at its best, the speed of NCRL's response to unblocking requests most often resembles that of the U.S. postal service.

Finally, forcing library patrons to submit unblocking requests on a site-by-site basis has an obvious chilling effect. Plaintiff Heinlen testified that making unblocking requests is "disruptive" to his Internet use and "intrusive" of his privacy. (CP 41 at 9, ¶ 45). The *Loudoun* court recognized "the severe chilling effect of forcing citizens to publicly petition the Government for access to speech it clearly disfavored." 2 F. Supp. 2d at 797. Requiring individuals to identify what content they want to peruse is unnecessary and unreasonable when a faster, more efficient alternative exists: disabling the filter.

3. NCRL's Filtering Policy Rises To The Level Of A Prior Restraint.

As explained above, NCRL's filtering policy is so overbroad that it prevents a substantial amount of constitutionally-protected communication from occurring. For that reason it "rises to the level of a prior restraint" as

that term is used in judicial decisions applying Const art. I, § 5. *See e.g.*, *Ino Ino*, 132 Wash.2d at 119. Most of NCRL's legal arguments regarding prior restraint miss the mark, because they fail to engage the central principle that the Washington Constitution's abhorrence of overbreadth is so strong that it requires a more stringent form of prior restraint analysis. Of course, the Washington Constitution is also less tolerant of classic prior restraints taking the form of pre-expression licensing requirements, which are per se violations of Const art. I, § 5. *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 6, 891 P.2d 723 (1995).

Even under less-protective First Amendment principles, the U.S. Supreme Court has found prior restraints in other scenarios where government agents reviewed content before permitting messages to be fully communicated to their intended audiences. *See Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 & n. 8, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (refusing to allow touring company of "Hair" to perform in municipal theater was prior restraint); *Interstate Circuit v. Dallas*, 390 U.S. 676, 688, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968) (classifying certain films as "not suitable for young persons" and requiring theaters to advertise this fact was prior restraint); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963) (sending letters to bookstores urging them not to sell works "manifestly tending to the

corruption of the youth" was prior restraint). Prior restraints are disallowed even in locations that are not considered public forums, such as high schools. *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988).

As explained above, this Court's decision in *Soundgarden*, finding that a system requiring certain musical recordings to be held behind a counter rose to the level of a prior restraint, fits squarely within this tradition. 123 Wn.2d at 766-67. NCRL's policies eliminate the possibility of communication in two directions: library patrons cannot read freely, and they cannot publish freely. Many participatory websites where users might post constitutionally-protected material (like blogs and the Craigslist personals section to which Plaintiff Heinlen sought access (CP 41 at 17, ¶ 91) are off-limits to NCRL patrons, barring them not only from receiving information but also from disseminating it.

C. NCRL's Filtering Policy Is An Impermissible Content-Based Restriction on Speech.

1. NCRL's Speech Restriction Is Content-Based.

NCRL concedes that it filters based on content. (Def.'s Br. at 28 (NCRL makes "content-based judgments").) The defendants in *Loudoun* conceded that library filters are by definition content-based. *See Loudoun I*, 2 F.Supp.2d at 796; *Loudoun II*, 24 F.Supp.2d at 564.

The government "has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't of*

Chicago v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 286, 33 L. Ed. 2d 212 (1972). Content-based speech restrictions regulations are presumptively invalid. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 24, 992 P.2d 496 (2000). Such restrictions are ordinarily upheld only if they serve a compelling government interest, are necessary to achieve that interest, and are narrowly-tailored. *Loudoun II*, 24 F. Supp. 2d at 564-65. These conditions are not met here.

2. NCRL's Proffered Justifications For Continuous Filtering For Adults Are Inadequate.

NCRL has failed to establish a compelling or important reason not to disable its filter at the request of adults. "[T]he government must present more than anecdote and supposition" to support a claim that a problem requiring the suppression of speech exists. *Playboy*, 529 U.S. at 822-23. The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys, Inc.*, 512 U.S. at 664 (plurality opinion) (internal citation and quotation omitted).

The reasons NCRL has proffered for its actions are not compelling, substantial, or even reasonable.

- *Complying With CIPA.*

NCRL implies that its filtering policy is mandated by the federal Children's Internet Protection Act (CIPA), which requires public libraries receiving federally subsidized Internet access to install a "technology protection measure" that bars online access to "visual depictions" constituting "obscenity" or "child pornography," and bars access by minors to "visual depictions" that are "harmful to minors." 20 U.S.C. § 9134(f)(1), (7) (Library Services Technology Act); 47 U.S.C. § 254(h)(6) (E-Rate program). (Def.'s Br. at 11-12, 23-24, 29.) The foregoing terms are narrowly defined by statute. 20 U.S. C. § 9134(f)(7); 47 U.S.C. § 254(h)(7). But NCRL's filtering system deviates from CIPA in many ways. CIPA requires a method to block "visual depictions," but NCRL's filter blocks entire websites and all their text. In addition, NCRL does not limit its filtering to the three categories enumerated in the statute (obscenity, child pornography and material that is "harmful to minors"). CIPA also requires that minors—not adults—be precluded from viewing material fitting the statutory definition of "harmful to minors," yet NCRL does not allow adults to access a much broader range of materials that NCRL believes may be "harmful to minors."

Finally, and perhaps most importantly, CIPA expressly authorizes libraries to disable Internet filters. 20 U.S.C. § 9134(f)(3); 47 U.S.C. §

254(h)(5)(D). NCRL, however, will not do so under any circumstances. As discussed more fully below in Section II.A.2, disabling of filters at the request of adults is what made CIPA constitutional.

- *Promoting NCRL's Mission And Collection Development Policy.*

The role of librarians is to encourage "free, open and unrestricted access to information and ideas." ." Statement of Washington Library Association core values, available at http://wla.org/. NCRL's stated mission is "to promote reading and lifelong learning." Neither this role nor NCRL's mission is well served by preventing adults from reading tens of thousands of websites. If anything, a filtering policy that sharply reduces the availability of reading matter, while creating frustration and ill will on the part of library patrons, is certain to discourage reading and lifelong learning.

- *Ensuring Network Security.*

Plaintiffs agree that NCRL may take appropriate steps to protect the integrity of its network. (CP 40 at 3 n.2.) But NCRL has not demonstrated how the categories chosen will serve that goal. (CP 53 at 13.) In fact, the best approach to network security is appropriate firewall and malware screening software, not measures like the Spam URL category that bar viewers from accessing any website that is mentioned in

a spam e-mail (most of which would pose no security risk at all). (CP 56 at 3, ¶ 7.)

- *Minimizing Confrontations Between Patrons and Staff.*

Sometimes librarians must perform uncomfortable tasks, including asking boisterous patrons to lower their voices, homeless patrons to shower, or underage patrons to stop giggling over gynecology texts. *See Loudoun II*, 24 F.Supp.2d at 567. Labeling these events "confrontations" does not justify content-based censorship.

There is also no evidence that the relief requested would lead to significantly more interactions of this sort. The Plaintiffs here all testified that they wanted to engage in protected speech: researching academic assignments, viewing personal ads, or discussing the right to bear arms. The evidence from other library systems is that unfiltered access does not lead to problems. NCRL's hypothetical confrontations with patrons who might want to view disruptive material lacks a basis in fact and support in the law, and is insufficient to justify broad censorship of protected speech.

- *Working Cooperatively With Schools.*

Disabling the filter at the request of adults would not affect NCRL's authority to require filters when its computers are being used by minors. Moreover, as with minimizing (hypothetical) confrontations,

other, readily-available measures such as privacy screens or recessed desks are more effective and less-restrictive of free speech rights.

- *Preventing Illegal Conduct.*

"The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d. 403 (2002). NCRL cannot block vast amounts of protected speech as the means to deter illegality. And again, the record plainly shows that reasonable use policies put in place by other libraries are sufficient to protect against untoward conduct. (CP 41 at 22-23.)

3. NCRL's Filtering Policy Is Not Narrowly Tailored.

A restriction that is overbroad is, by definition, not narrowly tailored. *See, e.g., Board of Trust. of the State University of New York v. Fox*, 492 U.S. 469, 482-83, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). The overbreadth arguments set forth above are therefore relevant here.

Moreover, a government policy that "effectively suppresses a large amount of speech . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U.S. at 874. In such a case, "the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665,

124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). When the government adopts a broad content-based restriction on Internet speech, there is "an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective." *Reno*, 521 U.S. at 879.

A wide range of less-restrictive library alternatives to full-time Internet filtering have been endorsed by the courts and adopted by comparable small-city and rural libraries. *See* pp. 9-12, above. The experience of these libraries shows that a filtering policy like NCRL's, which combines overly broad filtering software with a refusal to disable the filter for adult users, is not needed to accomplish a library's legitimate goals.

The library systems in Fairbanks, Alaska; Canton, Ohio; and Madras, Oregon allow adult users to have unfiltered Internet access. Fairbanks and Canton (which are multi-branch systems analogous to NCRL) allow adults to disable the filter upon request, while Madras does not use filters at all. (CP 41 at 21-23.) These libraries have not experienced problems with the viewing of pornography, obscenity, or any other inappropriate material. On those rare occasions when a patron reports that someone is viewing inappropriate material in Canton or Madras, a librarian simply asks the patron to stop, and the patron always complies. (*Id.* at ¶¶ 125-26, 131.) Fairbanks has effective methods to

ensure that that no one other than the user can see what is on a given computer screen. (*Id.* at 21-22, ¶ 121.) Its librarians have not received a single complaint about inappropriate computer usage. (*Id.* at 22, ¶ 123.)

In *Loudoun II*, the court found that a number of far less restrictive alternatives existed that would serve the library's needs as well as filtering would. Most importantly, Judge Brinkema found that the relief requested by the plaintiffs in that case would be a less restrictive altnerative: "the library could install filtering software that could be turned off when an adult is using the terminal." 24 F. Supp. 2d at 567. Other alternatives include privacy screens, recessed desks, and usage policies (sometimes called "tap and tell" policies) pursuant to which patrons who view truly improper material are told to stop doing so. *See* pages 10-11, above. In addition, a library may enforce an acceptable use policy, pursuant to which patrons who view truly improper material are told to stop (sometimes called a "tap and tell" policy). (CP 41 at 21, ¶ 120.) These methods are used effectively by libraries to prevent children from reading adult material. *Loudoun II,* 24 F. Supp. 2d at 567 (librarians are accustomed to "'shooing' people away from sites we know are objectionable, just as we always have with prepubescent boys giggling over gynecological pictures in medical books").

D. NCRL'S ARGUMENTS ARE UNPERSUASIVE.

1. The U.S. Supreme Court's Fragmented Decision In *American Library Association* Does Not Control, And In Any Event Supports Plaintiffs' Position.

a. *ALA* Does Not Control This Court's Independent Analysis Under Const. art. I, § 5.

The First Amendment decision in *ALA*, 539 U.S. 194, is not a reliable guide to the proper resolution of this case under Const. art. I, § 5. This Court "has a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law." *Collier*, 131 Wn.2d at 745 (citation omitted). The fact of certification from the federal district court to this Court underscores the need for an independent analysis.

b. *ALA* Supports Plaintiffs' Position.

Even if *ALA* were viewed as persuasive authority, Plaintiffs will prevail because NCRL's refusal to disable its Internet filter for adults contravenes that decision's narrow holding. Under *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d. 260 (1977), the holding of a Supreme Court decision with no single majority opinion is that opinion or portion of opinions deciding the case on the narrowest grounds.

In *ALA*, the narrowest ground—one agreed upon by six justices—was that Congress did not violate the First Amendment by encouraging

libraries to install filtering software that *would* be disabled upon the request of an adult patron. CIPA expressly allows a library to "disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose." 47 U.S.C. § 254 (h)(6)(D). *Accord* 20 U.S.C. § 9134(f)(3). The *ALA* plurality recognized that filters sometimes block access to harmless content by mistake, but even "assuming that such erroneous blocking presents constitutional difficulties, *any such concerns are dispelled by the ease with which patrons may have the filtering software disabled.*" 539 U.S. at 209 (emphasis added). Two concurring justices relied solely on this ground as their reason for upholding the statute. Justice Kennedy's concurrence explained that "there is little to this case" if "a librarian will unblock filtered material or disable the Internet software filter without significant delay." *Id.* at 214-15 (Kennedy, J., concurring). Justice Breyer similarly noted

> the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter."

Id. at 219 (Breyer, J., concurring).

The Court in no way endorsed the use of *overbroad* filters that *are not disabled* upon request of an adult. Both concurring justices believed

that a library's refusal to disable the filter at the request of an adult would be grounds for a successful challenge to the statute. *Id.* at 215 (Kennedy, J., concurring); *id.* at 219-220 (Breyer, J., concurring). This case presents that challenge.

Although not discussed by any member of the Supreme Court, the pre-*ALA* decision in *Loudoun* was also the sort of challenge envisioned by the concurrences. NCRL implies that *Loudoun* was somehow overruled because the later-decided *ALA* case did not cite it. (Def.'s Br. at 34, n.12.) The Supreme Court is not obliged to cite trial court opinions dealing with the same general subject matter, and especially not opinions whose facts are distinguishable and whose outcome is not being overruled. In fact, when the Senate considered the CIPA legislation, it specifically distinguished CIPA from the practices challenged in *Loudoun.*[4] *Loudoun* remains highly persuasive authority for this challenge.

NCRL urges this Court to follow the minority positions adopted by the plurality: (a) there is a legitimate government interest in preventing

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[4] In S.Rep. No. 106-141, p. 7 (1999), on which the *ALA* plurality relied, Congress explicitly distinguished CIPA from the filtering policy struck down in *Loudoun.* The report notes that "there are distinct differences between the requirements under [CIPA], and the *Mainstream Loudoun* case. A . . . critical distinction is that filters were used on all computers in the *Loudoun* case (both computers used by adults and by children), where as, under [CIPA] blocking or filtering is required only while a computer is in use by a minor. Further, under [CIPA], content which is specifically required to be blocked, child pornography and obscene material, enjoys no protection under the First Amendment."

individuals of all ages, not just children, from viewing "harmful to minors" material in the library and precluding individuals from exposing other patrons to such content, *ALA*, 539 U.S. at 200-01; and (b) filtering out access to already-acquired material is like a book selection decision, and thus subject to rational basis review. *Id.* at 204. These positions were not accepted by a majority of the Supreme Court and are not its holdings. Indeed, they represent the *least* speech-protective position in the First Amendment context, and are thus particularly inappropriate here, where this Court is examining NCRL's policy under the speech-protective Washington Constitution.

2. Public Forum Analysis Is Not Helpful In Resolving This Case, But In Any Event Supports Plaintiffs' Position.

a. Forum Analysis Is Not Applicable To These Facts.

As this Court recognized in *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350 n.4, 96 P.3d 979 (2004), the public forum doctrine as articulated by the U.S. Supreme Court is often a source of disagreement and confusion. *See also International Soc. for Krishna Consciousness, Inc.v. Lee*, 505 U.S. 672, 694, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (*ISKCON*) (Kennedy, J., concurring) (observing that public forum analysis has at times been "inconsistent with the values underlying the Speech and Press Clauses of the First Amendment"). Fortunately, it is not necessary

to parse through that doctrine to resolve this case because it may be fully resolved on grounds of overbreadth and content discrimination.

The public forum doctrine arose to answer a particular set of controversies about speaker's physical access to government-owned property. *See, e.g., Hague v. Comm. for Indus. Orgs.*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed.2d (1939) . Significantly, no justice of the U.S. Supreme Court has relied on the public forum analogy in the cases most closely on point. The plurality in *ALA* expressly found the doctrine to be "out of place in the context of this case." 539 U.S. at 205 at 205. Justice Breyer also expressly rejected standard forum analysis. *Id.* at 215 (Breyer, J. concurring). The other four justices did not even find the topic worthy of mention. Similarly, in the other leading Supreme Court case about content-based removal of material from public library collections, *Pico*, 475 U.S. 853, the Court did not engage in forum analysis. NCRL agrees that forum analysis is inapposite here. (Def.'s Br. at 33.) It is simply the wrong tool for the job.

b. If Forum Analysis Were Applied, It Would Support Plaintiffs.

Should this Court wish to apply forum analysis, it must look to the type of access desired by the Plaintiffs to determine if NCRL's policy is constitutional. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S.

788, 801, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). To the extent Plaintiffs seek access to any forum at all, it is to "the vast democratic fora of the Internet," *Reno*, 521 U.S. at 868. Plaintiffs do not seek to control NCRL's collection of books or magazines, or to make speeches or demonstrate in the library. They merely wish to use existing equipment and connections—which the library has already paid for—to quietly connect to a forum that has been described as "'the most participatory form of mass speech yet developed.'" *Id.* at 863 (quoting trial court). The Internet itself is the relevant forum, and it "is entitled to 'the highest protection from governmental intrusion.'" *Id.*

Even if the Court were to focus on the artificially-defined forum of the Internet as accessed through NCRL's computer terminals, a high level of protection would attach. Determining whether that forum is public or nonpublic would hinge on the library's intent, the extent of use, and the nature of the forum. *Loudoun II*, 24 F. Supp. 2d at 562. NCRL's stated mission is "promote reading and lifelong learning," (Def.'s Br. at 7), a goal consistent with adults' lifelong access to information. In keeping with this mission, Internet access at NCRL's branch libraries "is available to all residents of the library district's service area," an extent of use indistinguishable from the policy in *Loudoun*. In sum, while "the nature of the public library would clearly not be compatible with many forms of

expressive activity . . . it is compatible with the expressive activity at issue here, the receipt and communication of information through the Internet. Indeed, this expressive activity is explicitly offered by the library." *Loudoun II*, 24 F. Supp. 2d at 563.

In a public forum, only reasonable time, place and manner regulations are permitted. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). This test, in turn, requires that the regulation be content neutral, serve significant government interests, be narrowly tailored to those interests, and leave open ample alternative channels of communication. Even if this Court applies the standard suggested by Justice Breyer's concurrence in *ALA*, it must consider whether the government has satisfied its burden of demonstrating that the law is narrowly tailored to achieve the desired objective. *ALA*, 492 U.S. at 218 (Breyer, J. concurring). No matter which standard the Court adopts, it should strike down NCRL's policy and require NCRL to completely disable the filter for adults who request unfiltered access. As explained above, NCRL's policy is not content-neutral and therefore is not reasonable. Moreover, a restriction that is overbroad is, by definition, not narrowly tailored. *Fox*, 492 U.S. at 482.

Even under rational-basis scrutiny, NCRL must offer "some explanation" as to why the speech it is censoring "is inconsistent with the

intended use of the forum." *Lee*, 505 U.S. at 692 (O'Connor, J. concurring in No. 91-155 and concurring in the judgment in No. 91-339). NCRL has offered no reasonable justification, and there is nothing reasonable about a policy that is so overbroad that it rises to the level of a prior restraint.

The Second Amendment Foundation seeks to ensure that its publications relating to firearms remain accessible to NCRL's patrons. Sarah Bradburn wants to research her academic topics. Pearl Cherrington wants to research health topics and view videos on YouTube. Charles Heinlen wants to associate with others, publish his blog, and learn about fine art. There will be no parade of horrors if adults like the Plaintiffs are afforded unfiltered Internet access. On this record, NCRL's policy of refusing to disable its filter at the request of adult library patrons is unreasonable and unconstitutional.

CONCLUSION

For the reasons stated above, this Court should declare that Defendant NCRL's policy of refusing to disable its Internet filter at the request of adult library patrons violates Article I, § 5 of the Washington State.

DATED March 3, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document to be delivered by Email/PDF and U.S.Mail to the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 3rd day of March, 2009, at Seattle, Washington.

By: _____
Harry Williams IV, WSBA #41020
American Civil Liberties Union of Washington Foundation
705 Second Avenue, Third Floor
Seattle, WA 98103