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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs,

v.

NORTH CENTRAL REGIONAL LIBRARY DISTRICT,

Defendant.

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On Certification from the United States District Court  
for the Eastern District of Washington  
No. CV-06-0327-EFS

The Honorable Edward C. Shea

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DEFENDANT'S OPENING BRIEF

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Thomas D. Adams, WSBA # 18470  
Celeste M. Monroe, WSBA # 35843  
KARR TUTTLE CAMPBELL, P.S.C.  
Suite 2900, Washington Mutual Tower  
1201 Third Avenue  
Seattle, WA 98101-3028  
(206) 223-1313  
Attorneys for Defendant North Central Regional Library District

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## I. STATEMENT OF THE ISSUE

Whether a public library, consistent with article I, §5 of the Washington Constitution, may choose not to disable its internet filter at the request of an adult library patron even if the filter blocks access to certain web sites containing constitutionally-protected speech.

## II. STATEMENT OF THE CASE

### A. Procedural Background

Plaintiffs Bradburn, Cherrington, Heinlen, and the Second Amendment Foundation sued Defendant North Central Regional Library District (“NCRL”) in the United States District Court for the Eastern District of Washington (“District Court”). Plaintiffs seek a declaration that NCRL’s policy of refusing to disable internet filtering at the request of an adult patron infringes upon rights guaranteed to them under the First Amendment to the United States Constitution and Article 1, §5 of the Washington Constitution. Plaintiffs also claim attorney fees and costs under 42 U.S.C. § 1983. (CP 1) NCRL denies Plaintiffs claims. (CP 5)

Following fact and expert discovery, Plaintiffs and NCRL filed cross-motions for summary judgment supported by extensive briefing and evidence. (CP 28-36, 39-44, 48-59, 61-66, 71, 74) NCRL also

filed a *Motion for Certification of Questions of State Constitutional Law*. (CP 37)

On September 30, 2008, the District Court issued an *Order Granting and Denying in Part Defendant's Motion for Certification and Holding in Abeyance the Motions for Summary Judgment*. (CP 96) The District Court issued a separate *Order Certifying Issue To The Washington Supreme Court*. (CP 97) In this *Order*, the District Court certified the following question:

Whether a public library, consistent with Article 1, § 5 of the Washington Constitution, may filter Internet access for all patrons without disabling Web sites containing constitutionally-protected speech upon the request of an adult library patron.

It may assist the Court to consider the Certified Question with the added emphasized language:

Whether a public library, consistent with Article 1, §5 of the Washington Constitution, may filter Internet access for all patrons without disabling *the filter to allow access to* Web sites containing constitutionally-protected speech upon the request of an adult library patron.

The District Court declined to certify issues raised by NCRL concerning the standing of the respective Plaintiffs. (CP 96, pg. 21)

B. Factual Background

(1) *NCRL and its Mission.* NCRL is an inter-county rural library district serving the citizens of Chelan, Douglas, Ferry, Grant, and Okanogan Counties. NCRL was established in 1960 pursuant to RCW 27.12 et. seq. and other laws applicable to public library districts. It is funded by a combination of local property taxes, federal subsidies, and private grants and endowments. NCRL is controlled by its Board of Trustees which is responsible for issuing NCRL's policies. Operations are overseen and managed by a Board-appointed Director. Dean Marney has served as NCRL's Director since 1990. (CP 96, pgs. 6-7; CP 31)

The mission of NCRL is to promote reading and lifelong learning. NCRL also is committed to supporting public education. (CP 71, pg. 6) Twenty-six school districts operate within NCRL's territory. In fourteen of those districts, NCRL branches serve as *de facto* public school libraries for children. (CP 96, pg. 6)

NCRL serves a population base exceeding 220,000 people through 28 branches.<sup>1</sup> The branches vary size from 701 square feet in the Twisp branch to over 12,000 square feet in the Wenatchee branch.

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<sup>1</sup> CP 31, Ex. A provides a map of NCRL geographical reach.

Each branch has a designated children's area. Only one branch has a partition to separate the children's area from the rest of the branch. Twenty NCRL branches are staffed by one librarian. (CP 97, pgs. 6-7)

NCRL maintains a collection exceeding 675,000 books and other materials, all of which are available to patrons at any branch by mail-order or by request placed through NCRL's web site, ncrl.org. The mail order service is one of the few such services remaining in the United States. (CP 96, pg. 7)

NCRL also provides public internet access at each of its branches. All internet access is filtered. Sixteen branches have only one or two computers available for this purpose. (CP 96, pg. 7) NCRL expects branch librarians to monitor and respond to complaints of inappropriate computer use. (CP 71, pg. 19)

Internet access through the NCRL network is subject to the Internet Public Use Policy and the Collection Development Policy. The Collection Development Policy (CP 96, pgs. 8-9) states:

*The North Central Regional Library District's Board of Trustees recognizes that the library was created to serve all of the people within the District's service area, regardless of race, age, creed, or political persuasions. The Board of Trustees further recognizes that within the District's service area there are individuals and groups with widely disparate and diverse interests, cultural backgrounds, and needs. The Board of Trustees, therefore, declares as a matter of policy that:*

1. *The Collection Development Policy is based on and reflects the District's mission, goals, and values as stated in the current Strategic Plan.*
2. *Library materials shall be selected and retained in the library on the basis of their value for the interest, information, and enlightenment of all the people of the community in conformance with the District's mission. Some of the factors which will be considered in adding to or removing materials from the library collection shall include: present collection composition, collection development objectives, interest, demand, timeliness, audience, significance of subject, diversity of viewpoint, effective expression, and limitation of budget and facilities.*

*No library materials shall be excluded because of the race, nationality, political, religious, or social views of the author. Not all materials will be suitable all members of the community.*

*The District shall be responsive to public suggestion of titles and subjects to be included in the library collection. Gifts of materials may be accepted with the understanding that the same standards of selection are applied to gifts as to materials acquired by purchase, and that any gifts may be discarded at the District's discretion.*

*To ensure a vital collection of continuing value to the community, materials that are not well used may be withdrawn.*

*The Director is responsible to the Board of Trustees for collection development.*

*The Director may delegate collection development activities to members of the staff who are qualified by reason of education and training.*

3. *The Board of Trustees believes that reading, listening to, and viewing library materials are individual, private matters. While individuals are free to select or to reject materials for themselves, they cannot restrict the freedom of others to read, view, or inquire. The Board of Trustees recognizes that parents have the primary responsibility to guide and direct the reading and viewing of their own minor children.*

*The Board of Trustees recognizes the right of individuals to question materials in the District collection. A library customer questioning material in the collection is encouraged to talk with designated members of the staff concerning such material. To formally state his or her opinion and receive a written response, a customer may submit the form provided for that purpose.*

The Internet Public Use Policy (CP 96, pgs. 9-10) states:

*The mission of the North Central Regional Library is to promote reading and lifelong learning. Internet access is offered as one of many information resources supporting that mission.*

*The Internet is currently an unregulated medium. While the Internet offers access to materials that are enriching to users of all ages, the Internet also enables access to some materials that may be offensive, disturbing, or illegal. There is no guarantee that information obtained through the Internet is accurate or that individuals are who they represent themselves to be. The library district recognizes that it cannot fully control the amount of material accessible through the Internet but will take reasonable steps to apply to the Internet the selection criteria stated in the collection Development Guidelines and Procedures.*

*All Internet access on NCRL library computers is filtered.*

*The library district does not host customer e-mail accounts or provide access to chat rooms.*

*The library district cannot guarantee privacy for individuals using library public access computers to search the Internet and computer*

*screens may be visible to people of all ages, backgrounds, and sensibilities. Customers are requested to exercise appropriate discretion in viewing materials or submitting sensitive personal information. Minors, in particular, are discouraged from sharing personal information online.*

*Hacking and other unlawful online activities are prohibited.*

*The District's director is responsible for establishing procedures to carry out this policy.*

All internet access through NCRL's public computers is subject to these policies. Mr. Marney and Dan Howard, NCRL's Director of Public Services, interpret and apply these policies. (CP 71, pg. 9) It is also a policy of NCRL not to disable FortiGuard at the request of an adult patron. (CP 96, pg. 10)

In order to qualify for certain federal funding (discounted internet access and grants available to state libraries), NCRL is required to certify its compliance with the Children's Internet Protection Act ("CIPA"), 20 U.S.C. 9153(g); 47 U.S.C. 254(h). CIPA requires public libraries to operate a "technology protection measure" to prohibit access to visual depictions that are obscene, child pornography, or otherwise harmful to minors. CIPA defines these terms to include depictions of sexual conduct, pornography, lewd exhibitionism, nudity, sexual activity, or simulated sexual activity that have no serious literary, artistic, political or scientific value to minors. CIPA defines

“technology protection measure” to include internet filtering devices.  
(CP 31, pgs. 4-5)

(2) *Internet Filtering on NCRL's Network.* Prior to October 2006, NCRL filtered internet content through software called “SmartFilter, Bess Edition.” In October 2006, as part of a comprehensive network and cataloguing system upgrade, NCRL implemented a filtering solution provided by Fortinet, Inc. called the “FortiGuard Web Filtering Service.” (CP 96, pg. 10) FortiGuard has been deployed in a variety of government, corporate, library, and educational enterprise settings throughout the world. (CP 35, pgs. 2-4)

Using proprietary algorithms and human review, FortiGuard sorts web sites within its database into one of 76 categories based upon predominant content and one of seven classifications based on media type and source. The data base catalogues over 43 million web sites and over two billion individual web pages and is continually updated. Anyone may request review of Fortinet's treatment of a particular web site by using an electronic form available on Fortinet's web site. (CP 96, pgs. 10-11; CP 35, pgs. 2-3) Each of the 76 categories is defined by Fortinet. (CP 33, Ex. C)

Of the 76 available categories, NCRL has configured FortiGuard to block access to the following categories on its network:

*Hacking:* Websites depict illicit activities surrounding the unauthorized modification or access to programs, computers, equipment and websites.

*Proxy Avoidance:* Websites that provide information or tools on how to bypass internet access controls and browse the Web anonymously, includes anonymous proxy servers.

*Phishing:* Counterfeit web pages that duplicate legitimate business web pages for the purpose of eliciting financial, personal or other private information from the users.

*Adult Materials:* Mature Content websites (18+ years and over) that feature or promote sexuality, strip clubs, sex shops, etc. excluding sex education without the intent to sexually arouse.

*Gambling:* Sites that cater to gambling activities such as betting, lotteries, casinos, including gaming information, instruction, and statistics.

*Nudity and Risque:* Mature content websites (18+ years and over) that depict the human body in full or partial nudity without the intent to sexually arouse.

*Pornography:* Mature content websites (18+ years and over) which present or display sexual acts with the intent to sexually arouses and excite.

*Web Chat:* Websites that promote Web chat services.

*Instant Messaging:* Websites that allow users to communicate in 'real time' over the Internet.

*Malware:* Sites that are infected with destructive or malicious software, specifically designed to damage, disrupt, attack or manipulate computer systems without the user's consent, such as virus or Trojan horse.

*Spyware:* Sites that host software that is covertly downloaded to a user's machine, to collect information and monitor user activity, including spyware, adware, etc.

The category definitions are provided by Fortinet. (CP 96, pg. 11-12) NCRL also blocks Image Search, Video Search, and Spam classifications as well as certain specific image search web sites and the “personals” section of craigslist.org. (CP 96, pg. 12-13 n.2)

After implementing FortiGuard in October 2006, NCRL initially blocked but subsequently unblocked access to youtube.com, myspace.com, and craigslist.org (except the “personals” section) (CP 96, pg. 12-13 n.2)

When an NCRL patron seeks access to a web site, the site’s uniform resource locator (“URL”) address is routed first through the FortiGuard database. The site’s assigned category is then compared to the subset of categories NCRL has selected for blocking. If the site is not within a blocked category, access follows immediately. If the site falls into a blocked category, the computer user receives a message to that effect. If access to an embedded image is denied, a blank image is substituted. (CP 96, pg. 10-11) Any person may request Fortinet to review its classification or categorization of a particular site or page by means of an electronic form on the Fortinet web site. (CP 96, pg. 11; CP 35, pg. 3)

Any NCRL patron seeking access to a blocked web site may ask NCRL to override the filter by e-mailing NCRL staff. Upon receipt of

an override request, the site or page at issue is reviewed in light of NCRL's mission, Internet Use Policy, Collection Development policy and the requirements of the federal Children's Internet Protection Act ("CIPA"). If the request is approved, the site is unblocked and access is permitted throughout the NCRL network. (CP 96, pg. 13) A patron's request to unblock a blocked site is evaluated like any other collection decision. (CP 31, pg. 6)

NCRL received 92 requests to override blocked access between October 1, 2007 and February 20, 2008. Sites were unblocked upon request in 12 instances. (CP 96, pg. 13-14)

Like any internet filter, FortiGuard makes mistakes. In some instances, computer users have gained access to sites displaying pornographic or sexually explicit content. In other instances, patrons were unable to access sites that should not have been blocked. (CP 96, pg. 14) Plaintiffs' expert determined that of 100,000 randomly-selected ".com domains" FortiGuard blocked 536 web pages as pornography or "adult materials" and, of those, 64 were blocked in error. Similarly, of 100,000 randomly-selected ".org domains," Plaintiffs' expert determined that FortiGuard blocked 207 real pages and of those 49 were blocked in error. (CP 96, pg. 14-15) NCRL's expert conducted a study based upon actual internet use by NCRL patrons throughout the District.

NCRL's expert found that of the 60,000 web sites or pages requested by NCRL patrons during the week of August 23-29, 2007, 2,180 web addresses were blocked pursuant to NCRL's policy. Of those, 289 were complete blocks of which 20 were blocked in error. (CP 96, pg. 15)

(3) *Disabling Consequences and Filtering Alternatives.*

Disabling FortiGuard on a temporary basis to accommodate an adult patron may be technically possible but doing so would require NCRL to purchase additional or new software or hardware. (CP 31, pg. 7-8)

In addition, disabling the filter would require NCRL to take steps to prevent the inadvertent viewing of sexually-explicit and potentially illegal material by roaming children. NCRL's experience with privacy screens and recessed desks reveals that they are ineffective. The use of security guards within NCRL branches would be prohibitively expensive and would adversely impact the environment NCRL branches strive to maintain. (CP 34, pgs. 6-7)

Disabling the FortiGuard filter also could potentially allow patrons easier access to pornography and other inappropriate material that NCRL does not otherwise choose to include in its collection. NCRL believes that allowing potential access to such material creates an unacceptable risk for children and could create a hostile environment for NCRL staff. (CP 29, pgs. 19-20) NCRL staff librarians have reported

multiple instances of having observed patrons viewing sexually-explicit material on NCRL computers and printers. (CP 29, pgs. 22-27; CP 34, pgs. 2-6) NCRL expects its staff librarians to monitor and respond to complaints of improper computer use. However, librarians are not expected to confront patrons engaging in inappropriate behavior facilitated by unfiltered internet access. (CP 34, pg. 2)

(4) *Plaintiffs and their Claims.* Plaintiffs Sarah Bradburn (“Bradburn”), Pearl Cherrington (“Cherrington”), and Charles Heinlen (“Heinlen”) are adult patrons of NCRL. Plaintiff Second Amendment Foundation (“SAF”) is a non-profit corporation based in Bellevue, Washington. SAF is dedicated to issues associated with the federal constitutional right to keep and bear arms. (CP 96, pgs. 2-5)

Bradburn attempted to conduct online academic research in the Republic branch about alcohol and drug-addiction topics in October or November 2003. Bradburn was unable to access certain web sites, though she cannot recall which sites, and believes her access was blocked by NCRL’s filter. Bradburn did not tell NCRL staff about her access difficulties before filing suit. NCRL has been unable to confirm that access was in fact blocked and, if so, whether access was blocked by the filter, prevented by a transient network problem, or some other cause. (CP 96, pg. 2)

Cherrington attempted to perform online research on art and health-related topics in the summer of 2005 in NCRL's Twisp branch. Cherrington was unable to access an Idaho art gallery web site and another site containing health-related information. She cannot recall the sites. (CP 96, pg. 3)

Heinlen resides in Okanogan County. He primarily uses NCRL's Omak and Okanogan branches for internet access and research purposes. Heinlen also has used or attempted to use NCRL computers to communicate by e-mail, maintain a blog at myspace.com, research information on firearms, and access online dating sites. NCRL's filter blocked Heinlen's access to images embedded in commercial e-mail sent to him in Hotmail and Yahoo e-mail accounts. In February 2008, NCRL's filter prevented him from accessing several sites categorized as "Nudity and Risque" or "Adult Materials." Heinlen also was blocked from the "personals" section of craigslist.org. Heinlen is the only person to have requested that NCRL disable its filtering technology during his online access prior to the inception of this lawsuit. (CP 96, pgs. 3-5)

SAF maintains the saf.org web site. SAF sponsors commercial online publications including womenandguns.com. SAF was advised by Heinlen that access to womenandguns.com was blocked by NCRL's

filter in November 2006. SAF has no personal knowledge or experience confirming that NCRL blocked access to its sites. Prior to this lawsuit, NCRL had no report that womenandguns.com was blocked and does not contend the site should be blocked. The site is not blocked now. SAF is concerned that NCRL will block one of its sites in the future. (CP 96, pgs. 5-6)

### III. ARGUMENT

#### A. NCRL's Policy Does Not Violate Article 1, §5.

It is the policy of NCRL not to disable the internet filter serving all its publicly-available computers even when requested to do so by an adult patron. Plaintiffs challenge this policy under Article 1, §5 of the Washington Constitution which provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

This Court's decisions have made clear Article 1, §5 is less tolerant than the First Amendment of overly broad restrictions on constitutionally-protected speech that amount to prior restraints. See, e.g., *O'Day v. King Cty.*, 109 Wn.2d 796, 803-04, 749 P.2d 142 (1988). Apart from this difference, restrictions on speech are analyzed in much the same manner under Article 1, §5 and the First Amendment

despite differences in their wording and effect.<sup>2</sup> See *Sanders v. City of Seattle*, 160 Wn.2d 198, 208, 156 P.3d 874 (2007)(“Moreover, when interpreting our state constitution, we have held that federal case law interpreting federal constitutional provisions is persuasive, though not binding precedent.”) citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 353, 96 P.3d 979 (2004).

For the reasons that follow, NCRL’s policy is not a prior restraint and Article 1, §5 does not require NCRL to disable its internet filter at the request of an adult patron. Furthermore, whether analyzed in the manner articulated by a plurality of the United States Supreme Court in *United States v. American Library Ass’n.*, 539 U.S. 194, 123 S. Ct. 2297, 156 L.Ed.2d 221 (2003)(“ALA”) or according to forum principles, NCRL’s policy is consistent Article 1, §5 and should be upheld.<sup>3</sup>

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<sup>2</sup> The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<sup>3</sup> As the parties challenging the constitutionality of NCRL’s policy, Plaintiffs should bear the burden of proving unconstitutionality beyond a reasonable doubt. However, NCRL recognizes that in First Amendment disputes the burden shifts to the government to justify the restriction on speech. See *Ino Ino, Inc. v. City of Bellevue*,

B. NCRL's Policy is not a Prior Restraint.

Plaintiffs contend that NCRL's policy operates as an impermissible prior restraint because the filter prevents adult patrons from viewing certain sites and categories of sites offering constitutionally-protected speech. Plaintiffs' reliance on prior restraint doctrine is misplaced.

A prior restraint is an administrative or judicial order forbidding communication prior to its occurrence. A prior restraint seeks to prohibit future speech rather than punish past speech. See *Voters Education Comm. v. Public Disc. Comm.*, 161 Wn.2d, 470, 494, 166 P.3d 1174 (2007); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 764-65, 871 P.2d 1050 (1994).

NCRL's policy is neither an administrative order nor its functional equivalent. It is an operational rule that is interpreted and applied like any other collection decision by executive-level NCRL managers. (CP 96, pgs. 13-14; CP 71, pgs. 9-12) The policy is flexible by design. Rather than a rigid restriction on speech, NCRL's policy should be seen for what it is: a practical attempt to balance broad access to a modern medium while allowing NCRL to perform its traditional

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132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997). Without waiving the issue, NCRL presumes the burden also may shift in cases implicating Article 1, §5.

role as librarians, comply with CIPA, and manage its facilities consistent with their purpose.

NCRL recognizes that Washington cases have characterized the right of free speech guaranteed by Article 1, §5 as a “preferred right” and generally prohibit prior restraints. See *State v. Coe*, 101 Wn.2d 364, 374-75, 679 P.2d 353 (1984). That said, not all content-based restrictions trigger prior restraint doctrine. For example, speech that occurs in a non-public forum is subject to reasonable, viewpoint neutral regulation. See *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989).

There are other instances where this Court has declined to apply or extend prior restraint doctrine. For example, in *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986), this Court observed that “whether speech is regulated before or after publication is crucial under our state’s constitution.” The Court distinguished “the classic prior restraint” in which speech is prohibited before it occurs from situations in which speech is regulated post-publication in upholding an injunction preventing anti-abortion protesters from repeating certain words and demonstrating in particular areas near a physicians’ office complex. 106 Wn.2d at 243-44.

In another example, in *Voters Education Comm., supra*, this Court held that provisions of RCW 42.17 et. seq. requiring public disclosure of political contributions were not unconstitutionally vague, rising to the level of a prior restraint under Article 1, §5, and in no way prohibited future speech. 161 Wn.2d at 493-95.

Similarly, NCRL's policy cannot be considered a prior restraint. NCRL's policy prevents no one from speaking nor does it purport to ban online speech before it occurs. The policy simply results in the interception of published speech that NCRL deems to be inconsistent with its traditional role and mission, its collection development policy, and its legal duties under federal and state law.<sup>4</sup> NCRL's policy is no different than a quality-based, viewpoint neutral decision not to include a particular category of books in its collection. Prior restraint principles developed by this Court have no application to NCRL's decision to filter internet access.

The United States Supreme Court declined to extend prior restraint doctrine in the same circumstances presented by this case. In *ALA, supra*, a district court held CIPA unconstitutional under the First

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<sup>4</sup> The right to receive information is the fundamental counterpart of the right of free speech. *Voters Education Comm.* 161 Wn.2d at 483. However, free speech principles do not guarantee unfettered access to a medium simply because it is owned or controlled by the government. *Sanders, supra*, 160 Wn.2d at 210.

Amendment (among other rulings.) CIPA requires public libraries seeking eligibility for federal “E-rate” and LSTA funds<sup>5</sup> to install a “technology protection measure” on internet-accessible computers to block visual depictions deemed to be obscene, child pornography, or otherwise “harmful to minors.” The district court reasoned that the filtering software made content-based judgments within a public forum and the software was not narrowly tailored to address the government’s compelling interest in preventing dissemination of material deemed harmful to minors. 539 U.S. at 202-03.

The Supreme Court reversed and upheld CIPA under the First Amendment. A plurality of the Court found forum analysis inapplicable and rejected arguments portraying a library’s deployment of an internet filter as a prior restraint:

“[Dissenting] Justice Stevens further argues that, because some libraries’ procedures will make it difficult for patrons to have blocked material unblocked, CIPA ‘will create a significant prior restraint on adult access to protected speech’ (citation omitted) **But this argument ... mistakenly extends prior restraint doctrine to the context of public libraries’ collection decisions. A**

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<sup>5</sup> The “E-Rate program” allows qualifying libraries to purchase internet access at discounted rates. The Library Services and Technology Act (“LSTA”) provides grants to states to support the telecommunications and computer network initiatives of public libraries.

**library's decision to use filtering software is a collection decision, not a restraint on private speech.** Contrary to Justice Stevens' belief, a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected.

539 U.S. at 209-10, n.4 (emphasis added)

Despite the inapplicability of prior restraint doctrine in this case, Plaintiffs contend that NCRL's policy is overbroad, and rises to the level of a prior restraint, because it restricts access to a substantial amount of protected speech. (Ct. Rec 53, p. 7-11). As the Court's plurality observed in *ALA*, a library's use of an internet filter is a collection development decision and no publisher or patron can require a library to include material to its collection just because the material is constitutionally-protected. 539 U.S. at 209-10, n.4. See also *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728 737, 25 L.Ed. 2d 736, 90 S. Ct. 1484 (1970)(The First Amendment does not require others to hear or view unwanted communication).

Moreover, the extent of filtering performed by NCRL is not substantial. For example, Plaintiff SAF claims that access was blocked to *womenandguns.com* on NCRL's network. NCRL had no notice of such blocking prior to the inception of the lawsuit. The site is not

presently blocked and NCRL does not contend that womenandguns.com should be blocked. (CP 96, pg. 5)

More generally, of the 76 categories established by FortiGuard, NCRL blocks just these: hacking, proxy avoidance, phishing, malware, spyware, web chat and instant messaging, gambling, image search and video search, adult materials, nudity/risque and pornography as well as google images, and certain other specific sites. Of these, Plaintiffs do not object to NCRL's blocking the access of minors to appropriate categories for purposes of CIPA. (CP 40, pg. 2, n.1) Plaintiffs also acknowledge that NCRL may block sites for all patrons relating to hacking, phishing, malware, and spyware to protect the integrity of NCRL's network. (CP 40, pg. 3 n.2)

Of the remaining blocked categories, Plaintiffs overstate the extent of content that is actually blocked and the effect of blocking on patron's research capabilities. For example, Plaintiffs argue that NCRL blocks "all sites about gambling, whether or not they facilitate illegal transactions." (CP 58, pg 9) This is inaccurate. NCRL has unblocked casino-related sites at the request of patrons having interests other than

illegal wagering.<sup>6</sup> NCRL declined to unblock freelotto.com, which hosts gambling, but allowed access to oregonlotto.com which does not. (CP 57)

Moreover, NCRL offers patrons practical alternatives when access to a particular type of online content is blocked. To illustrate, images are not available through Google Images (because image and video search categories are blocked) but any patron may access image databases accessible through NCRL's home page (ncrl.org). Alternatively, any patron may search generally through Google's main search engine at Google.com (which is not blocked). Youtube.com also is not blocked for patrons seeking access to video content.

The extent of overblocking<sup>7</sup> that occurs on NCRL's network also is not substantial. NCRL developed evidence through Professor Paul Resnick based upon actual internet use by NCRL patrons during the period August 23-29, 2007. The purpose of the study was to assess FortiGuard's effectiveness at blocking what is intended to be blocked on the NCRL network as it is used by NCRL patrons. Professor Resnick

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<sup>6</sup> On one occasion, an NCRL patron was researching employment opportunities at a casino. NCRL was able to respond to an unblock request before the patron left the library branch. (CP 71, pg. 17)

<sup>7</sup> Overblocking is the propensity of the filter to erroneously block sites which should not be blocked. Underblocking is the propensity to fail to block what should be blocked.

found that 20 complete web pages or sites were erroneously blocked out of a total of more than 60,000 URL complete page requests. (CP 61, pg. 11) This rate of error does not support the contention that FortiGuard substantially overblocks content. No known internet filter operates completely without error but perfection is neither necessary nor is it the standard.<sup>8</sup> Any NCRL patron wishing to have access to a blocked site may seek an override from NCRL staff or a reclassification of the site directly from FortiGuard. Both alternatives are available electronically and offer reasonable recourse for any patron who believes her online research objectives have been mistakenly blocked by the filter. (CP 96; CP 35)

NCRL's role as a public library carries with it the right and responsibility to make content-based judgments about what to include in the collection. As it is configured on NCRL's network, FortiGuard facilitates implementation of NCRL's Collection Development policy while providing library patrons with access to vast amounts constitutionally-protected online content. NCRL filters internet content only to the extent necessary to ensure that online resources align with its mission and collection policy, advance the interests of public education,

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<sup>8</sup> Erroneous blocking may not give rise to a constitutional problem at all because of the ease with which a filter can be overridden or a site unblocked to allow

and to maintain an appropriate, safe environment for staff and patrons. NCRL's policy is driven by legitimate interests and should not be considered a prior restraint under *ALA* or the decisions of this Court.

C. The Supreme Court's analysis in *ALA* should control.

*ALA*'s discussion of the internet and its effect on the traditional role of public libraries is directly on point. *ALA* warrants the validation of NCRL's policy under Article 1, §5 and should control the outcome of this case without regard to forum analysis.

In determining that libraries do not violate the First Amendment by employing the filtering devices mandated by CIPA, a plurality of the Supreme Court explained the societal role of libraries:

Public libraries pursue the worthy missions of facilitating learning and cultural enrichment.... To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide 'universal coverage.' Instead, public libraries seek to provide materials 'that would be of the greatest direct benefit or interest to the community.' To this end, libraries collect only those materials deemed to have 'requisite and appropriate quality.'

539 U.S. at 203-02 (internal citations omitted)

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access. *ALA*, supra, 539 U.S. at 209.

The Court also addressed why public libraries choose to provide its patrons with internet access:

A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the author of books to speak.... It provides Internet access, not to 'encourage a diversity of views from private speakers, ... but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality....' As Congress recognized, 'the Internet is simply another method for making information available in a school or library.'... It is 'no more than a technological extension of the book stack.'"

539 U.S. at 206-07 (citations omitted).

The Court noted that libraries have an interest in preventing patrons from deliberately using computers to view online pornography. 539 U.S. at 207 n.3. The Court also noted that because "most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion ... it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason." 539 U.S. at 208.

Justice Kennedy concurred with *ALA* plurality but wrote separately to state his view that as-applied challenges may arise if a library lacks capacity to disable its filter or unblock specific sites at the request of an adult patron. Justice Kennedy also noted the “legitimate, even compelling” government interest in protecting young library users. 539 U.S. at 214-215.

In rejecting the relevance of forum analysis in the context of internet filtering by libraries, the Court noted that governments make permissible content-based judgments about constitutionally-protected speech in analogous circumstances without regard to forum principles. The Court observed that forum principles do not apply to the editorial judgments of public television stations<sup>9</sup> or to grant-making decisions that occur in the funding of public art programs.<sup>10</sup> Like these situations, “forum analysis and heightened judicial scrutiny “are incompatible with ... the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them. 539 U.S. at 205.

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<sup>9</sup> 539 U.S. at 204 discussing *Arkansas Ed. Television Comm. v. Forbes*, 523 U.S. 666, 672-74, 118 S. Ct. 1633, 140 L.Ed. 2d 875 (1998).

The broad discretion held by libraries in shaping their collections is no less in the realm of online content. Indeed, a library could choose to allow internet access only to the particular web sites deemed to have content worthy of including in its collection. Such an approach, however, would significantly limit patrons' access to information since library staffs cannot realistically review every web site for compliance with collection development standards. Acknowledging this reality, the *ALA* plurality said:

Given the tradeoff, it is entirely reasonable for public libraries to reject that approach [site by site review] and instead exclude certain categories of content, without making individualized judgments that everything that they do make available has requisite and appropriate quality.

*ALA* teaches that the traditional role of public librarians is not diminished in the digital era. NCRL's policy should be evaluated in the context of its traditional duties and societal role as articulated in *ALA* and held fully consistent with Article 1, §5 without regard to forum analysis.<sup>11</sup>

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<sup>10</sup> 539 U.S. at 205 discussing *National Endowment for Arts v. Finley*, 524 U.S. 569, 585-86, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).

<sup>11</sup> This Court has elected not to invoke forum analysis to resolve Free Speech issues in other instances upon applicable Supreme Court precedent. See, e.g., *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 174 P.3d 84 (2008)

D. Forum Analysis Also Validates NCRL's Policy.

Although principles of forum analysis were found inapplicable by the plurality in *ALA*, NCRL's policy nevertheless should be validated even if forum analysis is applied here.

Federal case law applying forum analysis is highly persuasive and has been consistently followed in Washington. See *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989). This Court has held that in a challenge to a government regulation under Article 1, §5, the appropriate level of judicial scrutiny is determined by nature of the property at issue. *Sanders*, supra, 160 Wn.2d at 208; *Mighty Movers*, supra, 152 Wn.2d at 350-51. In determining whether particular property should be treated as a "traditional public forum," a "designated public forum" or a "nonpublic forum," for purposes of Article 1, §5, this Court has adopted the federal analysis applicable to cases involving the First Amendment. See *Sanders*, 160 Wn.2d at 208.

To determine whether government property is a traditional public forum, this Court considers whether a "principal purpose" of the property is the "free exchange of ideas" and the property shares the characteristics of a traditional public forum. See *Sanders*, 160 Wn.2d at

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relying on *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994).

209. Streets, sidewalks, and parks are examples of traditional public forums because they have been immemorially held in trust for purposes of public assembly, the communication of thoughts and ideas among citizens, and the discussion of public questions.

However, traditional public forum status does not extend beyond its historical parameters. *Sanders*, 160 Wn.2d at 209. In *Sanders*, this Court held that shopping mall property subject to a municipal easement is not a traditional public forum. In *Mighty Movers*, this Court held that utility poles are not a traditional public forum. There is no legal or factual basis to characterize a public library as a traditional public forum.

A “designated public forum” is public property which the government has intentionally opened for use by the public as a place for expressive activity. A university hall and a municipal theatre are examples of facilities that have been deemed to be designated or limited public forums. See *Sanders*, 160 Wn.2d at 210. NCRL cannot be deemed a limited or designated public forum because it has not opened itself up for expressive purposes by providing patrons with internet access.<sup>12</sup> Internet access is just one of several conduits by which NCRL

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<sup>12</sup> Plaintiffs argue that a public library offering internet access was deemed to be a limited public forum in *Mainstream Loudon v. Board of Trustees*, 24 F.Supp.2d

offers its patrons content consistent with its collection development policy.

In *ALA*, the Court held that “internet access in public libraries is neither a ‘traditional’ nor a ‘designated’ public forum. 539 U.S. at 205.

The Court explained:

First, this resource – which did not exist until quite recently – has not ‘immemorially been held in trust for the use of the public and, time out mind, ... been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions.’ [citation omitted] We have ‘rejected the view that traditional public forum status extends beyond its historical confines.’ The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.

Nor does Internet access in a public library satisfy our definition of a ‘designated public forum.’ To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum. ....

The situation here is very different. A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to

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552 (E.D. Va. 1998). (CP 40, pg. 10) Plaintiffs’ reliance on *Loudon* is misplaced. *Loudon* was decided five years before *ALA* and is nowhere mentioned in *ALA*.

provide a public forum for the authors of books to speak. It provides Internet access not to 'encourage a diversity of views from private speakers,' .... but for the same reasons it offers other library resources: 'to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.....'"

539 U.S. at 206 (internal citations omitted) See also *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 805, 105 S. Ct. 3439, 87 L.Ed.2d 567 (1985)(The mere occurrence of protected speech activity within a forum does not render the forum public.)

If NCRL's network is neither a traditional public forum nor a designated public forum it can be considered, at most, a nonpublic forum. A nonpublic forum is government property that is not a traditional forum and has not been designated by the government as a forum for public communication. *Sanders*, 160 Wn.2d at 210.

The same standard applies to the regulation of speech in a nonpublic forum under Article 1 §5 as applies under the First Amendment: a restriction on speech in a nonpublic forum is valid if it is reasonable in light of the purpose served by the forum and is viewpoint neutral. *Sanders*, 160 Wn.2d at 210-11; *City of Seattle v. Eze*, 111 Wn.2d 22, 32, 759 P.2d 366 (1988) quoting *Cornelius, supra*, 473 U.S.

at 806. The regulation need only be reasonable, not the most reasonable. *Mighty Movers*, 152 Wn.2d at 361.

NCRL's policy is entirely reasonable in light of the institution's traditional purpose and duties. NCRL's essential mission is to promote reading and lifelong learning. It is reasonable to impose limited restrictions on internet access to maintain an environment conducive to study, and contemplative thought and to minimize circumstances that staff and other patrons may find threatening, hostile, or disruptive.

The reasonableness of NCRL's policy also must be considered in light of its vital responsibility to support the public education of children. The linkage among children, education, and the duty of a public library derives from RCW 27.12.020 states:

It is hereby declared to be the policy of the state, as part of its provision for public education, to promote the establishment and development of public library service throughout its various subdivisions.

The importance of this policy is made clear by Article 9, §1 of the Washington State Constitution which states:

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Indeed, this Court has recognized that Article 9, §1 establishes education as the State's "highest priority." See *Parents Involved in Comm. Schools v. Seattle Sch. Dist.*, 149 Wn.2d 660, 672, 72 P.3d 151 (2003). NCRL's role in helping fulfill the Washington's highest priority and paramount duty further justifies NCRL's policy to enforce limited restrictions on internet access for adults and children alike. More than half of NCRL's 28 branches serve as the de facto school library for local school districts. Few would dispute that internet enhances educational opportunities for the children within NCRL's territory. However, it is not difficult to imagine an atmosphere ill-suited to the education of children if adults are allowed unfiltered internet access, upon demand, on the same premises. NCRL has documented instances of sexually-explicit content displayed on and printed from its computers in spite of FortiGuard's operation. (CP 29; CP 34) Inappropriate use can reasonably be expected to increase if the filter could be disabled upon any adult's request.

In upholding the policy at issue in *Sanders*, a case involving a nonpublic forum, this Court noted the existence of alternate channels of expression to which the policy did not apply. 160 Wn.2d at 222-23. Similarly, in this case, NCRL offers patrons alternate ways to learn, study, and receive information which are completely unaffected by

NCRL's policy. NCRL maintains substantial print collections and other forms of media, either through the branches or through one of the remaining mail order systems still operating among public libraries in the United States. Patrons interested in viewing photographs or images online may access specialized databases through [ncrl.org](http://ncrl.org). (CP 63, pg.2) In addition, any patron is free to search for images using a common search engine such as [google.com](http://google.com). What NCRL blocks is the sub-search engine "Google Images" because of its belief, borne of experience, that Google Images can easily be used to generate visual depictions inappropriate for minors and otherwise inconsistent with NCRL's collection development policy.

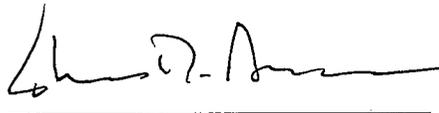
NCRL's policy is a reasonable measure setting minimal restrictions on internet access to help ensure that the internet is used by all patrons in a manner that advances the State's paramount duty of educating children and fulfills NCRL's mission and traditional purpose. It is neutral in application because it applies uniformly to adults and minors alike. It is neutral in viewpoint because distinctions are not drawn within any blocked category based upon the perspective of the speaker. For these reasons, NCRL's policy is rationally-related to legitimate government objectives and should be upheld.

#### IV. CONCLUSION

This Court should hold that NCRL's policy to not disable its internet filter upon the request of an adult patron is valid under Article 1, §5 of the Washington Constitution.

Respectfully submitted this 20<sup>th</sup> day of January, 2009.

KARR TUTTLE CAMPBELL

By: 

Thomas D. Adams, WSBA # 18470  
Celeste M. Monroe, WSBA # 35843

Attorneys for Defendant North Central  
Regional Library District

CERTIFICATE OF SERVICE

The undersigned certifies that on Tuesday, January 20, 2009, I

caused to be served the foregoing document to:

Duncan Manville via hand delivery via ABC Legal Messengers.
Savitt & Bruce LLP via first class mail, postage prepaid.
1325 Fourth Ave, Ste. 1410 via email.
Seattle, WA 98101-2509

Aaron Caplan via hand delivery via ABC Legal Messengers.
Loyola Law School Los Angeles via first class mail, postage prepaid.
919 Albany St. via email.
Los Angeles, CA 90015

Catherine Crump via hand delivery via ABC Legal Messengers.
American Civil Liberties Union via first class mail, postage prepaid.
Foundation via email.
125 Broad Street, 17th Floor
New York, NY 10004

Sarah A. Dunne via hand delivery via ABC Legal Messengers.
American Civil Liberties Union via first class mail, postage prepaid.
of Washington Foundation via email.
705 Second Ave., Ste. 300
Seattle, WA 98103

I declare under penalty of perjury under the laws of the state of
Washington on Tuesday, January 20, 2009, at Seattle, Washington.

Handwritten signature of Heather L. White
Heather L. White