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No. 82200-0

IN THE 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.

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STATE OF WASHINGTON

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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I. Plaintiffs mischaracterize NCRL's filtering policy.

Plaintiffs resort to unhelpful rhetoric in explaining their claims. Plaintiffs assert that Defendant North Central Regional Library District ("NCRL") "filters access to all Web sites it deems unsuitable for children .... ." (Pls.' Br., pg. 1). They argue NCRL's filtering policy "prevents adults from researching academic assignments, locating businesses and organizations, and simply engaging in study or leisure reading on constitutionally-protected subjects." (Pls.' Br., pg. 1). Plaintiffs even complain that 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." (Pls.' Br., pg. 14).

These sweeping contentions are misleading in what they say and what they imply. Plaintiffs ignore the abundant and diverse resources – including online resources — available to NCRL patrons.[1] They fail to account for NCRL's advanced filtering technology which allows more granular, accurate, and therefore limited, internet filtering than ever. Most importantly, Plaintiffs suggest NCRL engages in online censorship when in fact NCRL embraces the internet as a resource and encourages

[1] In addition to online resources, NCRL maintains a collection exceeding 675,000 books, periodicals, and other materials. (CP 96, pg. 7).

its use. But providing internet access to patrons does not mean librarians abdicate their essential functions. This case is less about the web sites an adult patron may view in a library than the measures librarians may take in shaping collections and fulfilling their duties in the digital age.

In considering NCRL's filtering policy, it is crucial to understand the nature and limited scope of the content that is actually blocked. NCRL's filter is configured to block web sites predominantly addressed to these subjects: hacking, proxy avoidance, phishing, adult materials, gambling, nudity/risqué, pornography, malware, spyware, certain video and image search engines, and the "personals" section of craigslist.org.[2] Just as a library is expected to make content-based judgments about books and magazines according to its Collection Development Policy, so may it also make judgments about internet content. This is a central tenet of *United States v. American Library Ass'n.*, 539 U.S. 194, 123, S. Ct. 2297, 156 L.Ed.2d 221 (2003)(hereafter, "*ALA*").

That said, NCRL has no wish to block any more online content than it must in order to comply with its legal duties, professional

[2] Category definitions are quoted in Defendant's Opening Brief at pg. 13. (See also CP 96, 11-12). A current list of blocked categories, and NCRL's Internet Public Use Policy is published at: http://ncrl.org/policy.htm#policy_internet

responsibilities, and Collection Development Policy. Indeed, the extent of blocking has steadily declined as NCRL gains familiarity with the Fortinet filtering service, the online interests and needs of its patrons, and as the internet itself has evolved. "Web chat" and "instant messaging," for example, have recently been unblocked to facilitate online educational services. Moreover, any patron who believes access to a particular web site should not be blocked, or that a particular site is wrongly categorized, can easily request NCRL to unblock the site or request the Fortinet vendor to review the site's classification.

One of Plaintiffs' recurring themes is based upon the Supreme Court's statement that government action 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 has no quarrel with this principle and its filtering policy complies fully with its requirements and spirit.

NCRL's Collection Development Policy guides decisions about the books, periodicals, tapes, compact discs, online content, and other media comprising the collection. The Policy neither favors nor disfavors any class of patrons based on age or other demographic characteristic. The Policy recognizes that NCRL patrons have "widely disparate and diverse interests, cultural backgrounds, and needs." It

explicitly states: "Not all materials will be suitable for all members of the community." Indeed, it emphasizes that parents have primary responsibility to direct the materials viewed and read by their children. (CP 98, pgs. 8-9).

In its Internet Public Use Policy (CP 96, pgs. 9-10), NCRL adds this cautionary language:

> 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.

These are not the policies of a library intent upon limiting adult patrons to online content only if such content also is fit for children. By these policies, NCRL maintains a broad, balanced collection of merit and relevance to all patrons consistent with its traditional purpose and essential mission.[3] The policy not to disable internet filtering at the request of an adult patron does not diminish NCRL as a "mighty resource in the free marketplace of ideas." *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582-83 (6th Cir. 1976).

[3] NCRL's mission is to "promote reading and lifelong learning." (CP 71, p. 6).

II. NCRL's filtering policy complies with Const. art. I, §5.

NCRL recognizes that this Court has found Const. art. I, §5 to be less tolerant than the First Amendment of overly broad restrictions on speech that rise to the level of a prior restraint. See *O'Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988). Apart from this distinction, freedom of speech issues under the state and federal constitutions are analyzed in the same manner.

Overbreadth analysis under Const. art. I, §5 is well enough established that consideration of the factors enumerated under *State v. Gunwall*, 106, 106 Wn.2d 54, 61, 720 P.2d 808 (1986) is unnecessary. *Voters Educ. Comm. v. Washington State Publ Disc. Comm.*, 161 Wn.2d 470, 494 n. 16, 166 P.3d 1174 (2007). Plaintiffs themselves recognized as much in proceedings before the District Court (CP 40, pg. 19). Nevertheless, Plaintiffs now offer a *Gunwall* analysis for the first time for no clear purpose. (Pls.' Br., pgs. 15-19). To the extent Plaintiffs are now arguing for an interpretation of Const. art. I, §5 beyond the scope of this Court's prior decisions, their *Gunwall* analysis is untimely and should not be considered. See generally *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994)(rejecting *Gunwall* analysis offered late in appellate proceedings).

Even if this Court engages in a *Gunwall* analysis, Plaintiffs have not established cause for the expansion of Const. art. I, §5 beyond its present reach. Indeed, consideration of the *Gunwall* factors weighs against departing from federal analysis in considering free speech issues associated with internet filtering in public libraries.

The first and second *Gunwall* factors require comparison of the texts of Const. art. I, §5 and the First Amendment, respectively. Clearly, the texts differ but these differences no more warrant independent analysis here than in other areas of free speech rights. This Court has not, for example, relied upon textual differences to justify a broader interpretation of Art. 1, §5 when reviewing restrictions on speech in a nonpublic forum. As with the First Amendment, such restrictions are valid as long as they are viewpoint neutral and reasonable in light of the purposes served by the forum. See, e.g., *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350-51, 96 P.3d 979 (2004). Forum principles, if applicable here, offer no basis for construing NCRL as anything other than a nonpublic forum. [4]

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[4] Traditional public forum status does not extend beyond its historical parameters. *Sanders*, 160 Wn.2d at 209. A "designated public forum" is a form of public property which the government has opened for use by the public as a place for expressive activity. 160 Wn.2d at 210. NCRL has not opened itself for this purpose.

The third *Gunwall* factor requires consideration of Washington's constitutional history. This factor is not applicable. Nothing in Washington's history speaks to how the drafters of the State's constitution would have dealt with the effect of technological advancement in a public library.

The fourth *Gunwall* factor considers preexisting state law. There is no Washington law juxtaposing the internet, free speech rights of adults, and the traditional role and responsibilities of public librarians. This factor does not weigh in favor of engaging in an independent analysis of Const. art. I, §5 beyond prior case law.

The fifth *Gunwall* factor requires a comparison of the structural differences between the federal and state constitutions. This factor is neutral. The federal constitution is a grant of enumerated powers while the state constitution serves as a limitation on what are otherwise plenary state government powers. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d 103, 121, 937 P.2d 154 (1997). The individual rights guaranteed by Const. art. I, §5 have been characterized as "preferred rights" but have never been held superior to the rights of children to receive a public education under Const. art. IX, §1. To the contrary, this Court has recognized it is the State's "paramount duty" and "highest priority" to provide for public education. See *Parents Involved in Comm. Schools v.*

Seattle Sch. Dist., 149 Wn.2d 660, 672, 72 P.3d 151 (2003). Undisputed evidence in this case establishes that NCRL branches serve as the school library in many of the school districts within its territorial reach encompassing Chelan, Douglas, Ferry, Grant, and Okanogan Counties. (CP 96, pg. 6). Online access enhances educational opportunities for the student-children of these districts thus obligating NCRL to manage its internet-based resources with the needs of student-children proximately in mind.

The sixth *Gunwall* factor considers whether the particular case raises a matter of unique state or local concern. This factor weighs against independent interpretation of Const. art. I, §5. Communities and libraries across the nation are dealing with issues similar to those raised by this case.[5] Washington's significant interest in these issues is no more or less than the interests of other states.

For all these reasons, Const., art. I §5 should not be interpreted more broadly than the First Amendment with respect to freedom of speech issues associated with internet filtering in a public library.

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[5] (CP 29, pgs. 36-37.) Additionally, litigation recently commenced against the operators of craigslist.org for allegedly supporting the proliferation of prostitution. www.cnn.com/2009/crime/03/05/craigs.list.prostitution. NCRL blocks the "personals" section of craigslist.org. (CP 96, pgs. 12-13).

With respect to Plaintiffs' contention that NCRL's filtering policy is overbroad, rising to the level of a prior restraint, Plaintiffs' argument fails. (Pls.' Br., pg. 29). NCRL's filtering policy is neither overbroad nor can it be characterized as a prior restraint.

By definition, 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 Edu. Comm. v. Public Disc. Comm.,* 161 Wn.2d, 470, 494, 166 P.3d 1174 (2007). NCRL's filtering policy is not an administrative or judicial order nor the functional equivalent. Prior restraint doctrine targets heavy-handed, overreaching restrictions on constitutionally-protected expression. NCRL's policy is limited in scope and flexible by design. It is applied as part of the Collection Development Policy by management-level staff. (CP 96, pgs. 13-14; CP 71, pgs. 9-12). If a web site is incorrectly blocked, NCRL's policy allows the filter to be overridden following prompt review. NCRL's responses to patron requests for unblocking vary, but typically responses follow in a matter of hours.[6] Delay may be inconvenient, even frustrating, but Plaintiffs

[6] CP 57-4, pgs. 338-50; CP 29, pg. 17).

cannot demonstrate that delay of limited duration translates to constitutional injury.

NCRL's policy is a dynamic solution that balances broad internet access with NCRL's duties comply with state and federal laws, and manage the library consistent with its essential purpose. The very flexibility of NCRL's policy distinguishes it from the forms of official decree that have been characterized as prior restraints. See, e.g., *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 891 P.2d 723 (1995)(ordinance allowing for license revocation with provisions for stay pending judicial review held to violate Const. art. I, §5).

NCRL's filtering policy cannot be characterized as a prior restraint for another reason: it does not prohibit constitutionally-protected expression prior to publication. See *Voters Educ.*, supra, 161 Wn.2d 494-95. (Because "compelled disclosure" law does not prohibit publication it is not a prior restraint); *Ashcroft v. American Civ. Lib. Un.*, 542 U.S. 656, 667, 124 S. Ct. 2783, 159 L. Ed.2d 690 (2004)(filtering software imposes "selective restrictions at the receiving end, not universal restrictions at the source.")

Article I, Section 5 of the Washington State Constitution provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of the right." NCRL's filtering policy

does not purport to regulate who may speak, write or publish or the subjects a writer or speaker may choose to address. NCRL's filtering policy does nothing more than establish reasonable restrictions on content that is inappropriate for dissemination in a library setting. It is no different than viewpoint-neutral decisions to exclude a particular category of books from the collection. Adult patrons do not have the discretion to supplant the judgment of librarians in matters of collection development.

Plaintiffs also fail to demonstrate that NCRL's filtering policy prevents access to a substantial amount of constitutionally-protected speech -- a requirement of any overbreadth claim. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 135, 937 P.2d 154 (1997). Plaintiffs claim that NCRL's filter makes mistakes but no known filtering software operates error free. The propensity of a filter to overblock or underblock is no reason to dismiss it as an acceptable means of managing internet content. *ALA*, *supra*, 539 U.S. at 208-09. Moreover, Plaintiffs offer no better solution that will enable NCRL to comply with its legal and professional obligations as librarians.

Plaintiffs argue that the categories selected for blocking are not defined in a manner that tracks constitutional standards. (Pls. Br., pgs. 26-27). Whether correct or not, the argument does not help Plaintiffs.

No library is required to include content within its collection simply because the content is constitutionally-protected. *ALA*, 539 U.S. at 209-10 n.4. Moreover, as the *ALA* plurality noted:

> Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; 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.

Plaintiffs argue that federal law supports the characterization of NCRL's policy as a prior restraint under a First Amendment analysis. (Pls.' Br., pgs. 30-31). Plaintiffs are mistaken. In fact, Plaintiffs choose not to even address the Supreme Court's perspective from *ALA* on this issue. In *ALA*, a plurality of the Supreme Court refused to apply prior restraint doctrine to internet filtering in a public library setting:

> "[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**

> **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).

The conclusion of *ALA*'s plurality on this point is clear: a library's decision to manage internet content with filtering software is a collection development decision, not a restraint on expressive activity.

III. The Supreme Court's analysis in ALA should be adopted.

Plaintiffs attempt to marginalize *ALA* on the ground that it is not "a reliable guide" to the resolution of this case under Const. art. I §5. Yet Plaintiffs themselves argue that *ALA* supports their position in the event this Court chooses to rely upon its reasoning. Plaintiffs assert that the narrowest holding agreed upon by a majority of the Supreme Court is that the Children's Internet Protection Act ("CIPA") does not violate the First Amendment as long as a filter is disabled at the request of an adult patron. (Pls.' Br., pg. 39-42).

Plaintiffs read *ALA* far too selectively and miss its broader, essential guidance. Neither the *ALA* plurality opinion, nor the separate concurring opinions of Justice Kennedy and Justice Breyer, found that

CIPA's constitutionality hinges upon the mandatory disabling of filtering software upon the request of an adult library patron. Disabling is an option, not a requirement. Justice Kennedy's concurrence states:

> If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software without significant delay, there is little to this case. The Government represents that this is indeed the fact.

ALA, 539 U.S. at 214.

Later, Justice Kennedy notes that a library may be subject to "as applied" constitutional claims by adult patrons if the library "lacks the capacity to unblock specific sites or disable the filter or an adult's choice is burdened in some other substantial way. 539 U.S. at 215. Clearly, Justice Kennedy recognized that libraries may choose to review and unblock sites on a case by case basis rather than simply disable the filter entirely upon the request of an adult patron.

Similarly, Justice Breyer endorsed the plurality's view that a site which is "overblocked" (i.e., blocked in error) by filtering software presents no First Amendment issue provided the adult patron "need only ask a librarian to unblock the specific Web site" or, alternatively ask the librarian to disable the entire filter. Indeed, Justice Breyer expressly left

open the possibility that library rules or practices may further restrict the access of patrons to "overblocked" internet material. 539 U.S. at 219.

Read objectively, the *ALA* plurality and concurring opinions together confirm two vitally important principles:

first, internet filtering in a public library need not achieve perfect accuracy if the filter can be disabled ***or*** a mechanism exists by which erroneously blocked material can be made reasonably accessible. NCRL offers such a mechanism; and

second, providing internet resources to library patrons does not diminish or alter the traditional, fundamental responsibility of librarians to shape the collection and facilitate learning and cultural enrichment.

As the *ALA* plurality wrote:

> 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).

ALA recognizes that libraries have the same broad discretion in shaping their online collections are they have with traditional forms of content. A library could choose to allow internet access only to the specific web sites having content deemed worthwhile. 539 U.S. at 208. Doing so, however, would eliminate access to much of the diverse content libraries strive to offer their patrons. Accordingly, 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.

Id.

Plaintiffs urge this Court to ignore *ALA* and instead adopt the approach of *Mainstream Loudon v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va 1998). (Pls.' Br., pgs. 23-24; 43-44). Plaintiffs' reliance on *Loudon* is misplaced. *Loudon* is nowhere mentioned in *ALA* and its facts and issues bear little resemblance to either *ALA* or this action. *Loudon* also was decided in 1998, nearly five years before *ALA*.

Moreover, in *Loudon*, the defendants claimed a public library could constitutionally prohibit access to speech "simply because it was authored by African-Americans, or because is espoused a particular political viewpoint, for example pro-Republican." 2 F.Supp.2d at 792. No such claim is made here. NCRL's decisions to include or exclude materials from its collection are informed and guided by its Collection Development Policy.

This Court has held that when interpreting the Washington State Constitution federal case law interpreting federal constitutional provisions is persuasive (though not binding) precedent. See, e.g., *Sanders v. City of Seattle*, 160 Wn.2d 198, 208, 156 P.3d 874 (2007), citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 353, 96 P.3d 979 (2004). Especially because of the unique context presented by this case, this Court should draw upon the historical perspectives applicable to libraries and the legal principles articulated by the plurality and concurring opinions in *ALA*.

Plaintiffs argue that "NCRL's proffered justifications for filtering are inadequate" in light of less restrictive alternatives. (Pls. Br., pgs. 32-38). Plaintiffs acknowledge that NCRL must comply with CIPA's proscription against "visual images" that are "harmful to minors," and Plaintiffs agree that NCRL may take appropriate steps to protect the

integrity of its network. Plaintiffs also acknowledge that librarians have latitude in exercising judgment to build a collection. What Plaintiffs object to, in essence, is NCRL's reliance upon internet filtering instead of alternatives such as "tap and tell" practices and recessed desks. (Pls.' Br. pg. 36-38).

Plaintiffs invoke the wrong legal standard. NCRL's filtering policy need only be a reasonable solution, not the most reasonable (although it is) or least restrictive. *Sanders*, 160 Wn.2d at 210-11. Heightened scrutiny does not apply. *ALA*, supra.

Moreover, evidence demonstrates that the alternatives proposed by Plaintiffs are ineffective and unsuitable for NCRL. Recessed desks and privacy screens are costly and have proven unsatisfactory in the judgment of NCRL's management. (CP 34). A "tap and tell" approach is necessarily subjective. Its effectiveness will depend upon the personal opinion, and tolerance for confrontation, of each librarian in each of NCRL's 28 branches. Plaintiffs promise "there will be no parade of horrors" if adults are afforded unfiltered internet access. (Pls., Br., pg. 46). However, NCRL librarians have documented instances in which patrons were discovered viewing sexually-explicit material on the internet and had printed images of the same. (CP 29, pgs. 22-27; CP 34, pgs. 2-6). NCRL does not expect its branch librarians to patrol the

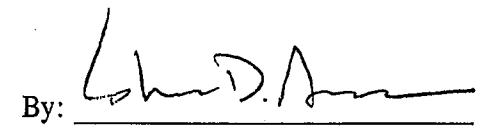
premises to enforce appropriate computer use or to confront patrons engaging in inappropriate behavior. The alternatives advanced by Plaintiffs may be appropriate in some libraries but they are poor solutions for NCRL. The filtering policy utilized by NCRL is reasonably related to its legitimate interests and should be upheld.

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 State Constitution.

Respectfully submitted this 16th day of March, 2009.

KARR TUTTLE CAMPBELL



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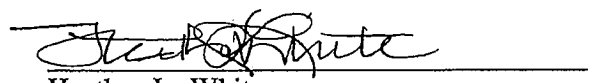

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