

THE HONORABLE EDWARD F. SHEA

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

NORTH CENTRAL REGIONAL LIBRARY  
DISTRICT,

Defendant

No. CV-06-327-EFS

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT NORTH CENTRAL  
REGIONAL LIBRARY DISTRICT'S  
MOTION FOR SUMMARY  
JUDGMENT**

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1 **I. INTRODUCTION**

2 The facts crucial to resolving this case are not in dispute: the North Central Regional  
3 Library (“NCRL”) configures its internet filters to prevent all patrons from viewing certain  
4 categories of constitutionally protected material that it does not want minors to view; the filter  
5 blocks additional protected material that does not actually fit within the categories the library  
6 seeks to filter; and the library will not disable the filter upon the request of an adult. For the  
7 reasons explained below and in Plaintiffs’ briefs on related motions (which are incorporated here  
8 by reference<sup>1</sup>), this Court should enter judgment in favor of Plaintiffs.  
9

10 This brief addresses only the federal free speech claim under the First Amendment. All  
11 issues relating to the state constitution are discussed in Plaintiffs’ summary judgment briefs and  
12 Plaintiffs’ opposition to NCRL’s motion to certify.

13 **II. PLAINTIFFS HAVE STANDING TO SEEK INJUNCTIVE RELIEF**

14 Plaintiffs include library users who want to use the facilities of their public library free of  
15 censorship and a publisher that wants to communicate with readers in the library free of  
16 censorship. Plaintiffs plainly have standing to seek an injunction to resolve this controversy.  
17

18 **A. General Principles of Standing**

19 NCRL would only be entitled to judgment if it could prove that all four Plaintiffs lack  
20 standing. The “presence of one party with standing assures that controversy before [the] Court is  
21 justiciable.” Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316, 330 (1999)  
22 (internal citation omitted). See also Bowsher v. Synar, 478 U.S. 714, 721 (1986). NCRL raises  
23

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24 <sup>1</sup> Plaintiffs will use the following abbreviations to refer to briefs: PSJ means Plaintiffs’  
25 Memorandum in Support of Summary Judgment (Docket #40, filed February 4, 2008). DSJ means  
26 Defendant’s Motion for Summary Judgment (Docket #28, filed February 4, 2008). DOPJS means  
Defendant’s Opposition to Plaintiffs’ Motion for Summary Judgment (Docket #48, filed February 15,  
2008).

1 no objection to Plaintiff Charles Heinlen's standing. DSJ at 11-14. Thus, even if there were a  
2 valid basis to challenge the other Plaintiffs' standing (which there is not for the reasons  
3 explained below), the Court would still need to reach the merits.

4 Standing hinges on the presence of "injury that could be redressed if the requested relief  
5 is granted." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). "Injury in fact" exists  
6 where there is "an invasion of a legally protected interest which is (a) concrete and  
7 particularized, and (b) actual or imminent, not conjectural or hypothetical." Nelson v. National  
8 Aeronautics and Space Administration, 512 F.3d 1134, 1142 (9<sup>th</sup> Cir. 2008) (internal citations  
9 and punctuation omitted). Plaintiffs' concerns are unquestionably concrete and particularized, as  
10 they have identified precisely which conduct is causing the constitutional injury (NCRL's refusal  
11 to disable its Internet filter at the request of adults) and the type of injunction that will remedy  
12 that injury (disabling of the filter at the request of adults).

13  
14 NCRL's standing argument focusses instead on whether past injury has been shown.  
15 Plaintiffs have suffered past injury (as explained below), but NCRL's argument ignores that  
16 present injury and imminent future injury are grounds for standing even if a past constitutional  
17 injury has not been proven. "The requirements for the issuance of a permanent injunction are the  
18 likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at  
19 law." Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9<sup>th</sup> Cir. 1996) (citation  
20 omitted). Accord Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833 (9<sup>th</sup> Cir. 2002). The  
21 justiciability of imminent future injury is what allows for pre-enforcement facial challenges to  
22 new statutes, as occurred in United States v. American Library Ass'n, 539 U.S. 194 (2003)  
23 ("ALA") and Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Thus, the key is whether  
24 Plaintiffs will likely suffer constitutional injury the next time they visit the library. NCRL's  
25 filtering policy guarantees that they will. This form of injury, of course, cannot be remedied by  
26

1 money damages, because “the loss of First Amendment freedoms, for even minimal periods of  
2 time, unquestionably constitutes irreparable injury.” Elrod v. Burns 427 U.S. 347, 374 (1976).

3 **B. Each Plaintiff Faces Actual And Imminent Constitutional Injury**

4 **1. The Plaintiff Library Patrons Face Unconstitutional Restrictions On**  
5 **Their Freedom To Read**

6 NCRL argues that plaintiffs Cherrington and Bradburn lack standing because they could  
7 not recite from memory the URL’s of each Web site that NCRL’s filter prevented them from  
8 viewing. DSJ at 13. This level of precision simply is not legally required. Both plaintiffs  
9 described the subject matter of the material that they sought to access, and have provided enough  
10 evidence to substantiate the fact that NCRL interfered with their lawful and constitutionally  
11 protected efforts to obtain information via the Internet. Bradburn was blocked from Web sites  
12 about teen smoking. PCSF ¶ 42.<sup>2</sup> Cherrington was prevented from accessing the Web sites of  
13 various art galleries, and described the blocking screen generated by the filter. PCSF ¶ 45. The  
14 head librarian on duty in the Twisp library told Cherrington that NCRL’s Internet filter was the  
15 cause. PCSF ¶¶ 45, 46. NCRL continues to this day to block Web sites featuring artistic nudity.  
16 DSF ¶ 54; PCSF ¶ 11. In addition, Cherrington identified YouTube by name. PCSF ¶ 45.

17  
18 NCRL does not attempt the same argument with regard to Plaintiff Charles Heinlen,  
19 since it would be sure to fail. In interrogatory answers, Heinlen listed 166 specific Web sites  
20 that had been blocked by NCRL’s filter. PSF ¶¶ 11-14. As recently as February 23, 2008 he  
21 was prevented from viewing certain Web sites that he attempted to view and would like to view  
22

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23  
24 <sup>2</sup> Plaintiffs will use the following abbreviations to refer to the various statements of fact submitted  
25 pursuant to Local Rule 56.1: PSF means Plaintiffs’ Statement of Facts (Docket #41, filed February 4,  
26 2008). DSF means Defendants’ Statement of Facts (Docket #29, filed February 4, 2008). DCSF means  
Defendants’ Counter-Statement of Facts (Docket #49, filed February 15, 2008). PCSF means Plaintiffs’  
Counter-Statement of Facts (filed February 25, 2008).

1 in the future. PCSF ¶ 11. NCRL asserts that “[t]he sites Heinlen claims were blocked are no  
2 longer blocked.” DSJ at 14. With the sole exception of MySpace, see Marney Decl. at ¶ 56,  
3 NCRL has adduced no evidence whatsoever to support that assertion, so it cannot be accepted as  
4 fact. Even if NCRL has unblocked some previously-blocked sites, that would not affect standing  
5 (is there “injury in fact”) but instead deals with mootness (is the injury still redressable). The  
6 argument is unpersuasive as to Bradburn and Cherrington (for whom NCRL describes it as an  
7 objection to standing) and as to Heinlen (for whom NCRL describes it as an objection on the  
8 merits). “It is well settled that a defendant’s voluntary cessation of a challenged practice does  
9 not deprive a federal court of its power to determine the legality of the practice.” City of  
10 Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 289 (1982). Otherwise, “the courts would be  
11 compelled to leave the defendant ... free to return to his old ways.” United States v.  
12 Concentrated Phosphate Export Assoc., 393 U.S. 199, 203 (1968) (internal quotation marks  
13 omitted).

14  
15 Judge Brinkema considered and rejected the identical argument in Mainstream Loudoun  
16 v. Bd. of Trust. of Loudoun County Library, 24 F. Supp. 2d 552, 559 (E.D. Va. 1998)  
17 (“Loudoun II”), finding that the plaintiffs in that case had standing and the case was not moot  
18 simply because particular blocking decisions had been reversed. The library “failed to carry its  
19 burden of demonstrating that the wrong will not be repeated.” Id. at 559. Given that NCRL  
20 continues to filter Web content and block specific Web sites (like the personals section of  
21 Craigslist) and entire categories of sites consisting primarily – if not exclusively – of protected  
22 speech, it is not merely likely but inevitable that the harm Plaintiffs have complained of will be  
23 repeated.

24  
25 Finally, Plaintiffs must rebut NCRL’s inflammatory suggestion that Plaintiff Heinlen  
26 wishes to use library computers to view pornography or obscenity. DSJ at 14. To the contrary,

1 he testified at deposition, “I’m trying to lawfully surf the Net on a library terminal.... I’m not  
2 looking for any X-rated sites or anything.” PCSF ¶ 52. In his view, if any patron were to view  
3 obscenity or perform illegal acts using library computers, NCRL would be “well within [its]  
4 rights to get the police right across the street and deal with it accordingly.” Id.

5 **2. The Plaintiff Publisher Faces Unconstitutional Restrictions On Its**  
6 **Freedom To Communicate With Its Willing Audience**

7 Contrary to NCRL’s contention, Plaintiffs can establish that the Web site for the Second  
8 Amendment Foundation publication “Women & Guns” was blocked by NCRL’s Internet filter,  
9 since the filter denied Mr. Heinlen access to the site in November 2006. PCSF ¶ 39. Even if the  
10 site was unblocked on a later date when NCRL tested it, SAF still has standing because NCRL  
11 offers no assurance that the site will not be blocked in the future absent an injunction. PCSF  
12 ¶ 40. An undisputed declaration that a site was blocked on a given date (which exists here)  
13 establishes standing, even if there is evidence that the site was unblocked on a different date.  
14 See Loudoun II, 24 F.Supp. at 558.  
15

16 **3. Plaintiffs Have Overbreadth Standing Where Others Are Harmed In**  
17 **Similar Ways By NCRL’s Filtering Policies**

18 In a First Amendment case alleging overbreadth, the rules of standing are relaxed. “The  
19 ‘overbreadth’ doctrine, which is a departure from traditional rules of standing, permits a  
20 defendant to make a facial challenge to an overly broad statute restricting speech, even if he  
21 himself has engaged in speech that could be regulated under a more narrowly drawn statute.”  
22 Alexander v. United States, 509 U.S. 544, 555 (1993). See Get Outdoors II, LLC v. City of San  
23 Diego, 506 F.3d 886, 890-94 (9<sup>th</sup> Cir. 2007). Because Plaintiffs object to the overbreadth of  
24 NCRL’s filtering, they are allowed to argue both their own injuries and the injures of “others not  
25  
26

1 before the court.” Id. at 891, quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). The  
2 record shows that plaintiffs’ experiences are not unique.

3 In the fall of 2007, NCRL installed a mechanism for patrons who encounter blocked sites  
4 to immediately send a complaint or an unblocking request to library staff. PCSF ¶ 13. This  
5 correspondence, summarized at PCSF Ex. FFF, reveals NCRL’s filtering policy in action.  
6 Between October 1, 2007 and February 20, 2008, library users sent 90 requests for unblocking,  
7 of which only 12 were granted. Id. A local artist was blocked from viewing  
8 [www.artbyjohndan.com](http://www.artbyjohndan.com), his own site that featured his “completely non-offensive, mostly  
9 abstract art.” Id. A family was blocked from seeing its own web site hosted by [www.ourfamily-  
11 web.com](http://www.ourfamily-<br/>10 web.com). Id. An unemployed patron researching job opportunities at the Northern Quest  
12 Casino was blocked from the Kalispel tribe’s web site under the “Gambling” category, even  
13 though that site did not itself allow any online gambling. Id. A patron who wished to have  
14 access to the web site [www.animeinsider.com](http://www.animeinsider.com) wrote:

15 This is not a porn site. It is a website dedicated to Anime Insider  
16 Magazine. The focus of this site is expanded coverage of the magazine, so  
17 that a cost effective magazine is available to fans of Japanimation. I am  
18 61 years old and not a participant in porn or so-called ‘adult’ media.

19 Id. NCRL refused to allow the patron to view the web site because one of the links found there  
20 led to a category called “Animexxx,” which in turn led to sites the library considered  
21 pornographic. Instead of simply blocking access to the allegedly pornographic sites that were  
22 the subjects of the links, the library stated: “While this site may offer access to Anime Insider  
23 magazine, part of the site appears to include pornography. With that in mind, we plan to  
24 continue to block access to this site.” Id. NCRL also flatly rejected a request to disable the  
25 filter. Id. Overbreadth standing helps ensure that these injuries may be rectified even if there is  
26 some technical defect in Plaintiffs’ individual standing.

### III. NCRL'S FILTERING POLICY IS OVERBROAD

1 “The overbreadth doctrine prohibits the Government from banning unprotected speech if  
2 a substantial amount of protected speech is prohibited or chilled in the process.” Ashcroft v.  
3 Free Speech Coalition, 535 U.S. 234, 237 (2002). Whether a governmental policy restricts a  
4 “substantial amount” of constitutionally protected communication is a question of law that may  
5 be determined on summary judgment. Id. at 256 (deciding overbreadth on summary judgment);  
6 Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569,  
7 572 (1987) (same). NCRL does not genuinely dispute the volume of Web sites that it prevents  
8 its patrons from viewing. Instead, it argues that the amount of material it censors is not  
9 substantial, and hence constitutionally tolerable. This Court should find otherwise.  
10

#### A. NCRL's Stated Purpose Is To Prevent All Patrons -- Including Adults -- From Viewing Material It Deems Inappropriate For Children

11  
12  
13  
14 There is no dispute that NCRL's filtering policy is driven by a conscious governmental  
15 policy to ensure that no one – including adults – will have access to certain Web sites because  
16 the library believes they are not fit for children. PSF at ¶¶ 50, 51; DSJ at 1-17. NCRL will only  
17 allow a blocked web site to be accessed if it is willing for minors to view that site. PSF 43-44.  
18 This approach suffers from the same fatal flaw as the Michigan statute that banned all literature  
19 that could have “a potentially deleterious influence upon youth.” Butler v. Michigan, 352 U.S.  
20 380, 383 (1957). As the Supreme Court remarked about that vastly overinclusive speech  
21 restriction, “[s]urely, this is to burn the house to roast the pig.” Id.  
22

#### B. NCRL Filters According to Categories That Encompass Protected Speech

23  
24 If the FortiGuard filtering categories are taken at face value, they plainly extend to  
25 constitutionally protected material that is not obscene, is not child pornography, and is not  
26 “harmful to minors” as defined in CIPA. Many of these categories were discussed in Plaintiffs’

1 summary judgment motion. PSJ at 11-13. An equally problematic category is “Nudity and  
2 Risque,” defined as “Mature content sites (18+ or older) that depict the human body in full or  
3 partial nudity without the intent to sexually arouse.” DSF ¶ 55 (emphasis added). This  
4 definition sweeps in valuable speech ranging from a photograph of the ceiling of the Sistine  
5 Chapel to an anatomical chart in a medical textbook. The filter’s actual functioning belies any  
6 argument that NCRL blocks access only to hard-core pornography. The filter blocks fine art that  
7 happens to feature nudity – including, for example, [www.artenuda.com/paintings2.asp](http://www.artenuda.com/paintings2.asp) (part of a  
8 site dedicated to “Renaissance, Baroque, Rococo, Neo-Classical masterpieces of fine art”),  
9 [www.mapplethorpe.org/index.html](http://www.mapplethorpe.org/index.html) (the Web site of the Robert Mapplethorpe Foundation),  
10 [fineartnude.com/webring](http://fineartnude.com/webring) (a site dedicated to artistic photographs of nudes). PCSF ¶ 11. This  
11 culturally valuable expression is constitutionally protected, and there is no justification for  
12 prohibiting adult library patrons from viewing it.  
13

14 Other categories that NCRL seeks to block raise similar problems. For example, NCRL  
15 blocks all image search tools because “[i]f such categories were not blocked, a patron could  
16 circumvent the filter by simply entering terms associated with obscene content.” Even if this  
17 were true, NCRL’s approach throws out the baby with the bathwater. The record reflects that a  
18 large number of NCRL patrons are aggrieved by the decision to bar image search web sites that  
19 they sought to use for entirely innocent purposes including scrapbooking, quilting, school  
20 reports, college homework, or to search for Disney characters or photos from the D-Day invasion  
21 at Normandy. PCSF ¶ 13 & Exs. EEE and FFF. As one library user wrote:  
22

23 Not sure I understand why [Google image search] is blocked. People that  
24 want to find pictures of ‘inappropriate’ things can find them without the  
25 image search. If they are motivated to do so, they will. Kind of like every  
26 other illegal activity. Please don’t make life more difficult for the 99.5%  
of people using the library resources in an acceptable manner (for  
instance, using the image search to study for anatomy and physiology).

1 Id. The library rejected all of these unblocking requests. In a similar vein, NCRL blocks all  
2 sites about gambling, whether or not they facilitate illegal transactions. PSF ¶ 88. Given the  
3 proliferation of state lotteries and surge in popularity of televised poker, there is likely to be  
4 substantial interest in lawful information about gambling.

5 **C. The Technology Used For Filtering Inevitably Results In Overblocking**

6 **1. The FortiGuard Filter Overblocks**

7 NCRL acknowledges in its Opening Brief the inevitability of underblocking (failure to  
8 block sites matching the category description) and overblocking (blocking sites that do not  
9 match the category description). DSJ at 19. NCRL contends that overblocking is not a  
10 substantial problem, but it is an independent source of overbreadth.  
11

12 Plaintiffs' expert Bennett Haselton established that at any given time, FortiGuard will  
13 block approximately 80,000 entirely innocent web sites as "Pornography" and "Adult Material."  
14 The number of overblocked sites would be even larger if Haselton had tested for other categories  
15 blocked by NCRL, including "Nudity and Risque", "Gambling", "Image Search", and so on.  
16 NCRL's expert Paul Resnick reported a similar volume of overblocking. PSF ¶ 101-11. NCRL  
17 does not genuinely dispute the sheer magnitude of sites wrongly blocked. Instead, it argues that  
18 it is inconsequential collateral damage. For this argument, it relies chiefly on Dr. Resnick's  
19 conclusion that during the week of August 23-29, 2007, NCRL patrons made requests to see only  
20 20 Web sites that were blocked in error. DSJ at 19. NCRL's argument is not well-taken.  
21

22 When considering overblocking, the salient question is the potential for interference with  
23 protected speech. For example, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981),  
24 involved a zoning ordinance that barred all "live entertainment" from the city limits. The  
25 Supreme Court found this to be overbroad without requiring the plaintiff to provide evidence that  
26 there was any particular level of demand for live entertainment in the town. The ordinance was

1 overbroad not because it eliminated a volume of communication for which there was proven past  
2 demand, but because it eliminated communication that could be substantial. Here, the question  
3 is not how much injury NCRL's filtering policy inflicted on library patrons in the past, but how  
4 much it may cause in the future. The fact that no NCRL patron happened to request a particular  
5 wrongly blocked site in the past does not reduce other patrons' right to see it today or tomorrow.

6 Even if overbreadth were to be judged solely on past overblocking experienced by NCRL  
7 patrons, Plaintiffs submit that 20 Web sites per week would result in approximately 1,040  
8 instances of overblocking per year, which is by itself a substantial imposition on speech in its  
9 own right. But as it happens, NCRL's assertion about 20 overblocked sites in one week  
10 understates Dr. Resnick's actual findings. His full report indicates that 20 entire web sites (top-  
11 level domain names) were wrongly blocked, but an even larger number of individual web pages  
12 had graphics or images wrongly blocked, including 24 large images and 744 smaller "helper"  
13 images. PCSF ¶ 35. Thus, in the test week, NCRL patrons requested but were not allowed to  
14 view over 788 wholly innocuous URLs. Over the course of a year, this would amount to 40,976  
15 wrongful blockages big and small.  
16

17 These troubling numbers are an understatement of the full problem for several important  
18 additional reasons. First, Dr. Resnick's task was to determine how often FortiGuard wrongly  
19 identified sites as falling within NCRL's chosen categories, whether or not the categories are  
20 themselves suspect. This means that if the "Nudity and Risque" category blocks 100 attempts by  
21 NCRL viewers to access Renaissance paintings by Titian or Michaelangelo, NCRL's method  
22 would not count them as errors. Second, Dr. Resnick did not attempt to quantify the number of  
23 cites wrongly blocked as Malware, Spyware, Hacking, and Phishing. The record reflects that in  
24 the past few months both the Malware and Hacking web sites have generated errors about which  
25 NCRL patrons have complained. PCSF ¶ 13 & Exs. EEE & FFF. Third, as Dr. Resnick himself  
26

1 acknowledged, his sample is likely affected by the fact that NCRL patrons know that the library  
2 filters stringently, and hence they may have engaged in self-censorship that reduces the total  
3 number of requests for sites that would have been wrongly blocked in the absence of self-  
4 censorship. PCSF ¶ 34.

## 5 **2. Site-By-Site Unblocking Does Not Cure the Constitutional Problem**

6 NCRL's unblocking procedures do not save its policy of refusing to disable its Internet  
7 filter at the request of adults. First, NCRL does not commit to unblocking individual Web sites  
8 at the request of adults – it only unblocks Web sites that it considers fit for viewing by all  
9 patrons, including children. FortiGuard allows users to disable the filter at a single terminal for a  
10 designated length of time, PCSF ¶ 20, and this is the method envisioned by CIPA, but NCRL  
11 will not do it. Second, there is no procedure for the prompt unblocking of erroneously blocked  
12 Web sites. Branch librarians are not authorized to unblock Web sites at the request of patrons.  
13 Rather, the decision whether to unblock must be made at headquarters, which takes hours or  
14 days. PCSF ¶ 13. For a rural library where patrons may have to travel significant distances to  
15 reach the library, the absence of a prompt response is significant.  
16

## 17 **IV. NCRL IMPOSES A CONTENT-BASED SPEECH RESTRICTION** 18 **THAT FAILS HEIGHTENED SCRUTINY**

### 19 **A. NCRL Filters Based on Content**

20 NCRL acknowledges, as it must, that its filter blocks web sites based on their content.  
21 See DSJ at 15 (“Internet filtering is a form of content selection”). A government entity may not  
22 interfere with communication because of its content unless it demonstrates that the decision  
23 serves compelling interests in a narrowly tailored way. See PSJ at 13-14; Loudoun II, 24  
24 F.Supp.2d at 564-65. NCRL cannot satisfy either part of that test.  
25  
26

1 **B. NCRL's Proffered Justifications for Continuous Filtering for Adults Are**  
2 **Inadequate**

3 NCRL's reasons for its actions are not compelling (or even substantial).

4 **1. Complying With CIPA**

5 NCRL's filtering system deviates from CIPA in many ways. PSJ at 2 n.1. Moreover,  
6 CIPA authorizes libraries to disable the filter, and it is this ability to disable that makes the  
7 statute constitutional. United States v. American Library Ass'n, 539 U.S. 194 (2003) ("ALA").  
8 See generally, PSJ at 16-18.

9 **2. Promoting NCRL's Mission and Collection Development Policy**

10 NCRL assertion that its filtering practices are "consistent" with its mission and  
11 Collection Development Policy, DSJ at 7, 11, 14-15, 16, is supported only by a conclusory  
12 assertion in a declaration. DSF ¶ 60; Marney Decl. at ¶ 32. "Uncorroborated and self-serving  
13 declarations ... alone do not create any genuine issues of material fact." DuBois v. Association  
14 of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175, 1180 (9th Cir. 2006). See also Lujan  
15 v. Nat'l Wildlife Federation, 497 U.S. 871, 888 (1990) (purpose of Rule 56(e) "is not to replace  
16 conclusory allegations of the complaint or answer with conclusory allegations of an affidavit").  
17 In fact, NCRL's stated mission "to promote reading and lifelong learning" is not well served by  
18 preventing adults from reading tens of thousands of Web sites. If anything, a filtering policy that  
19 sharply reduces the availability of reading matter, while creating frustration and ill will on the  
20 part of library patrons, is certain to discourage reading and lifelong learning.

21 The Collection Development Policy, Marney Decl. Ex. C, nowhere authorizes librarians  
22 to bar adult patrons from seeing wide swaths of lawful material that is already bought and paid  
23 for. To the contrary, the Policy emphasizes that "The Board of Trustees believes that reading,  
24 listening to, and viewing library materials are individual, private matters. While individuals are  
25  
26

1 free to select or to reject materials for themselves, they cannot restrict the freedom of others to  
2 read, view, or inquire.” The Collection Development Policy also recognizes that “Not all  
3 materials [in the collection] will be suitable for all members of the library.” The Policy states  
4 that NCRL “shall be responsive to public suggestion of titles and subjects to be included in the  
5 library collection.” The past few months of unblocking requests show that NCRL’s filtering  
6 policy actually impedes the library’s ability to respond to public suggestions. PCSF ¶ 13.

### 7 **3. Ensuring Network Security**

8 Plaintiffs agree that NCRL may take appropriate steps to protect the integrity of its  
9 network (see PSJ at 3 n.2). However, NCRL has not been demonstrated how the categories  
10 chosen will serve that goal. In fact, the best approach to network security is appropriate firewall  
11 and malware screening software, and not measures like the “Spam URL” category that bar  
12 viewers from accessing any web site that is mentioned in a spam e-mail (most of which would  
13 pose no security risk at all. See Declaration of Bennett Haselton.

### 14 **4. Working Cooperatively With Schools**

15 Disabling the filter at the request of adults would not prevent NCRL from working  
16 cooperatively with schools. Nothing in Plaintiffs’ requested relief would affect NCRL’s  
17 authority to require filters when its computers are used by minors.

### 18 **5. Minimizing Confrontations Between Patrons and Staff**

19 Where heightened scrutiny is involved, “the government must present more than  
20 anecdote and supposition” to support its claim that an actual problem exists requiring the  
21 suppression of speech. ); United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 822-23  
22 (2000). NCRL’s arguments about confrontations in the library are quite literally based upon  
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24  
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26

1 anecdote. Moreover, the anecdotes are inadmissible hearsay.<sup>3</sup> Even if considered, they are not  
2 legally persuasive.

3 The main thrust of most of these anecdotes is that library staff disliked viewing what  
4 some library patrons were viewing. But “speech does not lose its protected character ... simply  
5 because it may embarrass others.” NAACP v. Claiborne Hardware Corp., 458 U.S. 886, 910-  
6 911 (1982). Librarians, as much as – and indeed, more than – other citizens, are expected to  
7 know that “the burden normally falls upon the viewer to ‘avoid further bombardment of his  
8 sensibilities simply by averting his eyes’.” Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-  
9 11 (1975), quoting Cohen v. California, 403 U.S. 15, 21 (1971) (internal punctuation omitted).  
10 Thus, even if some employees are willing or eager for NCRL to suppress substantial amounts of  
11 protected expression in order to avoid exposure to a tiny amount of unprotected expression, this  
12 would not justify the suppression.  
13

14 In some hearsay anecdotes, library staff supposedly felt uncomfortable asking patrons to  
15 stop viewing inappropriate material. See DSF at ¶ 90-98. NCRL labels these events as  
16 “confrontations,” but the actual interactions with the patrons are not described (only the  
17 subjective feelings of the library staff). There is no evidence that these library users refused to  
18 conform their behavior to appropriate standards when instructed by a librarian. In fact, there is  
19 no evidence that these alleged “confrontations” consisted of anything more than a polite  
20 exchange of words. Nor is there any evidence that a child under the age of ever viewed  
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22  
23 <sup>3</sup> The only source of these anecdotes is the hearsay repeated in the Declaration of Dan Howard.  
24 DSF at ¶ 90-98. The Court should disregard paragraphs 8-17 of Mr. Howard’s declaration. Mr. Howard  
25 himself has never witnessed patrons viewing pornography in the library. Compare Howard Decl. at ¶¶ 7-  
26 16 with Howard Dep. at 39-41 (PCSF at ¶ 29-32). NCRL did not disclose as witnesses any of the library  
staff mentioned in Mr. Howard’s declaration, so under Fed.R.Civ.P. 37(c)(1), these witnesses may not be  
called to testify at trial. As a result, the declaration is not an affidavit “made on personal knowledge” that  
sets forth “facts that would be admissible in evidence.” Fed.R.Civ.P. 56(e).

1 pornographic images on a library computer due the actions of an adult library patron. PCSF at  
2 ¶ 29-32. Sometimes librarians must perform uncomfortable tasks, including asking boisterous  
3 patrons to lower their voices, homeless patrons to shower, or underage patrons to stop giggling  
4 over gynecology texts. See Loudoun II, 24 F.Supp.2d at 567. Labeling these events  
5 “confrontations” does not justify content-based censorship.

6 Finally, there is no evidence that the relief requested would lead to significantly more  
7 interactions of this sort. If the hearsay reports are believed, NCRL’s existing filtering system  
8 does not successfully banish all obscene images from NCRL’s computers. See Marney Dep. at  
9 51, 61-63, 140; Howard Decl. ¶ 7; Howard Dep. at 39-42. The existing sporadic level of alleged  
10 incidents will continue regardless. Not all adult users would ask for unfiltered Internet access if  
11 it were available, especially if the NCRL service area is as straight-laced as NCRL claims.  
12 PCSF ¶ 57. There is also no reason to believe that all requests for disabling would be made in  
13 order to view obscenity. Given the stigma involved, it is unreasonable to presume that many  
14 adults will view obscene in small-town public libraries where they might be seen by their  
15 neighbors.  
16

#### 17 **6. Protecting Children From a “Dangerous Environment”**

18 NCRL speculates that “unfiltered adult internet use may lead to a dangerous environment  
19 for children.” DSJ at 18-19. NCRL’s only support for this assertion is a newspaper article  
20 discussing online pornography in a Dallas, Texas public library. “Newspaper articles have been  
21 held inadmissible hearsay as to their content.” Larez v. City of Los Angeles, 946 F.2d 630, 642  
22 (9th Cir. 1991). Even if considered, there is no mention anywhere in the newspaper article that  
23 Dallas library patrons’ viewing of pornographic images online created a “dangerous  
24 environment” for anyone – children or adults. Also, according to the article, Internet access is  
25  
26

1 always unfiltered at the Dallas library, whereas the only relief Plaintiffs are seeking in this case  
2 is disabling of NCRL's Internet filter at the request of adults.

3 **7. Preventing Illegal Conduct**

4 NCRL seeks to prevent illegal activity (for example, online gambling) on NCRL  
5 computers, DSJ at 11, 16, which is a legitimate objective. However, NCRL cannot block vast  
6 amounts of protected speech as the means to deter illegality. "The Government may not  
7 suppress lawful speech as the means to suppress unlawful speech." Ashcroft v. Free Speech  
8 Coalition, 535 U.S. 234, 255 (2002). See also Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)  
9 ("the possible harm to society in permitting some unprotected speech to go unpunished is  
10 outweighed by the possibility that protected speech of others may be muted....").  
11

12 **8. Avoiding Liability for Employment Discrimination**

13 Finally, NCRL implies that the requested relief would subject it to liability for  
14 employment discrimination. DSJ at 17, 18. A claim of sex discrimination based upon a hostile  
15 work environment requires proof of, among other things, an employer's conduct that is  
16 "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an  
17 abusive working environment." Craig v. M & O Agencies, Inc., 496 F.3d 1047, 1055 (9th Cir.  
18 2007). The conditions of employment at a public library include a willingness to accept that  
19 patrons may read things that the staff would not appreciate. If NCRL's reasoning were accepted,  
20 Jewish employees could sue a library for allowing patrons to read Hitler's *Mein Kampf*, or  
21 African-American employees could sue a library that stocked copies of works alleged to be  
22 racist. Such claims would of course fail. See Monteiro v. Tempe Union High School District,  
23 158 F.3d 1022, 1029-30 (9<sup>th</sup> Cir 1998) (public school did not discriminate by assigning  
24 *Huckleberry Finn* as required reading, even though book frequently uses the word "nigger").  
25 Indeed, if NCRL's argument were correct it would probably need to filter for an entire range of  
26

1 Internet expression that it currently does not, because a claim for hostile environment is not  
2 limited to sex discrimination. See Monteiro, 158 F.3d at 1033 (outlining claim for racially  
3 hostile environment).

4 No court has ever found that a public library could be sued for the absence of filters.  
5 Loudoun II, a case indistinguishable from this one, held the opposite. A major defense of the  
6 Loudoun County library was that its overbroad internet filtering policy was necessary to prevent  
7 a hostile work environment. Judge Brinkema rejected that claim because, as here, filtering is not  
8 necessary to avoid a hostile work environment. 24 F.Supp.2d at 565-66. Other types of liability  
9 were at issue in Kathleen R. v. City of Livermore, 104 Cal.Rptr.2d 772 (Cal. App. 2001), where  
10 the plaintiff wanted her local library to install filters to ensure that her 12-year-old son did not  
11 see the adult material viewed by adult patrons. The California Court of Appeals rejected all of  
12 plaintiff's theories, concluding that "a city is not subject to suit for damages or an injunction for  
13 offering unrestricted access to the Internet through computers at a public library." Id. at 775.  
14 Much of the immunity results from 47 U.S.C. § 230(c)(1), which prevents any lawsuit against a  
15 "provider" of interactive computer services (including a library) for content written by third  
16 parties. Id. at 776-781.

17  
18 NCRL relies upon inadmissible hearsay from newspaper articles about a hostile work  
19 environment lawsuit in Minneapolis. DSJ at 18 n.11. The actual facts of that case support  
20 Plaintiffs. In Adamson v. Minneapolis Public Library, No. 03-02521 (D. Minn. March 24,  
21 2003), librarians challenged a policy that expressly allowed patrons to view obscenity on library  
22 computers, and instructed library staff not to intervene even if patrons invited minors to view  
23 obscenity with them. PCSF ¶ 56, Ex. HHH. This alarming situation is distinguishable from the  
24 relief requested by Plaintiffs in this case, which would not require NCRL to tolerate obscenity or  
25 substantial disruption of library facilities. Adamson settled out of court and established no  
26

1 precedent. PCSF ¶ 56, Ex. III. Significantly, the Minneapolis library revised its internet use  
2 policy after settling Adamson, and *the new policy is precisely what Plaintiffs seek here*:

3 The Children’s Internet Protection Act (CIPA), passed Congress in 2000 and  
4 upheld by the Supreme Court in 2003, requires libraries receiving certain types of  
5 federal funding to equip Internet-access computers with a technology protection  
6 measure that blocks or filters visual depictions that are obscene, contain child  
7 pornography or are harmful to minors. In compliance with CIPA, the  
8 [Minneapolis Public] Library Board authorized installation of filtering software  
9 designed to prevent access to obscenity, child pornography and materials harmful  
10 to minors. In accordance with the law, persons aged 17 years or older may  
11 request to have the filters disabled for any lawful purpose that meets the  
12 Minneapolis Public Library Internet Policy and Guidelines AND THE FILTER  
13 WILL BE DISABLED.

14 ... Illegal use of the Internet is prohibited. Library users may not use the  
15 Library’s Internet access to view, print, distribute, display, send or receive  
16 images, text or graphics of obscene material or material that violates laws relating  
17 to child pornography. Library users may not disseminate, exhibit or display to  
18 minors materials that are harmful to minors.

19 PSF ¶ 56, Ex. JJJ. (capital letters in original). The requested injunction would result in the same  
20 practices that the Minneapolis library believes are ample protection against liability.

21 **C. NCRL’s Filtering Policy Is Not Narrowly Tailored**

22 **1. An Overbroad Filtering Regime Is By Definition Not Narrowly Tailored**

23 A restriction that is overbroad is, by definition, not narrowly tailored. See, e.g., Bd. of  
24 Trust. of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (“Quite obviously,  
25 the rule ... that a statute ... must be ‘narrowly tailored’ ... prevents a statute from being  
26 overbroad”). The overbreadth arguments set forth above are therefore relevant here.

**2. Less Restrictive Alternatives Exist**

A government policy that “effectively suppresses a large amount of speech adults have a  
constitutional right to receive and to address to one another ... is unacceptable if less restrictive

1 alternatives would be at least as effective in achieving the legitimate purpose that the statute was  
2 enacted to achieve.” ACLU v. Reno, 521 U.S. 844, 874 (1997). In such a case, “the burden is  
3 on the government to prove that the proposed alternatives will not be as effective as the  
4 challenged statute.” Ashcroft v. ACLU, 542 U.S. 656, 665 (2004). A wide range of less-  
5 restrictive library alternatives have been endorsed by the Courts and adopted by comparable  
6 small-city and rural libraries. PSJ at 5. NCRL asserts without explanation that none of the  
7 methods that work successfully for others will work for it. DOPJSJ at 6-7. However, the  
8 adequacy of available alternatives is a question of law for the court, and when the government  
9 adopts a broad content-based restriction on internet speech, there is “an especially heavy burden  
10 on the Government to explain why a less restrictive provision would not be as effective.” Reno,  
11 521 U.S. at 879. “A court should not assume a plausible, less restrictive alternative would be  
12 ineffective.” Playboy, 529 U.S. at 824.

13  
14 It is also important to compare the proposed alternatives to the existing method. NCRL  
15 acknowledges that that even with filters installed, patrons manage to view content that the library  
16 deems inappropriate for children. See Marney Dep. at 51, 61-63, 140; Howard Decl. ¶ 7;  
17 Howard Dep. at 39-42. If NCRL’s goal is to prevent bystanders from seeing unwanted matter, it  
18 would be more efficacious for the library to concentrate on privacy screening and line-of-sight  
19 techniques than continued attempts to fortify an inherently imperfect electronic Maginot Line.

20  
21 **V. THE WORDING OF NCRL’S WRITTEN INTERNET USE POLICY  
22 IS NOT AT ISSUE**

23 The portions of NCRL’s brief defending its written Internet Use Policy, DSJ at 6-9,  
24 misapprehend Plaintiffs’ challenge. This lawsuit is not about the formal wording of the Internet  
25 Use Policy; it is about whether the library can refuse to disable its overbroad Internet filter upon  
26 the request of an adult patron. The cause of action created by 42 U.S.C. § 1983 allows plaintiffs

1 to challenge constitutional violations caused not just by “statute, ordinance, [or] regulation” but  
2 also caused by “custom” or “usage.” This encompasses unwritten policies as well as those  
3 committed to paper. Kirkpatrick v. City of Los Angeles, 803 F.2d 485 (9th Cir. 1986)  
4 (adjudicating § 1983 challenge to unwritten policy). It is undisputed here that, in Defendants’  
5 words, “NCRL will not disable the filter upon the request of an adult patron.” DSF ¶ 23. This is  
6 the policy that plaintiffs challenge.

7  
8 **VI. CONCLUSION**

9 For the foregoing reasons, NCRL’s Motion for Summary Judgment should be denied.

10  
11 DATED this 25<sup>th</sup> day of February, 2008.

12 AMERICAN CIVIL LIBERTIES UNION OF  
13 WASHINGTON FOUNDATION

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the persons listed below:

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