

THE HONORABLE EDWARD F. SHEA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

No. CV-06-327-EFS

Plaintiffs,

**PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY
JUDGMENT**

v.

NORTH CENTRAL REGIONAL LIBRARY
DISTRICT,

Defendant

This reply brief responds to arguments contained in Defendant's Opposition to Plaintiffs's Motion for Summary Judgment (Docket #48, filed February 15) ("DOPJSJ"). To avoid unnecessary repetition, this reply brief incorporates by reference the arguments from Plaintiffs' Motion for Summary Judgment (Docket #40, filed February 4) ("PSJ") and Plaintiffs' Opposition to NCRL's Motion for Summary Judgment (filed February 25).

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1 during use by an adult, to enable access for bona fide research or other lawful purpose.” 47
2 U.S.C. § 254(h)(5)(D) (emphasis added). Libraries receiving funds under LSTA “may disable a
3 [filter] to enable access for bona fide research or other lawful purposes,” 20 U.S.C. § 9134(f)(3)
4 (emphasis added), whether or not the user is an adult. Even the plurality in ALA adopted as a
5 definitive interpretation of the statute the statement of the Solicitor General at oral argument that
6 a “librarian can, in response to a request from a patron, unblock the filtering mechanism
7 altogether.” 539 U.S. at 209 (emphasis added). Disabling the filter is unquestionably
8 authorized. Moreover, the plurality and the concurring opinions envisioned that disabling would
9 actually occur when requested; if it did not, there would have been no reason for the various
10 opinions to lay such emphasis upon it.
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12 A library’s willingness to consider site-by-site unblocking requests made while the filter
13 as a whole is locked in place is not an adequate substitute. To begin with, it is not the
14 mechanism envisioned by CIPA, which speaks of “disabling” the filter upon request, not
15 reconfiguring it upon request. ALA is not dispositive on this question, since that case did not
16 call upon the Court to consider a hypothetical library that immediately unblocked sites upon
17 request, while otherwise leaving the filter running. This Court need not decide that question
18 either, because it is undisputed that NCRL does not unblock sites upon request. PSJ 4-5. At
19 most, NCRL will consider requests to unblock individual sites on a permanent basis for all
20 viewers. Even with fully legitimate reasons for an adult to view an adult site, NCRL will not
21 accommodate that site-by-site unblocking request. Instead, it will only make permanent
22 unblocking decisions -- and the only sites that will be permanently unblocked are those the
23 library deems to be appropriate for children. Plaintiffs’ Statement of Facts ¶¶ 43-44; Plaintiffs’
24 Counter-Statement of Facts ¶ 13.
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1 Because ALA was a facial challenge to Congress's authority to enact a statute under the
2 Spending Clause, it necessarily left unanswered many questions that might arise in a
3 constitutional challenge to a specific library's policies. Mainstream Loudoun v. Bd. of Trust. of
4 the Loudoun County Public Library, 24 F. Supp. 2d 552 (E. D. Va. 1998) ("Mainstream
5 Loudoun II") is the only such challenge to result in a published opinion. Like this case,
6 Mainstream Loudoun involved a library that blocked all web sites it considered inappropriate for
7 children and would not disable its filters for adults. The later enactment of CIPA, and the
8 decision in ALA, in no way overruled Mainstream Loudoun. The type of filtering envisioned by
9 CIPA and approved in ALA are factually distinguishable from the filtering systems found in
10 Mainstream Loudoun and in this case. PSJ at 2 n.1. NCRL implies that Mainstream Loudoun
11 was somehow overruled because the later-decided ALA case did not cite it. DOPJS at 10. Of
12 course, the Supreme Court is never obliged to cite trial court opinions dealing with the same
13 general subject matter, and especially not opinions whose facts are distinguishable and whose
14 outcome is not being overruled. Mainstream Loudoun remains highly persuasive authority.

16 II. NCRL'S POLICY IS OVERBROAD

17 A. Overbreadth Cases Apply To The Library Setting

18 NCRL writes that it "has no quarrel with the principle that speech appropriate for adults
19 cannot be completely silenced for the sake of protecting children when less restrictive safeguards
20 are shown to exist." DOPJS at 9 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 244
21 (2002)). Nonetheless, NCRL questions whether this rule applies in public libraries. Id.
22 ("Ashcroft, however, does not consider this principle in the context of internet filtering in public
23 libraries . . ."). There is of course no public library exception to the rule against overbroad
24 governmental speech restrictions. Ashcroft is just one example of the rule that government may
25 not "reduce the adult population . . . to reading only what is fit for children." Butler v. Michigan,
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1 352 U.S. 380, 383 (1957); PSJ at 9-10. The Court has applied this rule consistently and in a
2 variety of contexts. See, e.g., Sable Communications v. FCC, 492 U.S. 115, 131 (1989)
3 (invalidating a ban on indecent but not obscene telephone services); Bolger v. Youngs Drug
4 Products Corp., 463 U.S. 60, 74-75 (1983) (striking down a ban on mail advertisements for
5 contraceptives); Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975) (striking down a
6 statute that criminalized showing of nudity at drive-in theaters). It would be perverse if the one
7 place where the government could limit adults to childrens' discourse was the public library, an
8 institution dedicated to the dissemination of ideas.

9
10 Defendant's urges this Court to disregard the Butler overbreadth principle for libraries
11 because "[t]he issue before this Court are best informed by ALA because of the unique
12 considerations associated with speech rights, public libraries, and legal overlay of CIPA."
13 DOPJS at 9. But ALA was exceedingly narrow and avoided the questions that would arise in an
14 as-applied challenge: it upheld CIPA on its face because of the disabling provisions. This
15 Court's best recourse is to fall back on other well-established principles of First Amendment
16 jurisprudence. The prohibition on reducing adults to reading what is fit for children is such a
17 principle.

18 **B. That NCRL Could Block Even More Material Is Irrelevant**

19 NCRL asks this Court to "consider the 64 categories NCRL chooses not to block,
20 including, for example, categories pertaining to abortion, extremist groups, sex education,
21 alcohol, tobacco, weapons, and violence." DOPJS at 9-10. The potential for filtering policies
22 that are even more overbroad does not make the existing overbreadth acceptable. A statute
23 banning all speech about the war in Iraq would not be constitutional simply because it allows the
24 populace to discuss social security, the budget deficit, and nuclear proliferation.
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1 **C. Paternalistic Judgments About What Patrons Should Read Cannot Trump**
2 **Patrons' Own Choices**

3 NCRL attempts to explain away some examples of overblocked web sites by asserting in
4 a paternalistic manner that its patrons have no cause to read them. DOPJSJ at 13-14. This
5 argument shows the central problem with overbroad internet filtering technology. There are
6 dozens of reasons why a patron of NCRL may want to view www.acceptpreganancy.org or
7 www.faithchurchofdavis.org, including relatives living in those areas or simply research about
8 what exists in the world outside of North Central Washington. There is nothing wrong with a
9 patron of NCRL ordering tulips from www.tulipflorists.com. “The First Amendment mandates
10 that we presume that speakers, not the government, know best both what they want to say and
11 how to say it.” Riley v. National Federation of the Blind, 487 U.S. 781, 790-91 (1988). The
12 same applies to readers, since “the protection afforded [by the free speech clause] is to the
13 communication, to its source and to its recipients both.” Virginia Pharmacy Board v. Virginia
14 Consumer Council, 425 U.S. 748, 756 (1976).
15

16 It would be one thing if a library in Eastern Washington chose not to spend its limited
17 budget and shelf space on books about pregnancy counseling facilities in Florida or churches in
18 Illinois. But NCRL already bought and paid for that content when it acquired an internet
19 connection (subsidized in part by two federal programs). It takes up no shelf space at all, and
20 does not displace the ability of the library to acquire any other material it considers to be of
21 greater importance. The examples discussed here were not blocked because NCRL found their
22 content objectionable; this type of blockage is an unavoidable artifact of all filtering technology.
23 This means that the blockage serves no governmental interest at all. Searches for information
24 will be particularly prone to overblocking when they involve subjects containing whiffs of
25 generically “adult” content, as when Pearl Cherrington researched Washington State art galleries
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1 whose collections include artistic nudes, or when Sarah Bradburn researched tobacco use. A
2 patron who chooses to read this type of material would be wholly justified in seeking disabling
3 of the filter when it generates a frustrating level of censorship. In the absence of that option, a
4 patron would be justified in simply giving up -- which is precisely the harm that the constitution
5 seeks to avoid.

6 NCRL also argues, without citation to any evidence in the record, that some of the
7 blocked sites discovered through the random sample conducted by Plaintiffs' expert could be
8 accessed by typing a different domain extension. DOPJS at 13. This provides no comfort. A
9 patron curious about the Seattle Womens' Jazz Orchestra might learn from a friend, from a radio
10 program, from another web site, or from any other source that the Orchestra's primary web
11 address is www.swojo.org. A reasonable patron finding that this site is blocked would not
12 respond by trying other variations like www.swojo.com or www.swojo.net. A reasonable patron
13 would instead conclude that NCRL does not allow any access to information about the Seattle
14 Womens' Jazz Orchestra, which is why this sort of purposeless overblocking raises significant
15 constitutional problems.
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17 The foregoing discussion shows why it is NCRL's burden to show that its filtering
18 system is narrowly tailored. Ashcroft v. ACLU, 542 U.S. 656, 665 (2004). Library users should
19 not have to justify why they want to read material made freely available on the internet. NCRL
20 has the burden of showing why it is justified in denying access.
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22 III. NCRL MISAPPREHENDS PLAINTIFFS' STATE 23 CONSTITUTIONAL ARGUMENT

24 NCRL's discussion of prior restraints, NCRL Opposition Brief at 18-19, seems to be
25 based upon a misreading of Plaintiff's arguments under the Washington constitution. Although
26 there are certain troubling similarities, Plaintiffs have not argued that the NCRL filter is a

1 “classic” prior restraint as found in federal cases like New York Times Co. v. United States, 403
2 U.S. 713 (1971) (the “Pentagon Papers” case), or Washington cases like JJR, Inc. v. Seattle, 126
3 Wn.2d 1, 6 (1995) (revocation of nightclub license). Instead, Plaintiffs argue that the speech
4 restriction imposed by NCRL is so overbroad that it triggers Washington’s superior protections
5 under Art. I, § 5 for the right of “every person [to] freely speak, write and publish on all
6 subjects.” Washington courts often use terminology saying that overbroad speech restrictions
7 “rise to the level of a prior restraint,” because overbreadth causes many of the same chilling
8 effects on communication that prior restraints do. “Regulations that sweep too broadly chill
9 protected speech prior to publication, and thus may rise to the level of a prior restraint.” O’Day
10 v. King County, 109 Wn.2d 796, 804 (1988), citing State v. Coe, 101 Wn.2d 364, 373 (1984).
11 Accord, Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 117 (1997); Soundgarden v.
12 Eikenberry, 123 Wn.2d 750, 764 (1994). These Washington cases make clear that overbreadth is
13 a favored doctrine under Art. I, § 5, and is not viewed as “strong medicine” to be applied only as
14 a last resort. O’Day, 109 Wn.2d at 804. “The Washington constitution is less tolerant than the
15 First Amendment of overly broad restrictions on speech.” Id.

16
17 NCRL’s briefs do not grapple with Washington’s distinctive hostility to overbroad
18 speech restrictions. The briefs also ignore Soundgarden, the Washington case whose facts are
19 most illustrative for present purposes. Soundgarden demonstrates how Art. I, § 5 does not allow
20 a state agency to chill otherwise lawful communication among adults on the grounds that the
21 communication is supposedly harmful to minors. See Plaintiffs’ Opening Brief at 19-20.
22 NCRL’s filter is if anything more pernicious in its censorship than the statute in Soundgarden,
23 because it does not metaphorically move adult material “behind the counter” (which would be
24 enough to violate Art. I, § 5), but makes it literally unviewable in the library under any
25 circumstances.
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DATED this 25th day of February, 2008.

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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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