

The Honorable Edward F. Shea

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

SARAH BRADBURN, PEARL	)	
CHERRINGTON, CHARLES	)	
HEINLEN, and THE SECOND	)	NO. CV-06-327-EFS
AMENDMENT FOUNDATION,	)	
	)	JOINT SUBMISSION REGARDING
Plaintiffs,	)	POST-CERTIFICATION
	)	PROCEEDINGS
v.	)	
	)	
NORTH CENTRAL REGIONAL	)	
LIBRARY DISTRICT,	)	
	)	
Defendant.	)	
	)	

Plaintiffs Sarah Bradburn, Pearl Cherrington, Charles Heinlein, and the  
Second Amendment Foundation (“Plaintiffs”) and Defendant North Central

1 Regional Library District (“NCRL”) submit the following with respect to  
2 further proceedings in this Court in light of the Washington Supreme Court’s  
3 response to this Court’s certified question in *Bradburn, et al. v. North Central*  
4 *Reg. Lib. Dist.*, \_\_\_ Wn.2d \_\_\_, 2010 Wash. Lexis 434 (May 6,  
5 2010)(*Bradburn*).

8 **1. Procedural Status**

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10 On September 30, 2008, this Court entered an order (Dkt. 96)(“the  
11 September 30 order”) granting NCRL’s motion to certify a question  
12 concerning the constitutionality, under Art. I, § 5 of the Washington State  
13 Constitution, of NCRL’s policy not to disable internet filtering at the request  
14 of an adult patron. The September 8 order “held in abeyance” the  
15 constitutional issues<sup>1</sup> raised by the parties’ cross motions for summary  
16 judgment pending the Washington State Supreme Court’s response to the  
17 certified question.  
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21 On May 6, 2010, the Washington State Supreme Court answered the  
22 certified question, holding that “a library can, subject to the limitations set  
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25 <sup>1</sup> With respect to standing issues raised by NCRL, the September 8 order concluded  
26 that Plaintiff Sarah Bradburn may only assert a “facial” constitutional challenge but all  
27 other Plaintiffs have standing to assert “as applied” challenges.  
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1 forth in this opinion, filter Internet access for all patrons, including adults,  
2 without violating article I, section 5 of the Washington State Constitution.”  
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## 4 **2. Plaintiffs’ Statement**

5 The parties respectfully disagree regarding how the Washington State  
6 Supreme Court’s decision impacts the issues pending before this Court.  
7 Plaintiffs maintain that this Court should direct the parties to submit limited  
8 briefing on the matter. Plaintiffs propose additional briefs of no more than 15  
9 pages apiece, to be filed simultaneously by the parties within 45 days.  
10 Plaintiffs request that the pending cross-motions for summary judgment be re-  
11 set for a hearing with oral argument on the first possible date thereafter.  
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15 NCRL contends that the pending motions may be resolved on the basis  
16 of the Washington State Supreme Court’s decision, without additional briefing  
17 – since, according to NCRL, if its policy complies with Art. I, § 5, it  
18 necessarily also complies with the First Amendment. This contention is  
19 incorrect. First, as the *Bradburn* majority stated in its opinion with regard to  
20 Plaintiffs’ claims under Art. I, § 5, “the federal court will apply the legal  
21 guidelines we set forth in this opinion to the facts of the case.” And second,  
22 NCRL improperly subordinates the First Amendment to Art. I, § 5. The  
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1 majority's opinion – with which Plaintiffs strongly disagree – is not dispositive  
2 of Plaintiffs' claims under federal law. The Supremacy Clause, U.S. CONST.  
3 art. IV, cl. 2, provides, "This Constitution, and the Laws of the United States  
4 which shall be made in Pursuance thereof ... shall be the supreme Law of the  
5 Land; and the Judges in every State shall be bound thereby, any Thing in the  
6 Constitution or Laws of any State to the Contrary notwithstanding." It has  
7 been firmly established for decades that in any given case, state law applies  
8 "[e]xcept in matters governed by the Federal Constitution or by acts of  
9 Congress." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82  
10 L. Ed. 1188 (1938) (emphasis added). If a case presents an issue arising  
11 under the United States Constitution, a federal court "[has] the duty to make  
12 [an] independent inquiry and determination" regarding the issue. *Aftanase v.*  
13 *Economy Baler Co.*, 343 F.2d 187, 192 (8<sup>th</sup> Cir. 1965). A state court's  
14 construction of the United States Constitution may be entitled to respect, but it  
15 is not binding on the federal courts. *Watson v. Estelle*, 886 F.2d 1093, 1095  
16 (9<sup>th</sup> Cir. 1989). It follows that a state court's construction of a *state*  
17 constitution cannot control a federal court's analysis of a corresponding federal  
18 constitutional provision.  
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1 Plaintiffs disagree that the Washington State Supreme Court properly  
2 relied on *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct.  
3 2297, 156 L. Ed. 2d 221 (2003)(*ALA*), and note that the *Bradburn* Court cited  
4 plurality as well as majority conclusions in support of its decision. Plaintiffs  
5 maintain that the *Bradburn* decision is deeply flawed and profoundly  
6 misguided. In fact, Justice Chambers, in a sharp dissent joined by two other  
7 justices, pointedly observed that “[u]nder the First Amendment, the library’s  
8 filtering policy is at best doubtful and, I predict, will be struck down.” More  
9 detailed arguments are beyond the scope of this short submission, but  
10 Plaintiffs should be permitted to explain, in a concise brief, why this Court  
11 should reach a different result under federal law than a majority of the  
12 Washington State Supreme Court reached under state law.  
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18 NCRL also contends that no issues remain for trial and thus there is no  
19 need to re-set the case for trial or to establish related pre-trial deadlines. Both  
20 sides have moved for summary judgment. Should the Court intend to dispose  
21 of this case as a matter of law, then Plaintiffs agree that the case may not need  
22 to be re-set for trial at this time. Otherwise, Plaintiffs submit that a new trial  
23 date and related pretrial deadlines would appear to be necessary. Plaintiffs  
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1 suggest that these issues be discussed during the status conference that the  
2 Court has scheduled for June 1, 2010.  
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### 4 **3. NCRL's Statement**

5 *Bradburn* definitively resolved the state constitutional challenge asserted  
6 by Plaintiffs and effectively resolves the First Amendment claim as well. The  
7 First Amendment issues held in abeyance by this Court's September 30 order  
8 should now be decided as a matter of law under Fed. R. Civ. Pro. 56 in  
9 NCRL's favor. There are no issues to be tried and thus no reason to set a trial  
10 date.  
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14 In resolving the certified question under Art. I, §5, the Washington  
15 State Supreme Court drew heavily from federal First Amendment law.  
16 Notably, the *Bradburn* Court relied upon multiple rulings by a majority (not  
17 just a plurality) of the U.S. Supreme Court. *Bradburn* held, for example, that  
18 NCRL's filtering policy does not constitute a prior restraint and that public  
19 libraries must have broad discretion to decide what materials to provide their  
20 patrons. In broadly rejecting Plaintiffs' overbreadth arguments, the *Bradburn*  
21 Court also held that its "analytical approach aligns with the approach taken  
22 under the First Amendment." 2010 Wash. Lexis 434, pg. 15.  
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1 Plaintiffs suggest this Court might disagree with *Bradburn's* federal  
2 analysis and conclude that NCRL's policy infringes upon Plaintiffs' First  
3 Amendment rights. This argument assumes the *Bradburn* Court committed  
4 error in its interpretation of *ALA*. There is no basis for that assumption.<sup>2</sup>  
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7 Moreover, in opposing certification Plaintiffs themselves argued that  
8 because Art. I, § 5 provides no lesser, and sometimes greater, protection that  
9 the First Amendment, a violation of the First Amendment is always a violation  
10 of Art. I, § 5.<sup>3</sup> Yet the *Bradburn* Court held NCRL's filtering policy did not  
11 violate the Washington State Constitution. Accordingly, by Plaintiffs' logic, a  
12 ruling that NCRL's policy violates the First Amendment would be tantamount  
13 to a statement that the Washington State Supreme Court misinterpreted the  
14 Washington State Constitution given that Art. I, § 5 provides no less  
15 protection than the First Amendment. In fact, the converse is true: because  
16 NCRL's policy complies with Art. I, § 5, it follows that the policy also  
17 satisfies First Amendment standards.  
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23 <sup>2</sup> Nor is there any basis for Plaintiffs to argue that *ALA* should not apply at all.  
24 Plaintiffs often cite the *Mainstream Loudoun* cases in opposition to *ALA*. The *Mainstream*  
25 *Loudoun* cases were summarily distinguished by the *Bradburn* Court and not even  
26 mentioned, let alone defended, by the *Bradburn* dissenters. 2010 Wash. Lexis 434, pg. 20.  
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1 Plaintiffs' plea for this Court to re-visit NCRL's filtering policy based  
2 upon the same facts and federal law considered by the *Bradburn* Court is  
3 unfounded and should be rejected.<sup>4</sup> NCRL will be pleased to provide further  
4 briefing and argument if this Court wishes to have it. That said, NCRL  
5 believes the cross-motions for summary judgment may be decided as a matter  
6 of law in NCRL's favor based upon *Bradburn* and the parties' previous  
7 submissions.  
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11 DATED this 24<sup>th</sup> day of May, 2010.

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25 <sup>3</sup> Dkt. 52, pg. 8, citing *In re Washington State Apple Adver. Comm.*, 257 F.  
26 Supp.2d 1290, 1304 (E.D. Wash. 2003).

27 <sup>4</sup> NCRL's argument does not implicate the Supremacy Clause of the U.S.  
28 Constitution. NCRL's point is that the *Bradburn* Court correctly applied *ALA* and other  
federal cases such that *Bradburn* has effectively resolved the First Amendment claim as  
well as Plaintiffs' state constitutional claim.

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