IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANAKA HUNTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:12-CV-4 ERW
	)	
BOARD OF TRUSTEES, SALEM PUBLIC LIBRARY, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff moves for summary judgment that Defendants' past policy, practice, and custom of blocking Internet content based on viewpoint is unconstitutional under the Free Speech Clause and Establishment Clause of the First Amendment.

In July 2010, the Plaintiff began researching Native American tribes and their spirituality at the Salem Public Library. Statement of Uncontroverted Material Fact ("SUMF") at ¶ 19. While conducting Internet research on the library's computers, she discovered that the websites she wanted to access were blocked by the filtering software as "occult" or "criminal skills." *Id.* at ¶¶ 20-21. In contrast, patrons seeking access to websites about mainstream religions faced no such barriers. *Id.* at ¶¶ 105-108. Hunter brought the improper viewpoint-discriminatory filtering to the attention of Glenda Wofford and the Board of Trustees for the Salem Public Library. *Id.* at ¶¶ 22, 50-51.

Her initial complaint elicited from Wofford and the Board a refusal to do anything. *Id.* at ¶¶ 23-24, 51-52. Subsequent efforts, including reaching out to the State Library, resulted in a tracking of Plaintiff's visits to the library, research, complaints and interactions with people (*id.*

at ¶ 28), and temporary unblocking of some web pages. *Id.* at ¶¶ 35-38. Despite having the capability to permanently disable the entire web filtering system, the "occult" or "criminal skills" filters, websites, or web pages (*id.* at ¶¶ 33, 84, 87, 88, 91), Wofford never did so for Hunter. *Id*. at ¶ 33.

Plaintiff challenges the policy, practice, and custom in effect when, beginning in July 2010, she conducted research at the Salem Public Library. She seeks nominal damages for the past violation of her constitutional rights and a permanent injunction preventing Defendants from employing an unconstitutional filtering policy, practice, or custom in the future.

II. Summary judgment standard

This Court should grant summary judgment to Plaintiff because, viewing the uncontroverted evidence in the light most favorable to Defendants, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034 (8th Cir. 2005). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that burden is met, the nonmoving party must come forward and establish specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "Although a party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, a nonmoving party may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial." *Rose-Matson v. NME Hospitals, Inc.*, 133 F.3d 1104, 1107 (8th Cir. 1998).

As set forth in Plaintiff's Statement of Uncontroverted Material Facts, which is filed herewith, there are no disputed material facts in this case. As a result, this case turns on questions of law.

III. Count I – Free Speech Clause

"The Free Speech Clause of the First Amendment provides that 'Congress shall make no law... abridging the freedom of speech[.]'" *Neighborhood Enterprises, Inc. v. City of St. Louis,* 644 F.3d 728, 736 (8th Cir. 2011)(quoting U.S. CONST. AMEND. I). The First Amendment applies to the states and their subdivisions through the Fourteenth Amendment. *See Gitlow v. New York,* 268 U.S. 652, 666 (1925); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938).

Defendants' past practice, policy, and custom of blocking, based on viewpoint, websites beyond what is required by the Children's Internet Protection Act, 20 U.S.C. § 9134(f)("CIPA") or MO. REV. STAT. § 182.827.3, harmed Plaintiff because she was both prevented from accessing and deterred from seeking access to constitutionally protected content. The Supreme Court has recognized in a variety of contexts, including libraries, that the constitutional "right to receive information and ideas" is "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution[.]" *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 866-67 (1982)(citing *Stanley v. Georgia,* 394 U.S. 557, 564(1969)); *Kleindienst v. Mandel,* 408 U.S. 753, 762-63 (1972)). It is that right Plaintiff seeks to vindicate here.

Supreme Court precedent does not tolerate the use of filters to engage in intentional viewpoint discrimination. In *United States v. Am. Library Ass'n* ("*ALA*"), 539 U.S. 194 (2003), a fractured Supreme Court rejected a facial challenge to CIPA's requirement that public schools and libraries receiving certain federal funds use filtering software to block access to pornographic websites. A plurality opinion joined by four Justices concluded that Internet access at public libraries is not a traditional public forum, and, thus, the law was not subject to heightened judicial scrutiny. *ALA*, 539 U.S. at 205-06 (plurality). Instead, the plurality reasoned that the purpose of a library is "to facilitate research, learning, and recreational pursuits by

furnishing materials of requisite and appropriate quality," and that libraries have wide discretion to make content-based decisions in determining which materials meet those criteria. *Id.* at 206. The plurality concluded that in light of a library's "traditional role in identifying suitable and worthwhile material" and the fact that "[m]ost libraries already exclude pornography from their print collections," it was "entirely reasonable" for libraries to block categories of content categorized as "pornography" without reviewing each website individually. *Id.* at 208.[1]

The reasoning of the *ALA* plurality is consistent with the Supreme Court's earlier decision in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (plurality). A public librarian's discretion to make content-based judgments when selecting "material of requisite and appropriate quality for educational and informational purposes," *ALA*, 539 at 211, is analogous to the discretion of a school official to remove books based on legitimate criteria such as "educational suitability," or "appropriateness to age and grade level," *Pico*, 547 U.S. at 871. Just as in *Pico*, that discretion to make content-based decisions in applying legitimate selection criteria does not also empower school or public librarians to censor otherwise appropriate materials through viewpoint discrimination. *See ALA*, 539 U.S. at 236 (Souter, J., dissenting) (noting without contradiction that a library's practice of "excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic" would be something that "even the plurality would consider to be illegitimate"); *see also Am. Council of the Blind v. Boorstin*, 644 F. Supp. 811, 816 (D.D.C. 1986) (holding that

[1] As described below, the post-*ALA* cases refer to the plurality opinion. The narrower concurring opinions of Justice Kennedy and Justice Breyer, which require that improperly blocked sites be unblocked immediately, would seem to be controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotations and citations omitted)).

Librarian of Congress impermissibly removed Braille version of magazine that had "consistently met the selection criteria established by the Library of Congress" because of political pressure from member of Congress).[2]

Thus, although the *ALA* plurality upheld the constitutionality of reasonable and viewpoint-neutral web filtering, nothing in *ALA* supports the constitutionality of viewpoint-based web filters like those employed here. Unlike the removal decision in *Pico*, none of the filtering practices considered in *ALA* discriminated on the basis of viewpoint. As the Solicitor General explained to the Supreme Court, "the commercial filtering products used by public libraries draw distinctions based on whether the material falls into a category such as 'Pornography,' not on the basis of any viewpoint about sexuality." Br. of Solicitor General in *ALA*, 2003 WL 145228, at *31 (2003) (citation omitted); *see also id* at *12 (noting that "there is no allegation of viewpoint discrimination here"). The plaintiffs in *ALA* argued that those viewpoint-neutral filters for pornography accidentally "over blocked" non-pornographic websites, but there was no allegation that the filtering software treated websites about sexuality differently based on the viewpoints

[2] The distinction between legitimate content-based selection criteria and illegitimate viewpoint discrimination is also reflected in the subsidized-speech cases cited in the plurality opinion. For example, the Court in *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569 (1998), reaffirmed that "even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas." *Id.* at 587 (internal quotation marks and citations omitted). The National Endowment for Arts may therefore use content-based criteria such as artistic merit when funding private speech, but cannot use criteria that are "utilized as a tool for invidious viewpoint discrimination" or that "in practice, would effectively preclude or punish the expression of particular views." *Finley*, 524 U.S. at 582-83. Similarly, in *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), the Supreme Court held that a public broadcaster can use editorial discretion to make content-based distinctions when deciding which candidate to allow to participate in a televised debate, but the broadcaster "cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views." *Id.* at 676; *see also id.* at 682. In each of these cases, "[t]he Court recognized that it was essential to the functioning and traditional missions of the organizations involved in *American Library Association*, *Forbes*, and *Finley* to allow them to make value-based, and thus content-based -- but not, importantly, viewpoint-based-decisions." *ACLU v. Mineta*, 319 F. Supp. 2d 69, 85 (D.D.C. 2004).

they expressed. *See ACLU v. Mineta*, 319 F. Supp. 2d 69, 86 (D.D.C. 2004) (explaining that, in *ALA*, "[t]he blocking of protected material was an unintended side effect of the application of the filter" and that "[t]hough content-based, the restriction was viewpoint-neutral"). In this case, the library drew distinctions between mainstream religious viewpoints and non-mainstream religious viewpoints. Here the blocking is viewpoint discriminatory and not accidental.

Extending *ALA* to sanction a viewpoint-based filtering system would be a dramatic and unprecedented restriction of speech. The Supreme Court has warned that viewpoint discrimination is the most "egregious" type of speech restriction because "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *accord Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (stating that "[v]iewpoint discrimination is censorship in its purest form"). The government thus bears a much heavier burden when justifying viewpoint discrimination. The Supreme Court has even stated that a compelling governmental interest that justifies content-discrimination might not be enough to justify discrimination on the basis of viewpoint. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-13 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." (citation omitted)).[3]

[3] *See also R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992) (even when speech may be criminalized as obscene or unprotected "fighting words," government still may not discriminate on basis of viewpoint); *id.* at 430 (Stevens, J., dissenting) ("[W]e have implicitly distinguished between restrictions on expression based on subject matter and restrictions based on viewpoint, indicating that the latter are particularly pernicious."); *Finley*, 524 U.S. at 587 (allowing NEA to make content-based decisions when awarding grants but not to discriminate on the basis of viewpoint);

In short, *ALA* "does not stand for the proposition that no constitutional protections apply to Internet computers at public libraries." *Miller v. NW Region Library Bd.*, 348 F. Supp. 2d 563, 569 (M.D.N.C. 2004). Web filtering must still satisfy the minimum requirements of reasonableness and viewpoint neutrality that apply to other library removal decisions.

In the time since *ALA*, appellate courts in California and Washington and the United States District Court for the Western District of Missouri have considered the constitutionality of library policies restricting Internet access. Each court expressly adopted the reasoning of the *ALA* plurality while at the same time reaffirming that such policies must be reasonable and viewpoint-neutral.

In *Bradburn v. North Cent. Reg'l Library Dist.*, 231 P.3d 166 (Wash. 2010), the Washington Supreme Court considered an issue left open in *ALA*: whether a library must unblock the filter for pornography upon request. The library in *Bradburn* would unblock individual websites if the sites were accidentally blocked by the pornography filter, but the library refused to disable the entire pornography filter for individual users upon request. The *Bradburn* court endorsed the reasoning of the *ALA* plurality and held that the Washington Constitution "is not violated by a public library's Internet filtering policy if it is reasonable when measured in light of the library's mission and policies, and is viewpoint neutral." *Bradburn*, 231 P.3d at 180. The court held that the library's pornography filter "is viewpoint neutral because it makes no distinctions based on the perspective of the speaker." *Id.* (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The court also reasoned that the pornography filter was reasonable in light of the library's "mission is to promote reading and lifelong learning." *Id.* In light of that traditional mission, the court concluded that a public

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Boos v. Barry, 485 U.S. 312, 319 (1988) (distinguishing between discrimination based on content and discrimination based on viewpoint).

library "has traditionally had the authority . . . to legitimately decline to include adult-oriented material such as pornography in its collection. This same discretion continues to exist with respect to Internet materials." *Id.* at 181.

In *Crosby v. South Orange County Cmty. Coll. Dist.*, 172 Cal. App. 4th 433 (2009), the California Court of Appeal applied the same standard when it considered the constitutionality of a library policy restricting Internet access. The plaintiff challenged a state college's policy of limiting "computer use to educational and employment purposes." The court adopted the reasoning of the *ALA* plurality and held that the college's restriction was constitutional because the restriction was "reasonable and not an effort to suppress expression contrary to the views of school officials." *Crosby*, 172 Cal. App. 4th at 437; *accord id.* at 443 (concluding that the restriction "does not represent a public official's effort to silence opposing viewpoints").

Most closely analogous to this case is *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012)("*PFLAG*"). In *PFLAG*, a school district maintained an Internet filter that blocked favorable information about lesbian, gay, and transgender ("LGBT") persons while allowing negative information about LGBT issues to be viewed without interference. *Id.* at 891-92. The court held that *Pico*, not *ALA*, provides the correct standard of scrutiny because the library did not decide to exclude all resources on the subject of LGBT issues, but rather employed an Internet filter to exclude one viewpoint on the subject. *Id.* at 901. But the court also noted that, even under the *ALA* plurality's standard, there was no evidence that a "decision to systematically block access to websites expressing a positive viewpoint toward LGBT individuals is reasonable in light of a librarian's 'traditional role in identifying suitable and worthwhile material.'" *Id.* Further, the court determined that the availability of a procedure to request a website be unblocked did not cure the First Amendment problem, finding "consistent with the plurality decision in *ALA*" that

"a procedure, burdening only one viewpoint in a debate … chills speech in a viewpoint-discriminatory fashion, which is the antithesis of the First Amendment." ***Id.*** at 898. Such a procedure is also constitutionally problematic because it "stigmatizes protected speech." ***Id.***

These cases reflect the consensus view that restrictions on library Internet access must meet the basic requirements of reasonableness and viewpoint-neutrality. This Court should apply the same requirements when evaluating the filtering practices at issue here.

The Netsweeper filters for "occult" and "criminal skills" are different than the filtering systems previously considered by courts, other than *PFLAG*. Unlike other filters, but like the filter in *PFLAG*, the "occult" and "criminal skills" filters that Defendants chose to employ (a) are not viewpoint-neutral, and (b) do not target content that is subject to CIPA. No court has upheld a library's use of filtering software with these two features, and this Court should not be the first.

A. Salem's "Occult" and "Criminal Skills" Filter Is Not Viewpoint-Neutral

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804; *accord Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Bradburn*, 231 P.3d at 180; *PFLAG*, 853 F. Supp. 2d at 902 ("Viewpoint discrimination by a state actor is antithetical to the First Amendment, one of our country's most cherished constitutional rights.") Viewpoint neutrality means that "if government permits the discussion of a topic from [one] perspective, it may not shut out speech that discusses the same topic from [a different] perspective." *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004); *cf. Byrne v. Rutledge*, 623 F.3d 46, 56-57 (2d Cir. 2010) (Vermont engaged in "facially impermissible viewpoint discrimination" in issuing vanity license plates because "[w]hatever its stated intent, Vermont's ban on religious messages in practice

operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views on the same subjects").

Many websites that Plaintiff attempted to access were blocked because of their inclusion in the "occult" and "criminal skills" categories. SUMF at ¶ 21. The "occult" and "criminal skills" filters used by Defendants systematically discriminate against websites supportive of minority religious views on the basis of viewpoint. *Id.* at ¶¶ 27, 40, 51, 104-111, 116-118. This viewpoint discrimination is different than the unintentional and viewpoint-neutral overblocking at issue in *ALA*. As explained above, in *ALA*, "the commercial filtering products used by public libraries dr[e]w distinctions based on whether the material f[ell] into a category such as 'Pornography,' not on the basis of any viewpoint about sexuality." Br. of Solicitor General in *ALA*, 2003 WL 145228, at *31(citation omitted); *see also Bradburn*, 231 P.3d at 180 (stating that library's pornography filter "is viewpoint neutral because it makes no distinctions based on the perspective of the speaker").

In contrast, Netsweeper, the Internet filtering solution used by Defendants, works by grouping large collections of websites together by category. SUMF at ¶¶ 73-75. Customers select entire categories to "block." *Id.* at ¶¶ 78-79. When a category is blocked, users cannot view any website within that category. Only three Netsweeper categories are required to be blocked to comply with CIPA and Missouri law. *Id.* at ¶ 76. Defendants knew this. *Id.* at ¶ 77. Yet, Defendants chose to employ additional filters, not related to CIPA, including "occult" and "criminal skills." *Id.* at ¶¶ 97, 101-118.

Plaintiff does not challenge the use of viewpoint-neutral filters designed to block pornography or other CIPA-related content. Instead, Plaintiff challenges the use of the "occult" and "criminal skills" filters, neither of which purports to target pornographic content or be related in any way to compliance with CIPA.

The filters employed here are viewpoint discriminatory. Choosing to filter the "occult" category blocks "websites involving the study of secret or hidden knowledge such as: cults, supernatural forces and events, occult lore, vampires, astrology, witchcraft, mysterious symbols, and other phenomena beyond ordinary understanding" are placed in the "occult" category along with "websites about these topics that are historical or factual in nature and/or promote such practices." *Id.* at ¶ 107. The "occult" category blocks non-mainstream beliefs such as Wicca and Native American Spirituality. *Id.* at ¶ 106.[4] Some websites that Plaintiff attempted to access on these viewpoints were blocked because of their inclusion in the "criminal skills" category. *Id.* at ¶ 21. Websites about mainstream religious beliefs such as Christianity, Judaism, and Islam are categorized as "religion" or "general" and were never blocked. *Id.* at ¶ 108. Furthermore, Netsweeper also categorizes Internet content discussing these mainstream religions' views *about* minority religions, religious practices, and beliefs as either "religion" or "general."[5] *Id.*

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[4] For example, Netsweeper categorizes the following websites as "occult": (a) **About.com: Paranormal Phenomena** (paranormal.about.com), a viewpoint-neutral portal to news and discussions of paranormal issues; (b) **All About Spirituality** (www.allaboutspirituality.org), a website discussing from a neutral viewpoint numerous topics in spirituality, including angels, astrology, meditation, paganism, shamanism, and yoga; (c) **Astrology.com** (www.astrology.com), a website discussing astrology and offering horoscope readings and similar services; (d) **The Church and School of Wicca** (www.wicca.org), the official homepage of the Wiccan Church; (e) **Cult FAQ** (www.cultfaq.org), a viewpoint-neutral discussion of the cult phenomenon, including links to resources such as counseling and support for cult (ex-) members and their families; (f) **Encyclopedia of Death and Dying** (www.deathreference.com), containing viewpoint-neutral discussions of various cultures' and religions' ideas of death and death practices; (g) **Wikipedia: Wicca** (en.wikipedia.org/wiki/Wicca), a viewpoint-neutral discussion of the Wiccan Church; and (h) **WitchVox** (www.witchvox.com), an overview of pagan belief systems, such as Druidism, Haitian Voodoo, Neopaganism, and Wicca. SUMF at ¶ 105.

[5] The viewpoint discrimination was especially insidious because, while blocking non-mainstream religious viewpoints about religion, Defendants did not block mainstream religious views about non-mainstream beliefs. **Astrology and Horoscopes: The Bible and Christian View** (http://www.northforest.org/ChristianTopics/Astrology.html), a discussion of astrology from a Christian viewpoint is categorized as "general." **Catholic Encyclopedia: Paganism** (www.newadvent.org/cathen/11388a.htm), a discussion of Paganism from a Catholic viewpoint,

Therefore, blocking the "occult" category results in content –and viewpoint– discrimination against non-mainstream religions and beliefs. *Id.* at ¶¶ 27, 40, 51, 104-111, 116-118.

This viewpoint discrimination is like the unconstitutional viewpoint discrimination in *Lamb's Chapel*. The public school in *Lamb's Chapel* allowed its facilities to be used by outside organizations for films and lectures, but refused to allow a Christian group to show a film series that discussed family values from a Christian perspective. The Supreme Court held that the exclusion constituted viewpoint discrimination because the subject matter of family and child-rearing "is not one that the District has placed off limits to any and all speakers." *Lamb's Chapel*, 508 U.S. at 393. Rather, "all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.*

In this case, the roles are reversed but the viewpoint discrimination remains the same. Library patrons could generally access viewpoints about "religion" from Christian, Jewish, or Muslim perspectives, but were blocked from receiving information about non-mainstream religions. SUMF at ¶¶ 104-111. What is more, for example, library patrons were allowed to access the Catholic view of Paganism, but not a viewpoint-neutral discussion at www.witchvox.com. *Id.* at ¶¶ 105, 108.

Defendants engaged in viewpoint discrimination that was not necessary, and Defendants knew it was not necessary, to achieve a compelling government interest. *Id.* at ¶¶ 56-68, 76-77, 101-102, 113-114. Accordingly, Plaintiff should be granted summary judgment against Defendants on Count I.

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is categorized as "religion." **Christian Paranormal Answers** (christianparanormalanswers.com), a site that describes itself as "Answers about the Paranormal from a Christian viewpoint," is categorized as "general." **What does the Bible say about Voodoo?** (www.gotquestions.org/voodoo-Bible.html), a discussion of Voodoo from a Christian viewpoint, is categorized as "religion." SUMF at ¶ 108.

B. Salem's use of the "occult" and "criminal skills" filters is not reasonable in light of the traditional role of libraries.

Defendants' decision to use the discriminatory filters is not reasonable in light of the traditional role of a library. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) ("Where the government uses or attempts to regulate a particular medium, [courts] have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations.").

The *American Library Association Code of Ethics*, passed initially in January 1939 and amended over time, is the most critical document articulating the principals and values affecting the practice of librarianship. SUMF at ¶ 16. Those principles which stand out relative to the delivery of services to library users are:

> We provide the highest level of service to all library users through appropriate and usefully organized resources; equitable service policies; equitable access; and accurate, unbiased, and courteous responses to all requests.
>
> We uphold the principles of intellectual freedom and resist all efforts to censor library resources.
>
> We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.
>
> We distinguish between our personal convictions and professional duties and do not allow our personal beliefs to interfere with fair representation of the aims of our institutions or the provision of access to their information resources.

Id.

When the Supreme Court in *ALA* upheld the facial constitutionality of a statute requiring libraries to filter pornographic web content, the plurality noted that the filtering did not distort the usual functioning of the library "because public libraries have traditionally excluded pornographic material from their other collections." *ALA*, 539 U.S. at 212 (plurality). Similarly, in *Bradburn*, the Washington Supreme Court reasoned that a public library "has traditionally had

the authority . . . to legitimately decline to include adult-oriented material such as pornography in its collection. This same discretion continues to exist with respect to Internet materials." *Bradburn*, 231 P.3d at 817.

There is no similar tradition of libraries censoring particular viewpoints or excluding materials that provide viewpoint-neutral or positive information about non-mainstream religions. SUMF at ¶¶ 16-17. The "occult" and "criminal skills" filters did not block pornography or other content required by CIPA. *Id.* at ¶¶ 56-68, 76-77, 101-102, 113-114. The decision to track and record Plaintiff's use of the Internet and to provide this information to the police is also contrary to the accepted public library standard. *Id.* at ¶¶ 28-29.

The American Library Association's *Library Bill of Rights* reinforces this view.[6] SUMF at ¶ 17. Article II of the *Library Bill of Rights* states that "[l]ibraries should provide materials and information presenting all points of view on current and historical issues." *Id.*; ALA, *Library Bill of Rights* (available at http://www.ala.org/ala/issuesadvocacy/intfreedom/librarybill/index.cfm (last visited Feb. 22, 2013)). Article V provides, "A person's right to use a library should not be denied or abridged because of origin, age, background, or views." *Id.* Indeed, rather than engaging in viewpoint discrimination, "[l]ibraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment." SUMF at ¶ 17; *Library Bill of Rights*. Similarly, ALA Policy Statement 53.1.11 provides that library collections should include "materials and resources that reflect a diversity of political, economic, religious, social, minority, and sexual issues," and ALA Policy Statement 53.1.15 provides that "librarians have an obligation to resist

[6] Defendants recognize the validity of the ALA's *Library Bill of Rights*. SUMF at ¶¶ 17-18. The Salem Public Library Statement on Intellectual Freedom incorporates the *Library Bill of Rights* into its own Bylaws. *Id.*

efforts that systematically exclude materials dealing with any subject matter, including sex, gender identity or expression, or sexual orientation." ALA. *ALA Policy Manual* (available at http://www.ala.org/aboutala/governance/policymanual/updatedpolicymanual/section2/53intellfreedom (last visited Feb. 22, 2013)).

Defendants' viewpoint discrimination was intentional. Defendants intended to discriminate based on viewpoint because they continued to use the "occult" and "criminal skills" filters long after being given notice by Plaintiff of the viewpoint-discrimination. Plaintiff first brought the viewpoint-discriminatory blocking to the attention of Wofford in or about July 2010. SUMF at ¶¶ 22-23. Wofford responded to Plaintiff's initial request to unblock certain blocked websites by saying that there was nothing she could do and that it was up to the filtering system which websites library patrons could view. *Id.* at ¶ 24. Wofford's assertions were not true, and she knew they were not true. *Id.* at ¶¶ 78-96.[7] Hunter then called Barbara Reading at the Missouri State Library in October 2010 to complain about Salem Public Library's viewpoint-discriminatory web filtering. *Id.* at ¶ 25. Reading then called Wofford on October 29, 2010. *Id.* at ¶ 26. During this call Reading articulated to Wofford that Hunter complained about Salem Public Library's web filtering discriminating based on viewpoint. *Id.* at ¶ 27. After receiving a call from Barbara Reading, Library Development Director at the Missouri State Library, Wofford met with Plaintiff in the library meeting room for approximately fifty minutes that same day and explained that Wofford could override the filter allowing Plaintiff to view websites currently

[7] Wofford and the Board had policymaking authority to determine which categories to block or unblock. SUMF at ¶96. Wofford had the ability to permanently or temporarily change the blocked category list, permanently or temporarily unblock individual websites, and permanently or temporarily unblock web pages (and had done so previously). *Id.* at ¶¶ 78-96. The library and Wofford had complete control over filtering configuration and implementation, knew they had complete control, and had a policy that overblocked content well beyond what is required by CIPA that resulted in discrimination by unnecessarily filtering out specific viewpoints within topics or categories. *Id.* at ¶ 78-118.

blocked. RFA. *Id.* at ¶¶ 30-31. Subsequent to her discussion with Wofford, Plaintiff again sought to have particular websites pertaining to Native Americans unblocked. *Id.* at ¶ 32.

Despite having the capability to ***permanently*** unblock the "occult" or "criminal skills" filters or websites or web pages, neither Wofford nor any other Salem Public Library employee ever did so in response to Hunter's requests to unblock Internet content. *Id.* at ¶ 33. Despite having the capability to ***temporarily*** unblock entire websites for up to one hour, neither Wofford nor any other Salem Public Library employee ever did so in response to Hunter's requests to unblock Internet content. *Id.* at ¶ 34. Instead, they only unblocked some websites for short periods. *Id.* at ¶¶ 35-37. Furthermore, in response to Hunter's requests to unblock Internet content, Wofford or other Salem Public Library employees sometimes unblocked entire domains (e.g., www.witchcraft.com), but other times only unblocked single pages to some websites (e.g., www.deathrefrence.com/Me-Nu/Native-American-Religion.html and www.crystalinks.com/sundance.html), which caused other sections of those same websites to remain blocked. *Id.* at ¶ 38. It was the custom, policy, and practice of Defendants to require Plaintiff to repeatedly request overblocked Internet content be unblocked. *Id.* at ¶ 39. It was also the Defendants' policy, practice, and custom to impose substantial burdens for patrons seeking to unblock Internet content that was over blocked by the Salem Public Library's ICF. *Id.* at ¶ 119.

Subsequently, Hunter raised the issue of filtering again with Wofford, telling Wofford that the viewpoint-discriminatory filtering of the Internet content she tried to view was improper and burdensome and that the classification of Native American cultural and religious history and practices as the "occult" and "criminal skills" was misleading and derogatory. *Id.* at ¶ 40. Wofford responded that it was up to the filtering system which Internet content library patrons could view and that she only allows people to view blocked Internet content if it pertains to their job, if they are writing a paper, or if she determined that they otherwise have a legitimate reason

to view the content. *Id.* at ¶ 41.[8] Additionally, Wofford also told Plaintiff that Wofford had an "obligation" to call the "proper authorities" to report those who were attempting to access blocked sites if she thought they would misuse the information they were attempting to access. *Id.* at ¶ 43. Wofford's assertion that she would be obligated to notify authorities caused Plaintiff to be reasonably concerned that she would be reported to the police if she continued to attempt to access Internet content about Native American cultural and religious history and the Wiccan Church. *Id.* at ¶ 44.[9]

Plaintiff also notified the Board. At the Salem Library Board Meeting on November 8, 2010, Plaintiff voiced her concerns about the viewpoint-discriminatory filtering to the Board. *Id.* at ¶¶ 50-51. There Plaintiff raised the issue about the policies, practices, and customs that block religious content based upon its viewpoint. *Id.* at ¶ 51. She stated that the filtering was unfair. *Id.* A member of the Board responded to Plaintiff that the Library's Internet Content Filtering system would not change, adding, "If that's all, we have business to discuss." *Id.* at ¶ 52. In spite of knowledge, the blocking of the "occult" and "criminal skills" categories remained in place until August 1, 2011. *Id.* at ¶¶ 97-98.

When a public library chooses to restrict Internet resources, it must select a reasonable and viewpoint-neutral method of doing so. Defendants cannot demonstrate that their decisions to

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[8] Wofford's belief that she had the authority to allow, or not allow, patrons to view websites was consistent with the Defendants' written "Public Access Microcomputer Policy" which states that states that "[t]he use of the Internet system is a privilege which can be revoked by the library at any time for abusive conduct[,] [with the] Salem Public Library [as] the sole arbiter of what constitutes abusive conduct." SUMF at ¶ 42.

[9] On or about December 9, 2010, Wofford did call the Salem City Police about Plaintiff's complaints regarding Internet filtering. SUMF at ¶ 45. When the police came to the Salem Public Library, Wofford disclosed the log that she had maintained describing in detail Hunter's activities and research at the Salem Public Library between October and December 2010. *Id.* at ¶ 46. Prior to Wofford calling the Salem Police, Hunter had last visited the library on December 2, 2010. *Id.* at ¶ 47. After the Salem Police were called on December 9, 2010, Hunter has chosen not returned to the Salem Public Library. *Id.* at ¶ 48.

enable the "occult" and "criminal skills" filters were reasonable methods of complying with CIPA and cannot demonstrate that it had a sufficiently compelling reason to justify viewpoint discrimination. *Id.* at ¶¶ 56-68, 76-77, 101-102, 113-114. Blocking websites that Netsweeper categorizes as "occult" or "criminal skills" is not required by the Children's Internet Protection Act or by MO. REV. STAT. § 182.827.3. *Id.*

Defendants' intentional viewpoint discrimination was not reasonable in light of the traditional role of libraries, so Plaintiff is entitled to summary judgment on Count I.

C. Salem's Filtering Stigmatized and Burdened Access to Non-Mainstream Religious Viewpoints Despite a Procedure Allowing Individual Webpages to Be Temporarily Unblocked Upon Request

It is no defense for Defendants that they required a patron request before they temporarily unblocked individual websites. Requiring Plaintiff and others who seek positive information about non-mainstream religions to make repeated requests to the library for websites to be unblocked (and then only temporarily) stigmatizes and places a burden on Plaintiff's right to receive information. SUMF at ¶¶ 22-24, 32-48, 50-52 119; *See PFLAG*, 853 F. Supp. 2d at 894-95. "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring); *see also Watchtower Bible v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) (requiring a permit -- even one granted without cost or waiting period -- as a prior condition on the exercise of the right to speak imposes a burden on speech); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (requirement that individuals request permission to receive mail on disfavored subjects had an unconstitutional "deterrent effect" on First Amendment right to receive information). Requiring library patrons to request special access to websites about non-mainstream religions sends a stigmatizing message that the

websites are somehow different or less acceptable than comparable websites that condemn non-mainstream religions. *See Pratt*, 670 F.2d at 779 (by restricting access to films, the school had impermissibly "used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be discussed or considered"); *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003) (requiring student to affirmatively request access to Harry Potter book sends a message that it is "a 'bad' book" that students should not read); *PFLAG*, 853 F. Supp. 2d at 895 ("when a student is required to ask permission to access information, 'even if it's anonymous that still the student feels stigmatized, that he's less than worthy, and the information that he's seeking is less than worthy.'").

To be sure, the plurality in *ALA* stated that, even though the "pornography" filters mistakenly blocked non-pornographic content, there are no constitutional concerns if library patrons can request that the filter be turned off. But the intentional and avoidable viewpoint discrimination practiced by Defendants is very different than the unintentional and unavoidable over-blocking at issue in *ALA*. Unlike the pornography filters at issue in *ALA*, neither the "occult" nor the "criminal skills" filters targets pornographic content; rather, they operate in a manner that blocks content supportive of non-mainstream religions even though the content is not sexually explicit. Moreover, at the time *ALA* was decided, there was no alternative filtering technology that could efficiently block pornographic websites without over-blocking the protected content. *See ALA*, 539 U.S. at 209 (Breyer, J., concurring in judgment) ("[N]o one has presented any clearly superior or better fitting alternatives."); *id.* at 207 n.3 (plurality). In light of these technological limitations, it was "reasonable" for libraries to use filtering software that engaged in unavoidable over-blocking. *Id.* at 208. Unlike the libraries in *ALA*, Salem Public Library has readily available alternatives that would allow it to filter out sexually explicit

content, as required by CIPA, without posing the same First Amendment problems. SUMF at ¶ 76.

ALA noted that an individual could request that a filter be disabled. Yet despite Plaintiff's requests to conduct research into Native American spirituality without viewpoint filtering or the burden of having to repeatedly ask to have individual sites unblocked (*id.* at ¶¶ 22-24, 32, 35-40), and despite the library having the capability to permanently unblock the "occult" or "criminal skills" filters, neither Wofford nor any other Salem Public Library employees ever did so for Hunter. *Id.* at ¶ 33. Instead, Defendants imposed substantial burdens for patrons seeking to unblock Internet content that was over blocked by the Salem Public Library's ICF (*id*. at ¶ 119) and then, at best, access to specific websites was sporadically, and only temporarily, allowed. *Id.* at ¶¶ 35-38.

* * *

Defendants engaged in intentional viewpoint discrimination that did not further a compelling government interest. Accordingly, Plaintiff is entitled to summary judgment on Count I of her complaint.

IV. Count II – Establishment Clause

"The First Amendment provides in relevant part that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' U.S. CONST., AMDT. 1. The Religion Clauses apply to the States by incorporation into the Fourteenth Amendment. See *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 fn.4. (2004); *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 423 (8th Cir. 2007)(citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000)); *ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 (8th Cir. 2005).

In this case, Defendants intentionally maintained a filtering practice that blocked access to information about non-mainstream religions while permitting access to information about mainstream religions. SUMF at ¶¶ 27, 40, 51, 104-111, 116-118. In addition, Defendants' imposed substantial burdens for patrons seeking to unblock Internet content that was over blocked by the Salem Public Library's ICF. *Id.* at ¶ 119. These policies, practices, and customs gave preferential treatment to mainstream religions and disfavorable treatment to non-mainstream religious views, such as Wicca and Native American Spirituality. "The 'clearest command of the Establishment Clause' is that the government must not treat any religious denomination with preference over others." *O'Brien v. U.S. Dept. of Health & Human Services*, 4:12-CV-476 CEJ, 2012 WL 4481208, *9 (E.D. Mo. Sept. 28, 2012)(quoting ***Larson v. Valente,*** 456 U.S. 228, 244 (1982)).

Defendants' filtering policy violates that clear command. Because it "discriminates among religions, it can survive only if it is 'closely fitted to the furtherance of any compelling interest asserted.'" ***See, e.g., Awad v. Ziriax***, 670 F.3d 1111, 1127 (10th Cir. 2012) (quoting *Larson*, 456 U.S. at 255). As noted above, Defendants' discriminatory filtering policy cannot even meet the test of reasonableness, let alone satisfy strict scrutiny. It, therefore, fails under the Establishment Clause for that reason alone.

Alternatively, Defendants' filtering policy also violates the traditional test from ***Lemon v. Kurtzman***, 403 U.S. 602 (1971). A "government practice is permissible for purposes of Establishment Clause analysis only if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion." ***Plattsmouth***, 419 F.3d at 775 (citing ***Lemon***, 403 U.S. at 612-13. Put another way, "[u]nder the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither

advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989). "Courts have frequently treated the 'excessive entanglement prong' of the *Lemon* test as part of the inquiry into a statute's principal or primary effect." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 205 (2d Cir. 2012)

The Salem Public Library's intentional blocking of non-mainstream religious viewpoints while permitting mainstream religious viewpoints, including mainstream religious viewpoints about non-mainstream religions, and imposition of substantial burdens for patrons seeking to unblock Internet content that was over blocked by the Salem Public Library's ICF. violates the Establishment Clause. The undisputed facts here demonstrate that Defendants, with no valid, secular purpose, determined to advance mainstream religions and inhibit non-mainstream religions.

Defendants have offered no secular purpose for their viewpoint-discriminatory blocking other than compliance with CIPA. "When a governmental entity professes a secular purpose for an arguably religious policy, … it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)(citations omitted); *see also, e.g., McCreary County, Ky. V. American Civil Liberties Union*, 535 U.S. 844 (2005) ("[T]he secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."). Here, the only evidence is that employment of the "occult" and "criminal skills" filters was not necessary to comply with CIPA or Missouri law. SUMF ¶¶ 56-68, 76-77, 101-102, 113-114. Wofford admits as much. *Id.* at ¶¶ 57-58, 60-61, 76-77. In the absence of a non-sham secular purpose, the practice plainly violates the Establishment Clause.

Although Defendants' failure to meet *Lemon*'s first prong ends the constitutional inquiry, *see, e.g. Edwards v. Aguillard*, 482 U.S. 578 (1987) ("State action violates the Establishment Clause if it fails to satisfy any of [*Lemon*'s] prongs."), Defendants' filtering practice falls short under *Lemon*'s second prong: The primary effect of the viewpoint-discriminatory filtering practice was both to advance mainstream religions and to inhibit non-mainstream religions. "For a law to have forbidden 'effects,' it must be fair to say that the government has advanced religion through its own activities and influence." *Am. Civil Liberties Union of Minnesota v. Tarek ibn Ziyad Acad.*, 788 F. Supp. 2d 950, 963 (D. Minn. 2011)(citing *Stark v. Indep. Sch. Dist., No. 640*, 123 F.3d 1068, 1074-75 (8th Cir. 1997)). Here the public library allowed patrons to access the Internet on the library's computers. When they accessed a website about a mainstream religion, patrons faced no barrier. *Id.* at ¶ 108. But when, like Plaintiff, they sought positive information about non-mainstream religions, they were blocked. *Id.* at ¶¶ 21, 105-107. Providing access to information about religion might be admirable as a general matter, but here Defendants were not neutral.

The viewpoint-discriminatory blocking excessively entangled Defendants with religion. "Not all entanglements, of course, have the effect of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Here, however, discretion was given to Wofford to determine the legitimacy of Plaintiff's, or others', requests to access websites presenting a non-mainstream religious viewpoint. SUMF at ¶¶ 11, 24, 31, 41-46, 80-96. Wofford had the authority and ability to permanently unblock the "occult" and "criminal skills" filters so that information with non-mainstream religious viewpoints could flow freely. *Id.* at ¶¶ 33, 84. She did not do so for Hunter. *Id.* at ¶ 33. Instead, Wofford warned Plaintiff that she had an "obligation" to call the "proper authorities" to report those who were attempting to access blocked sites if she thought they would misuse the information they were attempting to access.

Id. at ¶¶ 43, 119. The employment of the filters by Defendants guaranteed an excessive entanglement between the government and religion.

Defendants' filtering practice resulted in preferential treatment for mainstream religious viewpoints and disfavorable treatment for other viewpoints. *Id.* at ¶¶ 101-118. Defendants have advanced no non-sham secular purpose for the practice, the practice had the effect of advancing mainstream religious viewpoints while inhibiting non-mainstream religious viewpoints, and the practice required Wofford to be excessively entangled with religion. For these reasons, Plaintiff is entitled to summary judgment on Count II of her complaint.

V. Relief

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." ***Marbury v. Madison***, 1 Cranch 137, 163 (1803).

A. Nominal Damages

An award of nominal damages is appropriate in this case. "[N]ominal damages must be awarded when a plaintiff establishes a violation of the right to free speech." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008)(internal citations omitted). Similarly, "[a]n award of nominal damages is an appropriate remedy for a violation of the Establishment Clause." *O'Connor v. Washburn University*, 416 F.3d 1216, 1222 (10th Cir. 2005). A party is entitled to an award of nominal damages when a constitutional right is violated because of the "importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Farrar v. Hobby,* 506 U.S. 103, 112 (1992) ("*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his [constitutional] right ... but cannot prove actual injury").

B. Permanent Injunction

To obtain a permanent injunction, Plaintiff must show the following: (1) actual success on the merits; (2) that she faces irreparable harm; (3) that the harm to her outweighs any harm to others; and (4) that an injunction serves the public interest. *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999) ("The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits"); *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (preliminary injunction standards).

1. Actual Success on the Merits

As explained, *supra*, Plaintiff is entitled to summary judgment on Counts I and II of her complaint. A grant of summary judgment constitutes actual success on the merits.

2. Irreparable Harm

Plaintiff, and others, will suffer irreparable harm if an injunction does not issue. Although the "occult" and "criminal skills" filters were disabled on August, 1, 2011, this was through no action on Defendants' part. SUMF at ¶¶ 97-98. The change on August 1, 2011, was because MOREnet emailed Defendants to notify them that absent specific step by Defendants the "occult" or "criminal skills" filters would no longer be effective. *Id.* at ¶ 98. Absent an injunction, nothing prevents Defendants from reemploying the viewpoint-discriminatory filters. *Id*. at ¶¶ 97-100.

It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Because Plaintiff has established success on the merits of her First Amendment claim, she has also established irreparable harm as a result of the deprivation. *See Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140-41 (8th Cir.1996).

3. Balance of Harms

The use of the "occult" and "criminal skills" filters" harmed Plaintiff and unknown others who were chilled. "The balance of equities … generally favors the constitutionally-protected freedom of expression." ***Phelps-Roper v. Nixon***, 545 F.3d 685, 690 (8th Cir. 2008) ***overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.***, 697 F.3d 678 (8th Cir. 2012).

There is no harm to Defendants. Even though it took longer than a year, the offending filters have, for now, been disabled and not yet re-enabled. Prohibiting Defendants from returning to their unconstitutional conduct would impose no harm on them.

4. Public Interest

"It is always in the public interest to protect constitutional rights." ***Nixon***, 545 F.3d at 689. Because Plaintiff has demonstrated that she is entitled to succeed on the merits, the public interest is served by preventing enforcement of the unconstitutional practice. The public interest supports an injunction that is necessary to prevent a government entity from violating the Constitution. ***Doe v. South Iron R-1 School Dist.***, 453 F.Supp.2d 1093, 1103 (E.D.Mo. 2006), ***aff'd*** 498 F.3d 878 (8th Cir. 2007).

VI. Conclusion

For the foregoing reasons, Plaintiff is entitled to summary judgment on Counts I and II of her complaint, an award of nominal damages, and a permanent injunction. Nominal damages should be in the amount of $1.00. The permanent injunction should prohibit Defendants from enabling the "occult" or "criminal skills" filters on Netsweeper so long as the content of those categories does not include sexually explicit material.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Anthony E. Rothert