The Honorable Edward F. Shea

Thomas D. Adams
Celeste Mountain Monroe
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900
Seattle, Washington 98101-3028
(206) 223-1313
Attorneys for North Central Regional Library District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

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

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

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

Regional Library District ("NCRL") submit the following with respect to further proceedings in this Court in light of the Washington Supreme Court's response to this Court's certified question in *Bradburn, et al. v. North Central Reg. Lib. Dist.*, ___ Wn.2d __, 2010 Wash. Lexis 434 (May 6, 2010)(*Bradburn*).

1. Procedural Status

On September 30, 2008, this Court entered an order (Dkt. 96)("the September 30 order") granting NCRL's motion to certify a question concerning the constitutionality, under Art. I, § 5 of the Washington State Constitution, of NCRL's policy not to disable internet filtering at the request of an adult patron. The September 8 order "held in abeyance" the constitutional issues[1] raised by the parties' cross motions for summary judgment pending the Washington State Supreme Court's response to the certified question.

On May 6, 2010, the Washington State Supreme Court answered the certified question, holding that "a library can, subject to the limitations set

[1] With respect to standing issues raised by NCRL, the September 8 order concluded that Plaintiff Sarah Bradburn may only assert a "facial" constitutional challenge but all other Plaintiffs have standing to assert "as applied" challenges.

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

forth in this opinion, filter Internet access for all patrons, including adults, without violating article I, section 5 of the Washington State Constitution."

2. Plaintiffs' Statement

The parties respectfully disagree regarding how the Washington State Supreme Court's decision impacts the issues pending before this Court. Plaintiffs maintain that this Court should direct the parties to submit limited briefing on the matter. Plaintiffs propose additional briefs of no more than 15 pages apiece, to be filed simultaneously by the parties within 45 days. Plaintiffs request that the pending cross-motions for summary judgment be re-set for a hearing with oral argument on the first possible date thereafter.

NCRL contends that the pending motions may be resolved on the basis of the Washington State Supreme Court's decision, without additional briefing – since, according to NCRL, if its policy complies with Art. I, § 5, it necessarily also complies with the First Amendment. This contention is incorrect. First, as the *Bradburn* majority stated in its opinion with regard to Plaintiffs' claims under Art. I, § 5, "the federal court will apply the legal guidelines we set forth in this opinion to the facts of the case." And second, NCRL improperly subordinates the First Amendment to Art. I, § 5. The

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

majority's opinion – with which Plaintiffs strongly disagree – is not dispositive of Plaintiffs' claims under federal law. The Supremacy Clause, U.S. CONST. art. IV, cl. 2, provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It has been firmly established for decades that in any given case, state law applies "*[e]xcept* in matters governed by the Federal Constitution or by acts of Congress." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (emphasis added). If a case presents an issue arising under the United States Constitution, a federal court "[has] the duty to make [an] independent inquiry and determination" regarding the issue. *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 192 (8th Cir. 1965). A state court's construction of the United States Constitution may be entitled to respect, but it is not binding on the federal courts. *Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989). It follows that a state court's construction of a *state* constitution cannot control a federal court's analysis of a corresponding federal constitutional provision.

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

Plaintiffs disagree that the Washington State Supreme Court properly relied on *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003)(*ALA*), and note that the *Bradburn* Court cited plurality as well as majority conclusions in support of its decision. Plaintiffs maintain that the *Bradburn* decision is deeply flawed and profoundly misguided. In fact, Justice Chambers, in a sharp dissent joined by two other justices, pointedly observed that "[u]nder the First Amendment, the library's filtering policy is at best doubtful and, I predict, will be struck down." More detailed arguments are beyond the scope of this short submission, but Plaintiffs should be permitted to explain, in a concise brief, why this Court should reach a different result under federal law than a majority of the Washington State Supreme Court reached under state law.

NCRL also contends that no issues remain for trial and thus there is no need to re-set the case for trial or to establish related pre-trial deadlines. Both sides have moved for summary judgment. Should the Court intend to dispose of this case as a matter of law, then Plaintiffs agree that the case may not need to be re-set for trial at this time. Otherwise, Plaintiffs submit that a new trial date and related pretrial deadlines would appear to be necessary. Plaintiffs

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

suggest that these issues be discussed during the status conference that the Court has scheduled for June 1, 2010.

3. NCRL's Statement

Bradburn definitively resolved the state constitutional challenge asserted by Plaintiffs and effectively resolves the First Amendment claim as well. The First Amendment issues held in abeyance by this Court's September 30 order should now be decided as a matter of law under Fed. R. Civ. Pro. 56 in NCRL's favor. There are no issues to be tried and thus no reason to set a trial date.

In resolving the certified question under Art. I, §5, the Washington State Supreme Court drew heavily from federal First Amendment law. Notably, the *Bradburn* Court relied upon multiple rulings by a majority (not just a plurality) of the U.S. Supreme Court. *Bradburn* held, for example, that NCRL's filtering policy does not constitute a prior restraint and that public libraries must have broad discretion to decide what materials to provide their patrons. In broadly rejecting Plaintiffs' overbreadth arguments, the *Bradburn* Court also held that its "analytical approach aligns with the approach taken under the First Amendment." 2010 Wash. Lexis 434, pg. 15.

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

Plaintiffs suggest this Court might disagree with *Bradburn's* federal analysis and conclude that NCRL's policy infringes upon Plaintiffs' First Amendment rights. This argument assumes the *Bradburn* Court committed error in its interpretation of *ALA*. There is no basis for that assumption.[2]

Moreover, in opposing certification Plaintiffs themselves argued that because Art. I, § 5 provides no lesser, and sometimes greater, protection that the First Amendment, a violation of the First Amendment is always a violation of Art. I, § 5.[3] Yet the *Bradburn* Court held NCRL's filtering policy did not violate the Washington State Constitution. Accordingly, by Plaintiffs' logic, a ruling that NCRL's policy violates the First Amendment would be tantamount to a statement that the Washington State Supreme Court misinterpreted the Washington State Constitution given that Art. I, § 5 provides no less protection than the First Amendment. In fact, the converse is true: because NCRL's policy complies with Art. I, § 5, it follows that the policy also satisfies First Amendment standards.

---

[2] Nor is there any basis for Plaintiffs to argue that *ALA* should not apply at all. Plaintiffs often cite the *Mainstream Loudoun* cases in opposition to *ALA*. The *Mainstream Loudoun* cases were summarily distinguished by the *Bradburn* Court and not even mentioned, let alone defended, by the *Bradburn* dissenters. 2010 Wash. Lexis 434, pg. 20.

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

Plaintiffs' plea for this Court to re-visit NCRL's filtering policy based upon the same facts and federal law considered by the *Bradburn* Court is unfounded and should be rejected.[4] NCRL will be pleased to provide further briefing and argument if this Court wishes to have it. That said, NCRL believes the cross-motions for summary judgment may be decided as a matter of law in NCRL's favor based upon *Bradburn* and the parties' previous submissions.

DATED this 24th day of May, 2010.

KARR TUTTLE CAMPBELL

By:*/s/ Thomas D. Adams*
Thomas D. Adams, WSBA #18470
E-mail – tadams@karrtuttle.com
Celeste M. Monroe, WSBA #35843
E-mail – cmonroe@karrtuttle.com
Attorneys for Defendant North Central Regional Library District
KARR TUTTLE CAMPBELL
1201 Third Ave., Ste. 2900
Seattle, WA 98101
Telephone: 206.233.1313

---

[3] Dkt. 52, pg. 8, citing *In re Washington State Apple Adver. Comm.*, 257 F. Supp.2d 1290, 1304 (E.D. Wash. 2003).

[4] NCRL's argument does not implicate the Supremacy Clause of the U.S. 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.

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100

Facsimile: 206.682.7100

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION

By: /s/ Duncan Manville
Duncan Manville, WSBA #30304
Savitt Bruce & Willey, LLP
1325 Fourth Ave., Ste. 1410
Seattle, WA 98101
Tel. (206) 749-0500
Fax (206) 749-0600
dmanville@jetcitylaw.com

Aaron H. Caplan, WSBA #22525
Loyola Law School Los Angeles
919 Albany St.
Los Angeles, CA 90015

Catherine Crump, *pro hac vice*
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 519-7806
ccrump@aclu.org

Sarah A. Dunne
American Civil Liberties Union of
Washington Foundation
705 Second Ave., Ste. 300
Seattle, WA 98103

Counsel for Plaintiffs

Law Offices
KARR TUTTLE CAMPBELL
A Professional Service Corporation
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028
Telephone (206) 223-1313, Facsimile (206) 682-7100