No. 82200-0

CHAMBERS, J. (dissenting) — The question before this court is whether, consistent with our state constitution's free speech protections, a public library can actively restrict adult access to web sites containing *constitutionally protected* speech. The question is easy to answer: of course it cannot.

Article I, section 5 is direct. It says that "[e]very person may freely speak, write and publish on all subjects, being responsible for abuse of that right." The freedom to "speak, write and publish" encompasses the freedom to read as well. *Cf. Fritz v. Gorton,* 83 Wn.2d 275, 297, 517 P.2d 911 (1974) ("Freedom of speech without the corollary-freedom to receive-would seriously discount the intendment purpose and effect of the first amendment."). Article I, section 5 provides greater protection from restrictions than the First Amendment. *Ino Ino, Inc. v. City of Bellevue,* 132 Wn.2d 103, 115, 937 P.2d 154, 943 P.2d 1358 (1997) (citing *State v. Reece,* 110 Wn.2d 766, 778, 757 P.2d 947 (1988)). The "Washington Constitution is less tolerant than the First Amendment of overly broad restrictions on speech." *O'Day v. King County,* 109 Wn.2d 796, 804, 749 P.2d 142 (1988). Our cases have stated the principle broadly, as they should.

Here, a library district, I am sure with the best of intentions, hired a private company to install a technological censor on its public computer terminals. Order at 11. I am willing to accept for our purposes today that the vast majority of what the

censor catches is low value speech. While the purpose seems to be to protect children, the libraries within the library district flatly refuse to remove the filter on the request of an adult patron, or use any less censorial ways to accomplish their aims. *Id.* at 10. The library district does not attempt to argue that it cannot disable its computer filters at the request of adults. It merely suggests that to do so would be inconvenient and might require additional staff, which could be expensive.

I am not unsympathetic to the goal of protecting children. But that laudable goal has all too often been advanced as a ground to restrict constitutionally protected speech generally though, at least in our state before today, usually unsuccessfully. Animated by the understanding that freedom to say what might annoy or offend others comes with the corollary cost that others may say what might annoy or offend you, the founders chose risk as the price of freedom. "We endure and embrace these potential harms willingly as the price we pay to freely exchange ideas without government interference." *Sanders v. City of Seattle,* 160 Wn.2d 198, 235, 156 P.3d 874 (2007) (Chambers, J., dissenting). This court has rarely retreated from its constitutional duty to defend the constitutional right of free speech, even though such speech may have a detrimental effect on children. This court has struck legislation that forbade the sale of erotic music and unlicensed comic books to adults simply because the State deemed they were too dangerous for children. *Soundgarden v. Eikenberry,* 123 Wn.2d 750, 778, 871 P.2d 1050 (1994) (music); *Adams v. Hinkle,* 51 Wn.2d 763, 775, 779, 322 P.2d 844 (1958) (comics). Though we noted solemnly "[t]hat the regulation of comic books is a matter of grave public

concern is exemplified by the many private and legislative studies . . . collected in the margin," *Adams,* 51 Wn.2d at 765*,* we took a dim view of the idea that the State could restrict an adult's access to books to protect children. "'The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.'" *Id.* at 779, *quoted with approval in Butler v. Michigan,* 352 U.S. 380, 383, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957). This principle is deeply enshrined in our free speech jurisprudence, be it under the First Amendment or article I, section 5. *See, e.g., Bering v. SHARE,* 106 Wn.2d 212, 242, 721 P.2d 918 (1986) (invalidating portion of an injunction that forbade speech harmful to children even if children were not present; "[t]he injunction cannot water down speech to make it suitable for the sandbox"); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) ("the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality" (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000))).[1]

[1] In *Ashcroft,* the United States Supreme Court upheld a temporary injunction against enforcement of the Child Online Protection Act (COPA), 47 U.S.C. § 231. On remand, the trial court entered a permanent injunction against enforcing COPA. While the Court agreed Congress's goal in protecting children was compelling, it found that COPA was overinclusive, underinclusive, not narrowly tailored to meet Congress's goal, vague, and overbroad. *Am. Civil*

Our constitution does not prohibit any law or policy that touches on speech. *Bering,* 106 Wn.2d at 215. Rights do not express themselves absolutely. *Id.* But any law that impinges upon the right to read, in my view, in a public forum or otherwise, must be narrowly tailored to serve a compelling purpose. *See id.* at 234, 245-46; *State v. Coe,* 101 Wn.2d 364, 374, 679 P.2d 353 (1984); *cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Content based restrictions on speech are presumptively invalid. *City of Bellevue v. Lorang,* 140 Wn.2d 19, 24, 992 P.2d 496 (2000). At the very least, even on government property, any restrictions on speech have to be rational and viewpoint neutral. *City of Seattle v. Mighty Movers, Inc*., 152 Wn.2d 343, 351, 96 P.3d 979 (2004) (citing *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989)). In my view, article I, section 5 protects speech in many more forums than the First Amendment. *See Sanders,* 160 Wn.2d at 235 (Chambers, J., dissenting).

Congress, which put this chain of events in play by enacting Child Internet Protection Act (CIPA),[2] recognizes that children can be protected in libraries that

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*Liberties Union v. Gonzales,* 478 F. Supp 2d 775, 810-20 (E.D. Pa. 2007). The United States Supreme Court denied certiorari. *Mukasey v. Am. Civil Liberties Union*, __ U.S. __, 129 S. Ct. 1032, 173 L. Ed. 2d 293 (2009). While we are not interpreting the First Amendment, the failure of the congressional attempts to do much the same thing as North Central Regional Library District attempts to do by policy should give us pause.

[2] CIPA requires that libraries protect access to "visual depictions that are . . . obscene," "child pornography," or "harmful to minors." 20 U.S.C. § 9134(f)(1)(A); 47 U.S.C. § 254(h)(5)(B). "Harmful to minors" is defined as a "visual depiction" that "taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors" and "taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion"; or "depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or

disable their Internet censorship at the request of an adult patron. 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D). If the concern is that children might see scandalous images on the screen, privacy screens could be installed or librarians could enforce a code of conduct, but these libraries have not explored any alternative since 1999. Order at 16. There is simply no reason that withstands article I, section 5 to install a system to protect children that cannot be disabled when used by adults.

I respectfully disagree with the majority that *United States v. American Library Ass'n,* 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), supports upholding the policy's constitutionality under either the federal or state constitution. Even accepting for the moment that these libraries are not a limited public forum, eight justices found the ability of a patron to *disable* the filter constitutionally critical. Writing for a four justice plurality upholding CIPA, Justice Rehnquist noted constitutional concerns about the software blocking "are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter." *Id.* at 209. Justice Kennedy was even more pointed, beginning his concurrence by saying, "If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case." *Id.* at 214 (Kennedy, J., concurring).

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simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals." 20 U.S.C. § 9134(f)(7)(B).

Justice Breyer also agreed that because a library patron could ask to have the filter disabled, the limitation on First Amendment activity was too slight to be of concern. *Id.* at 219 (Breyer, J., concurring). Justice Stevens alone thought the ability of an adult patron to have the filter removed was constitutionally irrelevant and even with that escape hatch, the CIPA was flatly unconstitutional. "A law that prohibits reading without official consent, like a law that prohibits speaking without consent, 'constitutes a dramatic departure from our national heritage and constitutional tradition.'" *Id.* at 225 (Stevens, J., dissenting) (quoting *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150, 166, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002)).

Justice Souter (joined by Justice Ginsburg) agreed with the plurality that *if* "an adult library patron could, consistently with the Act, obtain an unblocked terminal simply for the asking," then the First Amendment would not be offended. *Id.* at 232 (Souter, J., dissenting). However, unlike the plurality, which had accepted the solicitor general's statement that the filter would be removed on request, Justice Souter relied upon the trial court's contrary findings of fact. *Id.* Based on the trial court's conclusion that filters were not in fact being removed, Justice Souter concluded that CIPA was unconstitutional. *Id.* Justice Souter went further, substantially reaching the question now before Judge Shea in this case:

> The question for me, then, is whether a local library could itself constitutionally impose these restrictions on the content otherwise available to an adult patron through an Internet connection, at a library

> terminal provided for public use. The answer is no. A library that chose to block an adult's Internet access to material harmful to children (and whatever else the undiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. This would simply be censorship [and] presumptively invalid.

*Id.* at 234-35 (Souter, J., dissenting). Thus, four United States Supreme Court justices stated explicitly and four other justices hinted strongly that content filtering in libraries is only constitutional if the filter can be removed at the request of an adult patron. Under the First Amendment, the library's filtering policy is at best doubtful and, I predict, will be struck down. And, again, our state constitution is more protective of speech. *O'Day,* 109 Wn.2d at 804.

The majority assumes that there is some constitutional equivalent between removing the filter and removing, often after considerable time, a particular site from the list of blocked sites. Order at 13-14. But, as Justice Stevens noted, filtered Internet content is akin to having "a significant part of every library's reading materials . . . kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests." *Am. Library Ass'n,* 539 U.S. at 224 (Stevens, J., dissenting). I do not accept they are constitutionally equivalent.

I agree with the majority that public libraries have no responsibility to have any particular text in their collection, though of course the decision to exclude a text cannot be made for a constitutionally prohibited reason. But censoring material on the Internet is not the same thing as declining to purchase a particular book. It is more like refusing to circulate a book that is in the collection based on its content.

That would raise serious constitutional concerns. *Cf. Lorang,* 140 Wn.2d at 24. I also agree that libraries in this state are not necessarily public forums, though I disagree that we should be deciding on this record whether these particular libraries have become public forums by their own policies and practices. *Cf. Sanders,* 160 Wn.2d at 209-10. But it is the freedom to read, not whether libraries are public forums, that is the issue before us.

North Central Regional Library's Internet filters reach admittedly constitutionally protected speech, and, we are informed, it "does not and will not disable the filter at the request of an adult person." Order at 10. Simply put, the State has no interest in protecting adults from constitutionally protected materials on the Internet. These policies do exactly that. The filter should be removed on the request of an adult patron. Concerns that a child might see something unfortunate on the screen must be dealt with in a less draconian manner. I respectfully dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Richard B. Sanders

Justice Debra L. Stephens