

No. 82200-0

J.M. JOHNSON, J. (concurring)—The certified question has a simple answer: yes. I agree with the majority's conclusion but write separately because the majority overcomplicates the analysis.

Limited Resources

A public library providing computer access may, consistent with article I, section 5 of the Washington Constitution, filter Internet access without disabling that filter to allow access to all web sites containing constitutionally protected speech. The reason is simple: in determining the makeup of their collections, public libraries have limited resources, including computers; some libraries in this case have only one or two. Public libraries may determine – by filter – among the vast sea of educational and informational materials which materials are appropriate for the libraries' collections. The number of available computer terminals is a more limited resource for many public libraries than the amount of

available shelf space and funds to buy books.

Scarcity of resources is particularly relevant in the present case. The North Central Regional Library District's (NCRL) twenty-eight branch libraries in five rural counties also serve as school libraries for fourteen school districts. Sixteen branches have only one or two computer terminals available for patrons. Twenty branches are staffed with only one librarian. Public libraries have the "traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes." *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003). Public libraries are necessarily empowered with discretion to make quality-based judgments on how to allocate their limited resources, including finances and shelf space, in building their collections. Some content-based decisions have been held to strict scrutiny. *Collier v. City of Tacoma*, 121 Wn.2d 737, 749-50, 854 P.2d 1046 (1993). However, due to public libraries' traditional role, their collection decisions to allocate scarce resources are not subject to strict scrutiny, but instead are subject to the rational basis test. Protecting patrons (including minors) from obscene material and increasing the library's capacity to provide literary, scientific, historic, and other materials clearly satisfies the rational basis

test.

This analysis applies directly to a library's online collection as well. Removing NCRL's Internet filters would allow patrons to access online pornography and other materials currently unavailable because they are not selected for collection, resulting in increased demand for an extremely limited resource: available computer terminals. In many libraries, children would be displaced from computer terminal use to allow adult access. The libraries are thus exercising quality-based collection judgments to determine the best way to fulfill their traditional role. These decisions are viewpoint neutral. Rationales for the Internet filters include protecting patrons (often children) from offensive, disturbing, and illegal material, conserving resources, and safety. These are sufficient to satisfy the rational basis test, especially given the dual school-library function of many of NCRL's branches.

The analysis should end here. Unfortunately, I must also address the majority's improper discussion of article I, section 5.

Freedom of Speech

Our state constitution provides that “[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

Wash. Const. art. I, § 5. The words “right to receive information and ideas,” majority at 12, do not exist in this provision. Our analysis should focus on the right to “speak, write and publish on all subjects,” not on a right to receive information and ideas that is not found in the constitution.¹

Our constitution reserves the right to amend our constitution to the people of Washington. Wash. Const art. XXIII. By its unambiguously plain language, article I, section 5 provides the right to “speak, write and publish” only. This court may believe that *access* to information and ideas is important to a free and well-informed society, but we do not amend our state constitution via judicial opinion, especially an advisory opinion on a certified question. That power is entrusted to the people of Washington.

The dissent notes, and the majority appears to agree, that the First Amendment to the United States Constitution protects the “freedom to read.” Dissent at 1. That the right to receive information has been discussed in First Amendment analyses is not determinative here. The Washington State Constitution defines the term “freedom of speech.” Wash. Const art. I, § 5. In contrast, the First Amendment lists freedom of speech among other rights,

¹ Inasmuch as plaintiffs’ rights to speak, write or publish are not infringed, they fail to state a claim upon which relief can be granted. CR 12(b)(6).

including the rights of the press and petitioning the government, but does not define what “freedom of speech” entails. Necessity has led some federal courts to consider this undefined term’s meaning. The First Amendment has thus been interpreted to include the rights of writing, publishing, distributing, and receiving information and ideas. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943). This does not mean the Washington State Constitution must have an identical interpretation; in fact, the interpretation is not identical. This court has previously recognized that article I, section 5 is subject to *independent* interpretation. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 118, 937 P.2d 154, 943 P.2d 1358 (1997). Sometimes the more specific speech protections of article I, section 5 has warranted greater freedom of speech than the First Amendment. *See, e.g., O’Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988) (article I, section 5 provides greater protection against prior restraints and overbreadth than the First Amendment). Sometimes the speech protections under both provisions are equivalent. *See, e.g., Ino Ino, Inc.*, 132 Wn.2d at 115-16 (article I, section 5 and the First Amendment provide equivalent degrees of protection regarding speech that is obscene, commercial,

false, defamatory, or expressed in nonpublic forums). However, we must not lose sight of the fact that article I, section 5 is differently worded and constructed than the First Amendment.

An analysis of whether article I, section 5 contains a right to receive information and ideas (and a focused *Gunwall*² argument) may well be necessary in another case. Today, we need only determine that the NCRL's policy of Internet filtering on its computers is consistent with article I, section 5 of the Washington Constitution.

² *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

AUTHOR:

Justice James M. Johnson

WE CONCUR:
