

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,)
) NCRL'S REPLY IN SUPPORT OF
Plaintiffs,) MOTION FOR CERTIFICATION OF
v.) QUESTIONS OF STATE
) CONSTITUTIONAL LAW
NORTH CENTRAL REGIONAL)
LIBRARY DISTRICT,)
)
Defendant.)
_____)

Plaintiffs may misunderstand Defendant North Central Regional Library District's ("NCRL") *Motion for Certification of Questions State Constitutional Law*. (Ct. Rec. 37). NCRL's Motion is not about subject matter jurisdiction or

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#661446 v1 / 42703-001

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1 this Court’s capacity to decide issues of state law. The question is whether this
2 Court *should* allow the Washington Supreme Court the opportunity to resolve
3 dispositive issues of first impression under Art. I, § 5 of the Washington
4 Constitution. As held in *Barnes-Wallace v. City of San Diego*, 471 F.3d 1038,
5 1046.47 (9th Cir. 2006), federal courts are bound “to resolve state constitutional
6 questions before reaching federal challenges.”
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10 **A. Standards for Certification.**

11 Plaintiffs cite *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) for the idea
12 that “difficulty in ascertaining local law” is insufficient reason to direct the
13 parties to state court. In *Lehman*, the Court vacated an appellate ruling and
14 remanded for consideration of certification. The principles discussed in *Lehman*
15 apply with even greater force where as here, the case should turn on state
16 constitutional law and RCW 2.60.040 offers direct access to Washington’s
17 highest court. See 416 U.S. at 394 (Rehnquist, J. concurring)(certification is a
18 “desirable means” to have an undecided point of state law resolved).
19 Plaintiffs note that certification burdens state courts and may cause delay and
20 expense but certification also offers systemic benefits such as advancement of
21 state and federal comity. In *In Re Elliott*, 74 Wash.2d 600, 610 (1968), the
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1 Court found that Washington's certification statute sets a permissive, not a
2 mandatory, standard and "... does not impose onerous or unconstitutional
3 dictates upon this Court." Similarly, the United States Supreme Court wrote in
4 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) that
5 certification offers the opportunity to save time, energy and resources and build
6 a cooperative judicial federalism.
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9 Plaintiffs imply that certification is inappropriate because existing
10 Washington law allows this Court to rule on Plaintiffs' claims under Art. I, §5.
11 Plaintiffs cite five cases in which federal courts have resolved free speech cases
12 in part under Art. I, §5. (Ct. Rec. 52, pg. 4). These cases do not address
13 certification. The fact that certification was not invoked does not mean the
14 procedure was inappropriate or that it was considered and rejected.
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18 The cases also are distinguishable. For example, in *Seattle Affiliate of*
19 *October 22nd v. City of Seattle*, 430 F. Supp.2d 1185, 1196 (2006) the Court
20 limited its ruling to a federal analysis because there was no argument that Art. I,
21 §5 should be interpreted more broadly than the First Amendment. Here,
22 Plaintiffs do make such an argument. (Ct. Rec. 40, pg. 19) In *Clark v. City of*
23 *Lakewood*, 259 F.3d 996, 1016 (9th Cir. 2001), the Court held a regulation to
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1 infringe Art. I, §5 but the regulation was effectively identical to one previously
2 held unconstitutional. No Washington case juxtaposes free speech issues with
3 internet filtering in a public library and it is precisely this context that makes this
4 case different. If this Court does not grant certification, it will have to predict
5 how the Washington Supreme Court would balance the competing interests of
6 free expression under Art. I, §5, the societal role of public libraries, and the
7 internet as a collection development tool (assuming Plaintiffs have standing).
8 RCW 2.60.040 allows these issues to be decided in the first instance by the
9 Washington Supreme Court.

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14 **B. The Question of Standing Should Be Certified.**

15 Plaintiffs argue the question of Plaintiffs' standing to challenge NCRL's
16 Internet Filtering Policy need not be certified. (Ct. Rec. 52, pgs. 5-6). NCRL
17 agrees that Washington law is well-developed on the question of standing.
18 However, the issue of standing is intertwined with the merits of Plaintiffs'
19 claims under Art. 1, § 5. Each Plaintiff lacks standing to assert an "as applied,"
20 personal challenge if not personally aggrieved in some substantial way. But
21 determining whether each Plaintiff is aggrieved requires examination of
22 NCRL's Policy and circumstances surrounding each Plaintiff's use of the NCRL
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1 network. In this sense, the questions of standing and the merits of Plaintiffs'
2 challenges to NCRL's Policy are intertwined. Cf. *State v. Francisco*, 107 Wn.
3 App. 247, 252 (2001) citing *Rakas v. Illinois*, 439 U.S. 128, 139 (1979)(standing
4 is theoretically distinct from but inextricably intertwined with the scope of
5 personal rights under the Fourth Amendment). Thus, the standing issue should
6 be certified.
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10 **C. The Question of the Validity of NCRL's Policy Under Art. I, § 5**
11 **Should Be Certified.**
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13 Plaintiffs oppose certifying a question of the validity of NCRL's Policy
14 under Art. I, § 5 for several reasons, each of which is addressed below:
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16 First, Plaintiffs assert that "a state law ruling will not be necessary to the
17 resolution of the case if it is decided on federal grounds." (Ct. Rec. 52, pg. 7)
18 This Court should do the opposite of what Plaintiffs suggest. See *Barnes-*
19 *Wallace, supra*, 471 F.3d at 1046-47 ("We are bound to resolve state
20 constitutional questions before reaching federal challenges.") citing *City of*
21 *Mesquite v. Aladdin's Castle, Inc.* 455 U.S. 283, 295 (1982).
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1 Second, Plaintiffs argue that this is not a case where there is an absence of
2 state law. (Ct. Rec. 52, pg. 7). Plaintiffs are wrong and their reliance on
3 *Soundgarden v. Eikenberry*, 123 Wn.2d, 750 (1994) and *O’Day v. King*, 109
4 Wn.2d 796 (1988) is misplaced. *Soundgarden* addressed an “erotic music”
5 statute primarily under federal law. Moreover, *Soundgarden* found the statute to
6 be an unconstitutional “prior restraint.” Internet filtering is a collection
7 development tool, not a restraint on speech. See *United States v. American*
8 *Library Ass’n.*, 539 U.S. 194, 209 n.4 (2003) (“*ALA*”). In *O’Day*, the Court
9 proceeded in part upon “a federal analysis of the narrow issue of whether
10 obscenity is protected speech.” 109 Wn.2d at 801. These cases will not help
11 this Court balance personal rights established by Art. I, § 5 with the interests of
12 public libraries striving to fulfill their traditional mission in the digital age.
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14 Third, Plaintiffs argue that RAP 16.16(a) limits certification to questions
15 that are not determined by reference to the United States Constitution. (Ct. Rec.
16 52, pg. 8). Plaintiffs claim that Art. I, § 5 extends them broader protections than
17 the First Amendment in some respects.¹ NCRL disputes that contention but if
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25 ¹ E.g., prior restraint and overbreadth analysis. Ct. Rec. 40, pg. 19.

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1 Plaintiffs are correct then by definition their claims will not be determined by
2 reference to First Amendment law even if federal law informs the analysis.

3
4 Plaintiffs' citation to *In re Washington State Apple Advertising Comm.*,
5 257 F. Supp.2d 1290 (E.D. Wash. 2003) does not help them. (Ct. Rec. 52, pg. 7-
6 8). In that case, this Court observed that Art. I. § 5 provides no lesser, and
7 sometimes greater, protection than the First Amendment. Consequently, a
8 violation of the First Amendment is always a violation of the Washington
9 Constitution. 257 F.Supp.2d at 1304. NCRL has no quarrel with this principle
10 but its inverse is equally true: state action that is permissible under Art. I, § 5 is
11 also permissible under the First Amendment. The questions here are whether
12 the state issue should be resolved first, thus avoiding the federal analysis, and
13 whether this Court or the Washington Supreme Court should address state
14 constitutional issues of first impression.

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20 Fourth, Plaintiffs argue that this case involves the application of
21 established law to undisputed facts and that even if the facts are "novel" a
22 Washington court is in no better position to decide the issues. (Ct. Rec. 52, pg.
23 8). Even assuming the material facts are undisputed, they create a profoundly
24 unique context within which to consider constitutional rights of free speech. In
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1 ALA, the Court elaborated on the societal role of the public library as a
2 community institution and the considerations raised by its use of internet filter.
3
4 There is no similar Washington case law to draw upon but presumably the
5 Washington Supreme Court is best situated to apply the Washington
6
7 Constitution in matters of first impression.

8 Plaintiffs' citations to *Paul v. Watchtower Bible & Tract Soc'y.*, 819 F.2d
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10 875, 879 (9th Cir. 1987) and *Micomonaco v. State of Wash.*, 45 F.3d 316, 322
11 (9th Cir. 1995) are unhelpful. Unlike this case, *Paul* did not require the federal
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13 court to address a contention that the Washington Constitution is broader than
14 the United States Constitution (with respect to religious freedoms.) 819 F.2d at
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16 880 n.3. In *Micomonaco* the Court was as well-positioned as a state court to
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18 determine whether a Washington statute effected a waiver of Eleventh
19
20 Amendment immunity using criteria well-established in federal case law and its
own experience with the issue. 45 F.3d at 322.

21 Fifth, Plaintiffs argue that the constitutional questions presented fit
22
23 "squarely within existing case law and statutes." (Ct. Rec. 52, pg. 9). NCRL
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25 agrees that *ALA* speaks to the issues but no Washington case considers Art. I,
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27 § 5 in an analogous setting. The case which Plaintiffs call "indistinguishable" –

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1 *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp.2d 552 (E.D. Va. 1998) –
2 has no value here. In *Loudoun*, the Court found that a library was a public
3 forum and applied strict scrutiny to invalidate its internet filtering policy. 24 F.
4 Supp.2d at 561-63. The *ALA* plurality nowhere mentions *Loudoun*. More
5 importantly, *ALA* rejected forum analysis and heightened scrutiny as
6 “incompatible with the discretion that public libraries must have to fulfill their
7 traditional missions.” 539 U.S. at 205.
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11 Sixth, Plaintiffs argue that federal courts do not always resolve state
12 issues first. (Ct. Rec. 52, pg. 9-10). Plaintiffs cite again to *Washington State*
13 *Apple Advertising Comm.*, *supra*, where this Court found violations of the
14 federal and state constitutions. However, this Court declined to interpret Art. I,
15 § 5 more broadly than the First Amendment. 257 F. Supp.2d at 1304 n.9.
16 Applying only a federal analysis is proper where a *Gunwall* analysis has not
17 been presented for a broader interpretation of the Washington Constitution. See
18 *Seattle Affilliate*, *supra*, 430 F. Supp.2d at 1196. Infringing the First Amendment
19 necessarily infringes Art. I, § 5 too. 257 F.Supp.2d at 1304.
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1 **D. NCRL Should Not Bear Plaintiffs' Costs.**

2 This Court should not allocate all costs of certification to NCRL. (Ct.
3
4 Rec. 52, pg. 10). NCRL is in no better position than Plaintiffs to absorb such
5 costs. Moreover, NCRL is only responding to the claim Plaintiffs chose to
6
7 plead. Having alleged that Art. I, § 5 offers them broader protections than the
8 First Amendment, Plaintiffs cannot credibly protest about when NCRL invokes
9
10 an available alternative procedure to address them.

11 **CONCLUSION**

12 NCRL's Motion should be granted.

13 DATED this 29th day of February, 2008.

14 KARR TUTTLE CAMPBELL

15
16 By: /s/ Thomas D. Adams
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1 **CERTIFICATE OF SERVICE**

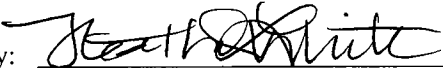
2 I hereby certify that on February 29, 2008, I electronically filed the foregoing with the Clerk of the
3 Court using the CM/ECF system which will send notification of such filing to the persons listed below:

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