

1 THE HONORABLE EDWARD F. SHEA

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

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11 SARAH BRADBURN, PEARL
12 CHERRINGTON, CHARLES
13 HEINLEN, and the SECOND
AMENDMENT FOUNDATION,

14 Plaintiffs,

15
16 v.

17
18 NORTH CENTRAL REGIONAL
19 LIBRARY DISTRICT,

20 Defendant

No. CV-06-327-EFS

**PLAINTIFFS' PROPOSED
CERTIFIED QUESTION AND
BRIEF IN SUPPORT OF THEIR
PROPOSED CERTIFIED
QUESTION**

21 **INTRODUCTION**

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23 On April 23, 2008, this Court entered an Order granting in part Defendant's
24 Motion to Certify Questions of State Constitutional Law ("Motion to Certify").
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26 PLAINTIFFS' PROPOSED CERTIFIED QUESTION
AND BRIEF IN SUPPORT OF THEIR PROPOSED
CERTIFIED QUESTION -- 1

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1 Doc. No. 91. The Court directed the parties to work together to propose a joint
2 stipulated question to be certified to the Washington State Supreme Court. The
3 Court also ordered that, if the parties were unable to agree on a question, they
4 should propose independent questions for the Court’s review.
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7 The parties were unable to reach an agreement. Plaintiffs submit this brief in
8 support of their proposed question.
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10 **FACTUAL BACKGROUND**

11 The Defendant in this case, the North Central Regional Library District
12 (“NCRL”), is a publicly-funded library system. NCRL provides Internet terminals
13 in each of its 28 branch locations. Rather than allow patrons to decide what
14 materials to view, NCRL has chosen to deploy an Internet filter to block access to
15 content that it considers inappropriate. NCRL refuses to disable its filter at the
16 request of adult library patrons.
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20 The filter that NCRL uses categorizes Internet content by subject matter, and
21 then allows NCRL’s staff to select certain categories to preclude patrons from
22 viewing. NCRL has chosen to block access to categories titled Adult Materials,
23 Gambling, Hacking, Malware, Nudity and Risque, Phishing, Pornography, Proxy
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26 PLAINTIFFS’ PROPOSED CERTIFIED QUESTION
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1 Avoidance, Spyware, Web Chat, Instant Messaging, Image Search, Video Search,
2 and Spam URL. As defined by the company providing the filtering system, all of
3 these terms are broad enough to include a substantial amount of constitutionally
4 protected speech. In addition to preventing NCRL's patrons from reading
5 materials properly placed into these broad categories, NCRL's filter wrongly
6 identifies a vast range of other Web sites as belonging to these categories, thus
7 blocking access to much content that NCRL itself does not intend to block. The
8 result of NCRL's filtering policy is to prohibit its adult patrons from accessing
9 many thousands of constitutionally protected Web sites.
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14 Three of the Plaintiffs in this case are patrons of NCRL who use the library's
15 Internet access terminals. NCRL's filtering policy has prevented them from
16 conducting research for class assignments, locating legitimate businesses and
17 organizations, and simply engaging in study or leisure reading of constitutionally
18 protected materials. The fourth Plaintiff in this case operates a Web site. Because
19 NCRL's filter blocked this site, NCRL prevented the Plaintiff publisher from
20 communicating with its audience in NCRL's service area.
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PLAINTIFFS' PROPOSED CERTIFIED QUESTION
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1 The relief Plaintiffs seek is for NCRL to disable its Internet filter upon the
2 request of individual adult library patrons. The library may continue to use
3 filtering software on its computer terminals, establish filtered access as the default
4 rule, and limit underage users to filtered access. However, when an adult requests
5 unfiltered access to the Internet, such access must be allowed.
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8 Plaintiffs allege that NCRL's policy violates both the First Amendment of
9 the United States Constitution and Article I, Section 5 of the Washington State
10 Constitution. Defendant moved this Court to certify the state constitutional issues
11 to the Washington State Supreme Court. This Court granted that motion, and must
12 now decide how to formulate the certified question.
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16 **PROPOSED CERTIFIED QUESTION**

17 Plaintiffs ask the Court to adopt the following certified question:
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19 Whether a public library violates Article I, Section 5 of the
20 Washington State Constitution by refusing to disable, upon the request
21 of adult library patrons, an Internet filter that blocks constitutionally
22 protected speech.

23 Plaintiffs' proposed question accurately and impartially describes the central issues
24 in this case. The question is stated in fairly broad terms because the Court, in
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PLAINTIFFS' PROPOSED CERTIFIED QUESTION
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1 comments made during argument on NCRL's Motion to Certify, indicated that it
2 wished to submit a broad question to the Washington State Supreme Court; and
3
4 also because submission of a broad question will best further the resolution of this
5 case. Plaintiffs have presented this Court, and are likely to present the Washington
6 State Supreme Court, with several alternative theories to support their contention
7 that NCRL's policy violates Article I, Section 5 of the Washington State
8 Constitution. Specifically, and as explained in greater detail in Plaintiffs' summary
9 judgment briefs, Plaintiffs argue that NCRL's policy (1) is impermissibly
10 overbroad, (2) is a content-based speech regulation that fails any form of
11 heightened scrutiny, and (3) rises to the level of an unconstitutional prior restraint.
12 Any certified question should allow Plaintiffs enough latitude to present all three
13 of these theories to the Washington State Supreme Court, thereby increasing the
14 likelihood of the State Supreme Court definitively resolving all the state law issues
15 in this case.
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21 It is also important that the question certified to the State Supreme Court
22 makes clear the narrowness of the constitutional claim at issue here. This case is
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26 PLAINTIFFS' PROPOSED CERTIFIED QUESTION
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1 about the right of adults to opt out of Internet filtering. It is not about the right of
2 minors to have unfiltered access to the Internet. None of the Plaintiffs are minors,
3 and Plaintiffs do not seek relief that encompasses unfiltered Internet access for
4 minors. Furthermore, this case is not about the right of adults to have unfiltered
5 access as their default option. The only relief that Plaintiffs seek is that NCRL
6 disable its Internet filters at the specific request of adults. Plaintiffs' proposed
7 certified question makes this clear.

11 Finally, it is essential that the certified question reflect the fact that NCRL
12 blocks access to constitutionally protected content. Plaintiffs are challenging
13 NCRL's decision to deny its adult patrons access to entire categories of
14 constitutionally protected content, such as information about gambling and all Web
15 sites that feature nudity, regardless of artistic merit. Plaintiffs also challenge
16 NCRL's decision to control content through inherently flawed software that
17 inadvertently blocks access to large numbers of Web sites that are objectionable to
18 no one. NCRL does not dispute that its Internet filter blocks access to
19 constitutionally protected speech, and the fact that such speech is blocked is

1 integral to Plaintiffs' claims. The certified question should include this important
2 and undisputed fact.
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4 **OBJECTIONS TO DEFENDANT'S POSSIBLE CERTIFIED QUESTION**

5 NCRL's proposed certified question is as follows:
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7 Whether a public library, consistent with Article 1, §5 of
8 the Washington State Constitution, may filter internet
9 access for all patrons to comply with funding
10 requirements of the Children's Internet Protection
11 Act, advance the library's collection development and
12 other objectives, and provide a quality educational
13 resource.

14 This question is objectionable for several reasons. First, it is excessively broad and
15 vague, and fails to identify the central issue in this case. And second, it contains a
16 misstatement of law and two contested facts that unfairly slant the question in
17 NCRL's favor. The Court should not adopt it.
18

19 As noted above, the fundamental issue in this case is whether a public
20 library that filters constitutionally protected Internet content must disable its filter
21 at the request of adults. NCRL's proposed question does not acknowledge that
22 NCRL's filter blocks constitutionally protected speech, it does not mention
23 disabling of Internet filters, and it does not specify that the relief being sought by
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26 PLAINTIFFS' PROPOSED CERTIFIED QUESTION
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1 Plaintiffs would apply only to adults. The question is not descriptive of the issues
2 presented, and has little to no utility as a summary of what this case is about.
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4 NCRL's proposed question is also inaccurate and replete with disputed facts.
5 For example, the proposed question implies that it is necessary for NCRL to filter
6 adults' access to the Internet to comply with the Children's Internet Protection Act.
7 As Plaintiffs previously explained in their summary judgment briefs, this is not the
8 case. Although a federal statute requires NCRL to use some sort of filter as a
9 condition of federal funding, the statute allows and encourages libraries to disable
10 the filter "for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3);
11 47 U.S.C. § 254(h)(5)(D). Indeed, it is the ability to disable the filter that makes
12 the statute constitutional. See United States v. American Library Ass'n, 539 U.S.
13 194 (2003) ("ALA"). No statute or regulation requires NCRL to implement an
14 overbroad content-based filtering system without a disabling feature for adults. To
15 the contrary, such a system violates the free speech clauses of the United States
16 Constitution. See Mainstream Loudoun v. Board of Trustees of the Loudoun
17 County Public Library, 24 F.Supp.2d 552 (E.D. Va. 1998); and the Washington
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1 State Constitution, see Soundgarden v. Eikenberry, 123 Wn.2d 750 (1994).

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3 Plaintiffs also dispute NCRL's factual contentions that filtering advances the
4 library's collection development objections and is necessary to provide a quality
5 educational resource. Because the purpose of a filter is to censor certain
6 information and make it unavailable for patrons' consideration, library filtering is
7 antithetical to a primary role of libraries, which is to provide access to
8 constitutionally protected information. In any event, the disputed legal and factual
9 assertions contained in NCRL's proposed certified question are not central to the
10 issues presented in this case, and they have no place in a certified question.
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14 Plaintiffs' certified question accurately and succinctly captures the central
15 issues in this case. It reflects, in a fair and unbiased fashion, the relief that
16 Plaintiffs seek (disabling of NCRL's Internet filter at the request of adult patrons
17 only), as well as the justification for such relief (the uncontested fact that NCRL's
18 filter blocks access to constitutionally protected material). NCRL's proposed
19 question, by contrast, is overly broad, inaccurate, and slanted in NCRL's favor.
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PLAINTIFFS' PROPOSED CERTIFIED QUESTION
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CERTIFIED QUESTION -- 9

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1 Plaintiffs ask this Court to adopt their proposed question to certify to the
2 Washington State Supreme Court.
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4 DATED this 23rd day of May, 2008.
5

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CERTIFIED QUESTION -- 10

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the persons listed below:

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DATED this 23rd day of May, 2008.

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