

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,)	
)	DEFENDANT NORTH CENTRAL
Plaintiffs,)	REGIONAL LIBRARY DISTRICT'S
)	MEMORANDUM IN SUPPORT OF
v.)	PROPOSED CERTIFIED QUESTION
)	
NORTH CENTRAL REGIONAL)	
LIBRARY DISTRICT,)	
)	
Defendant.)	

A. NCRL's proposed certified question matches the parameters of the case.

Pursuant to the Court's April 23, 2008 order (Ct. Rec. 91), Defendant North Central Regional Library District ("NCRL") and Plaintiffs conferred in an

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 MEMORANDUM IN SUPPORT OF
 PROPOSED CERTIFIED QUESTION- 1

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1 effort to craft a question to jointly propose for certification to the Washington
2 Supreme Court. The parties' efforts were unsuccessful.

3
4 NCRL independently proposes this question for certification:

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

11 NCRL's certified question frames the legal issue in the context giving rise
12 to it. It is particularly important to avoid abstraction in a case that presents an
13 "as applied" constitutional challenge. NCRL accomplishes this by juxtaposing
14 the constitutional standard against the key factors influencing its application.
15 The elements of NCRL's proposed question are addressed further below.

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17
18 • *Whether a public library, consistent with Article 1, §5 of the*
19 *Washington State Constitution, may filter internet access for all patrons ...*

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21 The Washington State Constitution is structurally different than the
22 United States Constitution. The federal constitution is a grant of enumerated
23 powers while the state constitution acts as a limitation on the otherwise plenary
24 powers of state government. See *Ino Ino Inc. v. City of Bellevue*, 132 Wn.2d
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28 DEFENDANT NORTH CENTRAL'S
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1 103, 121, 937 P.2d 154 (1997); *State v. Reece*, 110 Wn.2d 766, 780, 757 P.2d
2 947 (1988). Accordingly, the certified question should be framed in terms of the
3 action a public library “may” take in exercising its broad authority and
4 discretion.
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6
7 In addition, “may” speaks to the idea that a library may choose not to
8 filter, or filter more or less rigorously, just as NCRL chooses to filter according
9 to criteria that apply to all patrons at all times. NCRL acknowledges that
10 libraries may differ in their balancing of community expectations, the need for
11 federal funding, the vitality of their collection development policies, and other
12 considerations.
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15 NCRL also believes the certified question should state that filtering
16 applies to “all patrons,” which is an undisputed fact. Plaintiffs focus only on the
17 adult patrons of NCRL and characterize NCRL’s filtering policy as one that
18 ensures adults have access only to online resources deemed fit for children.¹
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20 This is unfair and inaccurate. NCRL’s patrons obviously have varying interests,
21 tastes, and sensibilities. For the sake of consistency and quality, NCRL
22 manages traditional and online resources provided to patrons according to
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26 ¹ See, e.g., Ct. Rec. 40, pgs. 10-11.

1 uniform criteria. This does not mean all resources must be appropriate for all
2 patrons before being included in NCRL's collection. NCRL's Collection
3 Development policy explicitly cautions that "not all materials will be suitable
4 for all members of the community" and that "parents have the primary
5 responsibility to guide and direct" what their children read and view.² Thus,
6 although Plaintiffs dwell on the effect of NCRL's filtering policy on adults,
7 adults are treated no differently than any other patron subset. NCRL's policy
8 applies equally "to all patrons" and the certified question should make that clear.
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12 • *Whether a public library, consistent with Article 1, §5 of the Washington*
13 *State Constitution, may filter internet access for all patrons to comply with*
14 *funding requirements of the Children's Internet Protection Act, advance the*
15 *library's collection development and other objectives, ...*

16 NCRL filters internet access because of its desire to comply with the
17 funding requirements of the Children's Internet Protection Act ("CIPA"), to
18 further its collection development goals, and to otherwise provide a safe, non-
19 hostile environment for patrons and library staff. Plaintiffs disagree with
20 NCRL's interpretation of CIPA and reject collection development and the other
21 reasons as proper grounds for filtering internet access by adult patrons. But
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26 ² Ct. Rec. 71, pgs. 10-11.

1 Plaintiffs' disagreement does not change the fact that these reasons constitute
2 NCRL's rationale for filtering and the rationale is supported by *United States v.*
3 *American Library Ass'n.*, 539 U.S. 194 (2003) ("ALA") and state law. If these
4 factors are not articulated in the certified question, the legal issue is not framed
5 in a meaningful context. In an "as applied" constitutional challenge, context is
6 critical. The certified question should focus the Washington Supreme Court's
7 inquiry on the factors that shape and inform the issue.
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11 No rule or convention requires a certified question to be drafted in a
12 particular form. However it is worth noting that recent examples are context-
13 driven³, see, e.g., *Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*,
14 149 Wn.2d 660, 665, 72 P.3d 151 (2003), or are highly-structured, *United States*
15 *v. Hoffman*, 154 Wn.2d 730, 735-36, 116 P.3d 999 (2005).
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22 ³ For example: "By using a racial tiebreaker to determine high school
23 assignments, does Seattle School District Number 1 'discriminate against, or
24 grant preferential treatment to, any individual or group on the basis of race, ...
25 color, ethnicity, or national origin in the operation of ... public education' in
26 violation of Initiative 200 (I-200), codified at Washington Revised Code
§ 49.60.400." *Parents Involved in Comm. Schools*, 149 Wn.2d at 665.

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1 • *Whether a public library, consistent with Article 1, §5 of the Washington*
2 *State Constitution, may filter internet access for all patrons to comply with*
3 *funding requirements of the Children's Internet Protection Act, advance the*
4 *library's collection development and other objectives, and provide a quality*
5 *educational resource.*

6 NCRL's proposed question recognizes the nexus between public
7 education and public libraries in the State of Washington. RCW 27.12.020
8 codifies "the policy of state, as a part of its provision for public education, to
9 promote the establishment and development of public library service throughout
10 its various subdivisions." Consistent with State policy (and its own mission "to
11 promote reading and lifelong learning"⁴), NCRL provides substantial support to
12 public education. It is undisputed that NCRL branches serve as the functional
13 "school library" in 14 of the 26 school districts operating within NCRL's
14 territorial reach.⁵ NCRL's proposed question properly links Washington's
15 legislatively-expressed policy favoring public education with the
16 constitutionality of action taken by NCRL in furtherance of it.
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22 The reference to public education in NCRL's proposed question is
23 important for another reason. In *Parents Involved in Comm. Schools v. Seattle*
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25 ⁴ Ct. Rec. 71, pg. 7, lns. 10-11.
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1 *Sch. Dist. No. 1*, 149 Wn.2d 660, 672, 72 P.3d 151 (2003), a case certified by
2 the U.S. Court of Appeals for the Ninth Circuit, the Washington Supreme Court
3 reaffirmed that Art. 9, §1 of the State's Constitution "sets education as the
4 State's highest priority."
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6
7 Art. 9, §1 states:

8 It is the paramount duty of the state to make ample
9 provision for the education of all children residing
10 within its borders, without distinction or preference on
11 account of race, color, caste, or sex.

12 The Supreme Court in this case ultimately may wish to consider how
13 Plaintiffs' claimed right of unfiltered internet access under Art. 1, §5 implicates
14 the "paramount duty" of public libraries, as State instrumentalities, to help
15 provide Washington's children with quality educational opportunities under Art.
16 9, §1. NCRL's proposed question accommodates this analysis.
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19 **B. Plaintiffs' proposed Certified Question is inadequate.**

20 Plaintiffs are expected to propose this certified question:

21 Whether a public library violates Article I, Section 5 of the
22 Washington State Constitution by refusing to disable, upon the
23 request of adult library patrons, an Internet filter that blocks
24 constitutionally protected speech.
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26 ⁵ Ct. Rec., pg. 7, lns. 12-18.

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1 This proposed question suffers from a number of deficiencies:

2 First, it misstates NCRL's duty. Filter disabling is not mandatory.
3
4 Although *ALA* is a First Amendment case, its discussion of CIPA, internet
5 filtering, and the traditional role of public libraries is instructive. In *ALA*, the
6 Court observed that a filter may be disabled or it may be overridden as to
7 particular web sites. *ALA, supra*, 539 U.S. at 215 (Kennedy, J. concurring). It is
8 undisputed that NCRL has the capability to unblock or override the filter in
9 appropriate circumstances. The certified question should not imply that
10 disabling is a public library's only recourse.
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14 Second, Plaintiffs' proposed question omits the reasons and imperatives
15 that cause NCRL to filter in the first place. Plaintiffs raise "as applied"
16 challenges to NCRL's filtering policy which cannot be resolved in a vacuum.
17 NCRL's rationale and goals for filtering, not addressed by Plaintiffs' proposed
18 question, provides important context.
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21 Third, Plaintiffs' proposed question focuses on "adult patrons." As
22 discussed previously, NCRL objectively applies its policies to all patrons.
23 Plaintiffs' question implies that NCRL's policies apply differently to adults.
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1 Fourth, Plaintiffs' proposed question, read literally, implies that NCRL's
2 filter is configured for the very purpose of blocking all constitutionally-protected
3 speech. This suggests a censorship motive that is unsupported by any evidence.
4 Just as *ALA* recognized that no known filtering software operates perfectly,
5 NCRL acknowledges that some constitutionally-protected content is blocked by
6 its filter in error (in which case patrons may invoke the review and override
7 mechanisms). Other content not meeting NCRL's collection development
8 criteria may be blocked by design but this does not translate to censorship. As
9 noted in *ALA*, a library need not include content in its collection simply because
10 the material is constitutionally-protected. 539 U.S. at 209 n. 4. In fact, a library
11 could properly choose to allow access only to sites deemed worthwhile despite
12 the drawbacks of such an approach. 539 U.S. 208. It is enough to establish that
13 internet access is filtered. What is or is not blocked by the filter need not be
14 addressed in the certified question.

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21 Fifth, Plaintiffs' proposed question ignores the public education goals and
22 duties raised by their Art. 1, §5 claims. The education issues are rooted in
23 undisputed evidence (Ct. Rec. 71, pg. 7) and Washington's statutory law
24 (RCW 27.12.020) and Constitution (Art. 9, §1). The certified question should
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1 connect in some manner to a public library's "paramount duty" to help the State
2 provide a quality educational experience for its children.
3

4 **C. Conclusion.**

5 NCRL ask this Court to adopt its proposed Certified Question and certify
6 it to the Washington Supreme Court under RCW 2.60.020.
7

8 DATED this 23rd day of May, 2008
9

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27 DEFENDANT NORTH CENTRAL'S
28 MEMORANDUM IN SUPPORT OF
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1 **CERTIFICATE OF SERVICE**


2 I hereby certify that on May 23, 2008, I electronically filed the foregoing
3
4 with the Clerk of the Court using the CM/ECF system which will send
5 notification of such filing to the persons listed below:
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