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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 SARAH BRADBURN, PEARL
8 CHERRINGTON, CHARLES HEINLEN,
9 SECOND AMENDMENT FOUNDATION,

10 Plaintiffs,

11 v.

12 NORTH CENTRAL REGIONAL
13 LIBRARY DISTRICT,

14 Defendant.

NO. CV-06-0327-EFS

**ORDER GRANTING AND DENYING IN
PART DEFENDANT'S MOTION FOR
CERTIFICATION AND HOLDING IN
ABEYANCE THE MOTIONS FOR
SUMMARY JUDGMENT**

15 A hearing was held in the above-captioned matter on April 23, 2008.
16 Catherine Crump and Duncan Manville appeared on behalf of Plaintiffs
17 Sarah Bradburn, Pearl Cherrington, Charles Heinlen, and the Second
18 Amendment Foundation (collectively referred to as "Plaintiffs"). Thomas
19 Adams appeared on behalf of Defendant North Central Regional Library
20 District (NCRL). Before the Court were NCRL's Motion for Certification
21 of Questions of State Constitutional Law (Ct. Rec. 37), NCRL's Motion for
22 Summary Judgment (Ct. Rec. 28), and Plaintiffs' Motion for Summary
23 Judgment (Ct. Rec. 39). After reviewing the submitted material and
24 relevant authority and hearing from counsel, the Court was fully
25 informed. This Order supplements and memorializes the Court's oral
26 ruling granting and denying in part NCRL's certification motion and

1 holding in abeyance the motions for summary judgment, absent the standing
2 issues, until the the to-be-certified state constitution Article I, § 5
3 issue(s) are resolved.

4 I. Facts¹

5 A. Plaintiffs

6 Sarah Bradburn, Pearl Cherrington, and Charles Heinlen are patrons
7 of NCRL. (Ct. Rec. 41 at 1-2.) Each uses, or has used, computers made
8 available to the public by NCRL to access the Internet. *Id.* at 2.

9 Ms. Bradburn is a resident of Republic, Washington, and primarily
10 uses NCRL's Republic branch for Internet access and other purposes. *Id.*
11 In October or November 2003, Ms. Bradburn attempted to conduct Internet
12 research regarding alcohol and drug-addiction topics in connection with
13 academic assignments. *Id.* at 2. Ms. Bradburn was unable to access
14 certain Web sites relating to youth tobacco usage; she believes her
15 access was blocked by NCRL's Internet filter, but she cannot recall the
16 sites specifically. *Id.* at 2-3; Ct. Rec. 57 at 21. Ms. Bradburn
17 completed her research in Spokane where she was attending school, and
18 she did not tell NCRL staff of her access difficulties before filing
19 suit. (Ct. Rec. 41 at 3; Ct. Rec. 49 at 32.) NCRL has had no
20 opportunity to confirm that access was in fact blocked and, if so,
21 whether access was blocked by the Internet filter, a transient network
22 problem, or some other cause. *Id.* Ms. Bradburn seeks to have, on
23

24
25 ¹ This factual statement is based on the parties' Joint Statement
26 of Uncontroverted Facts. (Ct. Rec. 71.)

1 request, unfiltered Internet access for lawful purposes at her local NCRL
2 branch. (Ct. Rec. 57 at 21.)

3 Ms. Cherrington is a resident of Twisp, Washington, and she
4 primarily uses NCRL's Twisp branch. (Ct. Rec. 41 at 3.) Ms.
5 Cherrington attempted to conduct Internet research on art and health-
6 related topics in the summer of 2005 through NCRL's network using a
7 computer in the Twisp branch. *Id.*; Ct. Rec. 57 at 21-22. NCRL's
8 Internet filter denied Ms. Cherrington access to the Idaho art gallery
9 Web site and a site containing health information, but she cannot recall
10 the specific Web sites. (Ct. Rec. 41 at 3; Ct. Rec. 57 at 21-22.) After
11 Plaintiffs filed their Complaint, Ms. Cherrington attempted to access the
12 YouTube Web site. (Ct. Rec. 41 at 3; Ct. Rec. 57 at 21-22.) NCRL's
13 current filter denied Ms. Cherrington access to YouTube. (Ct. Rec. 41
14 at 3; Ct. Rec. 57 at 21-22.) NCRL no longer blocks access to YouTube.
15 (Ct. Rec. 29 at 33.) Ms. Cherrington seeks to have, on request,
16 unfiltered Internet access for lawful purposes at her local NCRL branch.
17 (Ct. Rec. 57 at 22.) Ms. Cherrington denies ever having seen a
18 "Material Selection Review Form" - a form that NCRL made, and still
19 makes, available to patrons requesting to unblock specific Web sites.
20 *Id.* at 20.

21 Mr. Heinlen, a resident of Okanogan County, Washington, primarily
22 uses NCRL's Omak and Okanogan branches. (Ct. Rec. 41 at 3.) Mr. Heinlen
23 attempted to use NCRL computers to conduct Internet research, communicate
24 with others via email, maintain a MySpace.com blog, obtain information
25 on firearms, and access various dating sites and other Web sites. *Id.*
26 at 3-4; Ct. Rec. 57 at 6. NCRL's Internet filter prevented him from

1 accessing images or photographs embedded in commercial emails sent to his
2 Hotmail and Yahoo! Accounts, and to the Web sites listed in his answer
3 to NCRL's Interrogatory No. 5 and his Declaration in Opposition to
4 Defendant's Motion for Summary Judgment. (Ct. Rec. 41 at 4; Ct. Rec. 57
5 at 6.) On February 23, 2008, while using an NCRL computer at the Omak
6 branch, Mr. Heinlen found that NCRL's Internet filter blocked access to
7 the following Web sites under the category Nudity and Risque (except
8 www.courting-disaster.com, which was blocked under the category "Adult
9 Materials"):

10 www.netnude.com

11 aanr.com

12 www.artenuda.com/paintings2.asp

13 gregfriedler.com

14 billbrandt.com

15 www.ryoung-art.com

16 www.courting-disaster.com

17 www.mapplethorpe.org/index.html

18 fineartnude.com/webring

19 (Ct. Rec. 57 at 6.) Mr. Heinlen also attempted to access the "personals"
20 section of craigslist.org on February 23, 2008, through an NCRL computer.
21 *Id.* NCRL's Internet filter prevented him from doing so. *Id.* Mr.
22 Heinlen wishes to access the Craigslist personals section. *Id.* Mr.
23 Heinlen is the only person to have requested that NCRL's Internet filter
24 be disabled during his computer sessions prior to this lawsuit. (Ct.
25 Rec. 29 at 10; Ct. Rec. 62 at 20.) Mr. Heinlen maintains that his
26 request to unblock a specific "personal Web site" in 2004 was denied.

1 (Ct. Rec. 57 at 20.) Mr. Heinlen denies having seen a "Material
2 Selection Review Form." *Id.* Mr. Heinlen seeks to have, on request,
3 unfiltered Internet access for lawful purposes at his local NCRL branch.
4 *Id.* at 23.

5 Second Amendment Foundation ("SAF"), a Washington non-profit
6 corporation headquartered in Bellevue, Washington, is dedicated to issues
7 associated with the constitutional right to keep and bear firearms. (Ct.
8 Rec. 29 at 30-31; Ct. Rec. 41 at 4.) SAF has approximately 650,000
9 contributing members and supporters throughout the United States -
10 including about 1,000 in Chelan, Douglas, Ferry, Grant, and Okanogan
11 Counties. (Ct. Rec. 41 at 4.) SAF maintains the www.saf.org Web site
12 and sponsors online publications, including Women & Guns ("The World's
13 First Firearms Publication for Women") at www.womenandguns.com. *Id.* at
14 4-5. SAF wishes to communicate the Web site's content and sponsored
15 publications to Internet users in North Central Washington. *Id.* at 5.
16 SAF was advised by one or more of its members that access to
17 www.womenandguns.com was blocked on NCRL's computers. (Ct. Rec. 29 at
18 31; Ct. Rec. 41 at 5; Ct. Rec. 49 at 2.) SAF has no personal knowledge
19 or experience confirming that access to its sites were, in fact,
20 blocked. (Ct. Rec. 29 at 31; Ct. Rec. 41 at 5; Ct. Rec. 49 at 2.)
21 Plaintiff Heinlen attempted to access www.womenandguns.com in November
22 2006, but was prevented from doing so by NCRL's Internet filter. (Ct.
23 Rec. 57 at 20.) Before this lawsuit, NCRL had not received any report
24 that access to www.womenandguns.com was blocked. (Ct. Rec. 29 at 31.)
25 Access to www.womenandguns.com is not presently blocked, and NCRL does
26 not contend that it should be blocked. *Id.* SAF, however, is concerned

1 that NCRL will block that Web site (or another site sponsored by SAF) in
2 the future. (Ct. Rec. 57 at 20.)

3 **B. NCRL**

4 NCRL is an inter-county rural library district established in 1960
5 by the citizens of Chelan, Douglas, Ferry, Grant, and Okanogan Counties.
6 (Ct. Rec. 29 at 2; Ct. Rec. 41 at 5.) NCRL was formed and operates under
7 RCW 27.12 *et seq.* and other statutes applicable to inter-county rural
8 library districts. *Id.* NCRL's mission is to promote reading and
9 lifelong learning. (Ct. Rec. 29 at 6; Ct. Rec. 41 at 7.)

10 NCRL also is committed to supporting public education. (Ct. Rec.
11 29 at 4.) Twenty-six (26) school districts operate within NCRL's
12 territorial reach. *Id.* In fourteen (14) of those districts, NCRL branch
13 libraries serve as the *de facto* school library for children. *Id.*

14 NCRL, which maintains twenty-eight (28) branches and serves over
15 220,000 people, is funded by local property taxes, federal subsidies,
16 private grants, and endowments. (Ct. Rec. 29 at 2-3.) NCRL receives
17 federal assistance through the E-Rate program, which provides for
18 discounted Internet access and other telecommunications services, and the
19 Library Services and Technology Act, which provides for grants to public
20 libraries. (Ct. Rec. 41 at 6.)

21 NCRL is managed and controlled by a Board of Trustees ("the Board"),
22 which is responsible for issuing NCRL's policies. (Ct. Rec. 29 at 2.)
23 The Board is comprised of two trustees from each of Chelan and Grant
24 Counties, and one trustee from each of Douglas, Ferry, and Okanogan
25 Counties. *Id.* NCRL's operations are overseen and managed by a Board-
26 appointed director. *Id.* The director serves as liaison between the

1 Board and library employees. *Id.* Dean Marney, a NCRL employee since
2 1977, has served as NCRL's Director since being appointed in 1990. *Id.*

3 NCRL maintains a collection exceeding 675,000 books and other
4 materials, all of which are available to patrons at any of NCRL's twenty-
5 eight (28) branches or by order placed through NCRL's Web site,
6 www.ncrl.org. *Id.* NCRL also offers its patrons access to materials by
7 mail order. *Id.* NCRL's mail order service is one of the few remaining
8 mail services in the United States. *Id.*

9 NCRL's branches vary in physical size, with the average size being
10 approximately 2,865 square feet. *Id.* The largest is the Wenatchee
11 branch, which is about 12,000 square feet of public area; the smallest
12 is the Twisp branch, which is approximately 701 square feet of public
13 space. *Id.* While there is a designated children's area in every NCRL
14 branch, only one branch has a wall or other partition physically
15 separating the children's section from the rest of the library. *Id.*
16 Twenty (20) NCRL branches are staffed by one librarian. *Id.* Sixteen NCRL
17 branches offer only one or two computers for public use in accessing the
18 Internet. *Id.*

19 In furtherance of its mission, and to meet the diverse needs and
20 interests of its patrons, NCRL provides public Internet access at all of
21 its branches. (Ct. Rec. 41 at 7.) Internet access through the NCRL
22 network is subject to two policies: the Internet Public Use Policy and
23 the Collection Development Policy (hereinafter, collectively referred to
24 as "the Policy"). (Ct. Rec. 29 at 6-9.) Dean Marney, NCRL's Director,
25 and Dan Howard, NCRL's Director of Public Services, interpret and apply
26 the Policy. (Ct. Rec. 29 at 2-3, 17; Ct. Rec. 41 at 9, 15; Ct. Rec. 49

1 at 12-13; Ct. Rec. 57 at 1; Ct. Rec. 59 at 5-6; Ct. Rec. 62 at 2.)

2 NCRL's Collection Development Policy states:

3 The North Central Regional Library District's Board of Trustees
4 recognizes that the library was created to serve all of the
5 people within the District's service area, regardless of race,
6 age, creed, or political persuasions. The Board of Trustees
7 further recognizes that within the District's service area
8 there are individuals and groups with widely disparate and
9 diverse interests, cultural backgrounds, and needs. The Board
10 of Trustees, therefore, declares as a matter of policy that:

11 1. The Collection Development Policy is based on and
12 reflects the District's mission, goals, and values as
13 stated in the current Strategic Plan

14 2. Library materials shall be selected and retained in the
15 library on the basis of their value for the interest,
16 information, and enlightenment of all the people of the
17 community in conformance with the District's mission.
18 Some of the factors which will be considered in adding to
19 or removing materials from the library collection shall
20 include: present collection composition, collection
21 development objectives, interest, demand, timeliness,
22 audience, significance of subject, diversity of
23 viewpoint, effective expression, and limitation of budget
24 and facilities.

25 No library materials shall be excluded because of the
26 race, nationality, political, religious, or social views
of the author. Not all materials will be suitable for all
members of the community.

The District shall be responsive to public suggestion of
titles and subjects to be included in the library
collection. Gifts of materials may be accepted with the
understanding that the same standards of selection are
applied to gifts as to materials acquired by purchase,
and that any gifts may be discarded at the District's
discretion.

To ensure a vital collection of continuing value to the
community, materials that are not well used may be
withdrawn.

The Director is responsible to the Board of Trustees for
collection development.

1 The Director may delegate collection development
2 activities to members of the staff who are qualified by
reason of education and training.

- 3 3. The Board of Trustees believes that reading, listening
4 to, and viewing library materials are individual, private
5 matters. While individuals are free to select or to
6 reject materials for themselves, they cannot restrict the
7 freedom of others to read, view, or inquire. The Board of
Trustees recognizes that parents have the primary
responsibility to guide and direct the reading and
viewing of their own minor children.

8 The Board of Trustees recognizes the right of individuals
9 to question materials in the District collection. A
10 library customer questioning material in the collection
is encouraged to talk with designated members of the
staff concerning such material. To formally state his or
her opinion and receive a written response, a customer
may submit the form provided for that purpose.

11 (Ct. Rec. 29 at 6-8.) NCRL's Internet Public Use Policy states:

12 The mission of the North Central Regional Library is to promote
13 reading and lifelong learning. Internet access is offered as
14 one of many information resources supporting that mission.

15 The Internet is currently an unregulated medium. While the
16 Internet offers access to materials that are enriching to users
17 of all ages, the Internet also enables access to some materials
18 that may be offensive, disturbing, or illegal. There is no
19 guarantee that information obtained through the Internet is
20 accurate or that individuals are who they represent themselves
to be. The library district recognizes that it cannot fully
control the amount of material accessible through the Internet
but will take reasonable steps to apply to the Internet the
selection criteria stated in the Collection Development
Guidelines and Procedures

21 All Internet access on NCRL library computers is filtered.

22 The library district does not host customer e-mail accounts or
provide access to chat rooms.

23 The library district cannot guarantee privacy for individuals
24 using library public access computers to search the Internet
and computer screens may be visible to people of all ages,
25 backgrounds, and sensibilities. Customers are requested to
exercise appropriate discretion in viewing materials or
submitting sensitive personal information. Minors, in
26 particular, are discouraged from sharing personal information
online.

1 Hacking and other unlawful online activities are prohibited.

2 The District's director is responsible for establishing
3 procedures to carry out this policy.

4 *Id.* at 8-9.

5 Pursuant to the Policy, public Internet access through the NCRL
6 network is filtered and has been filtered continuously since access began
7 in the late 1990s. *Id.* at 5-6; Ct. Rec. 41 at 8. NCRL does not and will
8 not disable the filter at the request of an adult patron. (Ct. Rec. 29
9 at 6; Ct. Rec. 41 at 8.)

10 **C. Internet Filtering at NCRL**

11 1. How Filtering is Accomplished

12 Prior to October 2006, NCRL filtered Web content using a software
13 product called SmartFilter, Bess edition. (Ct. Rec. 41 at 13.) In
14 October 2006, as part of a comprehensive network and cataloguing system
15 upgrade, NCRL replaced its SmartFilter product with a Web-based filtering
16 solution offered by Fortinet called the FortiGuard Web Filtering Service
17 ("FortiGuard"). (Ct. Rec. 29 at 11; Ct. Rec. 41 at 13.) The FortiGuard
18 service has two primary components: the FortiGuard Rating Server and the
19 FortiGate firewall/proxy unit. (Ct. Rec. 35 at 2; Ct. Rec. 41 at 13.)

20 The FortiGuard Rating Server is a database maintained by Fortinet
21 that catalogues more than 43 million Web sites and over two (2) billion
22 individual Web pages. (Ct. Rec. 29 at 11; Ct. Rec. 35 at 2; Ct. Rec. 41
23 at 13) Using a combination of proprietary algorithms and human review,
24 Fortinet sorts sites and pages into seventy-six (76) categories based on
25 predominant content, and also assigns Web sites to one (1) of seven (7)
26 classifications based on media types and sources. (Ct. Rec. 29 at 11;

1 Ct. Rec. 35 at 2-3; Ct. Rec. 41 at 12.) Any one may request that
2 Fortinet review its classification of a particular Web site or page by
3 using an electronic form available on the Fortinet site. (Ct. Rec. 29
4 at 12.)

5 A FortiGate unit is installed at each of NCRL's 28 branches. (Ct.
6 Rec. 41 at 13.) The FortiGate unit is an appliance that acts as an
7 intermediary between a user's computer browser and the servers. *Id.* All
8 Internet traffic to and from NCRL's public use computers is routed
9 through the FortiGate unit, which filters Web content in accordance with
10 information provided by the Fortinet Rating Server and settings
11 established by NCRL that define which categories and classifications of
12 Web sites to block. (Ct. Rec. 29 at 13-15; Ct. Rec. 41 at 13-15.) If
13 access to a Web site or page is denied, the computer user receives a
14 message to that effect. (Ct. Rec. 41 at 15.) If access to an embedded
15 image is denied, the user receives no message; instead, a blank image is
16 substituted for the blocked image. *Id.*

17 2. NCRL's FortiGuard Configuration

18 The Internet site categories that NCRL's FortiGuard filter is
19 configured to block - along with category descriptions provided by
20 Fortinet - are listed below:

Hacking	Websites that depict illicit activities surrounding the unauthorized modification or access to programs, computers, equipment and websites.
Proxy Avoidance	Websites that provide information or tools on how to bypass Internet access controls and browse the Web anonymously, includes anonymous proxy servers.

1	Phishing	Counterfeit web pages that duplicate legitimate business webpages for the
2		purpose of eliciting financial, personal
3		or other private information from the
4	Adult Materials	Mature content websites (18+ years and
5		over) that feature or promote sexuality,
6		strip clubs, sex shops, etc. excluding
7		sex education, without the intent to
8		sexually arouse.
9	Gambling	Sites that cater to gambling activities
10		such as betting, lotteries, casinos,
11		including gaming information,
12		instruction, and statistics.
13	Nudity and Risue	Mature content websites (18+ years and
14		over) that depict the human body in full
15		or partial nudity without the intent to
16		sexually arouse.
17	Pornography	Mature content websites (18+ years and
18		over) which present or display sexual
19		acts with the intent to sexually arouse
20		and excite.
21	Web Chat	Websites that promote Web chat services.
22	I n s t a n t Messaging	Websites that allow users to communicate
23		in "real-time" over the Internet.
24	Malware	Sites that are infected with destructive
25		or malicious software, specifically
26		designed to damage, disrupt, attack or
27		manipulate computer systems without the
28		user's consent, such as virus or trojan
29		horse.
30	Spyware	Sites that host software that is covertly
31		downloaded to a user's machine, to
32		collect information and monitor user
33		activity, including spyware, adware, etc.

19 *Id.* at 16-17. NCRL also blocks the Image Search, Video Search, and Spam
20 URL classifications of Web sites, as well as certain specific sites and
21 pages within those sites.²

23 ² NCRL blocks netvue.com and pixsy.com, and certain pages within
24 Web sites, including: ask.com/images, ask.com/pictures,
25 search.live.com/images, images.google.com and images.search.yahoo.com
26 (image search engines); and craigslist.org/cgi-bin/personals.cgi (a

1 3. Accessibility of Blocked Internet Sites

2 If a NCRL patron wishes to access a Web site or page that is blocked
3 by FortiGuard, the patron may ask NCRL to manually override the filter
4 by sending an email to NCRL administrators. (Ct. Rec. 29 at 17; Ct. Rec.
5 41 at 8-9.) When a request is submitted, the Web site or page at issue
6 is reviewed to determine whether allowing access would be consistent with
7 NCRL's mission, its Policy, and the Childrens Internet Protection Act's
8 (CIPA) requirements. (Ct. Rec. 29 at 17; Ct. Rec. 41 at 8; Ct. Rec. 49
9 at 4, 8.) If the request is approved, access is allowed on all public
10 computers in all branches. (Ct. Rec. 41 at 8.) If, on the other hand,
11 NCRL deems the request to be inconsistent with its mission, its Policy,
12 or CIPA, the request is denied. (Ct. Rec. 29 at 17; Ct. Rec. 41 at 8;
13 Ct. Rec. 49 at 4, 8.) NCRL received 92 requests to unblock access to Web
14 sites (including 90 automated requests) between October 1, 2007, and
15 February 20, 2008. (Ct. Rec. 57 at 7.) Of those 90 automated requests,
16 NCRL responded as follows:

- 17 • within less than an hour to eight (8) of the requests;
18 • within the same day to nineteen (19) of the requests;
19 • the day after twenty-nine (29) of the requests;

20
21
22 personals site). (Ct. Rec. 41. at 17.) Since it implemented the
23 FortiGuard filter, NCRL initially blocked but susquently unblocked the
24 YouTube, MySpace, and Craigslist Web sites (excluding the personals
25 section of the Craigslist site). (Ct. Rec. 29 at 33; Ct. Rec. 41 at 17-
26 18.)

- 1 • more than twenty-four (24) hours, but less than three days,
- 2 after twenty (20) of the requests
- 3 • more than three (3) days after five (5) of the requests; and
- 4 • there is no evidence in the record if NCRL responded to the
- 5 remaining eleven (11) requests.

6 Since October 1, 2007, NCRL unblocked sites upon request on twelve
7 (12) occasions. *Id.* Examples of sites unblocked at a patron's request
8 include: www.keyartpromotions.com, artbyjohndan.com (described by the
9 requestor as "non-offensive, mostly abstract art"), www.pcthandbook.com
10 (erroneously blocked as Pornography), www.firstthings1st.com (described
11 by the requestor as a nonprofit ministry but erroneously blocked as
12 Gambling), and www.ourfamily-web.com (erroneously blocked as Malware).
13 *Id.* at 7-8. FortiGuard also blocked access to the Kalispel tribe's Web
14 site under the "Gambling" category, even though the site did not itself
15 allow any online gambling; upon a patron's request, NCRL unblocked access
16 to the tribe's Web site while the patron was in the library researching
17 employment opportunities. (Ct. Rec. 57-3 at 210-13.)

18 4. The FortiGuard Filter's Error Rates

19 Like all Internet filters, the FortiGuard filter makes mistakes.
20 (Ct. Rec. 41 at 18.) In some instances, NCRL patrons were able to
21 obtain pornographic, sexually explicit, child pornographic, or obscene
22 materials online at NCRL branch libraries. (Ct. Rec. 29 at 23; Ct. Rec.
23 41 at 18.) In other instances, NCRL patrons were unable to access sites
24 that should not be blocked. (Ct. Rec. 41 at 18-19.)

25 Plaintiffs' expert Bennett Haselton tested the FortiGuard filter's
26 accuracy, describing his methodology and results in an expert report.

1 *Id.* at 19. Mr. Haselton determined that of 100,000 randomly-selected
2 .com domains, FortiGuard blocked 536 "real" Web pages as Pornography or
3 Adult Materials, and that of those blocked sites 64 were blocked in
4 error, for an error rate of 11.9%. *Id.* Mr. Haselton determined that of
5 100,000 randomly-selected .org domains, FortiGuard blocked 207 "real" Web
6 pages as Pornography or Adult Materials, and that of those blocked sites
7 49 were blocked in error, for an error rate of 23.6%. *Id.*

8 NCRL's expert, Dr. Paul Resnick, conducted his own study based on
9 the URLs that were actually visited or requested at NCRL branch libraries
10 during the week of August 23-29, 2007. (Ct. Rec. 29 at 28; Ct. Rec. 57
11 at. 17.) Dr. Resnick found that, of the 60,000 URLs that were visited
12 or requested during the week of August 23-29, 2007, 2,180 URLs were
13 blocked by the FortiGuard filter under NCRL's filtering policy; and that
14 of those 2,180 URLs:

- 15 ● 289 complete Web pages were blocked, with 20 of those blocked in
16 error;
- 17 ● 1,406 "helper images" (that is, "little images that are parts of
18 web pages") were blocked, with 744 of those blocked in error;
- 19 ● 194 "other images" were blocked, with 24 of those blocked in
20 error; and
- 21 ● 110 URLs were not "ratable" - meaning that Dr. Resnick could not
22 determine whether they had been correctly blocked.

23 (Ct. Rec. 57 at 17-19; Ct. Rec. 62 at 17-18.)

24 **D. Filtering Alternatives**

25 NCRL installed privacy screens on terminals in its Wenatchee branch
26 when Internet access was first provided in approximately 1999, but

1 removed the screens shortly thereafter. (Ct. Rec. 41 at 20; Ct. Rec. 49
2 at 16.) Since 1999, NCRL has not considered any other alternatives to
3 full-time Internet filtering, such as recessed desks or a tap-and-tell
4 policy. (Ct. Rec. 41 at 21; Ct. Rec. 49 at 17.) NCRL expects branch
5 librarians to monitor and respond to complaints of inappropriate public
6 computer use. (Ct. Rec. 29 at 23.)

7 **E. The Complaint**

8 Plaintiffs challenge the Policy's constitutionality - in particular,
9 NCRL's decisions to not disable the Internet filter at the request of an
10 adult. Plaintiffs claim the Policy violates the First Amendment of the
11 U.S. Constitution and Article I, § 5 of the Washington Constitution.
12 They seek permanent injunctive relief requiring NCRL to turn off Internet
13 filtering upon an adult patron's request.

14 **II. Defendant North Central Regional Library District's Motion for**
15 **Certification of Questions of State Constitutional Law (Ct. Rec. 37)**

16 The threshold motion before the Court is NCRL's certification
17 motion. NCRL asks the Court to certify standing and constitutional
18 issues to the Washington Supreme Court pursuant to RCW 2.60.020.³
19 Plaintiffs oppose the motion because certification is an unnecessary
20

21 ³ The two certification questions posed by NCRL are:

- 22 1. Whether Plaintiffs have standing to challenge on state
23 constitutional grounds NCRL's Internet Use Policy and
24 practice pursuant to which NCRL elects not to disable
internet filtering upon the request of library adult
patrons.
- 25 2. If Plaintiffs have standing, whether NCRL's Internet Use
26 Policy and practice is permissible under Article 1, § 5
of the Washington State Constitution.

1 complication that will burden this Court, the state court, and the
2 parties.

3 **A. Standard**

4 RCW 2.60.020 states:

5 When in the opinion of any federal court before whom a
6 proceeding is pending, [1] it is necessary to ascertain the
7 local law of this state in order to dispose of such proceeding
8 and [2] the local law has not been clearly determined, such
9 federal court *may* certify to the supreme court for the answer
10 the question of local law involved and the supreme court shall
11 render its opinion in answer thereto.

12 RCW 2.60.020 (2008) (emphasis added).

13 **B. State Constitutional Issue(s)**

14 NCRL asks the Court to certify to the Washington Supreme Court
15 Plaintiffs' Washington Article 1, § 5 constitutional challenge to the
16 Policy.

- 17 1. "Necessary to ascertain the local law of this state in order
18 to dispose of such proceeding"

19 Plaintiffs challenge NCRL's Policy on both state and federal
20 constitutional grounds. Defendants highlight the federal "doctrine that
21 federal courts should not decide federal constitutional issues when
22 alternative grounds yielding the same relief are available." *Kuba v. 1-A*
23 *Agr. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004); *Barnes-Wallace v. City of*
24 *San Diego*, 471 F.3d 1038, 1046-47 (9th Cir. 2007) (citing to *City of*
25 *Mesquite v. Aladdin's Castle*, 455 U.S. 282, 295 (1982)). In compliance
26 with this directive, the First Amendment issue need not be reached if
Washington Article 1, § 5 provides Plaintiffs with the relief they
request - invalidation of the Policy.

1 In their motion for summary judgment, Plaintiffs argue Article 1,
2 § 5 is more protective than the First Amendment with respect to overly
3 broad governmental policies. This is correct if the policy is so
4 overbroad that it leads to a prior restraint. See *O'Day v. King County*,
5 109 Wn. 2d 796, 804 (1988). "Unlike the First Amendment, [A]rticle 1,
6 section 5 categorically rules out prior restraints on constitutionally
7 protected speech under any circumstances." *Id.*

8 Chilling of free speech is the product of state action, which
9 exists if "the conduct allegedly causing the deprivation of a
10 federal right [is] fairly attributable to the State." This
11 court has concluded that the Washington Constitution is less
12 tolerant of overly broad restrictions on speech than the
13 Federal First Amendment and that "regulations that sweep too
14 broadly chill protected speech prior to publication, and thus
15 may rise to the level of a prior restraint", while the United
16 States Supreme Court "considers the overbreadth doctrine
17 'strong medicine', employing it only as a 'last resort.'

18 *Soundgarden*, 123 Wn.2d at 764-65; see also *Voter Educ. Comm. v. Public*
19 *Disc. Comm.*, 161 Wn. 2d 470, 496 (2007).⁴

20 Because Plaintiffs argue that the Policy is overbroad, and
21 Washington Constitution Article 1, § 5 provides greater protection
22 against policies that rise to the level of a prior restraint, the Court

23 ⁴ The Washington Supreme Court determined that Article 1, § 5
24 disallows prior restraints and, therefore, a *Washington v. Gunwall*, 106
25 Wn.2d 54, 58 (1986), analysis is not needed to determine whether the
26 Washington Constitution provides a separate and independent grounds of
decision as compared to the federal constitution. See *Voters Educ. Comm.*
v. Wash. State Public. Disclosure Comm'n, 161 Wn.2d 470, 494 n.16 (2007);
Ino Ino Ino v. City of Bellevue, 132 Wn.2d 103, 114-22 (1997).

1 finds that a ruling in Plaintiffs' favor on Article 1, § 5 will provide
2 Plaintiffs with the relief requested. Accordingly, the Washington state
3 constitutional issue(s) must be resolved before the First Amendment
4 issue(s). RCW 2.60.020's first requirement is satisfied.

5 2. "Local law has not been clearly determined"

6 NCRL contends Washington law has not clearly determined a state
7 library's discretionary authority to filter public Internet access.
8 Plaintiffs contend Washington constitutional law is clearly determined
9 and that this Court is in just as good of a position as the Washington
10 Supreme Court to analyze the state constitutional issue(s). The two
11 cases cited by Plaintiffs set forth Washington's overbreadth principles
12 but do not clearly address whether a library's public Internet filter use
13 violates Article 1, § 5: *Soundgarden v. Eikenberry*, 123 Wn. 2d 750, 764,
14 and *O'Day v. King County*, 109 Wn.2d 796, 803-04 (1988).

15 In fact, there are only three reported cases addressing Internet
16 filter use in public libraries: *United States v. American Library*
17 *Association*, 539 U.S. 94 (2003); *Miller v. NW Region Library Bd.*, 348 F.
18 *Supp. 2d 563, 569-70 (M.D.N.C. 2004)*; and *Mainstream Loudoun v. Board of*
19 *Trustees of the Loudoun County Public Library*, 24 F. Supp. 2d 552 (E.D.
20 Va. 1998) - none are Washington decisions. The U.S. Supreme Court's
21 decision in *American Library Association* indicates that the nature of the
22 library's mission and functions are critical components to consider when
23 determining whether a library's Internet-filtering system violates free
24 speech rights. 539 U.S. 94 (upholding CIPA following a challenge under
25 Congress' spending power). But, it is presently unclear how Washington
26 will balance a library's mission and functions with an adult's free

1 speech rights under Article 1, § 5, especially in light of CIPA, 20
2 U.S.C. § 9134(f). Accordingly, the Court finds the second requirement
3 of RCW 2.60.020 is met.

4 3. "May Certify"

5 The parties disagree as to whether certification is best. NCRL
6 contends certification will promote state and federal comity; Plaintiffs
7 contend that certification will burden the state court and cause delay
8 and expense.

9 The Court acknowledges that certification is not required; rather,
10 it is a within this Court's discretion. Since the Washington Supreme
11 Court is in a better position than this Court to determine what role a
12 state library's mission and functions play in the Article 1, § 5
13 analysis, the Court finds certification appropriate. Any delay caused
14 by certification is not of great concern to the Court given that this
15 case, which was filed in November 2006, advanced to the summary-judgment
16 stage slowly at the parties' request. Therefore, the Court denies
17 Plaintiffs' request for Order requiring NCRL to bear the costs associated
18 with certification.

19 **C. Standing Issues**

20 NCRL argued that standing is intertwined with the constitutional
21 issues; the Court disagrees. The Court can determine whether Plaintiffs
22 suffered an injury in fact without determining whether the Policy
23 violates either the First Amendment or Article 1, § 5. Therefore, below,
24 the Court will consider the standing issues under the clearly-established
25 federal standing principles. See *Lujan v. Defenders of Wildlife*, 504
26 U.S. 555, 560 (1992).

1 **D. Conclusion**

2 The Court finds it is necessary to ascertain Washington law with
3 respect to a library's public computer Internet filtering because Article
4 1, § 5 provides broader coverage from an overly broad governmental policy
5 than the First Amendment. Washington law does not clearly define what
6 role a state library's mission and functions play in analyzing whether
7 a library's Internet-filtering policy violates Article 1, § 5.
8 Therefore, the Court exercises its discretion to certify the state
9 constitutional issue(s) to the Washington Supreme Court. However, the
10 Court denies NCRL's request to certify standing issues, which the Court
11 addresses below.

12 **III. Motions for Summary Judgment**

13 The parties filed cross-motions for summary judgment. Because the
14 Court elects to certify the state constitutional issue(s) to the
15 Washington Supreme Court, the Court holds in abeyance the motions for
16 summary judgment pertaining to the constitutionality of NCRL's Internet-
17 filtering system. NCRL's motion for summary judgment preliminarily asked
18 the Court to find that Plaintiffs lack standing to raise the
19 constitutional challenges. Because the Court finds the question of
20 standing is separate and apart from the filtering system's
21 constitutionality, the Court addresses that portion of NCRL's motion.

22 **A. Summary Judgment Standard**

23 Summary judgment is appropriate if the "pleadings, depositions,
24 answers to interrogatories, and admissions on file, together with the
25 affidavits, if any, show that there is no genuine issue as to any
26 material fact and that the moving party is entitled to judgment as a

1 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for
2 summary judgment, the opposing party must point to specific facts
3 establishing that there is a genuine issue for trial. *Celotex Corp. v.*
4 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make
5 such a showing for any of the elements essential to its case for which
6 it bears the burden of proof, the trial court should grant the summary
7 judgment motion. *Id.* at 322. "When the moving party has carried its
8 burden of [showing that it is entitled to judgment as a matter of law],
9 its opponent must do more than show that there is some metaphysical doubt
10 as to material facts. In the language of [Rule 56], the nonmoving party
11 must come forward with 'specific facts showing that there is a *genuine*
12 *issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
13 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in original
14 opinion).

15 When considering a motion for summary judgment, a court should not
16 weigh the evidence or assess credibility; instead, "the evidence of the
17 non-movant is to be believed, and all justifiable inferences are to be
18 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
19 (1986). This does not mean that a court will accept as true assertions
20 made by the non-moving party that are flatly contradicted by the record.
21 *See Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

22 **B. Standing**

23 NCRL argues Plaintiffs do not have standing to bring "as applied"
24 challenges. To bring an "as applied" challenge to a statute, the
25 traditional standing rules apply: a litigant must establish injury in
26

1 fact, causation, and redressability.⁵ *Lujan v. Defenders of Wildlife*,
2 504 U.S. 555, 560 (1992). The Supreme Court, however, has altered its
3 traditional standing rules to permit First Amendment facial overbreadth
4 attacks on a statute. *City Council of Los Angeles v. Taxpayers for*
5 *Vincent*, 466 U.S. 789, 798 (1984); *Broadrick v. Oklahoma*, 413 U.S. 61,
6 612 (1973).

7 The Court finds SAF has standing to bring an "as applied" challenge.
8 Although SAF does not have evidence that their Web sites were/are blocked
9 by the filter, Plaintiff Heinlen testified that he tried to access one
10 of SAF's Web sites and was denied access by the filter. Accordingly, the
11 Policy caused an injury in fact to SAF, as it is uncontested that this
12 site should not be blocked.

13 Next, the Court finds Ms. Cherrington also presented sufficient
14 evidence that she suffered an injury in fact due to NCRL's Policy. The
15 Court concludes it is not necessary that Plaintiffs identify the URL of
16 the Web site that the filter blocked, but rather allege that they
17 experienced an inability to access a Web site due to the filter. Ms.
18 Cherrington did so. Ms. Bradburn, however, was unable to testify as to
19 the cause of her inability to view the desired Web site. Accordingly,
20 the Court finds Ms. Bradburn failed to present sufficient evidence of an
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24 ⁵ "Injury in fact" requires evidence of "an invasion of a legally-
25 protected interest which is concrete and particularized and actual or
26 imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

1 injury caused by the Policy to have standing to bring an "as applied"
2 challenge to the Policy; she may, however, pursue a facial challenge.⁶

3 Lastly, the Court finds Mr. Heinlen has standing to bring an "as
4 applied" challenge to the Policy. Mr. Heinlein was able to list a
5 variety of Web sites that he was not able to view because of the filter.
6 These Web sites are currently unblocked; however, "[i]t is well settled
7 that a defendant's voluntary cessation of a challenged practice does not
8 deprive a federal court of its power to determine the legality of the
9 practice." *Aladdin's Castle*, 455 U.S. at 289; see also *Loudoun*, 24 F.
10 Supp. 2d at 558-59.

11 Accordingly, NCRL's motion is granted (Ms. Bradburn may only bring
12 a facial challenge) and denied in part (all other Plaintiffs may bring
13 an as applied challenge).

14 IV. CONCLUSION

15 For the reasons given above, **IT IS HEREBY ORDERED:**

16 1. Defendant North Central Regional Library District's Motion for
17 Certification of Questions of State Constitutional Law (**Ct. Rec. 37**) is
18 **GRANTED** (constitutional issue(s)) **AND DENIED** (standing) **IN PART**.

19 2. Defendant NCRL's Motion for Summary Judgment (**Ct. Rec. 28**) is
20 **GRANTED** (Ms. Bradburn may only bring a facial challenge), **DENIED** (all
21
22

23 ⁶ In a facial challenge, the court looks only at the language of
24 the policy to determine whether it violates the constitution. *JJR, Inc.*
25 *v. City of Seattle*, 126 Wn.2d 1, 3 (1995)
26

1 other Plaintiffs have standing to bring as applied challenge), **AND HELD**
2 **IN ABEYANCE IN PART** (constitutional issues).

3 3. Plaintiffs' Motion for Summary Judgment (**Ct. Rec. 39**) is **HELD**
4 **IN ABEYANCE**.

5 4. The remaining pretrial deadlines, pretrial conference, and
6 trial are **STRICKEN**.

7 **IT IS SO ORDERED**. The District Court Executive is directed to enter
8 this Order and provide copies to counsel.

9 **DATED** this 30th day of September 2008.

10
11 s/ Edward F. Shea
12 EDWARD F. SHEA
13 United States District Judge

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