No. 10-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN DOE, Plaintiff-Appellee, v. CITY OF ALBUQUERQUE Defendants-Appellant	)	On Appeal from the United States District Court for the District of New Mexico No. CIV 08-1041 MCA/LFG United States District Court Judge M. Christina Armijo

APPELLANT'S OPENING BRIEF

City of Albuquerque
Appellant:

Gregory S. Wheeler
Peter H. Pierotti
Assistant City Attorneys
City of Albuquerque
Albuquerque, NM 87103

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

TENTH CIRCUIT CASES

OTHER FEDERAL CIRCUIT COURT CASES

NEW MEXICO CASES

OTHER STATE COURTS

STATUTES

OTHER AUTHORITIES

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTION

A. District Court Subject Matter Jurisdiction

Appellant City of Albuquerque ("City") removed the matter to the United States District Court under 28 U.S.C. § 1443(b) on grounds that the Complaint alleged violations of 42 U.S.C. § 1983.

B. Court of Appeals Jurisdiction

The Court of Appeals has jurisdiction under 28 U.S.C. § 1291.

C. Timeliness and Finality

The District Court entered a final judgment disposing of all claims on March 31, 2010. The City filed a Notice of Appeal on April 28, 2010.

ISSUES PRESENTED FOR REVIEW

A. Did the lower court err by failing to observe the rule that, in a facial challenge, a law is entitled to a presumption of constitutionality and the burden is on the challenger to show that no set of circumstances exists under which the law would be valid?

B. Did the lower court err by striking the ban based on authorities that analyze the contours of the rights of the general public with no deference to the

fact that the ban applied to sex offenders, who, as a class, do not have the scope of constitutional rights available to the public, or even to other felons?

C. Did the lower court err by applying censorship cases pertaining to the rights of the public to receive information in their homes rather than addressing the instant case involving a right of access to a limited public forum?

D. In a case where the burden was on the challenger to show no that no set of circumstances exists under which the law would be valid, did the lower court err by ruling that John Doe was entitled to summary judgment because the City failed to come forward with material facts controverting John Doe's allegations that he can only afford City libraries and non-City libraries are inferior to City libraries?

E. In a case where the burden was on the challenger to show that no set of circumstances exists under which the law would be valid, did the lower court err by ruling that John Doe was entitled to summary judgment because the City failed to controvert John Doe's assertion that there are no alternative sources of the information available in a City library in Albuquerque?

F. In a facial challenge, should the lower court have presumed there are alternative sources of the information available in a City library?

G. Did the lower court err by striking the ban on its face in reliance on the concrete case after John Doe dismissed his as-applied challenge to limit discovery regarding the facts of his concrete case?

H. Did the lower court err by relying on the facts of John Doe's concrete case without re-opening discovery?

I. Did the lower court err by assuming John Doe lives on a fixed income which prevents him from having access to other libraries in Albuquerque?

J. Did the lower court err by assuming that the City Libraries have a collection of mainstream works which is superior to all other libraries in the City including the libraries at the University of New Mexico?

K. Did the lower court err by concluding that access to a public library is a fundamental right?

L. Did the lower court err by concluding that the ban violated John Doe's right to equal protection?

NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

John Doe is a convicted sex offender registered with the State of New Mexico. John Doe resides in Albuquerque. The Mayor of the City of Albuquerque banned all registered sex offenders from public libraries. John Doe was not charged with a violation of the ban, but challenged the constitutionality of the ban on its face. John Doe filed a complaint in New Mexico District Court

seeking injunctive and declaratory relief and alleging that the ban violated his civil rights under 42 U.S.C. § 1983. The City removed the action to the United States District Court for the District of New Mexico. The City filed a motion to dismiss which was denied on grounds that John Doe's complaint contained allegations sufficient to state a claim that the ban violated John Doe's rights to free expression under the First Amendment. [Appx. at 199]. The lower court reasoned that the allegations of John Doe's complaint have "'facial plausibility [inasmuch as the underlying] factual content . . . allows the [C]ourt to draw the reasonable inference that [the City] is liable for the misconduct alleged.'" [Appx. at 203]

John Doe filed a motion for summary judgment which was granted. The lower court found that the ban was facially unconstitutional and violated John Doe's civil rights. The lower court reasoned that the City did not prove that there are other places in the City where a registered sex offender can obtain the information available in a public library.

FACTS RELEVANT TO ISSUES UNDER REVIEW

There are no relevant facts because a facial challenge to the constitutionality of a law raises a pure legal issue. [Appx. at 125] John Doe relied on allegations that he is dependent upon library reference materials and unable to obtain literature from alternate sources because he subsists on a fixed low income. [Appx. at 94].

John Doe refused to allow the City to conduct discovery by contending that the facts of his particular case are not relevant in a facial challenge. [Appx. at 154] The lower court relied on John Doe's factual allegations, concluded that the City failed to controvert material facts required to substantiate the basis for the ban, and ultimately decided that the ban is invalid, in part, because the City failed to meet the burden of proving that there are alternative sources of the information available in a public library. *Memorandum Opinion and Order.* [Appx. at 233]

SUMMARY OF THE ARGUMENT

A facial challenge is not dependent on the facts of a particular concrete case, but turns on whether the law at issue may by constitutionally applied at all. An as-applied challenge tests the manner in which a facially valid law was applied in a given situation. The lower court struck the ban facially based on John Doe's concrete case. The lower court did not entertain the presumptions regarding the constitutionality of laws and placed the burden on the City to prove certain facts. There were no facts in issue and, even if there were, the burden of proof is never placed on the government in a facial challenge.

Sex offenders are dangerous. The lower court would require the state to prove that laws designed to protect victims incapable of protecting themselves from a uniquely recidivist and untreatable class of violent felon are unconstitutional if it is possible to imagine a situation in which those laws might be

applied unfairly. The lower court analyzed the matter without deference to the presumptions favoring the constitutionality of laws and addressed the case in the framework of whether uncontroverted material facts predicated final judgment in a case between two private litigants.

The lower court found support in inapposite censorship authority and ignored cases that allow government to ban sex offenders from other I such as public parks where free expression has been accorded the highest level of constitutional protection since the origin of our jurisprudence. The lower court abandoned the legal framework, found an unprecedented "fundamental" constitutional right and ignored precedent which already allows the state more discretion than that which was at issue below. The lower court erred.

I.

ARGUMENT

A. Introduction

The lower court enjoined the ban because the City did not show there are alternative sources of the information available in City libraries. *Memorandum Opinion and Order* [Appx. at 233]: (". . . the City has not demonstrated that [the ban] leaves open alternative channels of communication."). The question of the availability of information from alternative sources is a question of fact and factual issues have no bearing in a facial challenge. *Kansas Judicial Review v. Stout*, 519

bearing on the facial challenge, which seeks to invalidate the law in all of its applications. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1117 (10th Cir. 2008) (a facial challenge raises a pure legal issue); *Dias v. City and County of Denver,* 567 F.3d 1169, 1179 (10th Cir. 2009); *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998). "[A] first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1504 (10th Cir. 1995).

In *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008), a political party challenged a new "blanket" primary law on its face on grounds that voters might be confused and unable to determine the party affiliation of the candidate on the ballot. The Supreme Court reasoned as follows:

> Respondents object to I-872 not in the context of an actual election, but in a facial challenge. Under *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), **a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in all of its applications.** *Id.*, at 745, 107 S.Ct. 2095. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Washington v. Glucksberg,* 521 U.S. 702, 739-740, and n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (STEVENS, J., concurring in judgments). Washington's primary system survives under either standard, as we explain below.[FN6] **In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases.** See *United States v.*

> *Raines,* 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). . . Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Raines, supra,* at 22, 80 S.Ct. 519. [emphasis added]

552 U.S. at 449-450. The City appealed because the lower court did not follow the standards.

D. The Lower Court did not Follow the Standards

Under the standards, John Doe in the present case had to establish that "no set of circumstances exists under which the Act would be valid." Therefore, for example, John Doe had to show that the ban could not be constitutionally applied in a city where there are alternative sources of the information available in a public library. However, John Doe did not have to make this showing because the lower court assumed there are no alternative sources in Albuquerque. It was error for the lower court to reason that the ban would be invalid in some imaginary city where only the public libraries contain information sex offenders must receive before they can express themselves in an informed manner.

Rather than holding John Doe to the standard of showing no conceivable constitutional application of the law, the lower court relied extensively on the unique facts of John Doe's case and enjoined the law in all applications because the law supposedly made it more difficult for John Doe to learn something he allegedly needed to know the express himself. Below, the City urged the lower

court not to mix John Doe's case into the legal question of whether the law could be legally applied to any set of circumstances and argued, hypothetically, that there are alternative sources in the City should the lower court erroneously elect to address this issue *arguendo*. The City argued that there are universities and colleges in the City that have public libraries. After mistakenly entertaining facts about the extent and quality of reference materials available in Albuquerque from sources other than City libraries, rather than assuming, as it should have, that the other sources are adequate, the lower court erred further by assuming that these other sources are inadequate for John Doe and therefore inadequate for all registered sex offenders:

> . . . With respect to the libraries of the University of New Mexico, John Doe testified through his deposition that "their book selection and there library contents are different from the public library. There are nowhere near as [many] mainstream works available at the UNM library. *Plus library privileges at the UNM library cost money*." [emphasis added by lower court]. . .Given that John Doe undisputably lives on a monthly fixed income, it is not clear that he has the financial means to access the libraries of the University of New Mexico. As for the Central New Mexico Community College, John Doe testified that he does not utilize it. There is no explanation in the record as to *why* he does not, or even if, as a non- student, he would be allowed to use it.....
>
> . . . Once again, as the non-moving party, the City bore a summary-judgment burden of making an adequate showing on the essential elements of its case, as to which it would have the burden of proof at trial.

Memorandum Opinion and Order, [Appx. at 235]. The question should have been whether the law could be constitutionally applied to a wealthy sex offender who has access to the other libraries in the City. When entering the realm of assumption, the lower court could have assumed that, for example, the law and medical school libraries at the University of New Mexico contain more extensive collections on those topics than City libraries. The lower court should have assumed that the general library at the University has a more comprehensive collection of "mainstream works." The lower court mistakenly entered the field of factual inquiry in a facial challenge and entertained all assumptions in favor of the wrong party, John Doe.

In *Grange*, the Supreme Court assumed that voters would not be confused by the new initiative. *Id.* at 455 (". . .we cannot strike down I-872 on its face based on the mere possibility of voter confusion.") If the City of Albuquerque would have enacted a blanket primary law in city elections like the law at issue in *Grange,* the lower court in the case at hand would presumably have required the City to prove that no voter would be confused or even inconvenienced by the new law. This is an errant new approach to facial challenges,

The lower court in the present case should have assumed there are other places in Albuquerque (or on the internet) to acquire the information available at a public library. Instead, the lower court not only assumed the opposite but ruled

not merely by analogy. The lower court addressed the case as a content based restraint on the right of the general public to read certain materials in the privacy of a residence rather than as a case involving a prohibition of access by convicted sex offenders to a particular public forum. The nature of the forum is always at issue in free expression cases, but the lower court abandoned forum analysis and analyzed the case as if the City was censoring information available to non-felons in their homes. The ban cannot possibly be read to work such a result on its face and the lower court's reasoning seems to apply to some measure not at issue.

1. The Lower Court Ignored the Presumption of Constitutionality

All duly enacted laws are entitled to a presumption of constitutionality. *City of Herriman v. Bell*, 590 F.3d 1176, 1187 (10th Cir. 2010). Unless the law "jeopardizes the exercise of a fundamental right or categorizes persons on the basis of an inherently suspect characteristic" the law is presumed to be constitutional and the challenger bears a heavy burden of persuasion. *American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008). John Doe did not allege the ban impacted a suspect class. The only remaining issue was whether the ban jeopardized the exercise of a fundamental right.

The lower court found that the right to enter a library is a fundamental right. The court should have avoided constitutional analysis and certainly should not have concocted a new species of fundamental right. The "canon of constitutional

avoidance" requires a court to avoid striking a law on constitutional grounds when the law is capable of an interpretation that does not trammel upon fundamental rights. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008).

In the present case, the lower court did not merely fail to observe the canon against deciding cases on constitutional grounds but found, for the first time, that there is a link between freedom of expression and acquisition of information from a library such that government treads upon fundamental rights by curtailing access to libraries by a small class of convicted felon. If courts are supposed to avoid constitutional jurisprudence where possible, a court clearly errs by crossing the threshold of constitutional jurisprudence to find a new fundamental right or to find that a penumbra of an existing fundamental right covers a novel situation.

The lower court in the case at hand relied on cases that construe the question of whether a complaint states a cause of action against a private litigant sounding in tort or contract and not whether a complaint states a claim against a municipality entitled to certain legal presumptions regarding the constitutionality of its laws. [Appx. at 190] citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Conley v. Gibson*, 355 U.S. 41 (2007); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) [Appx. at 190]. It was error for the lower court to rely on authorities not predicated on the presumptions at work in the case at hand.

2. The Lower Court's Analysis did not Touch Upon the Limited Contours of the Rights of Convicted Sex Offenders in Relation to the Rights of the General Public

"Because facial challenges push the judiciary towards the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims." *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005). The lower court analyzed the case outside the context of the limited rights of sex offenders in comparison to the rights of the general public. Like all persons who have been convicted of felonies, registered sex offenders do not enjoy the exercise of the full panoply of rights reserved for those who have not been convicted. *Smith v. Doe*, 538 U.S. 84 (2003); *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

For example, sex offenders have to inform the State of changes of address before they move, inform the State before acquiring new employment, provide the license numbers of all vehicles they own or operate, and provide the State with any other information deemed relevant by an attorney general. *Adam Walsh Child Protection and Safety Act*, 42 USC §16914. The danger of recidivism and relative helplessness of the victimized class constrict the rights of this unique class of convicted felon, a reality the lower court gave no weight in its analysis.

Because of the tendencies of sex offenders to re-offend, the unfortunate reality that known treatment methodologies do not appear to substantially reduce

the risk of recidivism, and the fact that the victims of sex offenders are usually children, the rights of sex offenders are more restricted than other convicted felons. *Smith v. Doe,* 538 U.S. at 104; *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003); *State v. Druktenis*, 2004-NMCA-032, ¶ 54, 135 N.M. 223, 240, 86 P.3d 1050, 1067 (New Mexico sex offender registration statute "establishes an irrebuttable presumption that all persons convicted of the notification-triggering sex offenses pose a significant risk of recidivism"). Courts tend to yield to public safety policies aimed at protecting the prospective victims of sex offenders. For example, the government may prohibit sex offenders from living near schools, *Doe v. Miller*, 405 F.3d 700, (8th Cir. 2005), cert. denied, 126 S. Ct. 757, 163 L. Ed. 2d 574 (2005) (applying Iowa law). In *Standley v. Town of Woodfin,* 186 N.C.App. 134, 650 S.E.2d 618 (Ct. App. N.C. 2007), the Court upheld a city ordinance banning all registered sex offenders from public parks.

There is no other type of felon that may be deprived their freedom based merely upon the danger they present to others in society. *Kansas v. Hendricks,* 521 U.S. 346, 360 (1997) (certain types of pedophiles can be indefinitely involuntarily committed because of the "future dangerousness" they present). There is no other type of incarcerated felon who might not be free to leave prison after completing their sentence. *United States v. Comstock*, ____ S.Ct. ____, 2010 WL 1946729 (May 17, 2010). There is no other felon that is subject to registration

and stigmatization after serving their time without offending notions of fairness and double jeopardy. *Smith v. Doe,* 538 U.S. at 104; *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

The lower court ignored the reality that public libraries are one of the few places a sex offender can interact with children when their parents are not present. This is particularly true in present times when local budget constraints reduce staffing levels in our libraries. The ban did not address a contrived danger and the lower court should have deferred to local government on the issue. The City determined that need for public safety trumps any need society might have for learned sex offenders who can express themselves in an informed manner after researching their ideas in a library.[2] The lower court erred by not considering the nature of the problem and the restricted rights of the unique class of offender to which the ban applied. The lower court far exceeded its purview and expertise.

3. The Lower Court Erred by Relying on Censorship Analysis

The lower court ruled that the ban runs afoul of cases which prevent government from deciding the content of information available to the general public in their homes. *Memorandum Opinion and Order*, [Appx. at 192-193] citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Martin v. City of Struthers*, 319

[2] The reality of the danger the City was trying to address is apparent to the Iowa Legislature, for example, which recently enacted a law prohibiting sex offenders from entering libraries without the permission of the administrator or loitering within three hundred feet of a library. I.C.A. 692A.113 (2010).

U.S. 141 (1943); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). This approach treats the case as if the City of Albuquerque propounded a list of books and magazines Albuquerque residents cannot receive in the mail. The ban kept sex offenders away from children in a particular setting. The lower court's reliance on censorship cases was error.

For example, the lower court's reliance on cases holding that the populace has the right to read ostensibly obscene material is an odd divergence from the actual issue in the present case. In *Stanley v. Georgia*, 394 U.S. 557 (1969), for example, the Court held that government cannot criminalize the private possession of "obscene material." 394 U.S. at 559. Significantly, the *Stanley* Court reasoned that the right of a person to possess "obscene" material in their own home is protected by a right to privacy. 394 U.S. at 564. There is no expectation of privacy in a public library akin to the expectation of privacy in one's home. *Stanley* does not apply. The ban at issue is simply not a content based ban in any respect and the lower court's decision to place the ban under this line of authority was an ill-conceived means to a mistaken conclusion.

Martin does not even apply by analogy. *Martin* held that a city cannot require a person to obtain a permit to hand out religious materials to residents in their homes. 319 U.S. at 153. *Martin* does not elevate access to a library to the

realm of free expression of religious views or advance the inquiry in a meaningful way. *Martin* is as inapposite.

The lower court's devotion to its reading of *Lamont* is a good example of the error that results from applying censorship law to the issue at hand. In *Lamont*, the Court struck a statute requiring the post office to detain and destroy "communist political propaganda" mailings from foreign countries unless the addressee returned a reply card indicating his desire to receive this type of mail. 381 U.S. at 305. In the present case, the City was not limiting or monitoring the content of the information available to the general public in their homes. The lower court erred by ignoring the fact that the ban applied to access to a particular limited forum by persons with sharply circumscribed rights.

F. The Lower Court Erred by Applying Summary Judgment Concepts to the Question of Whether a Law is Constitutional on its Face

The lower court could have enjoined the ban when it denied the City's motion to dismiss and allowed this Court to review the propriety of the lower court's legal conclusion that the right to free speech covers the right of sex offenders to enter libraries. The City respectfully asserts that the lower court was fully aware of the vulnerability on appeal of its unprecedented legal conclusion and transitioned to summary judgment in a veiled attempt to substantiate a vulnerable legal conclusion.

The ruling on the motion to dismiss was not grounded on the presumption of constitutionality, did not consider the limited rights of the class subject to the ban and applied censorship cases in an unprecedented manner. The lower court entertained John Doe's motion for summary judgment because the ruling on the City's motion to dismiss is deficient and summary judgment standards, in the manner applied below, deprive government of the presumptions at play in a facial challenge. We find no other case where a court has ruled that a law is unconstitutional on its face because the government failed to controvert issues of fact for trial where no as-applied count was also pending.

1. Rule 56 Does not Apply to Facial Challenges

Summary judgment may be granted where "the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P.56(c)(2). The City never contended there were any material facts in issue below. Facial challenges seek to invalidate a law as a whole and are not dependent upon facts or a "plaintiff's concrete case." *Faustin v. City and County of Denver, Colo.*, 423 F.3d 1192, 1196 (10th Cir. 2005). There are no authorities that allow a court to rely on a plaintiff's concrete case to support a conclusion that a law is unconstitutional on its face where the plaintiff does not also bring an "as

applied" challenge to the law. There are no authorities that require government to controvert facts for trial in a purely legal inquiry.

2. The Lower Court Erred by Requiring the City to Show Factual Issues for Trial in a Facial Challenge

In the present case, the lower court decided that John Doe was entitled to summary judgment as a matter of law, in part, because "as the party opposing the summary judgment, the City bore the burden of 'set[ting] forth [in its *Response*] specific facts showing a genuine issue for trial.'" *Memorandum Opinion and Order,* [Appx. at 230] ("Summary Judgment"). The lower court erred by holding that the City had to defend against John Doe's motion for summary judgment by demonstrating a factual issue for trial in a case not dependent upon facts.

Nothing demonstrates the error more clearly than the lower court's determination that the City had to set forth, "for the record, the interest it sought to protect in banning all sex offenders from public libraries within the City of Albuquerque. This it did not do." *Id.* This reasoning is tantamount to the *Grange* Court striking the Washington primary law because the State did not set forth for the record the interest it sought to protect by changing election law. The compelling interest of a law pertaining to "registered sex offenders" is readily apparent from the mere use of that term by the state and lower court erred by requiring the City to prove that which should have been assumed in the City's favor in the first place. Courts allow cities to ban sex offenders from parks without

setting forth for the record that the city is trying to prevent children from being molested.

Even if we assume, *arguendo*, that the City of Albuquerque, for example, submitted an affidavit of the mayor stating that he imposed the ban to protect library users from sex offenders, how would such an affidavit controvert a fact for trial? The lower court imposed a mysterious unprecedented burden on the City. This was error. Moreover, the lower court was unfair to the City by waiting until the summary judgment argument was briefed before ruling on the motion to dismiss and letting the City know the lower court was requiring the City to set forth for the record that, for example, it was trying to prevent crime rather than, as the lower court seemed to presume, persecuting sex offenders for no good reason.

The lower court ruled that summary judgment was appropriate below because the City "failed to make an adequate showing on an essential element of its case, as to which it has the burden of proof at trial." *Id.* There were no facts in issue below and no burden upon the City to prove anything. There were no affirmative defenses or elements of affirmative defenses to be proven by the City. In *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998) this Court held that "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 140 F.3d at 879, f.n.3.

There are no authorities holding government to a burden of proof on any issue in a facial challenge because a facial challenge is a pure legal inquiry not grounded on facts. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1117 (10th Cir. 2008) (a facial challenge raises a pure legal issue). The lower court erroneously applied summary judgment standards to protect its unprecedented legal conclusion that sex offenders have the right to enter public libraries because those libraries are the only places sex offenders can acquire the information they need to exercise their free speech rights.

3. The Lower Court Treated a Facial Challenge as an As-Applied Challenge

In the present case, John Doe proceeded anonymously under a protective order that prevented the City Attorneys from disclosing his name to third parties. The protective order prevented the City from conducting any investigation or discovery regarding John Doe. The protective order made some sense when issued because there are no facts at issue in a facial challenge and no need for investigation or discovery regarding John Doe's "concrete case." *Faustin v. City and County of Denver, Colo.*, 423 F.3d 1192, 1196 (10th Cir. 2005) (Facial challenges seek to invalidate a law as a whole and are not dependent upon facts or a "plaintiff's concrete case."). A challenger's concrete case is in issue only when the challenger brings an as-applied challenge in tandem with a facial challenge. The lower court erred by allowing John Doe to proceed as if the case was a pure

facial challenge during discovery but as an as-applied case when John Doe moved for summary judgment.

John Doe's complaint alleged that he should have been given a hearing before being banned to determine whether he "presented a danger to other City library patrons or City library staff." [Appx. at 5], *Complaint for Injunctive or Declaratory Relief*, ¶ 21. In depositions, the City asked John Doe why he did not consider himself dangerous and, specifically, what he had done since being released regarding treatment. John Doe had an as-applied challenge pending at that time. John Doe refused to answer deposition questions based on the advice of his Counsel, who, to provide a basis for instructing his client not to answer a deposition question, said: "Our position is that this is a facial challenge, not an as-applied challenge . . ." [Appx. at 154]

On April 10, 2009, John Doe dismissed the as-applied challenge. [Doc. 36] *Stipulated Dismissal of Procedural Due Process Claims*. At that point in time, the case below was no longer shaped by the nexus of facts pertaining to John Doe and was postured as a facial challenge, at least before the lower court allowed John Doe to put facts in issue and relied upon those facts when granting summary judgment in John Doe's favor. There is understandably no authority for the proposition that a party can dismiss a claim to foreclose discovery and re-assert that claim on the merits.

On May 15, 2009, John Doe attached an affidavit to his motion for summary judgment [Appx. at 93-95], which provides his monthly disposable income, describes the materials he enjoys in the libraries, lists the libraries he has supposedly attended frequently since 2003, complains that the ban prevents him from attending specific meetings and events in the libraries and states that he fears retaliation from the City if required to disclose his true identity. The City was not allowed to test any of these assertions thorough investigation or discovery below. The lower court relied extensively on John Doe's concrete case to support the Summary Judgment:

> In this case, it is undisputed that "John Doe lives on a fixed disposable monthly income of approximately $728." [Doc. 44 at 7]. It also is undisputed that, in addition to using public libraries to check out books and other materials; peruse magazines and newspapers; and consult various resource materials, John Doe "attended various meetings, events, concerts, exhibits, and lectures at the Albuquerque public libraries. . . ." [Id. at 3]. Additionally, it is extremely unlikely that at least some of the events and meetings that John Doe has attended at city libraries, such as public meetings of the Library Advisory Board, would be accessible to an individual who has been banned from public libraries. 1 at 2; Affidavit of John Doe (explaining that public meetings and events that John Doe has in the past attended at city libraries include Friends of the Library Monthly Book Sales, Lunchtime Performance Series at the Main Library, and public meetings of the Library Advisory Board.)].

Memorandum Opinion and Order, [Appx. at 234]. The lower court erred by relying on John Doe's particular circumstance to invalidate the ban as it applies to the entire class of registered sex offenders. The lower court erroneously enjoined

the ban on its face by relying on the concrete case of a particular John Doe who had foreclosed discovery regarding the veracity of his claims and put facts in the record in a case not dependent on facts. The lower court invaded the policy making province of the City and substituted the lower court's interest in preserving the rights of sex offenders to attend lunchtime performances in City libraries. This was error.

The City asked the Court to re-open discovery to allow the City to explore the truth of the facts John Doe relied on in his motion for summary judgment if the lower court, for some reason, deemed the concrete case material.[3] [Appx, at 127, f.n.2]. The lower court entered summary judgment in reliance on John Doe's untested factual assertions. Stated alternatively, the lower court decided the case under summary judgment standards without allowing the City any opportunity to

[3] The City will quote the footnote it used below: "If the Court elects to entertain an as-applied challenge to the [ban], the City respectfully requests notice prior to a decision on the merits in order to file motions to re-open discovery and require Plaintiff to proceed under his actual name without a protective order. If facts are in issue, then the City should be allowed to explore the facts. The City had no opportunity to test the veracity of many of Plaintiff's factual claims because he cut off discovery arguing that this is a facial challenge and threatened to bring a motion for an order to show cause for contempt when the City tried to investigate his background using his real name. A pseudonym proceeding is designed to allow a party to challenge a law without fear of reprisal, not to limit discovery in an action for damages. Plaintiff should not be allowed to proceed anonymously and bring an action for damages without allowing the City to investigate his claims and engage in full blown discovery. The City respectfully asserts that this Plaintiff is using anonymity as a sword rather than a shield.

explore the truth of John Doe's allegations. The lower court treated a facial case as an as-applied case.

The City argued that, should the lower court erroneously embark on a factual inquiry, the lower court should also consider the uncontroverted facts in the record that did not assist John Doe. Specifically, the City argued that the fact that there are non-City operated libraries in the City which John Doe simply chooses not to use is material in a fact case. After requiring the City to show alternative sources of information, John Doe rather unconvincingly tried to explain the inadequacy of the alternative sources and the lower court not only assumed that John Doe was being truthful but entertained hypothetical facts in John Doe's favor:

> . . . With respect to the libraries of the University of New Mexico, John Doe testified through his deposition that "their book selection and there library contents are different from the public library. There are nowhere near as [many] mainstream works available at the UNM library. *Plus library privileges at the UNM library cost money* [emphasis added by lower court]. . .Given that John Doe undisputably lives on a monthly fixed income, it is not clear that he has the financial means to access the libraries of the University of New Mexico. As for the Central New Mexico Community College, John Doe testified that he does not utilize it. There is no explanation in the record as to *why* he does not, or even if, as a non-student, he would be allowed to use it.....
>
> . . . Once again, as the non-moving party, the City bore a summary-judgment burden of making an adequate showing on the essential elements of its case, as to which it would have the burden of proof at trial.

Memorandum Opinion and Order, [Appx. at 235] Again, the burden the lower court placed on the City is error. The lower court assumed that the Central New Mexico Community College does not admit non-students. The Supreme Court entertains all assumptions in favor of a law. *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449-450 (2008). The lower court entertained all assumptions against the constitutionality of the ban at issue. This was error.

Because John Doe argued that the ban was imposed pre-textually to assuage the media rather than protect children, the City offered a hypothetical set of facts to show the lower court that, should it enter the imaginary world, there are many ways a court could presume a ban was necessary, or could at least defer to local authorities on the question as required by the legal standards. The lower court improperly relied on the City's hypothetical facts to grant summary judgment for John Doe. The lower court reasoned that an outright ban is not a reasonable time, place and manner restriction on sex offenders who stalk their child victims in libraries after school, that if the City was faced with a sexual predator problem in its libraries after school, the City should impose a ban that applied only from 3:00 p.m. to 5:00 p.m. on weekdays, [Appx. at 232], that a blanket ban was not the proper response to the hypothetical the City offered. As a result, the lower court's reasoning continued, John Doe was entitled to summary judgment because the City

did not controvert facts for trial the City, apparently, to prove that the ban was imposed in response to a real tragedy or potential danger rather than merely to assuage the media. Moreover the lower court could have deemed it reasonable for a local government to respond to a problem discovered by the media. But the lower court in the present case entertained every issue in favor of John Doe. The lengthy Memorandum Opinion below is devoid of any deference to the City as required by law.

The lower court relied on parts of John Doe's factual allegations as if they were true to find a basis to strike the ban, such as John Doe's assertion that City libraries have more main stream works than university and college libraries in Albuquerque, while simultaneously distinguishing the City's hypothetical as if it was the real case at bar. This shows that the lower court entertained all presumptions and assumptions in favor of the wrong party. A hypothetical offered by a party does not dispense with the lower court's own requirement, in a facial challenge, to consider any and all possibilities in a manner that construes the law at bar as constitutional if at all possible.

G. Registered Sex Offenders do not Have a Fundamental Right to Enter a Library

This Court reviews the lower court's legal conclusions underlying a summary judgment *de novo*. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1105 (2010). The lower court concluded that the

right to learn new information by reading reference materials in a public library is a protected precursor of the right of free expression, that informed free expression grows from the right to learn from reference materials supposedly unavailable to John Doe under the ban at issue. When faced with the same formulation of a similar alleged precursor to the exercise of a fundamental right, the United States Supreme Court wisely declined to dilute fundamental rights in the manner adopted below.

In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the challengers argued that the right to a public education is critical to the fundamental right to participate in the local election process in an informed manner. Recognizing such extensions of law dilute the scrutiny reserved to protect fundamental rights, our highest court concluded:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the **most effective speech or the most informed electoral choice.** That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities. [emphasis added]

411 U.S. at 36. The Supreme Court held that the right to learn is not protected by the right to vote even though an informed electorate grows from equal access to

quality education. The lower court in the present case reasoned that the right to free speech protects a new "right" of registered sex offenders to acquire information in a particular place. The lower court reasoned that registered sex offenders have a right to the most effective speech and assumed that a City library is the only place a sex offender can learn information required to produce the most effective and persuasive speech. The lower court erred in reaching the core legal conclusion the remainder of its decision below rests upon.

H. The Rational Relationship Test Applies

The lower court properly concluded that a library is a designated public forum, which for purposes of forum analysis, is treated the same as a limited public forum, both of which accord substantially less protection for free expression than that provided by a traditional public forum. *Shero v. City of Grove, Okl.*, 510 F.3d 1196 (10th Cir. 2007), citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

"Any government restriction on speech in a limited public forum must only be reasonable in light of the purpose served by the forum and be viewpoint neutral." *Id.* John Doe did not allege he was banned from the libraries to chill a viewpoint he wants to advocate. Therefore, the ban merely had to be rationally related to public safety.

People frequent libraries to obtain information in a peaceful setting. *Board of Educ., Island Trees Union Free School Dist No. 26 v. Pico,* 457 U.S. 853, 868 (1982). Minors congregate in libraries without parental supervision to explore ideas outside school curricula and free of the supervision of parents or teachers. *Id.* Children should be comfortable using libraries and a library is often one of the first places children become accustomed to exploring new ideas without supervision. Unfortunately, registered sex offenders, many of whom have victimized children in the past, know that a library is one of the places children can be found outside the veil of parental protection. Fortunately, lawmakers recognize the need for public safety regulations in settings where children tend to congregate without supervision and Courts tend to affirm reasonable regulations designed to protect children and others in those settings. *Hobbs v. County of Westchester*, 397 F.3d 133 (2nd Cir. 2005)

In *Westchester*, 397 F.3d 133 (2nd Cir. 2005), a sex offender brought an action challenging the validity of an executive order of a mayor that precluded issuance of a street performance permit to any person if that person had been "previously convicted of a sexual offense against a minor if the effect of the solicitation, performance, or demonstration would be to entice a child to congregate around that person." 397 F.3d at 134. In response to a claim the executive order violated the First Amendment, the Court reasoned as follows:

> There can be no question that protecting children from sexual predators constitutes a compelling state interest. *Smith v. Doe*, [538] U.S. at [103-04], 123 S.Ct. at 1153. See also *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 3355, 73 L.Ed.2d 1113 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Moreover, the fact that the Prohibition creates a lifetime ban is reasonable in light of the recognition in the cases that "[t]he risk of recidivism posed by sex offenders is 'frightening and high,[' "] and that "'contrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.[' "] *Smith v. Doe*, [538] U.S. at [103-04], 123 S.Ct. at 1153.

397 F.3d at 134. *Westchester* affirmed the constitutionality of an executive order that banned a sex offender from performing in a park, which is a traditional public forum where laws that chill free expression are "sharply circumscribed." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

The United States Supreme Court has specifically recognized the inherent danger of reintegrating sex offenders into society. *Conn. Dep't of Pub. Safety v. Doe*, (CDSP) 538 U.S. 1. In *CDSP*, the Court stated that "[s]ex offenders are a serious threat in this Nation. The victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." 538 U.S. at 4. In *Standley v. Town of Woodfin*, 186 N.C.App. 134, 138, 650 S.E.2d 618, 622 (Ct. App. (2007) the Court relied on *CDSP* to affirm the constitutionality of an

ordinance banning all registered sex offenders from public parks. The *Standley* Court rejected strict scrutiny and applied the rational basis test to the question even though the sex offender argued that the parks ban implicated a fundamental right to travel. *Id.* The lower court erred by applying strict scrutiny.

I. The Ban did not Violate Equal Protection

The lower court ruled that the ban violated John Doe's right to equal protection of the laws. This Court reviews the lower court's legal conclusions underlying a summary judgment *de novo*. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1105 (2010).

When no fundamental rights are at issue, a court applies the rational basis test to the question of whether a law violates equal protection. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Kt & G Corp v. Attorney General of State of Oklahoma*, 535 F.3d 1114 (10th Cir 2008). If the ban implicated fundamental rights, as the lower court concluded, there was no reason to also hold that the ban also violated equal protection. The appeal depends on whether this Court agrees that a sex offender has a fundamental right to enter a public library. The equal protection ruling below was superfluous and another violation of the canon of constitutional avoidance. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008).

II.

CONCLUSION

The lower court struck the ban facially based on John Doe's concrete case. The lower court did not entertain the presumptions regarding the constitutionality of laws and placed the burden on the City to controvert material facts. There were no facts in issue and, even if there were, the burden of proof is never placed on the government in a facial challenge. The lower court should be reversed.

ORAL ARGUMENT

Oral argument is requested because the lower court created a new species of fundamental right and departed from precedent regarding facial challenges. The issue presented is a novel one pertaining to the duty of local government to protect the populace from registered sex offenders.

Respectfully Submitted,

CITY OF ALBUQUERQUE
Robert J. Perry
City Attorney

Gregory S. Wheeler
Peter H. Pierotti
Attorneys for Appellant
P. O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500

I hereby certify that a true and accurate copy of the foregoing was served by mail on July 30, 2010 to:

Brendan Egan
1215 Paseo de Peralta
PO Box 8180
Santa Fe, New Mexico 87504-8180

Gregory S. Wheeler