Case No. 10-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN DOE,

Plaintiff-Appellee,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellant,

On Appeal from the United States District Court
for the District of New Mexico
The Honorable M. Christina Armijo
United States District Judge
Case No. 08-CV-1041 MCA/LFG

APPELLEE'S RESPONSE BRIEF

Oral Argument Requested

ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM, SCHOENBURG
& BIENVENU, LLP

Richard W. Hughes, Esq.
Brendan K. Egan, Esq.
1215 Paseo de Peralta
Santa Fe, NM 87501
(505) 988-8004

ACLU of NEW MEXICO

Laura Schauer Ives, Esq.
Managing Attorney
P.O. Box 566
Albuquerque, NM
(505) 243-0046

SANDERS & WESTBROOK, PC

Maureen A. Sanders, Esq.
Co-Legal Director ACLU of New Mexico
102 Granite Avenue, NW
Albuquerque, NM 87102
(505) 243-2243

OF COUNSEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

Case No. 10-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN DOE,

Plaintiff-Appellee,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellant,

On Appeal from the United States District Court
for the District of New Mexico
The Honorable M. Christina Armijo
United States District Judge
Case No. 08-CV-1041 MCA/LFG

APPELLEE'S RESPONSE BRIEF

STATEMENT OF THE CASE

Plaintiff-Appellee John Doe resides in Albuquerque, New Mexico and is registered with the State of New Mexico as a convicted sex offender. Since at least 2003, and up until the executive instruction banning sex offenders from the City of Albuquerque Public Libraries, John Doe has possessed an Albuquerque City Public

Library card and has accessed the City of Albuquerque's numerous public library branches. Prior to the ban, John Doe frequently checked out books, music, and books on CD, and accessed many other resources. On March 4, 2008, Defendant-Appellant City of Albuquerque enacted an executive instruction banning all sex offenders from entering or otherwise using the Albuquerque Public Library System. This ban made it impossible for John Doe to access any of the information he previously received, or could have received, through the Albuquerque Public Library system.

On October 9, 2008, John Doe filed suit seeking declaratory and injunctive relief alleging that the executive instruction at issue violated, as relevant to this appeal, his constitutional rights to: 1) receive information and peaceably assemble under the First Amendment to the U.S. Constitution; and 2) equal protection under the Fourteenth Amendment to the U.S. Constitution. The City of Albuquerque filed a motion to dismiss on November 6, 2008, which the District Court denied on September 30, 2009. Plaintiff-Appellee John Doe filed a motion for summary judgment on May 15, 2009. On March 31, 2010, the District Court granted Plaintiff-Appellee summary judgment on his First Amendment and equal protection claims and enjoined the City of Albuquerque from enforcing the above-described executive instruction. Defendant-Appellant City of Albuquerque appealed the District Court's summary judgment decision and denial of the City's motion to dismiss to this Court.

On August 11, 2010, Defendant-Appellant City of Albuquerque filed its opening brief (as amended and corrected). Doc. 01018475337.[1] Plaintiff-Appellee hereby responds to Defendant's opening brief.

STATEMENT OF FACTS

I. Defendant-Appellant City of Albuquerque banned Plaintiff-Appellee John Doe, along with and all other registered sex offenders, from all Albuquerque Public Libraries.

Before March 4, 2008, the Albuquerque Public Library system had a number of methods, rules, and policies in place to protect the general welfare and safety of minors who utilized City libraries: 1) some of the libraries have separate restrooms for children's use only; 2) adults unaccompanied by children are not allowed to use children's sections in any public libraries; and, 3) library staff routinely patrol all areas of the library. Appendix at 65, 102. Although the efficacy of these sensible precautions had been evident–the City of Albuquerque is unaware of any registered sex offender violating any library building use rules or engaging in any inappropriate behavior with any minor in any Albuquerque public library in the five years prior to

[1] Defendant-Appellant's Appendix contains confidential information, such as identifying information on John Doe and other patrons' library records, protected by the District Court's two Stipulated Protective Orders. *See* Appellee's Appendix, filed concurrently herewith. None of the confidential protected information found in the Appendix is disclosed herein or in Appellant's Opening Brief, but citations *to* such confidential information are found in both briefs.

the ban (Appendix at 68, 74, 105, 120)–on March 4, 2008, the City of Albuquerque issued an executive instruction completely banning all registered sex offenders from all of the City's numerous libraries during all hours of operation. Appendix at 12-13; 63-64. The instruction provided no rationale or explanation for the complete ban and reads as follows:

> Registered sex offenders are not allowed in public libraries in the City of Albuquerque. This ban includes any person currently registered under the Megan's law of any state, the New Mexico Sex Offender Registration and Notification Act or the Albuquerque Sex Offender Registration and Notification Act. Library staff shall send a letter to every sex offender who has a library card and inform them they are no longer allowed in our libraries. The Albuquerque Police Department, the Bernalillo County Sheriff's Office, the New Mexico State Police and other law enforcement agencies shall enforce this ban.

Appendix at 11, 188, 206.

Prior to the ban, Plaintiff-Appellee John Doe, an Albuquerque resident and registered sex offender, held a city library card and utilized city libraries with frequency. Appendix at 3, 63-64. In the course of those frequent visits, John Doe checked out books, CDs, used other reference material available to him, and attended meetings and lectures. Appendix at 3, 64, 93-95. After the City of Albuquerque gave John Doe notice that his library privileges had been revoked, he could no longer access Albuquerque public library materials or attend the various meetings that he

had attended in the past as he faced a credible threat of prosecution for trespass if he attempted to do so. Appendix at 3, 93-95.

II. John Doe sued the City of Albuquerque.

Plaintiff-Appellee John Doe filed a civil complaint for declaratory and injunctive relief (and not damages) against the City of Albuquerque in New Mexico state court. Appendix at 1-11. He sued the City under 42 U.S.C. § 1983 for, in relevant part, violating his First and Fourteenth Amendment rights by depriving him of the right to receive information and peaceably assemble, and by discriminating against him on the basis of his status as a registered sex offender. Appendix at 4-6. John Doe sought declaratory and injunctive relief. Appendix at 8-9. Defendant-Appellant City of Albuquerque timely removed the case to the United States District Court for the District of New Mexico. Appendix at 12-14.

III. Defendant's Motion to Dismiss.

In lieu of an answer to Plaintiff-Appellee John Doe's complaint, Defendant-Appellant filed a motion to dismiss, arguing that Plaintiff-Appellee's complaint did not state a cognizable claim upon which relief could be granted. Appendix at 12. In support of the ban's constitutionality, Defendant Appellant–while admitting that the constitutionality of banning sex offenders from libraries was an issue of first impression–claimed that because "there is no authority supporting the proposition

that an executive order that bans sex offenders from libraries is unconstitutional," Plaintiff-Appellee's complaint failed to state any claim upon which relief can be granted. Appendix at 17. If there is not a case directly on point, as if this involves a qualified immunity determination, Defendant-Appellant maintains that its actions evade review.

Moreover, according to Defendant-Appellant, it must only provide a rational basis for treating sex offenders differently than other citizens, even when fundamental rights are at issue:

> There are no fundamental rights at issue in the present case because the library is not a traditional public forum reserved for the existence of fundamental rights, and, even if it was, government can prohibit sex offenders from access to a traditional public forum in the interest of public safety without treading upon fundamental rights.

Appendix at 26 (citations omitted).

A. John Doe's Response to the City's Motion to Dismiss.

In his response to Defendant-Appellant City of Albuquerque's motion to dismiss, Plaintiff-Appellee John Doe primarily argued that he had satisfied his burden under Fed. Rule Civ. P. 12(b)(6) and that "[i]n its Motion to Dismiss, the City spends a great deal of its argument discussing various points of fact and law that are irrelevant to this Court's analysis of a motion to dismiss under Fed. Rule Civ. P. 12(b)(6), an analysis that tests the legal sufficiency of the *Complaint*." Appendix at

34. Although John Doe found the standard by which the City's ban would be subject to in the future irrelevant to a motion to dismiss, he addressed the City's extensive argument as to the level of scrutiny that should apply in this case, offering the following:

> The City is correct that a library is a limited or designated public forum. However, the City is wrong to suggest that, under the First Amendment, the level of scrutiny to be applied to the City's ban is mere rational basis. In *Kreimer* and in *Neinast*, the library rules at issue regulated the dress and the hygiene of its patrons. The court in *Kreimer* noted that a library 'is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum.' *Kreimer*, 958 F.2d at 1262. In both *Kreimer* and *Neinast*, the Third and Sixth Circuits used the rational basis standard to analyze the regulations at issue because, unlike here, the regulations did not have a direct impact on speech...The Sixth Circuit in *Neinast*, however, recognized that a heightened level of scrutiny should have been applied in the case if the regulation had a direct impact on speech.

Appendix at 47.

B. The City's Reply to John Doe's Response to Its Motion to Dismiss.

In its reply to Plaintiff-Appellee John Doe's response, Defendant-Appellant City of Albuquerque asserted that Doe was not entitled to know the state's interest in banning sex offenders from the library and that elected officials, not the courts, were better suited to determine whether the instruction was narrowly tailored to address a compelling or significant state interest. Appendix at 59-60. Among other things, the City also argued that a convicted sex offender does not have the right to

access a limited public forum nor attend a meeting in a public library. Appendix at 53, 55.

IV. The Motion to Dismiss Opinion.

In its Opinion, the District Court correctly denied Defendant-Appellant City of Albuquerque's motion to dismiss, applying the standard by which a plaintiff can withstand a motion to dismiss as set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007). Appendix at 187-204. In relevant part, the court concluded that Plaintiff-Appellee John Doe's claim for violation of his First Amendment right to receive information "states a plausible claim for relief, because, if true, the allegations set forth therein would justify relief for violations of John Doe's First Amendment right to receive information, a constitutional right that has been recognized in a line of Supreme Court and federal appellate court decisions..." Appendix at 195. The Court also held that John Doe stated a cognizable claim under the Fourteenth Amendment. Appendix at 199.

V. John Doe's Summary Judgment Motion.

On May 15, 2010, Plaintiff-Appellee John Doe moved for summary judgment on all claims set forth in his Complaint for Declaratory and Injunctive Relief, except procedural due process under both the U.S. and New Mexico constitutions. Appendix at 62-122. He argued, in part, that there is a tradition of accessibility to public

libraries and a First Amendment right to access information at public libraries so long as that right is consistent with a library's customary usage of reading, writing, or quiet contemplation. Appendix at 70. John Doe explained that his right to access the public library, a designated public forum, is protected in the same manner that a speaker's right to speak would be. Appendix at 71. In this instance, John Doe asserted, because the instruction is content neutral, but directly affects the ability to access information, it is subject to heightened scrutiny in determining whether the City's instruction is narrowly tailored to serve a significant governmental interest and whether the City has left open ample alternative sources of information. Appendix at 72-73.

Plaintiff-Appellee John Doe further stated:

> Ultimately, the City's apparent reasons for adopting the ban are immaterial because the City's right to completely extinguish Plaintiff's right to receive information at public libraries is still not narrowly tailored. *See Sund v. City of Wichita Falls*, 121 F.Supp.2d 530 (N.D. Tex. 2000) (In a case involving alleged censorship in a public library: "In a limited public forum, the government's ability to restrict patrons' First Amendment rights is extremely narrow."). Given that the Plaintiff's ability to access information is completely extinguished (instead of just being subjected to time, place, or manner restrictions that do not totally deprive Plaintiff of receiving information), the City has not tailored its regulation narrowly to address any significant interest. The City could address any of its general safety concerns regarding registered sex-offenders without completely extinguishing Plaintiff's important First Amendment right.

Appendix at 75-76.

Although heightened level of scrutiny should apply to the complete ban on registered sex offenders in public libraries, John Doe argued that the ban could not even pass rational basis review because a complete ban is unreasonable. Appendix at 78. In addition, he set forth his equal protection argument. Appendix at 82-83.

A. The City's Response to Plaintiff's Summary Judgment Motion.

In its response to Plaintiff-Appellee John Doe's Motion and Memorandum in Support of Summary Judgment, Defendant-Appellant City of Albuquerque, in part, continued to claim that it need not provide any facts in support of its interest in adopting the instruction banning sex offenders from Albuquerque City libraries because Doe had mounted a facial challenge. Appendix at 125. According to the City, the only interest that it need assert is that registered sex offenders are dangerous, and their dangerousness can be assumed in all situations because registered sex offenders are legislatively defined as a dangerous class. Appendix at 138, 143. It also, but only for the sake of argument, assumed that the goal of the library ban could be to make libraries safer for children. Appendix at 143.

Also, in the same vein, the City claimed that because Doe had launched a facial challenge, he had to prove that the ban was unconstitutional in any hypothetical situation. Appendix at 124. Furthermore, the City reluctantly set forth the following hypothetical unsupported by the record or any other type of factual evidence:

> Because Plaintiff questions the necessity of the ban based on facts not in issue and because the standard is whether the ban is constitutional in any hypothetical situation, to the extent the Court questions the impetus for the ban, the Court could assume, hypothetically, that the following occurred: The City entered into an agreement with schools near libraries so children can go to libraries after school and study. Shortly after the City entered this agreement with the schools, the attendance of young teens increased substantially between approximately 3:00 p.m. and 5:00 p.m. on weekdays in City libraries. The City noticed an increase in adult male presence in libraries in the same time frame. The police began an undercover operation regarding a notorious sex offender who preys on young teens and found that this sex offender and other "preferential" sex offenders, who also prey on young teens, were frequenting the libraries at a dramatically increased rate on weekdays between 3:00 p.m. and 5:00 p.m. On January 31, 2008, newspapers reported that registered sex offender Corey Saunders raped a six year old in a New Bedford, Connecticut public library. On March 4, 2008, the Mayor of Albuquerque banned all registered sex offenders from City libraries.

Appendix at 126, footnote 1.

B. John Doe's Reply.

In his reply to Defendant-Appellant City of Albuquerque's response, Plaintiff-Appellee John Doe pointed to the City's failure, in accordance with Fed.R.Civ.P. 56, to provide any evidence about its reasons for passing the library ban or any evidence to dispute Doe's undisputed material facts. Appendix at 163. The court need not decide an important legal issue in a vacuum, Doe argued. Doe also reminded the court that under pertinent First Amendment analysis he need not prove that the ban is unconstitutional in every application and that he need only prove that the ban chills

a substantial amount of protected speech, or more specifically for the case at bar, the receipt of information. Appendix at 159.

VI. The Summary Judgment Opinion.

The District Court granted Plaintiff-Appellee John Doe's motion for summary judgment on his claims that Defendant-Appellant City of Albuquerque's wholesale ban on sex offenders in public libraries violated his First Amendment right to receive information and equal protection based on the undisputed facts summarized above. The Court concluded its analysis with the following apt description of its deliberations:

> This Court has struggled in this case to strike the proper legal balance between competing interests, and, in the process, to discern and apply to the particular facts presented in the record before me the correct legal standard. On one side of the equation here is the City, which no reasonable person could or would contend does *not* have a legitimate and compelling interest in promoting and ensuring public safety and, more specifically, protecting children from harm, danger and crime, especially crimes of a sexual nature. On the other side of the equation is a group of individuals that, no matter how reviled, nevertheless possess certain constitutional rights. When those rights are burdened or, in this case, wholly extinguished by an action of government, this Court has an obligation to scrutinize the facts and the law closely, carefully, and objectively to ensure that, whatever the end result, it is just.

Appendix at 245-246 (emphasis in original).

The District Court first detailed, in general, the well-recognized fundamental right to receive information before turning to libraries specifically. Appendix at

212-217. The District Court then drew focus to three cases that set forth the right to receive information in libraries— *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F. Supp.2d 67 (D.D.C. 2001); and *Neinast v. Bd. Of Trustees of Columbus Metro. Library*, 346 F.3d 585 (6th Cir. 2003)—which all establish the principle that, because the right to receive information includes some level of access to the public library, if a prohibition *directly* affects a public library patron's ability to utilize a library for its intended purpose—reading, writing, or quiet contemplation—the prohibition must satisfy heightened scrutiny. Appendix at 217-225.

The District Court concluded that John Doe has a First Amendment right to receive information. Appendix at 228. It also held that a public library is a designated public forum and that restrictions on speech, or restrictions on the receipt of information, are subject to a court's review to determine whether "a regulation directly limiting a protected First Amendment right must be narrowly tailored to serve a compelling governmental interest, and must also leave open ample alternative channels for the communication of ideas." Appendix at 228. The District Court also made clear that there is not a fundamental right in and of itself to access a public library, as opposed to the right to receive information in general. Appendix at 225.

But when the District Court was faced with evaluating the City's interest in this case in order to determine whether the instruction was in fact narrowly tailored to further this interest, the City left the District Court in want:

> Accordingly, where John Doe questions the basis for the City's enactment of the regulation, the City, in accordance with its summary-judgment burden, might have responded by setting forth, for the record, the interest it sought to protect in banning all registered sex offenders from public libraries within the City of Albuquerque. This it did not do. Instead, the City asserts that "[t]he motivation for the ban is immaterial under the rubric of a facial challenge and Plaintiff's speculation about the purpose of the ban does not advance the inquiry."

Appendix at 230.

As such, and in the absence of any evidence of what the City's interest was in enacting the instruction, the District Court benevolently accepted the City's hypothetical as true and analyzed Plaintiff-Appellee's First Amendment right to receive information under these circumstances accordingly. Appendix at 230-233.

The Court concluded that, "the wholesale ban…in this case is not sufficiently narrowly tailored to withstand constitutional scrutiny. Indeed, it appears that the regulation is not tailored at all." Appendix at 232-33 (citations omitted). And, that "[a]s a wholesale ban that prevents certain patrons from engaging in *any* conduct within, or use of City of Albuquerque public libraries, the regulation in question does

precisely what is prohibited." Appendix at 233 (internal quotations and citations omitted) (emphasis in original).

The District Court further explained that the City also failed to demonstrate, as required under Fed.R.Civ.P. 56 and the applicable constitutional standards, that despite the ban, ample alternate channels to receive information remained. Appendix at 233-235. The District Court also held that the City's ban does not withstand even a less exacting level of scrutiny, referred to by the District Court as "intermediate scrutiny," as the complete ban on sex offenders was far more expansive than necessary to address the City's interest. Appendix at 236-238.

Lastly, the District Court found that sex offenders are not a suspect classification, as Plaintiff has admitted. Appendix at 241. It found that because the ban implicated the First Amendment right to receive information, the ban should be reviewed under a heightened level of scrutiny, concluding that the City had failed to meet this burden as the instruction was not finely tailored. Appendix at 245.

SUMMARY OF THE ARGUMENT

The District Court properly granted Plaintiff-Appellee John Doe summary judgment and appropriately denied Defendant-Appellant's motion to dismiss.

Defendant-Appellant's executive instruction banning registered sex offenders from entering and/or using Albuquerque's public libraries violates John

Doe's protected First Amendment right to receive information and his Fourteenth Amendment equal protection rights. In his motion for summary judgment, John Doe set forth, in accordance with Fed.R.Civ.P. 56, a statement of undisputed material facts that aptly apply to the pertinent First and Fourteenth Amendment standards in this facial challenge. Defendant-Appellant incorrectly asserts that it has no obligation, under either Fed.R.Civ.P. 56 or the applicable constitutional standards, to refute such undisputed material facts.

Because the executive instruction at issue is a wholesale ban precluding registered sex offenders from using or entering all of Defendant-Appellant's public libraries, the ban directly affects Plaintiff-Appellee's First Amendment right to receive information and, therefore, heightened scrutiny applies. In addition, because the library ban implicates the fundamental First Amendment right to receive information, strict scrutiny applies for purposes of John Doe's equal protection claim. Under both First Amendment heightened scrutiny and Fourteenth Amendment strict scrutiny analyses, Defendant-Appellant's ban fails to pass constitutional muster. As such, the District Court properly enjoined the executive instruction banning registered sex offenders' use of public libraries.

As for Defendant-Appellant's motion to dismiss under Fed.R.Civ.P. 12(b)(6), the District Court properly denied it. Plaintiff-Appellee set forth ample

factual allegations in his Complaint upon which the District Court could plausibly grant relief.

ARGUMENT

Defendant-Appellant City of Albuquerque argues that the District Court erred in two ways: (1) by improperly granting Plaintiff-Appellee John Doe Summary Judgment; and (2) by denying Defendant-Appellant's Motion to Dismiss under Fed.R.Civ.P. 12(b)(6). The District Court, however, ruled correctly in both instances. *See* Appendix at 187-204; 205-246.

I. The District Court Properly Granted Plaintiff-Appellee's Motion for Summary Judgment.

A. The Summary Judgment Standard.

"Summary judgment is appropriate when the record shows 'that there is no genuine issue as to any material fact *and* that the moving party is entitled to judgment as a matter of law.'" *Bacchus Industries, Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) (quoting Fed. R. Civ. P. 56(c)) (emphasis added). A party seeking summary judgment must inform " the district court of the basis for its motion, and identify[] those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotation marks omitted).

Once the moving party has met its burden, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. *Id*. "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *Sports Unlimited, Inc. v. Lankford Enterprises, Inc.*, 275 F.3d 996, 999 (10th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Furthermore, judgment is appropriate as a matter of law if the nonmoving party has failed to make an adequate showing on an essential element of its case, as to which it has the burden of proof at trial. *See Celotex*, 477 U.S. at 322-23; *Lopez v. LeMaster*, 172 F.3d 756, 759 (10th Cir. 1999). In deciding a motion for summary judgment, a court accepts the opponent's evidence as true and construes all evidence in the opponent's favor. *Eastman Kodak Co. v. Image Tech. Servs., Inc*., 504 U.S. 451, 456 (1992). The movant can prevail only if the materials offered in support of the motion show there is no genuine issue of a material fact. *Celotex*, *supra*, 477 U.S. at 323. Rule 56(e), however, "requires the nonmoving party to go beyond the pleadings to establish through admissible evidence, that

there is a genuine issue of material fact that must be resolved by the trier of fact." *Panis v. Mission Hills Bank N.A.,* 60 F.3d 1486, 1490 (10th Cir. 1995) *citing Celotex*, 477 U.S. at 324 .

B. The Summary Judgment Standard for a Facial Challenge Brought under the First Amendment.

Plaintiff -Appellee has consistently presented the legal questions at issue here under the rubric of a facial challenge. The Tenth Circuit has held:

> [F]acial challenges are appropriate in two circumstances: (1) when a statute threatens to chill constitutionally protected conduct (*particularly conduct protected by the First Amendment*); or (2) when a plaintiff seeks pre-enforcement review of a statute because it is incapable of valid application. *In the latter case, plaintiffs face a heavy burden*: They must demonstrate that the law is impermissibly vague in all of its applications.

Dias v. City and County of Denver, 567 F.3d 1169, 1179-80 (10th Cir. 2009) (internal citations and quotations omitted) (emphasis added). *See also American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1246-47 (10th Cir. 2000) ("To find a provision facially unconstitutional [under the First Amendment], we must conclude that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas."). The Tenth Circuit, commenting on First Amendment rights, has also stated, "[f]acial challenges seek to vindicate not only individual plaintiffs' rights but also those of all others who wish to engage in the

speech being prohibited." *Faustin v. City and County of Denver*, 423 F.3d 1192, 1196 (10th Cir. 2005). As such, Plaintiff-Appellee need not prove that the ban at issue here is incapable of any valid application.

Courts routinely and historically show a practical approach to facial challenges based on First Amendment grounds. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, [a law] is unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *See also Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997) (internal citations omitted) ("Plaintiffs may seek directly on their own behalf the facial invalidation of overly broad statutes that create an unacceptable risk of the suppression of ideas…whether the 'overbreadth doctrine' applies to their First Amendment challenge is more of a technical academic point than a practical concern.").

Defendant-Appellant asserts that the District Court erred by not "holding John Doe to the standard of showing no conceivable constitutional application of the law." Appellant's Brief at 9. Defendant-Appellant, however, ignores well-settled case law holding that facial challenges that are brought under the First

Amendment, as opposed to other constitutional rights, apply a different standard. *See Dias v. City and County of Denver*, 567 F.3d at 1179-80 (holding that in a facial challenge brought under the First Amendment a statute is unconstitutional if it threatens a substantial amount of constitutionally protected conduct; *Ashcroft v. Free Speech Coalition*, 535 U.S. at 244 (same); *American Target Advertising, Inc.*, 199 F.3d at 1246-47 (same).

In addition, Defendant-Appellant cites to *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) in arguing that the lower court revised the burden of proof and inappropriately forced the City of Albuquerque to prove something it need not prove. Appellant's Brief at 11. Defendant-Appellant includes this parenthetical from *Grange*: ". . .we cannot strike down I-872 on its face based on the *mere possibility* of voter confusion." *Id*. at 455 (emphasis added); Appellant's Brief at 11. The irrelevance of *Grange* for Defendant-Appellant's argument in this instance is readily apparent by comparing *Grange*, where there is a "mere possibility," versus the current case, in which there is no question that Plaintiff-Appellee and every other registered sex offender in the City of Albuquerque were denied access to all public libraries. *See Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987) (when fear of sanction "is not imaginary or wholly speculative, a plaintiff need not 'first expose himself to actual

arrest or prosecution to be entitled to challenge [the] statute'" (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979)).

Here, the ban's effect on the First Amendment right to access information is unquestioned because the ban was in effect and enforced when Plaintiff-Appellee filed suit; whereas in *Grange*, the facial challenge consisted of a "mere possibility" of voter confusion before the election occurred.

C. The District Court Applied the Appropriate Summary Judgment Standard.

The District Court correctly applied Fed.R.Civ.P. 56 ("Rule 56") in granting Plaintiff-Appellee John Doe's Motion for Summary Judgment.

Defendant-Appellant contends that, in applying Rule 56, the District Court erred in three ways: 1) by applying Rule 56 to a facial challenge; 2) by requiring the City to show factual issues for trial in a facial challenge; and 3) by treating a facial challenge as an as-applied challenge. These three interrelated contentions are incorrect as a matter of law.

1. Facial Challenges are Particularly Appropriate for a Court's Determination under Rule 56.

Defendant-Appellant City of Albuquerque challenges the application of Rule 56 to this case. Appellant's Brief at 21-22. Rule 56, however, is the most appropriate vehicle for deciding facial challenges to statutes or regulations where the relevant

facts are not in dispute or are not correctly disputed. *See, e.g., Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). *See also PSINet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004) ("Because we find that a facial challenge to the statute is appropriate given the facts of this case and that Plaintiffs were entitled to summary judgment and a final injunction, we affirm the District Court's ruling").

2. The District Court Properly Considered the Appropriate Facts in Granting Plaintiff-Appellee Summary Judgment.

Defendant-Appellant states: "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." Appellant's Brief at 22. This contention is incorrect as a matter of law.

Defendant-Appellant is correct that a facial challenge does raise purely legal issues. This does not mean, however, that facts are irrelevant. Facts concerning Plaintiff-Appellee John-Doe were provided to the District Court to ensure that Plaintiff-Appellee had standing to bring this lawsuit.[2] *See In re American Ready Mix*,

[2] For example, it is significant for standing purposes that Plaintiff-Appellee "in addition to using public libraries to check out books and other materials; peruse[d] magazines and newspapers; and consult[ed] various resource materials, [and he] 'attended various meetings, events, concerts, exhibits, and lectures at the Albuquerque public libraries....'" Appendix at 234.

Inc., 14 F.3d 1497, 1499 (10th Cir. 1994) (federal courts are required to examine jurisdictional issues, such as standing, on their own).

In addition, the facts concerning the circumstances in which Defendant-Appellant enacted the ban at issue in this case were set forth by Plaintiff-Appellee in order to prove the various, but related, legal standards. For example, Plaintiff-Appellee's First Amendment claim contains a "narrowly tailored" prong and the facts provided by Plaintiff-Appellee in support of his motion for summary judgment show that Defendant-Appellant's ban on registered sex offenders in its public libraries is not narrowly tailored to serve a substantial governmental interest. These facts surrounding Defendant-Appellant's decision to enact this ban are material to deciding whether well-established constitutional rights can be severely infringed upon in furtherance of the supposed governmental interest. Identifying the government's interests, the circumstances creating those interests, and the means chosen to address those interests is the only manner that a thorough analysis can address the narrowly tailored prong.

A facial challenge does not mean that courts decide legal issues in a vacuum. *See Hinton v. Devine*, 633 F. Supp. 1023, 1040, fn. 5 (E.D. Pa. 1986) ("[I]t is never possible to consider a facial challenge in a vacuum, without reference to what has actually transpired in a given case"). Instead, when courts state that the facts are

irrelevant in a facial challenge, courts mean that the facts usually applicable in an as-applied challenge are irrelevant. The facts surrounding how a government pursues, or even identifies, a compelling or significant interest, however, are relevant. *See Schad v. Mount Ephraim*, 452 U.S. 61, 71 (1981) ("Because the ordinance challenged in this case significantly limits communicative activity within the Borough, we must scrutinize both the interests advanced by the Borough to justify this limitation on protected expression and the means chosen to further those interests."); *Beckerman v. Tupelo*, 664 F.2d 502, 506 (5th Cir. 1981) ("When a statute is challenged on its face, the facts of the *challenging* party's case are irrelevant"(emphasis added)).

Even assuming *arguendo* that facts play no role in a facial challenge, summary judgment would likely still be the proper method of disposing of the case. *See, e.g., Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004). Courts regularly resolve cases without factual disputes on summary judgment. This is commonplace and occurs when courts decide cases at the summary judgment stage that have stipulated facts or, as with the instant case, where a party failed under Rule 56 to controvert the moving party's undisputed material facts.[3] *See, e.g., In re*

[3] Plaintiff-Appellee contends that Defendant-Appellant's failure to controvert Plaintiff-Appellee's undisputed material facts constitutes a de facto "stipulation" to those facts. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (emphasis in original) (While factual controversies are resolved in favor of the nonmoving party, that is so "only when there is an actual controversy,

Durability Inc., 212 F.3d 551, 555 (10th Cir. 2000) ("[O]n motions for summary judgment, courts regard stipulations of fact as admissions of the parties that are conclusive without further evidentiary support in the record"); *Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 382 (5th Cir. 1998)("Factual stipulations and admissions in pleadings can provide the basis for resolving a case at the summary judgment stage").

3. The District Court Did Not Convert Plaintiff's Facial Challenge into an As-Applied Challenge for the Purposes of Summary Judgment.

Defendant-Appellant argues that "[w]here a plaintiff brings an as-applied challenge in tandem with a facial challenge, a court should be cautious to prevent the facts of the particular case at bar from having any bearing on the facial challenge, which seeks to invalidate the law in all of its applications." Appellant's Brief at 7-8. Defendant-Appellant, however, incorrectly claims, without any citation to the record, that Plaintiff-Appellee has somehow brought an as-applied challenge. Plaintiff-Appellee has not brought an as-applied challenge and Defendant-Appellant appears to have agreed, at least in the lower court, with Plaintiff-Appellee. Appendix at 211. Defendant-Appellant incorrectly asserts that a procedural due process claim

---

... when both parties have submitted evidence of contradictory facts. *We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts*").

is necessarily an as-applied challenge and implies that a procedural due process claim can never be a facial challenge. Appellant's Brief at 25 ("On April 10, 2009, John Doe dismissed the as-applied challenge"). Plaintiff's withdrawn procedural due process claims alleged that the City failed carte blanche to provide any type of notice or hearing to determine dangerousness. Therefore, as originally alleged by Plaintiff-Appellee, under the withdrawn procedural due process claims, the ban would fail on its face to provide sufficient notice and procedures. Procedural due process claims alleged in this manner are facial challenges. *See, e.g., Sanitation and Recycling Industry, Inc. v. City of New York*, 928 F.Supp. 407 (S.D.N.Y. 1996); *South Lyme Property Owners Ass'n., Inc. v. Town of Old Lyme*, 539 F.Supp.2d 524 (D.Conn. 2008).

Defendant-Appellant complains that Plaintiff-Appellee attached an affidavit to his motion for summary judgement and contends that "[t]he City was not allowed to test any of these assertions thorough [sic] investigation or discovery below." Appellant's Brief at 26. Contrary to such contentions, Defendant-Appellant asked Plaintiff-Appellee many questions during his deposition. *See, e.g.,* Appendix at 154-157; 234-235. If Defendant-Appellant failed to ask certain questions during Plaintiff-Appellee's deposition, only Defendant-Appellant can be blamed. Furthermore, Defendant-Appellant fails to acknowledge that the only topic in which

counsel for Plaintiff-Appellee instructed his client to not answer questions involved Plaintiff-Appellee's medical and mental health history. The reason for such instructions from his counsel is that Plaintiff-Appellee does not now, nor did he ever, seek monetary damages in this suit and, therefore, this information was not likely to lead to the discovery of admissible evidence.[4] Thus, questions regarding Plaintiff-Appellee's medical and mental health history are irrelevant in this facial challenge. Even if Defendant-Appellant had received answers to questions regarding his medical and mental health, Defendant-Appellant has not stated how such information would in any way be relevant in this facial challenge.

D. The District Court Correctly Analyzed Plaintiff-Appellee's Facial Challenge to the Ban under Established First Amendment Precedent

The District Court correctly held that: 1) the regulation does not satisfy strict scrutiny and 2) in the alternative, the regulation fails the test of intermediate scrutiny.[5] The regulation at issue in this case directly affects Plaintiff-Appellee's right to receive information. Plaintiff-Appellee cannot access the library in any manner, *i.e.* to read,

---

[4] Nevertheless, Defendant-Appellant continues to incorrectly assert that Plaintiff-Appellee seeks damages in this action (Appellant's Brief at 27, footnote 3) despite Plaintiff-Appellee's many attempts to correct this mistaken assumption. *See* Appendix at 176.

[5] The executive instruction also fails rational basis review because the City's ban is not reasonable. Appendix at 77-78.

write, research, contemplate, or attend meetings. Defendant-Appellant's ban is a complete and non-appealable revocation of Plaintiff-Appellee's firmly established First Amendment rights.

The Supreme Court has articulated a three-step test for analyzing the constitutional protections afforded under the First Amendment: 1) determine whether the speech is protected by the First Amendment; 2) define the relevant forum and determine whether it is public or nonpublic; and 3) determine the appropriate level of scrutiny. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985); *See also Wells v. City & County of Denver*, 257 F.3d 1132, 1138 (10th Cir. 2001); *Mesa v. White*, 197 F.3d 1041, 1044 (10th Cir. 1999).

1. The First Amendment Applies Here Because, in Addition to Speech, the First Amendment also Protects the Right to Receive Information.

It is "well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.

Martin v. City of Struthers, 319 U.S. 141, 142-43 (1943). The right to free speech necessarily contains the right to receive information. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J. and Goldberg, J. concurring). *See also Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 386-87 (1998) ("Our decisions have concluded that First Amendment protection extends equally to the right to receive information."); *Providence Journal Co. v. City of Newport*, 665 F.Supp. 107, 110 (D.R.I.1987) ("the right to receive information is the indispensable reciprocal of any meaningful right of expression") (internal quotation and citation omitted).

Various courts have held that there is a First Amendment right to receive information at public libraries. *Armstrong v. Dist. Of Columbia Pub. Library*, 154 F.Supp.2d 67, 75 (D.D.C. 2001) (there is "long-standing precedent supporting plaintiff's First Amendment right to receive information and ideas, and this right's nexus with access to public libraries") (*citing Stanley*, 394 U.S. at 564 and *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965)). *See also Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992) ("This right, first recognized in *Martin* and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information"); *Neinast v. Board of Trustees of Columbus Metropolitan*

Library, 346 F.3d 585, 591 (6th Cir. 2003) (there is a First Amendment right to access information at public libraries so long as that right is consistent with a library's traditional usage of reading, writing, or quiet contemplation) (citations omitted); *Miller v. Northwest Region Library Bd.*, 348 F.Supp.2d 563 (M.D.N.C. 2004) (same).

As such, the right to receive information at public libraries is protected by the First Amendment.

2. The District Court Correctly Held that a Public Library is a Designated Public Forum.

"The Supreme Court has identified three distinct categories of government property: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora." *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999). The Tenth Circuit has stated that public libraries are designated public forums. *See Hawkins*, 170 F.3d at 1287 (citing *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir.1992)). The Supreme Court has held that "[a]lthough a State is not required to indefinitely retain the open character of the facility, as long as does so it is bound by the same standards as apply in a traditional public forum." *Hawkins*, 170 F.3d at 1287 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)); *accord Int'l Soc. for Krishna*

Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). Thus, the District Court correctly determined that public libraries are designated public forums.

3. The District Court Properly Held that the Regulation Does Not Satisfy Heightened Scrutiny.[6]

In its Opinion, the District Court held, that "to withstand constitutional scrutiny...the regulation in the instant case must be 'narrowly tailored to serve a significant governmental interest and...leave open ample alternative channels for communication of ideas.'" Appendix at 229 (*quoting Perry*, 460 U.S. at 45). Ultimately, the District Court held that the regulation in question, "which is a complete ban against registered sex offenders in any and all City of Albuquerque public libraries, is not narrowly tailored, nor does it leave open ample alternative channels for communication." Appendix at 231.

[6] The District Court held that the executive instruction at issue here does not satisfy "strict scrutiny." *See* Appendix at 225-236. It appears that courts do not always refer to this hybrid level of scrutiny as "strict" or "intermediate" in the traditional sense. However the heightened level of scrutiny is identified, the court applied the proper test. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). ("[T]he government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."(internal quotations omitted)). *See also Neinast*, 346 F.3d at 591-92.

Defendant-Appellant argues the District Court erred because it: 1) found a fundamental right to enter libraries; 2) applied heightened scrutiny as opposed to the rational basis test; 3) required Defendant-Appellant to set forth its interest in keeping sex offenders out of libraries; and 4) entertained facts about the other sources of information, such as libraries, in Albuquerque rather than simply assuming they were adequate. None of these arguments survive careful scrutiny.

a. The District Court did not Find that the Right to Enter a Public Library is a Fundamental Right.

Defendant-Appellant claims that the District Court "found that the right to enter a library is a fundamental right," and that it "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." Appellant's Brief at 14-15.

The District Court did not find that the right to enter a library is a fundamental right. In its Memorandum Opinion and Order granting Plaintiff-Appellee summary judgment the District Court noted:

> As a final matter, this Court wishes to emphasize that it has carefully reviewed and considered the above-analyzed library cases as part of its tracing of the evolution of the right to receive information, and how that right has been treated in the context of public libraries, *because* the instant case also involves a public library. The Court does *not* mean to suggest, nor is it finding, that

> there exists a fundamental right to access, in and of itself, to a public library.

Appendix at 225 (emphasis in original). The District Court did find that there is a fundamental right to receive information. Appendix at 225. This point is well established in the case law. "[T]his right [to receive information], first recognized in *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943) and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information." *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992); *See also Armstrong v. Dist. of Columbia Pub. Library*, 154 F. Supp.2d 67 (D.D.C. 2001); *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 591 (6th Cir. 2003).

b. The District Court did not Err in Applying Heightened Scrutiny Because the Ban Directly Affects Speech.

Defendant-Appellant argues:

> [a]ny 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. 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.

Appellant's Brief at 32 (*citing Shero v. City of Grove, Oklahoma*, 510 F.3d 1196, 1202 (10th Cir. 2007)). Defendant-Appellant's argument fails for two reasons.

First, while Defendant-Appellant has correctly stated the law for limited public forums, it has failed to provide the relevant law for public libraries: that concerning designated public forums. *See Hawkins,* 170 F.3d at 1287. ("Examples of designated public fora include... public libraries..."). A "designated public forum" is created when the government "intentionally open[s] a nontraditional public forum for public discourse." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). "A 'limited public forum,' on the other hand, 'arises where the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum.'" *Shero v. City of Grove, Oklahoma,* 510 F.3d 1196, 1202 (10th Cir. 2007) (*quoting Summum v. City of Ogden*, 297 F.3d 995, 1002, fn. 4 (10th Cir. 2002)).

Second, the Supreme Court has held that if content-neutral regulations directly affect speech, a heightened standard of review must be employed. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As the U.S. Supreme Court explained:

> [T]he government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, *that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.*

Id. (internal citations omitted) (emphasis added); *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Shero*, 510 F.3d at 1203; *PETA v. Rasmussen*, 298 F.3d 1198, 1204 (10th Cir. 2002). *See also Neinast*, 346 F.3d at 591-92.

While some courts have used the rational basis standard to analyze regulations in designated public forums, *see, e.g., Kreimer,* 958 F.2d at 1262*,* the regulations in those cases did not have a direct impact on the right to receive information. *See Neinast*, 346 F.3d at 591-92. The regulations in *Kreimer* and *Neinast*, involving dress, hygiene, and other similar rules at public libraries, were reasonable time, place, and manner restrictions that, if followed, still allowed the patron access to the library's information. *See id.* In other words, the rules were consistent with the government's purpose of opening the library for the general public and did not unreasonably limit the right to receive information. So long as one complied with these rules during each visit to the library, information could still be freely accessed.

The Sixth Circuit in *Neinast* and the Third Circuit in *Kreimer*, however, recognized that a heightened level of scrutiny should be applied if the regulation has a direct impact on speech. *Neinast*, 346 F.3d at 591-92; *Kreimer,* 958 F.2d at 1262. Both circuits cited *Ward* for the proposition that even when a regulation on speech is content-neutral, a court should apply heightened scrutiny if that regulation directly

affects the ability to speak, or like here, directly affects the ability to receive information. *Neinast*, 346 F.3d at 591-92; *Kreimer,* 958 F.2d at 1262. In *Neinast*, the Sixth Circuit only employed the rational basis test because the regulation at issue did not directly affect speech rights. *Neinast*, 346 F.3d at 591-92. The Court held: "While the Library regulation at issue in this case is also content-neutral, it does not directly impact the right to receive information. Therefore, applying the heightened scrutiny standard of *Ward* to the Library regulation is not appropriate." *Id.*

Defendant-Appellant cites to *Hobbs v. County of Westchester*, 397 F.3d 133 (2d Cir. 2005) for the proposition that even in a traditional public forum, a government may institute a wholesale ban on registered sex offenders. Appellant's Brief at 33-34. *Hobbs*, however, is both factually and legally distinguishable from the instant case. The *Hobbs* court found that the ban at issue there, which prohibited individuals convicted of sexual offenses against children from obtaining a performance permit only *if the activity would entice children to congregate around that person*, did not violate performer's First Amendment free speech rights. The court in *Hobb*s found that the ban was indeed narrowly tailored because it only curtailed activities that would "*entice*" a minor. *Id*. at 146.

The *Hobbs* court found the ban to be narrowly tailored to target and eliminate no more than the exact source of the "evil" it sought to remedy. The prohibition met

the standard because it applied, by its terms, only to individuals who have been convicted of a sexual offense against a minor and, specifically, only prohibited:

> solicitation, performance, demonstration or other similar activity that *would entice a child to congregate around* that person. Thus, consistently with this Order, even a convicted pedophile is free to go to Playland Park, or any other Westchester County park, to distribute leaflets or speak publicly regarding matters of personal or public concern, provided his activities and speech are oriented toward adults and are not of a nature that would be likely to "entice a child to congregate around" him.

Hobbs, 397 F.3d at 146 (emphasis in original) (internal citations and quotations omitted). Here, Plaintiff-Appellee is not free to access the City of Albuquerque's Public Libraries under any circumstances. Under *Hobbs*, a hypothetical library ban in the City of Albuquerque might conceivably be narrowly tailored if it banned registered sex offenders from accessing the children's section of public libraries but allowed access to other sections of public libraries, such as, the history, automobile-mechanics, or physics sections. But this is not the case. Heightened scrutiny, therefore, applies and the ban fails for the reasons stated by the District Court**.**

c. The District Court did not Err in Requiring Defendant-Appellant to Set Forth Its Interest in Keeping Sex Offenders Out of Libraries Because the Government has the Burden of Proof.

The government has the burden of proof for the pertinent constitution standards. As the U.S. Supreme Court has stated:

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity. A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.

Turner Broad Sys. Inc. v. FCC, 512 U.S. 622, 664-65 (1994) (internal quotations and citations omitted); *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007).

In response to Plaintiff-Appellee's motion for summary judgment, Defendant-Appellant not only failed to meet its burden; it refused. Judgment is appropriate as a matter of law if the nonmoving party has failed to make an adequate showing on an essential element of its case, as to which it has the burden of proof at trial. *Celotex*, 477 U.S. at 322-23; *Lopez*, 172 F.3d at 759. Defendant-Appellant asserted "[t]he motivation for the ban is immaterial under the rubric of a facial challenge and Plaintiff's speculation about the purpose for the ban does not advance the inquiry." Appendix at 230. However, in a footnote from Defendant-Appellant's Response to

Plaintiff-Appellee's Motion for Summary Judgment, Defendant-Appellant provided the District Court with a hypothetical rationale for the regulation. Appendix at 126.

The District Court correctly held that Defendant-Appellant's hypothetical, which was an unsupported and unsubstantiated rationale for instituting the executive instruction, was not sufficient to overcome a motion for summary judgment. Appendix at 232. The District Court would have arrived at this conclusion even if this hypothetically stated purpose for the ban was a substantiated fact proven under the tenets of Rule 56. *See* Appendix at 232.

d. The District Court Did Not Err in Entertaining Facts About Alternative Sources of Information in Albuquerque When Considering Plaintiff-Appellee's Motion for Summary Judgment.

Essentially, this aspect of Defendant-Appellant's argument goes to the "alternative sources" prong of the First Amendment standard. Defendant-Appellant argues that the District Court erred by assuming that no alternative sources existed for Plaintiff-Appellee to access information. Appellant's Brief at 6. Defendant-Appellant incorrectly contends:

> 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.

Appellant's Brief at 9. Further, Defendant-Appellant contends that the lower court made "assumptions" about the availability of alternative sources of information within the City of Albuquerque and that the lower court made these "assumptions" in favor of the wrong party. Appellant's Brief at 11.

First, the lower court assumed nothing. Contrary to Defendant-Appellant's argument, it only considered those facts it may permissibly consider under Rule 56 and its application to the appropriate First Amendment standard.[7]

Second, under intermediate, heightened, or strict scrutiny, Defendant-Appellant had the burden of proving that there are alternative sources of information. *See U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; it furthers an

---

[7] The District Court applied the correct First Amendment legal standard to the undisputed material facts.

> The regulation in question (1) directly impacts the fundamental and protected First Amendment right to receive information; (2) is (at least in its present form as a complete ban of certain individuals from public libraries) not narrowly tailored to serve an admittedly significant government interest; and (3) does not leave open ample alternative channels for communication of information. The regulation therefore creates an unacceptable risk of the suppression of ideas. The regulation does not satisfy strict scrutiny.

Appendix at 235-236 (internal citations and quotations omitted).

important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) (emphasis added) ("To survive intermediate scrutiny, *the government must be able to demonstrate* that the challenged speech restriction serves a 'substantial governmental interest.'"); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (Assuming the Government restriction is reasonable under intermediate scrutiny, "the Government still bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests'"); *Porter v. Bowen,* 496 F.3d 1009, 1021 (9th Cir. 2007) (quoting *Preferred Commc'ns, Inc. v. City of Los Angeles,* 754 F.2d 1396, 1406, fn. 9 (9th Cir. 1985)) (The government "bears the burden of proving that the elements of the [Intermediate scrutiny test under *United States v. O'Brien*] are satisfied"); *DiMa Corp. v. The Town of Hallie, Wi.*, 60 F. Supp. 2d 918, 923 (W.D. Wis. 1998) *aff'd sub nom. DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999) ("Regulations are narrowly tailored to serve a significant government interest if the government shows that it has a reasonable basis for belief that the regulation enacted will ameliorate the

correlated secondary effects in fact and the regulation is not substantially broader than necessary to achieve its interest"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004) (citations omitted) ("Even the less exacting test applied to content-neutral regulations requires that the state show that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests'"); *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1108 (9th Cir. 2003) (citations omitted) ("the City [must] show that the restriction is narrowly tailored to serve a significant government interest without burden[ing] substantially more speech than is necessary to further the government's legitimate interests"); *Golan v. Holder,* 611 F. Supp. 2d 1165, 1172 (D. Colo. 2009) *rev'd on other grounds,* 609 F.3d 1076 (10th Cir. 2010) ("The burden is on the Government to show it has a significant interest that is protected by limiting Plaintiffs' speech and that [the regulation] does not burden substantially more speech than necessary to further the Government's interest"); *Horton v. City of Houston, Tex*., 179 F.3d 188, 195 (5th Cir. 1999) (citations omitted) ("The [regulation] will be considered narrowly tailored if [the government] can demonstrate that it does not burden substantially more speech than is necessary to further the government's legitimate interests").

In this case, Defendant-Appellant not only fell short of its burden to prove its interest, it actually refused to attempt to meet it. Appendix at 230, 235. Thus, the District Court correctly held that Defendant-Appellant failed to meet its burden in response to Plaintiff-Appellee's motion for summary judgment. Judgment is appropriate as a matter of law if the nonmoving party has failed to make an adequate showing on an essential element of its case, as to which it has the burden of proof at trial. *Celotex*, 477 U.S. at 322-23; *Lopez*, 172 F.3d at 759.

Defendant-Appellant relies extensively on *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) to assert that absolutely no facts are ever at issue in a facial challenge. Appellant's Brief at 8-9. Defendant-Appellant argues, "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." Appellant's Brief at 6. Said argument's absurdity is apparent when considering that, according to Defendant-Appellant, an entire prong of a well-established First Amendment standard (availability of alternative channels of communications / sources of information) would then have to be ignored in all facial challenges. *See generally Hinton v. Devine*, 633 F. Supp. at 1040, fn. 5 ("[I]t is never possible to consider a facial challenge in a vacuum, without reference to what has actually transpired in a given case.")

Most importantly, however, in its briefing to this Court, Defendant-Appellant ignores the first element of the applicable standard and entirely disregards the heightened scrutiny standard, stating "[t]he lower court enjoined the ban because the City did not show there are alternative sources of the information available in City libraries." Appellant's Brief at 6. The lower court, however, also enjoined the ban because it found that the ban was not narrowly tailored to further a significant government interest. *See* Appendix at 229 (emphasis added) (citation omitted) ("To withstand constitutional scrutiny, then, the regulation in the instant case must be "narrowly tailored to serve a significant governmental interest *and* leave open ample alternative channels for communication of ideas").

Further, under intermediate scrutiny:

> [A] challenged restriction must: (1) be within the constitutional power of government to adopt; (2) further an important or substantial governmental interest; which (3) is unrelated to the suppression of expression; and (4) be no greater restriction on First Amendment freedom than is essential to furtherance of the government's purpose. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003).

Appendix at 237. The District Court assumed, without deciding, that even if the library ban at issue here satisfied elements 1-3 above, Defendant-Appellant could not satisfy the fourth element because "a complete and wholesale ban that prevents all registered sex offenders from entering any and all public libraries within the City of

Albuquerque imposes a greater restriction on the burdened parties' protected First Amendment rights than is essential to further the City's purpose." Appendix at 237.

Overall, the District Court appropriately considered the facts proffered surrounding alternative sources for references materials in Albuquerque in deciding Plaintiff-Appellee's motion for summary judgment. It also reached the correct outcome.

E. The District Court Properly Concluded that the Ban Violated the Equal Protection Clause of the Fourteenth Amendment.

The District Court found that Defendant-Appellant's complete ban on sex offenders in public libraries violates the Equal Protection Clause of the Fourteenth Amendment. Both parties agree that sex offenders are not a suspect classification. Still, government enactments can trigger strict scrutiny under the Fourteenth Amendment when either a suspect class is involved *or* the government has burdened a fundamental right. "Government classification that actually jeopardizes the exercise of a *fundamental right* or a suspect class (race, gender, etc.) must be reviewed under a strict scrutiny standard [under the Fourteenth Amendment] and must be precisely tailored to further a compelling governmental interest." *Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir. 1998) (citing to *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir. 1986)) (emphasis added).

It is well established that the right to receive information is a fundamental right (*See Stanley v.Georgia*, 394 U.S. 557, 564 (1969)), as described in detail above; thus, Defendant-Appellant's ban must be analyzed under strict scrutiny. The question then turns on whether the ban is narrowly tailored to achieve a compelling governmental interest. Because Defendant-Appellant's executive instruction is a wholesale ban, Defendant-Appellant cannot credibly demonstrate the necessary tailoring in order to achieve the government's interest.

Defendant-Appellant argues, "[i]f 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 equal protection ruling below was superfluous and another violation of the canon of constitutional avoidance." Appellant's Brief at 35. The doctrine of constitutional avoidance, however, does not apply here and is not relevant to an act of government that violates multiple constitutional protections. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245 (10th Cir. 2008) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction....") (internal citation and quotation omitted); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("only if a statute is 'readily

susceptible' to a narrowing construction will the court apply such a construction [constitutional avoidance] to save an otherwise unconstitutional law").

Therefore, because the ban cannot withstand strict scrutiny and the doctrine of constitutional avoidance does not apply in the instant matter, the District Court properly concluded than the wholesale ban violates the Equal Protection Clause of the Fourteenth Amendment.

II. The District Court Properly Denied Defendant-Appellant's Motion to Dismiss.

The District Court properly denied Defendant-Appellant's Motion to Dismiss because the factual allegations amount to cognizable claims as a matter of law when viewed in the light most favorable to the Plaintiff-Appellee. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210 (10th Cir. 2007). In order to withstand a motion to dismiss made pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007). Under the 12(b)(6) standard, Plaintiff-Appellee survives a motion to dismiss by showing that he could prove that he accessed Albuquerque's Public Library System, and the Defendant-Appellant's ban on sex offenders in public libraries restricted his constitutionally protected right to receive information and ideas.

Even though Plaintiff-Appellee's complaint contains enough facts to withstand Defendant-Appellant's 12(b)(6) motion, Defendant-Appellant contends that the District Court erred in three ways in denying its Motion to Dismiss.[8] Appellant's Brief at 13. According to Defendant-Appellant, the lower court (1) "ignored the presumption of constitutionality;" (2) "analyzed the case based on the contours of the rights of the general public" instead of the limited rights of registered sex offenders; and (3) "applied censorship cases pertaining to the right of the public to receive information in their homes." Appellant's Brief at 13. The District Court, however, properly denied Defendant-Appellant's Motion to Dismiss.

A. The Lower Court did not Ignore the Presumption of Constitutionality.

Defendant-Appellant incorrectly argues that "[t]he 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." Appellant's Brief at 14. In its Memorandum Opinion and Order granting Plaintiff-Appellee summary judgment, however, the District Court noted:

---

[8] In its argument in its brief in chief concerning the District Court's denial of its Motion to Dismiss, Defendant-Appellant appears to incorrectly intermingle legal standards under Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 56. Plaintiff-Appellee hereby responds to Defendant-Appellant's arguments concerning its Motion to Dismiss as best as possible under the circumstances.

> As a final matter, this Court wishes to emphasize that it has carefully reviewed and considered the above-analyzed library cases as part of its tracing of the evolution of the right to receive information, and how that right has been treated in the context of public libraries, *because* the instant case also involves a public library. The Court does *not* mean to suggest, nor is it finding, that there exists a fundamental right to access, in and of itself, to a public library.

Appendix at 225 (emphasis in original).

Moreover, Defendant-Appellant argues that the District Court "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." Appellant's Brief at 15. First, as a preliminary matter, the Defendant-Appellant did not merely "curtail" access to Albuquerque's public libraries. Defendant-Appellant "wholly extinguished" registered sex offenders' ability to enter and access information in those public libraries. Appendix at 246. Second, and more importantly, the First Amendment right to receive information has been repeatedly recognized in the context of public libraries. "[T]his right [to receive information], first recognized in *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943) and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information." *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3rd Cir. 1992). *See also*

Armstrong, 154 F.Supp.2d 67; *Neinast*, 346 F.3d 585, 591. As such, the District Court did not find that a new fundamental right existed or that an existing fundamental rights covers a novel situation.

Defendant-Appellant also appears to question the district court's reliance on cases such as *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) in determining the plausibility of Plaintiff-Appellee's claims. Appellant's Brief at 15. Defendant-Appellant asserts that a municipality is entitled to some sort of different standard in determining motions to dismiss under Fed. R. Civ. P. 12(b), but fails to set forth what that standard actually is other than to say that it is entitled to a "presumption of constitutionality." Appellant's Brief at 15. With that argument, Defendant-Appellant ignores the District Court's reliance in its Order Denying Defendant-Appellant's Motion to Dismiss on *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), a case discussing in detail Fed. R. Civ. P. 12(b) in the context of a motion to dismiss with claims against the federal government. *See* Appendix at 191.

B. The District Court Recognized the Dangers Associated with Registered Sex Offenders Despite Defendant-Appellant's Protests.

Defendant-Appellant appears to contend that because "registered sex offenders do not enjoy the exercise of the full panoply of rights reserved for those who have not been convicted," that Defendant-Appellant is free to ban, restrict, or deny registered

sex offenders access to any location as it sees fit. Appellant's Brief at 16-18. As mentioned previously, Defendant-Appellant completely ignores the well-established First and Fourteenth Amendment standards. In essence, Defendant-Appellant merely argues that because courts have upheld other types of restrictions on registered sex offenders, that the City of Albuquerque should be allowed to completely ban registered sex offenders from public libraries and Plaintiff-Appellee's Complaint should have been dismissed. Such is not the case and Defendant-Appellant cannot rely on conclusory allegations of "dangerousness." *See Open Homes v. Orange County*, 325 F. Supp.2d 1349, 1359-60 (M.D.Fla. 2004) (In invalidating a zoning law affecting residents of a residential substance abuse program, the court found proffered public safety concerns unsubstantiated. "[T]he County appeared to base its safety concerns on the unsubstantiated negative attitudes of community opponents who vocalized their opinions. As in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the County improperly deferred to the objections of a fraction of the body politic and illegally gave these biases effect.").

For example, Defendant-Appellant cites to *Standley v. Town of Woodfin*, 661 S.E.2d 728 (2008), as authority for its generalized proposition that because sex offenders have been banned from public places other than libraries, and constitutional challenges not brought under the First Amendment have been unsuccessful, the City

of Albuquerque may completely extinguish the rights of registered sex offenders in the instant case. Appellant's Brief at 34-35. This is simply incorrect.

In *Standley*, the Supreme Court of North Carolina considered a challenge to a city ordinance banning registered sex offenders from "knowingly entering" public parks. *Id*. at 729. Plaintiff's only allegation was a violation of his substantive due process right to intrastate travel under the U.S. and North Carolina Constitutions. *Id*. at 730. The court described the fundamental right to intrastate travel as "an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Id*. (internal citations omitted). The court found that the right was not implicated because "Plaintiff's alleged liberty interest to enter into Woodfin Riverside Park to have barbecues and enjoy the leisure offered by nature along the riverbank" is not a "right of function." *Id*. Since plaintiff's fundamental right to intrastate travel was not implicated by the city's action, the court applied the deferential rational basis test and determined that the ban was reasonable. *Id*. at 731. The other cases cited by Defendant-Appellant in arguing that the District Court improperly denied its motion to dismiss are also inapposite.

Defendant-Appellant's generalized argument concerning the "limited rights of sex offenders" does not change the fact that under Fed.R.Civ.P. 12(b)(6) Plaintiff-Appellant has stated "enough facts to state a claim to relief that is plausible on its

face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007). Given that the right to receive information at public libraries has been recognized by numerous courts and the general right to receive information has been recognized various times by the U.S. Supreme Court, Plaintiff-Appellee plausibly states a claim upon which relief can be granted.

C. The Lower Court did not Improperly Rely on any Case in Denying Defendant-Appellant's Motion to Dismiss.

Defendant-Appellant argues that, in denying its motion to dismiss, "[t]he 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." Appellant's Brief at 18. First, the District Court in its Memorandum Order denying Defendant-Appellant's Motion to Dismiss (Appendix at 187) did not rule that the ban at issue here runs afoul of any case. Rather, the District Court ruled that Plaintiff-Appellee stated claims upon which relief *may* be granted. *See* Appendix at 187-204. More importantly, however, the District Court cited cases such as *Stanley v. Georgia*, 394 U.S. 557 (1969); *Martin v. City of Struthers*, 319 U.S. 141 (1943); and *Lamont v. Postmaster General*, 381 U.S. 301 (1965) for the general proposition that the First Amendment protects not only the right to speak but also the right to receive information. *See* Appendix at 192-95.

Defendant-Appellant's attempt to distinguish the facts in these cases is a red herring that this Court should ignore. Registered sex offenders, while having circumscribed rights in some circumstances, nonetheless still retain the fundamental right to receive information in public libraries. Defendant-Appellant has not cited cases holding that registered sex offenders do not possess any right to receive information from any source.

The District Court properly denied Defendant-Appellant's Motion to Dismiss.

CONCLUSION

For the preceding reasons, this Court should affirm the District Court's grant of Summary Judgment to Plaintiff-Appellee and its denial of Defendant-Appellant's Motion to Dismiss.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

As required by Federal Rule of Appellate Procedure 32(a)(5)(A) and (7)(C), I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 12,973 words. I relied on my word processor, WordPerfect X4, to obtain the count. I certify that the information contained in this certification is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Brendan K. Egan
Brendan K. Egan

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk. I also certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus, 8/22/2010, rev. 7, and, according to the program, are free of viruses.

/s/ Brendan K.Egan
Brendan K. Egan

Respectfully submitted,

ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & BIENVENU, LLP

/s/ Brendan K. Egan 9.13.2010
Richard W. Hughes
Brendan K. Egan
1215 Paseo de Peralta
Post Office Box 8180
Santa Fe, NM 87504-8180
(505) 988-8004

AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO

Laura Schauer Ives
Managing Attorney
P.O. Box 566
Albuquerque, NM 87103
(505) 243-0046

SANDERS & WESTBROOK, PC

Maureen A. Sanders
Co-Legal Director ACLU of New Mexico
102 Granite Avenue, NW
Albuquerque, NM 87102
(505) 243-2243

OF COUNSEL

Attorneys for Plaintiff-Appellee

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed.R.App.P. 34(a)(1), Appellees request oral argument because this case presents important constitutional issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 13, 2010, I filed the foregoing pleading electronically through the CM/ECF system and caused the following parties and/or counsel to be served electronically through the CM/ECF system:

Gregory S. Wheeler &
Peter H. Pierotti
Assistant Albuquerque City Attorneys
P.O. Box 2248
Albuquerque, NM 87103

Attorneys for Defendant

/s/ Submitted Electronically 9/13/2010
Brendan K. Egan