No. 10-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

APPELLANT'S REPLY BRIEF

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A. Summary of Reply Argument

The lower court should have granted the City's Motion to Dismiss John Doe's facial challenge, and should not have treated this case as an "as applied" challenge suitable for summary judgment. John Doe's Response Brief does not persuade otherwise. To the extent the court should have determined any facts beyond the text of the prohibition, it should have assumed that there are multiple sources of reference materials in the Albuquerque metropolitan area, such as bookstores, the Internet and university libraries, and should not have assumed that City of Albuquerque Libraries are the only place a sex offender can obtain information he might need to express himself under the First Amendment. The ban should not have been enjoined based on an allegation by John Doe that he cannot acquire information any more than the ban would have been properly upheld if an unidentified former victim of a sex offender had alleged that the fear of sex offenders prevents them from entering libraries to acquire information needed to express themselves. Individual concrete cases, facts or assumptions, especially when brought by unidentified parties who make untested allegations, do not justify enjoining a law on its face. The court transformed the Plaintiff's facial challenge into an "as applied" challenge without giving the City an opportunity to modify its discovery or motions to respond to an as applied challenge.

The lower court erred by accepting John Doe's claim that he cannot express himself if banned and by assuming that the libraries are a sole source. The lower court did not entertain the presumptions regarding the constitutionality of laws and placed the burden on the City to controvert immaterial facts in a purely legal inquiry. The lower court should be reversed. In the alternative, the matter should be remanded with instructions to the lower court to require John Doe to identify himself and allow the City to engage in full blown discovery.

B. The Lower Court Should have Assumed that City of Albuquerque Public Libraries are not the Sole Source of Information in Albuquerque

In *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008) ("*Grange"*), our highest court held that a new law that changed the form of the ballot is not facially unconstitutional because of an allegation that some voters might be confused by the new ballot. *Id*. at 455 (". . .we cannot strike down I-872 on its face based on the mere possibility of voter confusion."). John Doe argues that "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." *Appellee's Response Brief,* ("Response") at 21. John Doe's argument is flawed. There is no question that the primary law in

Grange applied to all voters and no question that the ban at issue applied to all registered sex offenders, but that comparison misses the point.

The harm allegedly caused by the new Washington primary law was the possibility that voters might be confused by the new law. The harm allegedly caused by the ban in the present case is the possibility that sex offenders might not be able to acquire information. If the Supreme Court assumed Washington voters would not be confused by the new primary law, then the lower court should have assumed that registered sex offenders will not be deprived of information by being banned from City of Albuquerque Libraries. In a facial challenge, a court should avoid speculation and should not entertain facts until an as-applied challenge ripens the issue for the court. The lower court jumped the gun in the instant case and entertained the presumptions in favor of the wrong party. This is reversible error and John Doe's attempt to distinguish *Grange* is less than convincing.

C. The Overbreadth Doctrine Was not Plead and Could not Possibly Apply in the Present Case

In an attempt to avoid the rule that a court should entertain all presumptions in favor of the constitutionality of a law in a facial challenge, John Doe argues that the ban is overbroad because it "threatens to chill constitutionally protected conduct." Response at 19. Actually, the ban does not threaten to do anything. It precisely bans a statutorily defined class of felon from particular locations in the City of Albuquerque based on a prior felony conviction. No innocent third party

could mistakenly assume the ban applies to their protected conduct, which is the ill guarded against by the overbreadth doctrine. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988). The overbreadth doctrine is therefore not applicable.

A law is overbroad if it has a plainly legitimate sweep that discourages free expression by some who might mistakenly assume the law applies to conduct society encourages. Appellant's Opening Brief at 4, f. n. 1 citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) and .*United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir 2005). John Doe argues that the ban is overbroad because it impairs a "fundamental" right to receive information without being restricted to those sex offenders that are currently dangerous. The overbreadth doctrine is meaningless if it simply restates the rule that state action that abridges fundamental rights must be narrowly tailored to serve a compelling governmental interest.

More accurately stated, the overbreadth doctrine allows a court to invalidate a law that is constitutional, but has unintended consequences that outweigh the plainly legitimate purpose of the law. *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (a law meant to prevent destruction of government property deemed unconstitutional because it discourages demonstrations at nuclear power plants). John Doe did not allege the ban has a "plainly legitimate sweep" with

"unintended consequences" that "chill free expression"; the quoted phrases are not contained in the Complaint. The overbreadth doctrine does not apply.

D. There is no "Practical Approach to Facial Challenges" Where Courts Invalidate Laws on Claims not Framed by the Pleadings

There is no "practical approach" that nullifies the duty to plead the elements of a claim. John Doe believes courts "routinely and historically show a practical approach to facial challenges based on First Amendment grounds." Response at 20 citing *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244 (2002). John Doe wants this Court to approve the lower court's mistaken reliance on the overbreadth doctrine and an as-applied challenge that had been dismissed. If a court has jurisdiction to invalidate a law based on a claim not alleged in any lawsuit before the court, then the executive and legislative branches of government are unnecessary because courts have the power, *sua sponte*, to veto legislation or prohibit enforcement of laws enacted through legislative and executive process. The City asserts that such a rule of law would be very impractical because our Mayor and City Council would be reluctant to make any decision without advance approval from the courts.

In *Ashcroft,* the Free Speech Coalition challenged a Child Pornography Prevention Act provision that criminalized the use of computer generated images of minors in sexually explicit materials. FSC specifically "alleged that its members did not use minors in their sexually explicit works, but they believed

some of these materials might fall within the CPPA's expanded definition of child pornography." 535 U.S. at 243. There is no allegation in the present case that any non-registered sex offender or other person might stay away from the library because they believed the ban applied to them. And there is no practical approach that excuses the error below, even if the elements of overbreadth were plead, which they were not.

John Doe argues that the ban is unconstitutional because it implicates a "substantial amount" of constitutionally protected conduct. The ban is absolute. There is no ratio of protected versus unprotected conduct within the swath of the ban. The ban does not chill access to ostensibly legal pornography by criminalizing the use of the images of minors in a sexually explicit manner as in *Ashcroft*. The ban does not chill the adoption of dogs from shelters by banning pit bulls via a law that is vague regarding whether a particular dog might or might not be a pit bull, as in *Dias*. The ban is not vague and does not involve the subjective assessments of a librarian regarding personal hygiene as in *Kreimer*. If a registered sex offender has a fundamental right to enter a public library, then the ban prohibits that conduct in its entirety.

The lower court did not have to entertain facts to determine the constitutionality of the ban. The error lies in the reality that the lower court selectively relied on immaterial facts asserted by John Doe, or hypothetical facts

stated by the City, such as the contention that John Doe is a low income person, and refused to entertain presumptions in favor of the law, such as rejecting the notion that public libraries are a sole source of information required by sex offenders to express themselves.

E. There are no Uncontroverted Material Facts at Issue in a Facial Challenge to a Law not Dependent Upon Facts

John Doe argues that facial challenges are "particularly appropriate" for determination under Rule 56. Response at 22 citing *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), *Young v. American Mini Theatres, Inc*. 427 U.S. 50 (1976), and *PSINet Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004). All of the cited cases are easily distinguished.

In *Heffron,* there was a factual issue regarding whether a rule that confined the distribution of literature to certain locations on state fair grounds was content neutral. 452 U.S. at 648. There was an additional factual question regarding whether the rule vested too much discretion in a single public official, as in *Kreimer*, by allowing that official to assign Krishna Consciousness to a booth off the beaten path. *Id.* at 649. John Doe does not allege that the ban is content based or vests too much discretion in any public official, nor could he. John Doe alleges that the ban is unconstitutional in all its applications and that allegation sets the stage for the burden John Doe must carry. While some First Amendment cases necessarily involve factual issues, cases like *Grange* and the case at bar do not.

Young turned, partially, on whether the particular theatre was an "adult establishment" under a city ordinance that limited the number of adult establishments that could be operated in a particular part of the city. 427 U.S. at 52. Summary judgment is quite appropriate in fact driven cases. However, a court errs when it rules against a party for failing to create a factual record in a facial challenge not dependent upon facts. If the Mayor of Albuquerque banned registered sex offenders from adult establishments, then John Doe's reliance on *Young* might be appropriate in an as-applied challenge that raised the issue of whether a particular establishment fell within the rule. The present case is not subject to factual vagaries and not dependent upon subjective assessments.

Chapman concerned the unlawful distribution of sexually explicit materials to minors on the Internet. There was a factual question concerning whether the materials disseminated by Plaintiff fell within the law. The Court held: "In that the undisputed material facts and law reasonably support only one conclusion in the case at hand, we AFFIRM the District Court's grant of summary judgment." 362 F.3d at 233. There were no material facts at issue below in the present case. The lower court erred by assuming facts in favor of John Doe in a purely legal inquiry.

Heffron, Young and *Chapman* stand for the proposition that outcome determinative facts are material, a proposition not at issue herein. If, for example,

the Mayor of Albuquerque promulgated a regulation stating "all currently dangerous pedophiles are banned from City libraries," then questions of whether John Doe is currently dangerous and whether he is a pedophile would indeed be material in an as-applied challenge, and the City would not by asking the courts to assume the truth of those facts in its favor. But where John Doe raises facts not material to the enforcement scheme, such as whether Albuquerque libraries are a sole source of the information available to sex offenders in the City of Albuquerque, the City asked the lower court to follow *Grange* and assume there are other sources of information. A court could take judicial notice of the fact that information is available from other sources. The City asks this Court to reverse the lower court for assuming that the ban terminated John Doe's ability to learn information required for free expression of his views.

John Doe argues that a court should not decide a facial challenge in a vacuum. Response at 24 citing *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986). *Devine* concerned a regulation that required United States citizens to demonstrate "loyalty" before they could be employed be a foreign nation at the United Nations Building. There is no fact dependent subjective inquiry, such as loyalty, at issue in the instant case. If the regulation in *Devine* had banned registered sex offenders from the United Nations building, the regulation would have raised a purely legal facial inquiry. If the regulation banned "disloyal" sex

offenders and a particular allegedly "loyal" sex offender brought an as-applied challenge, a court could not have decided the question in a vacuum.

Actually, where protection of society from sex offenders is concerned, a facial challenge to a regulatory scheme is not decided in a vacuum. Rather, all presumptions are entertained in favor of the law and supported by the fact of a prior felony conviction of the offender after a full blown criminal trial. The reason sex offender cases are unique is because of recidivism and the victimization of very young children and juveniles: "[T]he victims of sex assault are most often juveniles," and "[w]hen 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 sexual assault." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003). The determination of, for example, "loyalty" is a factually driven inquiry; the determination of whether a particular person is a registered sex offender is not factually driven and the lower court erred by relying on the nexus of facts that applied to John Doe in a facial challenge not dependent upon facts.

F. The Lower Court Relied on Facts Established Under John Doe's As-Applied Challenge Before he Dismissed that Challenge to Foreclose Discovery Regarding his Current Dangerousness

In the present case, John Doe proceeded anonymously under a protective order that prevented the City from disclosing his name to third parties to investigate the veracity of his claims. [Doc. 8] The protective order prevented the

City from conducting any investigation or discovery regarding John Doe. For example, when John Doe claimed he persisted on an income of $728 per month, how could the City test the veracity of that claim if it could not disclose his name to the social security administration? When John Doe claimed he is no longer a danger to children, how could the City test that claim if John Doe would not reveal the name of any treating psychologist or psychiatrist? The lower court erred by ruling against the City for its failure to controvert facts without any opportunity for investigation or discovery.

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.

G. Due Process does not Require the Opportunity to Prove a Fact that is not Material to the Enforcement Scheme

On appeal, John Doe argues that a procedural due process claim is different than an as-applied challenge and can be brought against a law facially when the

law does not provide notice and an opportunity to be heard. Where a process is required to determine whether the law governs a given situation or person, John Doe is correct. John Doe is incorrect, however, where the law applies to a situation already determined by due process, such as a full blown criminal trial resulting in a felony conviction. John Doe argues that the ban failed to satisfy due process because "the City failed carte blanche to provide any type of notice and hearing to determine dangerousness." Response at 27 citing *Sanitation and Recycling Industry, Inc. v. City of New York*, 928 F.Supp. 407 (S.D.N.Y. 1996) and *South Lyme Property Owner's Ass'n., Inc. v. Town of Old Lyme*, 539 F.Supp. 2d 524 (D.Conn. 2008). The ban also did not provide a hearing for a sex offender to attempt to prove he never should have been convicted, but the ban is not unconstitutional for not including process to resolve immaterial questions. *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003).

In *Sanitation and Recycling*, the New York City Council passed an ordinance designed to eliminate the influence of corruption and organized crime in the sanitation industry. A key factor that could lead to termination of a contract with the City was the "background information concerning the business and its principals and the full circumstances surrounding the negotiation or administration of such contracts. . ." The law provided no hearing for the contractor to challenge termination, but the contractor could apply for a new license and challenge denial

of the license in a hearing. Therefore, the court ruled that the law was not unconstitutional on its face for failing to provide process. *Sanitation and Recycling* does not apply.

In *South Lyme*, a zoning regulation that imposed certain restrictions on "seasonal dwellings" deprived property owners of any opportunity to prove whether they did or did not live in their homes all year. The zoning officer's decision was conclusive and the owners were not allowed to offer the testimony of their neighbors to show they lived in their homes full time. 539 F.Supp. 2d at 527. Obviously, where the enforcement scheme expressly forbids process on the core question, due process is an appropriate facial challenge. But the ban at issue does not state that "dangerous" sex offenders are banned and further state that a librarian's decision on dangerousness is conclusive and not subject to review, as in *South Lyme.* "Due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003). There are no facts to be determined by the ban and therefore no cognizable due process claim.

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., v. Island Trees Union Free School Dist.* 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.

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* and its progeny in affirming the constitutionality of an ordinance banning all registered sex offenders, as a class, from entering 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. If rational basis scrutiny is applied, the injunction cannot stand, and the lower court must be reversed.

CONCLUSION

The lower court should have assumed that there are multiple sources of reference materials in the Albuquerque metropolitan area. The ban should not have been enjoined based on an allegation by John Doe that he cannot acquire information if banned from City libraries. Individual concrete cases, especially

when brought by unidentified parties who make untested allegations, do not justify enjoining a law on its face.

The lower court did not entertain the presumptions regarding the constitutionality of laws and placed the burden on the City to controvert immaterial facts in a purely legal inquiry. The lower court should be reversed. In the alternative, the matter should be remanded with instructions to the lower court to require John Doe to identify himself and allow the City to engage in full blown discovery.

COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Reply Brief complies with the type-volume limitation of 7,000 words for a Reply Brief under Fed. R. App. P. 32(a)(7)(B) because Appellant's Reply Brief contains 3,808 words (318 lines), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman font.

Respectfully Submitted,

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I hereby certify that a true and accurate copy of the foregoing was served on October 1, 2010, to all counsel of record electronically through the CM/ECF process and by mail to:

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