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 OPENING BRIEF

(as amended and corrected)

City of Albuquerque
Appellant:

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City of Albuquerque
Albuquerque, NM 87103

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

TENTH CIRCUIT CASES

OTHER FEDERAL CIRCUIT COURT CASES

NEW MEXICO CASES

OTHER STATE COURTS

STATUTES

OTHER AUTHORITIES

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTION

A. District Court Subject Matter Jurisdiction

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

B. Court of Appeals Jurisdiction

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

C. Timeliness and Finality

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

ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

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

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

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

FACTS RELEVANT TO ISSUES UNDER REVIEW

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

I.

ARGUMENT

A. Introduction

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

F.3d 1107, 1117 (10th Cir. 2008) (a facial challenge raises a pure legal issue). The lower court should have assumed there are alternative sources of information in Albuquerque available to registered sex offenders.

The lower court did not follow precedent regarding facial challenges, assumed facts in favor of the wrong party, put the burden on the wrong party and crafted an unprecedented "fundamental" constitutional right. The lower court found that registered sex offenders have a fundamental right to enter public libraries to acquire information they supposedly need to exercise their First Amendment right to free expression. This was error.

B. Standard of Review

Lower court rulings on a motion to dismiss and motion for summary judgment are under review in this Court. Both rulings are reviewed *de novo*. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (10th Cir. 2010).

C. Standards in Facial Challenges

"Because facial challenges push the judiciary towards the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims." *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005) citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). Where 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. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1117 (10th Cir. 2008) (a facial challenge raises a pure legal issue); *Dias v. City and County of Denver,* 567 F.3d 1169, 1179 (10th Cir. 2009); *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998). "[A] first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1504 (10th Cir. 1995).

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

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

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

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

D. The Lower Court did not Follow the Standards

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

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

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

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

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

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

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

against the City because the City failed to prove that there are alternative sources. The lower court's ruling is error because it is tantamount to the Supreme Court requiring the State of Washington in *Grange* to come forward with uncontroverted material facts justifying the blanket primary law and showing that the new law was not confusing. There are no cases before or after *Grange* imposing such a burden on the government in a facial challenge.

The lower court should not have engaged in a factual inquiry at all. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1117 (10th Cir. 2008) (a facial challenge raises a pure legal issue); *United States v. Castillo*, 140 F.3d 874, 879, (10th Cir. 1998). Except where the law is allegedly overbroad by chilling the legitimate exercise of First Amendment rights, and there is no overbreadth in the instant case,[1] the factual circumstances do not matter and a court that relies on facts to substantiate a ruling errs as a matter of law. After mistakenly engaging in a factual

[1] A law is overbroad if it has a plainly legitimate sweep, but has unintended consequences that chill the exercise of first amendment rights by those who fear that the law might be applied to them. *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir 2005): "The Supreme Court has warned that the application of the overbreadth trine is 'strong medicine' and it is to be employed 'sparingly and only as a last resort.'" *Id.* citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The overbreadth must be substantial. *Id.* The challenger has the burden. *Id.* The overbreadth trine did not assist John Doe below because he could not have credibly alleged that the ban has a plainly legitimate sweep with unintended consequences. John Doe was arguing that the ban was facially unconstitutional in all of its applications, that the sweep was not legitimate.

inquiry, the lower court compounded the error by requiring the City to carry the burden of proving immaterial facts.

The only exception to the rule that the challenger carries the burden is where a plaintiff alleges that the law is overbroad to an extent that the plainly legitimate sweep of a law has unintended consequences that chill free expression. The ban impacted a precisely defined group of individuals listed on sex offender registries. John Doe was contending that there was no legitimate sweep, not that the law had unintended consequences.

E. The City's Motion to Dismiss Should Have Been Granted

The lower court issued a Memorandum Opinion and Order denying the City's motion to dismiss the complaint. [Appx. at 187] This Court reviews that decision *de novo*. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (2010).

In denying the City's motion to dismiss, the lower court erred in three ways. First, the lower court ignored the presumption of constitutionality that applies to all laws. Second, the lower court analyzed the case based on the contours of the rights of the general public with no deference to the fact that the ban applied to sex offenders, who, as a class, do not have the scope of constitutional rights available to the public, or even to other felons. Third, the lower court applied censorship cases pertaining to the right of the public to receive information in their homes, and

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

1. The Lower Court Ignored the Presumption of Constitutionality

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

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

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

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

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

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

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

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

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

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

There is no other type of felon that may be deprived their freedom based merely upon the danger they present to others in society. *Kansas v. Hendricks,* 521 U.S. 346, 360 (1997) (certain types of pedophiles can be indefinitely involuntarily committed because of the "future dangerousness" they present). There is no other type of incarcerated felon who might not be free to leave prison after completing their sentence. *United States v. Comstock*, 130 S.Ct. 1949, 2010 WL 1946729 (May 17, 2010). There is no other felon that is subject to registration

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

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

3. The Lower Court Erred by Relying on Censorship Analysis

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

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

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

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

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

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

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

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

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

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

1. Rule 56 Does not Apply to Facial Challenges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. The Rational Relationship Test Applies

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

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

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

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

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

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

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

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

I. The Ban did not Violate Equal Protection

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

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

CONCLUSION

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

ORAL ARGUMENT

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

COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because Appellant's Opening Brief contains 9,109 words (778 lines), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This 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 Appellant's Opening 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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN DOE,

Plaintiff,

vs. No. 08cv1041MCA/LFG

CITY OF ALBUQUERQUE,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on *Defendant City of Albuquerque's Motion and Consolidated Memorandum to Dismiss* [Doc. 3], filed November 6, 2008. Having considered the parties' submissions, the relevant law, and otherwise being fully advised in the premises, the Court denies the motion.

I. BACKGROUND

The following allegations of fact are taken from Plaintiff's *Complaint for Injunctive and Declaratory Relief* and, for purposes of Defendant's motion to dismiss, are accepted as true. See Gann v. Cline, 519 F.3d 1090, 1091 (10th Cir. 2008).

Plaintiff John Doe ("John Doe") is registered with the State of New Mexico as a convicted sex offender. [Doc. 1; Exh. A at 2]. On March 4, 2008, Defendant City of Albuquerque ("the City"), through an administrative instruction, officially banned all registered sex offenders from using and/or entering any of the City's public libraries. [Id.; Exh. A at 2]. The administrative instruction provides:

> 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 of 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.

[Id.; Exh. A, Attachment 1].

As a former user of the City libraries and a holder of a City library card, John Doe received the letter referred to in the administrative instruction, informing him that he had been banned. [Doc. 1; Exh. A at 3]. John Doe alleges that, prior to the ban, he "frequently visited the City's public libraries, checked out books, CDs, used other reference material available to him, and attended meetings and lectures. . . ." [Id.; Exh. A at 3]. Given the ban, however, John Doe now lacks access to the City's public libraries and therefore is unable to receive information contained in books, magazines, newspapers, movies, and CDs. [Id.; Exh. A at 3]. Additionally, given that the express terms of the administrative instruction mandate enforcement of the ban by "[t]he Albuquerque Police Department, the Bernalillo County Sheriff's Office, the New Mexico State Police, and other law enforcement agencies[,]" any attempt by John Doe to enter any of the City's public libraries would subject him to a credible threat of prosecution. [Id.; Exh. A at 3]. John Doe alleges that the administrative instruction "constitutes an official City policy, custom, and practice." [Id.; Exh. A at 2].

In response to the administrative instruction and the City's ban against registered sex offenders in public libraries, John Doe, on October 9, 2008, filed his *Complaint for Injunctive and Declaratory Relief* in the State of New Mexico, County of Bernalillo, Second Judicial District. [Doc. 1; Exh. A]. In his complaint, which he brings pursuant to 42 U.S.C. § 1983 and the New Mexico Declaratory Judgment Act, John Doe alleges violations of rights secured by (1) the First Amendment to the United States Constitution (Count I); (2) the Fourteenth Amendment to the United States Constitution (substantive due process, procedural due process, and equal protection) (Counts II, III, and IV); (3) Article II of the New Mexico Constitution, Section 17 (free speech) (Count V); (4) Article II of the New Mexico Constitution, Section 18 (substantive due process, procedural due process, and equal protection) (Counts VI, VII, and VIII); and (5) Article II of the New Mexico Constitution, Section 4 (inherent rights) (Count IX).[1]

Pursuant to 28 U.S.C. § 1443(b), the City timely removed the matter to this Court and, on the same day, moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), on the ground that "Plaintiff's Complaint does not state a cognizable claim as a matter of law. . . ." [See Doc. 1; Doc. 3 at 1]. John Doe urges the Court to deny the City's motion, arguing that he has pled each of his claims with the required legal sufficiency. [Doc. 9 at 2].

[1] On April 10, 2009, the parties stipulated to the dismissal of the state and federal procedural due process claims that had been asserted in Counts III and VII. [See Doc. 36].

II. ANALYSIS

A. Standard of Review

1. Motion to Dismiss

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). In handing down Twombly, the United States Supreme Court invalidated the longstanding rule that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court explained that "after puzzling the profession for 50 years, this famous observation has earned its retirement." Twombly, 550 U.S. 544, 563. In order to survive dismissal under the new standard, a plaintiff must "nudge[his] claims across the line from conceivable to plausible . . . ." Id. at 570. In other words, "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

The Tenth Circuit has stated that

> "plausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs "have not nudged their claims across the line from conceivable to plausible." The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.

Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (*quoting* Twombly, 550 U.S. at 570)(internal citations omitted).

The Supreme Court has recently expounded upon the meaning of Twombly:

> Two working principles underlie [the] decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009)(citation omitted). The Supreme Court has also commented that

> [i]n keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.

Id. at 1950.

Finally, "'[t]he court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.'" Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009) (*quoting* Sutton v. Utah State Sch. for Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir.1999)). Additionally, "[i]n evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits. . . ." Smith, 561 F.3d at 1098. With these standards in mind, the Court now turns to the case at hand.

B. The Counts of Plaintiff's *Complaint for Injunctive and Declaratory Relief*

1. Count I: Violations of Rights Secured by the First Amendment to the United States Constitution (42 U.S.C. § 1983)

It has long been "well established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969). Indeed, in effectively invalidating a city ordinance making it unlawful for "any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing[,]" the United States Supreme Court commented that

> [t]he 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, Ohio, 319 U.S. 141, 142, 143 (1943) (emphasis added). The Court again spoke of the constitutional right to receive information when it struck down a postal statute mandating the Postmaster General's seizure and detention of mail originating in foreign countries, which was "determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda[,]'" pending notification of the recipient and the recipient's subsequent request to receive such mail. Lamont v. Postmaster General of U. S., 381 U.S. 301, 302 (1965). In a concurrence, Justice Brennan remarked:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Id. at 307 (Brennan, J. concurring) (internal citations omitted).[2]

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[2] Similarly, in Griswold v. Connecticut, the Court explained that

> the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge[, as t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry [and] freedom of thought. . . .

Expanding on the constitutional right to receive information, a number of lower federal courts have determined that "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." Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1255 (3rd Cir. 1992); see also Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585, 591 (6th Cir. 2003) (same); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581-583 (6th Cir. 1976) (concluding that removal of certain books from public-school library constituted First Amendment violation, and calling a library "a storehouse of knowledge[,]" "a mighty resource in the free marketplace of ideas[,]" and a place "specially dedicated to broad dissemination of ideas."); Armstrong v. Dist. of Columbia Pub. Library, 154 F.Supp.2d 67, (D.D.C. 2001) (noting "long-standing precedent supporting . . . First Amendment right to receive information and ideas, and this right's nexus with access to public libraries. . . .").

In this case, John Doe, a registered sex offender, alleges that the City's administrative instruction, which provides, in pertinent part, that "[r]egistered sex offenders are not allowed in public libraries in the City of Albuquerque[,]" works a violation of his First Amendment "right to free speech, . . . *right to receive information*, and . . . right to peaceably assemble. . . ." [Doc. 1; Exh. A at 4 (emphasis added)]. John Doe's allegations are sufficient to withstand the City's motion to dismiss with respect to Count I. See Twombly, 127 S.Ct. at 1974 (complaint must contain "enough facts to state a claim to relief that is plausible on

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Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

its face."). The Court concludes that Count I states "a plausible claim for relief[,]" Iqbal, 129 S.Ct. at 1949-50, 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 beginning with Martin v. City of Struthers, Ohio.

2. Count II: Violations of Rights Secured by the Fourteenth Amendment to the United States Constitution-Substantive Due Process (42 U.S.C. § 1983)

The Fourteenth Amendment "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights. . . .'" Troxel v. Granville, 530 U.S. 57, 65 (2000) (*quoting* Washington v. Glucksberg, 521 U.S. 702, 719 (1997)). Therefore, when a law or restriction "impinges upon fundamental rights protected by the Constitution[,]" courts apply the "strict scrutiny" standard of review. Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n, 889 F.2d 929, 932 (10th Cir. 1989). In other words, "[i]f a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest." Dias v. City and County of Denver, 567 F.3d 1169, 1181 (10th Cir. 2009).

As demonstrated above, John Doe has sufficiently pled that the City's administrative instruction burdens his fundamental, First Amendment rights. He also alleges that the administrative instruction is overbroad, and thus not narrowly tailored to serve a compelling government interest. [See Doc. 1; Exh. A at 4 (alleging that administrative instruction violates substantive due process component of Fourteenth Amendment inasmuch as the

City's "ban on registered sex offenders at its libraries is overbroad.")]. As with Count I, the Court concludes that John Doe's allegations are sufficient to withstand the City's motion to dismiss with respect to Count II. See Twombly, 127 S.Ct. at 1974. Count II states "a plausible claim for relief[,]" Iqbal, 129 S.Ct. at 1949-50, because the allegations contained therein "allow[] the court to draw the reasonable inference that [the City] is liable for the misconduct alleged[,]" id. at 1949, *i.e.*, the creation and implementation of an overbroad administrative instruction that is not narrowly tailored to serve a compelling government interest.

3. Count III: Violations of Rights Secured by the Fourteenth Amendment to the United States Constitution-Procedural Due Process (42 U.S.C. § 1983)

Because the parties stipulated to the dismissal of Count III, the Court does not address it here for purposes of the City's motion to dismiss. [See Doc. 36].

4. Count IV: Violations of Rights Secured by the Fourteenth Amendment to the United States Constitution-Equal Protection (42 U.S.C. § 1983)

"The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying 'any person within its jurisdiction the equal protection of the laws.'" Teigen v. Renfrow, 511 F.3d 1072, 1083 (10th Cir. 2007) (*quoting* U.S. CONST. amend. XIV, § 1. The Equal Protection Clause "creates no substantive rights. Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." Vacco v. Quill, 521 U.S. 793, 799 (1997).

John Doe concedes that, for purposes of his equal protection claim, rational-basis review applies "because there is no 'suspect class' at issue." [Doc. 1; Exh. A at 8]. John Doe's position is in accord with that taken by the Tenth Circuit, which has expressly "reject[ed the] contention that sex offenders constitute a suspect class." Riddle v. Mondragon, 83 F.3d 1197, 1207 (10th Cir. 1996).

Under the standard of rational-basis review, this Court will uphold a government classification if it is "rationally related to a legitimate government purpose or end[,]" Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n, 483 F.3d 1025, 1031-32 (10th Cir. 2007), and a plaintiff's equal protection claim will fail "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Copelin-Brown v. N.M. State Pers. Office, 399 F.3d 1248, 1255 (10th Cir. 2005) (quotations omitted). To be sure, notwithstanding the arguments set forth by the parties themselves, the Court "is *obligated* to seek out other conceivable reasons for validating [a state policy] and must independently consider whether there is any conceivable rational basis for the classification, regardless of whether the reason ultimately relied on is provided by the parties or the court." Teigen, 511 F.3d at 1084 (emphasis in original) (*quoting* Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir.2004)). Additionally, in the context of a Rule 12(b)(6) motion to dismiss, the Court, which accepts all of the allegations in the complaint as true, also "considers these 'facts' according to the deferential rational basis standard." Teigen, 511 F.3d at 1083. In the end, then "'[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the

presumption of rationality that applies to government classifications.'" Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995) (*quoting* Wroblewski v. City of Washburn, 965 F.2d 452 (7th Cir.1992)).[3]

In this case, John Doe alleges that the City's decision to ban registered sex offenders from public libraries amounts to a form of "discriminat[ion] against [him] on the basis of his status as a registered sex offender without a rational basis[,]" in violation of his Fourteenth Amendment right to equal protection of the laws. [Doc. 1; Exh. A at 6]. He also asserts the unconstitutionality of the administrative instruction on the basis that a "ban on registered sex offenders at its libraries is overbroad." [Id.; Exh. A at 4].

Even at this stage of the proceedings, John Doe's hurdle with respect to his equal protection claim is high because (1) the City's administrative instruction enjoys a

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[3] In Brown, the Tenth Circuit noted that "[c]ompeting standards for resolving a plaintiff's equal protection claim under Rule 12 complicate [the] analysis when [a court] review[s] a plaintiff's claim under the rational basis standard[,]" Brown, 63 F.3d at 971, and, similarly, in Wroblewski, the Seventh Circuit commented on the "perplexing situation [that] is presented when the rational basis standard meets the standard applied to a dismissal under Fed. R.Civ.P. 12(b)(6)." As the Seventh Circuit explained,

> The rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification; the Rule 12(b)(6) standard requires the plaintiff to prevail if [his complaint contains enough facts to state a claim to relief that is plausible on its face]. The rational basis standard, of course, cannot defeat the plaintiff's benefit of the . . . Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim.

Wroblewski, 965 F.2d at 459-460.

presumption of rationality, see Brown, 63 F.3d at 971; (2) this Court is obligated to conduct an independent inquiry to determine if "there is any conceivable rational basis for the classification," see Teigen, 511 F.3d at 1084; and (3) rather than demonstrate *any* set of facts that would entitle him to relief, John Doe now must "nudge [his] claims across the line from conceivable to plausible . . . ." Twombly, 127 S.Ct. at 1974 (emphasis added). Notwithstanding, and with full recognition that the competing standards present this Court with an exceedingly close call, the Court concludes that John Doe's allegations that the administrative instruction is overbroad and lacks a rational basis, which at this point in the litigation are necessarily made without the benefit of discovery to discern the precise basis for the City's decision, are sufficient (though barely) to withstand a Rule 12(b)(6) motion to dismiss. The Court concludes that facial plausibility exists in John Doe's contention that the City's decision to ban registered sex offenders from public libraries amounts to a form of "discriminat[ion] against [him] on the basis of his status as a registered sex offender without a rational basis[,]" in violation of his Fourteenth Amendment right to equal protection of the laws. [Doc. 1; Exh. A at 6]. Through Count IV, John Doe has pled sufficient "factual content [to] allow[] the [C]ourt to draw the reasonable inference that [the City] is liable for the misconduct alleged[,]" see Iqbal, 129 S.Ct. at 1949, *i.e.*, that the City's administrative instruction constitutes a form of discrimination against John Doe on the basis of his status as a registered sex offender without a rational basis, in violation of his Fourteenth Amendment right to equal protection of the laws.

5. Count V: Violations of Rights Secured by Article II, Section Seventeen of the New Mexico Constitution (New Mexico Declaratory Judgment Act)

Article II, § 17 of the New Mexico Constitution provides, in pertinent part, that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ." N.M. CONST. art. II, § 17. In considering together the First Amendment to the United States Constitution and Article II, § 17 of the New Mexico Constitution, the New Mexico Court of Appeals has commented that

> [w]hile the difference in the language used in the First Amendment and Article II, Section 17, may be some evidence that the drafters of the New Mexico Constitution intended a somewhat different scope of protection, our supreme court has recognized that Article II, Section 17, "reads substantially the same" as the First Amendment.

City of Farmington v. Fawcett, 843 P.2d 839, 846 (N.M.App. 1992) (*quoting* Nall v. Baca, 626 P.2d 1280, 1284 (N.M. 1980)). As previously discussed, it is "well established that the Constitution protects the right to receive information and ideas." Stanley, 394 U.S. at 564. Given that the First Amendment and Article II, § 17 "read[] substantially the same[,]" Fawcett, 843 P.2d at 846, the Court concludes that the allegations set forth in Count V of John Doe's complaint are sufficient to withstand the City's motion to dismiss. For the same reason that the allegations set forth in Count I are deemed to be facially plausible, so too are the identical allegations set forth in Count V. See Iqbal, 129 S.Ct. at 1949.

6. Count VI: Violations of Rights Secured by Article II, Section Eighteen of the New Mexico Constitution-Substantive Due Process (New Mexico Declaratory Judgment Act

Article II, § 18 of the New Mexico Constitution provides, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law. . . ." N.M. CONST. art. II, § 18. Article II, § 18 is substantially identical to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, that "'[N]or shall any State deprive any person of life, liberty, or property, without due process of law." State v. Druktenis, 86 P.3d 1050, 1066 (N.M.App. 2004) (*quoting* U.S. CONST. art. XIV, § 1. For substantially the reasons set forth above in Section II.B.2, the Court concludes that the allegations set forth in Count VI of John Doe's complaint are sufficient to withstand the City's motion to dismiss. Moreover, for the same reason that the allegations set forth in Count II are deemed to be facially plausible, so too are the identical allegations set forth in Count VI. See Iqbal, 129 S.Ct. at 1949.

7. Count VII: Violations of Rights Secured by Article II, Section Eighteen of the New Mexico Constitution-Procedural Due Process (New Mexico Declaratory Judgment Act)

Because the parties stipulated to the dismissal of Count VII, the Court does not address it here for purposes of the City's motion to dismiss. [See Doc. 36].

8. Count VIII: Violations of Rights Secured by Article II, Section Eighteen of the New Mexico Constitution-Equal Protection (New Mexico Declaratory Judgment Act)

Article II, § 18 of the New Mexico Constitution provides, in pertinent part, that "[n]o person shall be . . . denied equal protection of the laws." N.M. CONST. art. II, § 18. As with its Due Process Clause, the Equal Protection Clause of Article II, § 18 is substantially identical to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which forbids any provides, in pertinent part, that "nor shall any person be denied equal protection of State deprive any person of life, liberty, or property, without due process of law." State v. Druktenis, 86 P.3d 1050, 1066 (N.M.App. 2004) (*quoting* U.S. CONST. art. XIV, § 1. For substantially the reasons set forth above in Section II.B.4, the Court concludes that the allegations set forth in Count VIII of John Doe's complaint are sufficient to withstand the City's motion to dismiss. Moreover, for the same reason that the allegations set forth in Count IV are deemed to be facially plausible, so too are the identical allegations set forth in Count VIII. See Iqbal, 129 S.Ct. at 1949.

9. Count IX: Violations of Rights Secured by Article II, Section Four of the New Mexico Constitution-Inherent Rights (New Mexico Declaratory Judgment Act)

Article II, § 4 of the New Mexico Constitution provides that "[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." Lucero v. Salazar, 877 P.2d 1106, 1107 (N.M.App.,1994) (*quoting* N.M. CONST. art. II, § 4). Section 4 "contains very

general language protecting a variety of rights." State v. Sutton, 816 P.2d 518, 524 (N.M.App. 1991). By contrast, the United States Constitution contains no correlative provision. Indeed, in comparing Article II, § 4 and the Fourteenth Amendment to the United States Constitution, the New Mexico Supreme Court noted § 4's "guarantee of certain minimal levels of safety and security[,]" and also remarked that "[i]n interpreting the more expansive language of Article II, Section 4, [the court was] mindful of the more intimate relationship existing between a state government and its people, as well as the more expansive role states traditionally have played in keeping and maintaining the peace within their borders." California First Bank v. State, 801 P.2d 646, 658 (N.M. 1990).

In this case, John Doe alleges that "[a]ll of the actions taken" by the City "have deprived and continue to deprive [him] of rights secured by Article II, Section 4 . . . specifically the right to enjoy life and liberty, to acquire, possess and protect property [and] to seek and obtain safety and happiness." [Doc. 1; Exh. A at 8]. According to the complaint, activities that John Doe enjoyed by virtue of his pre-ban access to public libraries include (1) checking out books; (2) checking out CDs; and (3) attending meetings and lectures. John Doe further asserts that "the fundamental rights at stake here are inherent to [his] safety and happiness [as] protected by the New Mexico Constitution." [Doc. 9 at 13]. These allegations are sufficient to withstand the City's motion to dismiss Count IX. They have "facial plausibility [inasmuch as the underlying] factual content . . . allows the [C]ourt to draw the reasonable inference that [the City] is liable for the misconduct alleged[,]" Iqbal, 129 S.Ct. at 1949, *i.e.* the deprivation of his inherent rights to (1) enjoy life and liberty; (2) acquire,

possess, and protect property; and (3) seek and obtain safety and happiness. [Doc. 1; Exh. A at 8].

III. CONCLUSION

For the reasons set forth more fully herein, the Court concludes that John Doe has, though his *Complaint for Injunctive and Declaratory Relief*, pled sufficient facts to withstand the City's motion to dismiss. The claims as set forth in the complaint are facially plausible inasmuch as John Doe has pled sufficient factual content to allow the Court to draw the reasonable inference that the City would be liable for the misconduct alleged. See Iqbal, 129 S.Ct. at 1949. Consequently, the City's motion will be denied.

IT IS, THEREFORE, ORDERED that *Defendant City of Albuquerque's Motion and Consolidated Memorandum to Dismiss* [Doc. 3] is **DENIED**.

SO ORDERED this 30th day of September, 2009, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN DOE,

Plaintiff,

vs. No. 08cv1041MCA/LFG

CITY OF ALBUQUERQUE,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on *Plaintiff's Motion for Summary Judgment* [Doc. 43], filed May 15, 2009. Having considered the parties' submissions, the relevant law, and otherwise being fully advised in the premises, the Court grants the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following allegations are taken from Plaintiff's *Complaint for Injunctive and Declaratory Relief* and, for purposes of his summary-judgment motion, are viewed in a light most favorable to the non-movant, Defendant City of Albuquerque, with all reasonable inferences being drawn in its favor. See Turner v. Public Service Co. of Colorado, 563 F.3d 1136, 1142 (10th Cir. 2009).

Plaintiff John Doe ("John Doe") is registered with the State of New Mexico as a convicted sex offender. [Doc. 1; Exh. A at 2]. On March 4, 2008, Defendant City of Albuquerque ("the City"), through an administrative instruction ("administrative instruction" or "regulation"), officially banned all registered sex offenders from using and/or entering any

of the City's public libraries. [Id.; Exh. A at 2]. The administrative instruction provides:

> 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.

[Id.; Exh. A, Attachment 1].

As a former user of the City libraries and a holder of a City library card, John Doe received the letter referred to in the administrative instruction, informing him that he had been banned. [Doc. 1; Exh. A at 3]. John Doe alleges that, prior to the ban, he "frequently visited the City's public libraries, checked out books, CDs, used other reference material available to him, and attended meetings and lectures. . . ." [Id.; Exh. A at 3]. Given the ban, however, he now lacks access to the City's public libraries and therefore is unable to receive information contained in books, magazines, newspapers, movies, and CDs. [Id.; Exh. A at 3]. Additionally, given that the express terms of the administrative instruction mandate enforcement of the ban by "[t]he Albuquerque Police Department, the Bernalillo County Sheriff's Office, the New Mexico State Police, and other law enforcement agencies[,]" any attempt by John Doe to enter any of the City's public libraries would subject him to a credible threat of prosecution. [Id.; Exh. A at 3]. John Doe alleges that the administrative instruction "constitutes an official City policy, custom, and practice." [Id.; Exh. A at 2].

In response to the administrative instruction and the City's ban against registered sex offenders in public libraries, John Doe, on October 9, 2008, filed his *Complaint for Injunctive and Declaratory Relief* in the State of New Mexico, County of Bernalillo, Second Judicial District. [Doc. 1; Exh. A]. In his complaint, which he brings pursuant to 42 U.S.C. § 1983 and the New Mexico Declaratory Judgment Act, he alleges violations of rights secured by (1) the First Amendment to the United States Constitution (Count I); (2) the Fourteenth Amendment to the United States Constitution (substantive due process, procedural due process, and equal protection) (Counts II, III, and IV); (3) Article II of the New Mexico Constitution, Section 17 (free speech) (Count V); (4) Article II of the New Mexico Constitution, Section 18 (substantive due process, procedural due process, and equal protection) (Counts VI, VII, and VIII); and (5) Article II of the New Mexico Constitution, Section 4 (inherent rights) (Count IX).[1]

Pursuant to 28 U.S.C. § 1443(b), the City timely removed the matter to this Court and, on the same day, November 6, 2008, moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), on the ground that "Plaintiff's Complaint does not state a cognizable claim as a matter of law. . . ." [See Doc. 1; Doc. 3 at 1]. By *Order* entered September 30, 2009, this Court denied the motion. [See Doc. 57].

After the City filed its motion to dismiss, but before the Court ruled on the motion, John Doe, on May 15, 2009, filed the summary-judgment motion that is now before the

[1] On April 10, 2009, the parties stipulated to the dismissal of the state and federal procedural due process claims that had been asserted in Counts III and VII. [See Doc. 36].

Court. [See generally Doc. 43].

II. ANALYSIS

A. Standard of Review

1. Summary Judgment; Fed.R.Civ.P. 56

The Court may enter summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.'" Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir.1995) (quoting Fed.R.Civ.P. 56©). A "genuine issue" exists where the evidence before the Court is of such a nature that a reasonable jury could return a verdict in favor of the non-moving party as to that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. See id. at 248.

When, as here, the movant is also the party bearing the burden of persuasion with regard to the claim on which a summary judgment is sought, the movant must show that the record as a whole satisfies each essential element of its case and negates any affirmative defenses in such a way that no rational trier of fact could find for the non-moving party. See 19 Solid Waste Dep't Mechanics v. City of Albuquerque, 156 F.3d 1068, 1071 (10th Cir. 1998); Newell v. Oxford Mgmt., Inc., 912 F.2d 793, 795 (5th Cir. 1990); United Missouri Bank of Kansas City, N.A. v. Gagel, 815 F. Supp. 387, 391 (D.Kan. 1993). The admissions in a party's answer to a complaint are binding for purposes of determining whether the

movant has made such a showing. See Missouri Housing Dev. Comm'n v. Brice, 919 F.2d 1306, 1314-15 (8th Cir. 1990). Similarly, the Court may consider any undisputed material facts set forth in the motion papers which are deemed admitted by operation of D.N.M. LR-Civ.56.1. See LaMure v. Mut. Life Ins. Co. of N.Y., 106 F.3d 413, 1997 WL 10961, at *1 (10th Cir. 1997) (unpublished disposition); Smith v. E.N.M. Med. Ctr., 72 F.3d 138, 1995 WL 749712, at *4 (10th Cir. 1995) (unpublished disposition); Waldridge v. American Hoechst Corp., 24 F.3d 918, 920-24 (7th Cir.1994) (approving use of local rule similar to D.N.M. LR-Civ. 56.1(b)).

Further, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading. . . ." Fed.R.Civ.P. 56(e). Nor will unsupported conclusory allegations create a genuine issue of fact. Harrison v. Wahatoyas, L.L.C., 253 F.3d 552, 557 (10th Cir. 2001). Rather, "the adverse party's response . . . must set forth specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e). 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 Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Lopez v. LeMaster, 172 F.3d 756, 759 (10th Cir. 1999).

Apart from these limitations, it is not the Court's role to weigh the evidence, assess the credibility of witnesses, or make factual findings in ruling on a motion for summary judgment. Rather, the Court assumes the admissible evidence of the non-moving party to be true, resolves all doubts against the moving party, construes all admissible evidence in the

light most favorable to the non-moving party, and draws all reasonable inferences in the non-moving party's favor. See Hunt v. Cromartie, 526 U.S. 541, 551-52 (1999).

B. 42 U.S.C. § 1983

John Doe brings this action pursuant to 42 U.S.C. § 1983. Section 1983 of Title 42 of the United States Code provides, in relevant part, that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Section 1983 is not an independent source of substantive rights; rather it is a mechanism for enforcing federal rights conferred elsewhere, see Albright v. Oliver, 510 U.S. 269, 271 (1994), and provides a remedy "for any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of law." Curley v. Klem, 298 F.3d 271, 277 (3rd Cir.2002). Accordingly, an analysis of a plaintiff's federal civil-rights claim necessarily begins by identifying the specific constitutional right or rights allegedly infringed. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

With respect to his federal claims,[2] John Doe asserts that he possesses a First Amendment right to receive information in Albuquerque's public libraries, as well as a First Amendment right to assemble there for the purpose of attending meetings, exhibits, and other events, and that the City has infringed upon these rights by enacting the regulation in question. He also contends that a wholesale ban that prevents registered sex offenders from entering public libraries works a violation of his Fourteenth Amendment right to substantive due process. Finally, he argues that he has been denied equal protection of the laws because, even though registered sex offenders are admittedly not a suspect class, restrictions against whom are accorded no more than rational basis review, the City's enactment nevertheless is arbitrary and irrational. [Doc. 44 at 8-22].

The City contends, and John Doe freely admits, that he is mounting a facial (as opposed to an "as-applied") First Amendment challenge to the regulation in question, and the Court considers his challenge as such. [See Doc. 47 at 1-3 (interpreting John Doe's challenge as a facial challenge); Doc. 51 at 3 n.1 ("Plaintiff reasserts that he brings his lawsuit as a facial challenge as has been consistently stated.")].

In distinguishing facial from as-applied First Amendment challenges, our Tenth Circuit has explained that

> [t]here are two types of First Amendment challenges that can be brought against a city policy, facial and as applied. A facial challenge considers the restriction as a whole, while an

[2] John Doe also asserts claims arising under the laws of the State of New Mexico. Because the Court disposes of this matter on the basis of those claims brought pursuant to federal law, the Court does not address John Doe's state-law claims.

> as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case. Facial 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, Colo., 423 F.3d 1192, 1196 (10th Cir. 2005) (internal citations omitted). A municipal policy may be deemed unconstitutional upon a conclusion that any attempt to enforce it would create "an unacceptable risk of the suppression of ideas." Am. Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1247 (10th Cir. 2000) (internal quotation omitted).

C. The First Amendment: The Right to Receive Information (A General Overview of Significant United States Supreme Court Cases)

The First Amendment to the United States Constitution provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I.

It has long been "well established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969). Indeed, in effectively invalidating a city ordinance making it unlawful for "any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing[,]" the United States Supreme Court commented that

> [t]he 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, Ohio, 319 U.S. 141, 142, 143 (1943) (emphasis added). "This right to receive information and ideas, regardless of their social worth," explained the Stanley Court, "is *fundamental* to our free society." Stanley, 394 U.S. at 564 (emphasis added).

The Court again spoke of the constitutional right to receive information when it struck down a postal statute mandating the Postmaster General's seizure and detention of mail originating in foreign countries, which was "determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda[,]'" pending notification of the recipient and the recipient's subsequent written request to receive such mail. Lamont v. Postmaster General of U. S., 381 U.S. 301, 302 (1965). In invalidating § 305(a) of the Postal Service and Federal Employees Salary Act of 1962 ("Postal Service § 305(a)"), the Court "rest[ed] on the narrow ground" that requiring an addressee to request—in writing—that his mail be delivered to him amounted "to an unconstitutional abridgement of the addressee's First Amendment rights [inasmuch as t]he addressee carrie[d] an affirmative obligation which [the Court did] not think the Government [could] impose on him." Id. at 305. Section 305(a), therefore, was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." Id. at 305-406 (*citing* New York Times Co. v. Sullivan, 376 U.S. 254, 270

(1964)).

In a concurrence that is highly instructive for purposes of this Court's analysis of John Doe's First Amendment arguments, Justice Brennan identified the constitutional right implicated by Postal Service § 305(a) as an addressee's First Amendment entitlement to receive information in the form of delivered materials, which he deemed "a fundamental right." Lamont, 381 U.S. at 308 (Brennan, J., concurring). He explained:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. *I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers*.

Id. at 308 (Brennan, J., concurring) (internal citations omitted) (emphasis added).[3]

Emphasizing the all-important nature of First Amendment rights, Justice Brennan was not persuaded by the government's position that, since an addressee could receive a seized publication by making a written request for its delivery, Postal Service § 305(a) at most

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[3] Similarly, in Griswold v. Connecticut, the Court explained that

> the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge[, as t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry [and] freedom of thought. . . .

Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

inconvenienced—but did not abridge—the addressee's constitutional rights and, therefore, passed muster. Instead, he stated firmly and simply that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." Lamont, 381 U.S. at 309 (Brennan, J., concurring). Even if Postal Service § 305(a) could be viewed as imposing nothing more than an inconvenience on the addressee, Justice Brennan made clear that the Court could not "sustain an intrusion of First Amendment rights on the ground that the intrusion is only a minor one." Id. at 309 (Brennan, J., concurring). Rather, in commentary that guides this Court today, he stressed that

> [i]n the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose[, and that i]f the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights.

Id. at 310 (Brennan, J., concurring).

That the First Amendment right to receive information arises in contexts other than those involving written materials and publications is evidenced by Conant v. Walters, in which the Ninth Circuit affirmed the entry of a permanent injunction preventing enforcement of a federal policy that threatened to punish physicians who communicated with their patients about the medical use of marijuana. Conant v. Walters, 309 F.3d 629, 633, 639 (9th Cir. 2002). In a concurrence harking back to Lamont and written solely to express his view that "the fulcrum of th[e] dispute [was] not the First Amendment right of the doctors[,]" but, instead, the rights of *patients* who, in the absence of the injunction, would "be denied information crucial to their well-being," now-Chief Judge Alex Kozinski framed the issue

as the right to hear and receive information. Conant v. Walters, 309 F.3d 629, 639-640, 643 (9th Cir. 2002) (Kozinski, J., concurring). Viewing the right to hear and the right to speak as "flip sides of the same coin[,]" Judge Kozinski repeated Justice Brennan's observation from Lamont that "'[i]t would be a barren marketplace of ideas that had only sellers and no buyers.'" Conant, 309 F.3d at 643 (Kozinski, J., concurring) (*quoting* Lamont, 381 U.S. at 308) (Brennan, J., concurring). Judge Kozinski commented that, while the right to speak and the right to receive information might not always carry the same weight, and "denial of the right to speak is never trivial," Conant, 309 F.3d at 643 (Kozinski, J., concurring), there do exist situations in which the practical realities of hearing the message make the right to receive information more important than the right to send it. See id. at 643-644; see also 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:73 (2009). Such was the case in Conant, reasoned Judge Kozinski, where "the simple fact [was] that if the injunction were denied, the doctors would be able to continue practicing medicine and go on with their lives more or less as before." Conant, 309 F.3d at 644 (Kozinski, J., concurring). Ailing patients, however, would bear the brunt of this First Amendment deprivation by being denied competent medical advice. Patients' First Amendment right to hear and receive information provided by their physicians, according to Judge Kozinski, provided even more reason to affirm the district court's decision to enjoin the policy in question. See id. at 648 (Kozinski, J., concurring) ("In affirming the district court, I therefore find comfort in knowing that the interests of the patients . . . provide significant additional support for the district court's exercise of discretion."). Judge Kozinski's concurrence underscores the continued vitality

in the 21st century of the right to receive information, which right was first identified by the United States Supreme Court in 1943, see Martin, 319 U.S. at 143, and deemed "fundamental to our free society[]" in 1969, see Stanley, 394 U.S. at 564.

D. The First Amendment: The Right to Receive Information (Libraries)

1. *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3rd Cir. 1992)

A number of federal courts have addressed the right to receive information in cases arising in the specific context of challenges to public-library policy. For example, in Kreimer v. Bureau of Police for Town of Morristown, the Third Circuit held that the First Amendment right to receive information, "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." Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1255 (3rd Cir. 1992) ("Kreimer II"). The issue in Kreimer II was the enforceability of a written policy promulgated by Morris Township (N.J.) and the Joint Free Public Library of Morristown that expressly prohibited certain behavior in the library and authorized the library's director to expel any patron deemed to be in violation. Id. at 1247. The plaintiff, Richard Kreimer, was a homeless resident of Morristown who frequently visited the library to read books, newspapers, and magazines, and also to sit "in quiet contemplation." Id. at 1246-47. He was expelled on at least two occasions for having violated library rules (1) against nonengagement "in normal activities associated with the use of a public library while in the building[;]" and (2) demanding that "[p]atron dress and

personal hygiene . . . conform to the standard of the community for public places."[4] Id. at

[4] In their entirety, the challenged provisions of the policy read:

> 1. Patrons shall be engaged in normal activities associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials may be asked to leave the building. Loitering will not be tolerated.
>
> 5. Patrons shall respect the rights of other patrons and shall not annoy others through noisy or boisterous activities, by unnecessary staring, by following another person through the building, by playing walkmans or other audio equipment so that others can hear it, by singing or talking to oneself or any other behavior which may reasonably result in the disturbance of other persons.
>
> 9. Patron dress and personal hygiene shall conform to the standard of the community for public places. This shall include the repair or cleanliness of garments.

Kreimer II, 958 F.2d at 1247.

Following a complaint lodged by the ACLU of New Jersey, however, paragraph 1 was revised to read:

> 1. Patrons shall be engaged in activities associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials shall be asked to leave the building.

Accordingly, as revised, paragraph 1 removed any reference to "normal" activities; (2) made the expulsion of in-violation library patrons mandatory; and (3) removed any reference to "loitering." Kreimer v. Bureau of Police for Town of Morristown, 765 F.Supp. 181, 184 (D.N.J. 1991) ("Kreimer I").

Paragraph 5 was revised to read:

> Patrons shall respect the rights of other patrons and shall not harass or annoy others through noisy or boisterous activities, by unnecessary staring at another with the intent to annoy that person, by following another person about the building with the intent to annoy that person, by playing walkmans or other audio equipment so that others can hear it, by singing or talking to oneself or any other behavior which may reasonably result in the disturbance of

1247.

Mr. Kreimer brought suit pursuant to 42 U.S.C. § 1983, alleging, among other things, that the policy constituted a violation of his First Amendment right to receive information and ideas, "and identifie[d] the 'vital role played by public libraries' in promoting the fullest exercise of that right." Kreimer II, 958 F.2d at 1251. Applying strict scrutiny, the district court partially invalidated the policy, having determined that the policy (specifically paragraphs 1 and 9) was not narrowly tailored to serve the stated significant government interest, nor did it leave open any alternative means of access to publicly provided reading materials for patrons who were consequently denied the privilege of library access. Kreimer I, 765 F.Supp. at 187. The restrictions, explained the district court, especially the command in paragraph 1 that patrons not actively using library materials be removed from the building, bore no relation to the library's stated purpose of "preserving the peace and quiet of the facility for the benefit of all patrons." Id. at 189. Accordingly, the

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other persons.

Paragraph 9 was revised to read:

> Patrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is so offensive as to constitute a nuisance to other persons shall be required to leave the building.

Id. Finally, the policy was revised to mandate the denial of library access to violators. See id. at 185 (revised policy providing that "[a]ny patron who violates the library rules and regulations *shall* be denied the privilege of access to the library[,]" whereas original policy provided that "[a]ny patron who violates the library rules and regulations *may* be denied the privilege of access to the library. . . .") (emphasis added).

> court conclude[d] that paragraphs 1, 5, and 9 of the library policy [were] not reasonable time, place, or manner restrictions which serve[d] the state's significant interest in maintaining the library atmosphere at a level conducive to all patrons' use of the facility. As such, these paragraphs violate[d] the First Amendment of the United States Constitution.

Id.

The Third Circuit reversed and remanded. Accepting that "[a] library is 'a place dedicated to quiet, to knowledge, and to beauty'[5][, the] very purpose [of which] is to aid in the acquisition of knowledge through reading, writing and quiet contemplation[,]" the circuit nevertheless concluded that, rather than apply strict scrutiny to determine whether paragraphs 1 and 5 amounted to time, place, or manner restrictions that were narrowly tailored to serve a significant governmental interest, the district court should merely have gauged their reasonableness, as those provisions did not limit First Amendment activities that had been specifically permitted in the library. Kreimer II, 958 F.2d at 1261, 1262. Under this standard, the circuit deemed paragraphs 1 and 5 reasonable, because these provisions prohibited (1) activities that went beyond the purpose for which the library was opened; (paragraph 1), as well as (2) behavior that disrupted or tended to disrupt the library setting (paragraph 5). Id. at 1262-63.

As for paragraph 9, the circuit concluded that, because this provision would require the expulsion of a patron who might otherwise be peacefully engaged in permissible First Amendment activities within the purposes for which the library was opened (*i.e.*, reading,

[5] Brown v. Louisiana, 383 U.S. 131, 142 (1966).

writing, or quiet contemplation), review was for the purpose of "determin[ing] whether the rule [was] narrowly tailored to serve a significant government interest and whether it [left] ample alternative channels of communication." Kreimer II, 958 F.2d at 1264.

Reminding that the "narrowly tailored" requirement did not did not mean that the library was obligated to employ the least restrictive or least intrusive means of furthering its interests, the circuit explained that "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Kreimer II, 958 F.2d at 1264 (internal quotations omitted); see also Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

Paragraph 9 satisfied the "narrowly tailored" requirement, reasoned the circuit, because a regulation mandating that library patrons "have non-offensive bodily hygiene" furthered the library's goals of allowing all patrons' use and enjoyment of the library, as well as its "interest in maintaining its facilities in a sanitary and attractive condition." Kreimer II, 958 F.2d at 1264. Finally, paragraph 9 left open "ample alternative channels of communication" because even an ejected patron could eventually return to the library— and therefore was not permanently barred—so long as the patron complied with the library's rules. Id.

2. *Armstrong v. Dist. of Columbia Pub. Library*, 154 F.Supp.2d 67 (D.D.C. 2001)

In Armstrong v. Dist. of Columbia Pub. Library, the regulation promulgated by the District of Columbia Public Library instructed library personnel to deny access to potential

patrons with "objectionable appearance" ("the appearance regulation"). Armstrong v. Dist. of Columbia Pub. Library, 154 F.Supp.2d 67, 70 (D.D.C. 2001). Richard Armstrong was a resident of an area shelter who arrived at the Martin Luther King Memorial Library on February 14, 1993, dressed in a shirt, shoes, pants, several sweaters, and two winter jackets. He was stopped at the library entrance, denied access, told to "clean up," and directed to leave the building, which he did. Id. Mr. Armstrong subsequently filed suit pursuant to 42 U.S.C. § 1983, arguing, among other things, that the appearance regulation was both vague and overbroad, in violation of the First Amendment. Id. at 69.

The United States District Court for the District of Columbia agreed with Mr. Armstrong. The court looked to Kreimer II for guidance and, as did both the Kreimer I and Kreimer II courts, began with the pronouncement that "[i]t is well-established and can hardly be disputed that 'the Constitution protects the right to receive information and ideas.'" Armstrong, 154 F.Supp.2d at 75 (*quoting* Stanley, 394 U.S. at 564). Recognizing that Kreimer II applied a reasonableness standard to restrictions relating to conduct deemed antithetical to the nature of the library (paragraphs 1 and 5), but required narrow tailoring for that provision mandating the expulsion of a hygienically offensive patron who might otherwise be peacefully engaged in permissible First Amendment activities (paragraph 9), the Armstrong court determined that the appearance regulation before it could survive constitutional scrutiny only if it were "narrowly tailored to serve a significant governmental interest and [left] open ample alternative channels for communication of information." Id. The court reasoned that "[s]ince the effect of [the appearance] regulation [was] to prevent

certain patrons from engaging in *any* conduct within, or use of, the library, protected First Amendment activities such as reading, writing and quiet reflection [were] directly limited." Id. (emphasis in original).

As a content-neutral regulation limiting protected First Amendment activities inside the library, therefore, the appearance regulation amounted to a time, place, and manner restriction demanding narrow tailoring to serve a significant governmental interest. Armstrong, 154 F.Supp.2d at 75-76. The court, however, determined that the regulation was not sufficiently narrowly tailored because it was "amorphous" inasmuch as it "impermissibly vest[ed] unfettered and subjective enforcement discretion in whomever the regulation enforcer happen[ed] to be at a given hour or day." Id. at 82. Additionally, the appearance regulation was "imprecise" and provided no articulable standard to guide either government officials or employees tasked with enforcing it, or a public expected to "conform its conduct to the barring regulation's vague requirements." Id. For these reasons, the court held the appearance regulation "unconstitutionally vague and overbroad under settled First . . . Amendment principles" and enjoined its application. Id.

3. *Neinast v. Bd. of Trustees of Columbus Metro. Library*, 346 F.3d 585 (6th Cir. 2003)

Finally, in Neinast v. Bd. of Trustees of Columbus Metro. Library, the issue before the Sixth Circuit was the constitutionality of a regulation promulgated by the Columbus (OH) Metropolitan Library requiring library patrons to wear shoes while on library premises. Neinast v. Bd. of Trustees of Columbus Metro. Library, 346 F.3d 585, 589 (6th Cir. 2003).

Following several evictions for failing to wear footwear in the library, plaintiff/library patron Robert Neinast brought suit pursuant to 42 U.S.C. § 1983, alleging, among other things, that "enforcement of the requirement that patrons of the Library wear shoes deprived him of his right to receive information under the First . . . Amendment[]." Id. at 590.

Affirming the district court's entry of summary judgment for the defendants, the Sixth Circuit, as did the courts in Kreimer I, Kreimer II, and Armstrong, laid out the underlying premise that the First Amendment protects the right to receive information and, further, that "[t]his right to receive information 'includes the right to some level of access to a public library, the quintessential locus of the receipt of information.'" Neinast, 346 F.3d at 591 (*quoting* Kreimer II, 958 F.2d at 1255). However, whereas the appearance regulation in Armstrong "prevent[ed] certain patrons from engaging in *any* conduct within, or use of, the library," Armstrong, 154 F.Supp.2d at 75 (emphasis in original), and, therefore, directly limited protected First Amendment activities, the regulation in Neinast did not "directly impact the right to receive information." Neinast, 346 F.3d at 591-592. The Neinast regulation was accordingly reviewed for reasonableness, with the Sixth Circuit concluding that the regulation survived rational basis review because it provided "a rational means to further the legitimate government interests of protecting public health and safety and protecting the Library's economic well-being by seeking to prevent tort claims brought by library patrons who were injured because they were barefoot." Id. at 592.

The Sixth Circuit also concluded that, even if strict scrutiny were to apply, the regulation in question still would be constitutionally valid because the requirement that

library patrons wear shoes was narrowly tailored to the significant governmental interest of safeguarding the well-being of the library-going public, as well as shielding the library from possible tort claims brought by injured patrons. See Neinast, 346 F.3d at 593. Additionally, and importantly, the regulation in Neinast left open ample alternative channels for communication inasmuch as a patron desiring access to the library was required to do no more than comply with the rules and wear shoes. Id. at 595.

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.

E. The First Amendment: Applicable Level of Scrutiny and Forum Analysis

1. Strict Scrutiny

Having determined that there exists a First Amendment right to receive information, the Court's next task is to determine the applicable standard of review (or level of scrutiny), which it does by identifying and examining the nature of the forum in question, "because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985); see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations

upon such a right must be evaluated differ depending on the character of the property at issue.").

Courts employ a "forum" analysis in evaluating whether a rule or regulation constitutes a First Amendment violation. Three categories of government fora are relevant to the analysis.

At one end of the spectrum is the category that encompasses those places that "by long tradition or by government fiat have been devoted to assembly and debate. . . ." Perry, 460 U.S. at 45. Included in this category of public fora are streets, parks, and public sidewalks, as well as other public spaces that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Id., at 45-46 (*quoting* Hague v. CIO, 307 U.S. 496, 515 (1939)). The government's right to limit First Amendment activity in these "quintessential" public fora is strictly circumscribed, and any regulation that does so must (1) be necessary to serve a compelling government or state interest; (2) be narrowly drawn to achieve that end; and (3) leave open ample alternative channels of communication. Perry, 460 U.S. at 45.

At the other end of the spectrum is the category that encompasses "nonpublic" places that are by neither tradition nor designation maintained for the purpose of facilitating public communication. Regulations restricting First Amendment activity in these nonpublic fora need only be "reasonable and not an effort to suppress expression because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

Falling somewhere between these two ends is the category of places constituting "public property [that] the state has opened for use by the public as a place for expressive activity." Perry, 460 U.S. at 45. "The designated public forum, whether of a limited or unlimited character, is one a state creates 'by intentionally opening a non-traditional forum for public discourse.'" Hawkins v. City and County of Denver, 170 F.3d 1281, 1286 (10th Cir. 1999) (*quoting* Cornelius, 473 U.S. at 802). The government need not open or indefinitely retain the open nature of such places but, once it does, "the government is bound by the same limitations as exist in the traditional public forum context." Kreimer II, 958 F.3d at 1256. In other words, in these "designated"public fora, "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Perry, 460 U.S. at 46.

The Court concludes that, for purposes of the instant analysis, a public library constitutes a designated public forum.[6] Our Tenth Circuit, citing Kreimer II, has confirmed

[6] The Court notes that there exists some confusion over the terms "designated public forum" and "limited public forum." As the Tenth Circuit defines it, "[a] *designated* public forum is property the government has opened for expressive activity, treating the property as if it were a traditional public forum." Summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997) (emphasis added). A designated public forum may itself "be created for a 'limited purpose' for use 'by certain speakers, or for the discussion of certain subjects.'" Id. (*quoting* Perry, 460 U.S. at 45-46 n.7). Accordingly, "[s]ometimes included within this category of designated public forum is property referred to as a '*limited* public forum[,]'" id. (emphasis added), which is a sub-category of a designated public forum that is made available for use by certain speakers for a limited purpose. One example of a "limited public forum" as a sub-category of a larger "designated public forum" can be seen in Widmar v. Vincent, where a state university opened university facilities for meetings of registered student organizations, but excluded from those facilities registered student organizations dedicated to religious worship and teaching. Widmar v. Vincent, 454 U.S. 263, 265-266 (1981). When an otherwise designated public forum is made available for a limited purpose, content-based regulations must be narrowly drawn to effectuate a compelling state interest. Summum, 130 F.3d at 914.

as much in Hawkins. See Hawkins, 170 F.3d at 1287 ("Examples of designated public fora include . . . public libraries, see Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1261 (3rd Cir. 1992)."). For that reason, 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.

As already explained, John Doe has a protected First Amendment right to receive information. See, e.g., Stanley, 394 U.S. at 564; Lamont, 381 U.S. at 308 (Brennan, J., concurring). He seeks to exercise this right, as he had before enactment of the regulation in question, in public libraries in the City of Albuquerque where, in the past, he has checked out

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By contrast, when the term "limited public forum" is used to describe a type of *nonpublic* forum, First Amendment restrictions are permissible so long as they are "reasonable in light of the purpose served by the forum and are viewpoint neutral." Summum, 130 F.3d at 914-915. Such nonpublic fora include "public property that is not a designated public forum open for indiscriminate public use for communicative purposes. . . ." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392 (1993). The government creates "limited public forum" when it "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." Summun, 130 F.3d at 916.

While it should be noted that the terms "designated public forum" (opened or made available for a limited purpose) and "limited public forum" are not interchangeable, it also should be noted that the Tenth Circuit has "recognize[d] that the boundary between a designated public forum for a limited purpose (*e.g.*, Widmar) and a limited public forum (*e.g.*, . . . Lamb's Chapel) is far from clear." Summun, 130 F.3d at 916; see also Cook v. Baca, 95 F.Supp.2d 1215, 1221 n.7 (D.N.M. 2000) (noting confusion over terms "designated public forum" and "limited public forum"). Fortunately, this Court need not reach no farther than Hawkins, in which the Tenth Circuit, citing Kreimer II, included public libraries in the category of designated public fora. See Hawkins, 170 F.3d at 1287 ("Examples of designated public fora include . . . public libraries. . . .").

books, CDs, and DVDs; read magazines, newspapers, and other periodicals; made use of resource materials; and attended public meeting, events, and exhibits held at the libraries. [Doc. 44; Exh. 1, Affidavit of John Doe]. Each of these activities is consistent with the nature of a library, "a place dedicated to quiet, to knowledge, and to beauty[,]" Brown, 383 U.S. at 142, and an institution that at least one court has called "a storehouse of knowledge." Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 581 (6th Cir. 1976). Because public libraries are designated public fora, "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Perry, 460 U.S. at 45. In this case, the regulation in question amounts to a wholesale preclusion of registered sex offenders from all public libraries in the City of Albuquerque. In this sense, the City's regulation parallels the appearance regulation that was challenged in Armstrong, because the effect of both regulations, which completely deny certain patrons any and all library access, "is to prevent [those] patrons from engaging in *any* conduct within, or use of, the library, [thereby directly limiting] protected First Amendment activities such as reading, writing and quiet reflection. . . ." Armstrong, 154 F.Supp.2d at 75 (emphasis in original). 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." Perry, 460 U.S. at 45.

As an initial matter, the Court notes that, as the party opposing summary judgment, the City bore the burden of "set[ting] forth [in its *Response*] specific facts showing a genuine

issue for trial." Fed.R.Civ.P. 56(e). Moreover, 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 Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Lopez v. LeMaster, 172 F.3d 756, 759 (10th Cir. 1999). 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." [Doc. 47 at 4]. Nevertheless, in a *footnote*, the City states that

> the Court could assume, *hypothetically*, that the following occurred: The City entered 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, [Massachusetts] public library. On March 4, 2008, the Mayor of Albuquerque banned all registered sex offenders from City libraries.

[Doc. 47 at 4 n.1 (emphasis added)].

There can be no doubt that the City possesses a significant interest in protecting children from crime, in general, and from the danger and harm associated with their coming in contact with sex offenders, in particular. John Doe concedes as much. [See Doc. 44 at 13 ("Plaintiff concedes that the City's interest in protecting children from any danger, including crimes containing a sexual element, is a significant one for purposes of this constitutional analysis."). The regulation is content-neutral, so "the test is whether [the City's] policy is a reasonable restriction on the time, place, or manner of protected [First Amendment rights] that is 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Faustin, 423 F.3d at 1200 (*quoting* Perry, 460 U.S. at 45).

The Court concludes that the regulation in this case, as specifically written, 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. As did the appearance regulation at issue in Armstrong, the regulation here "prevent[s] certain patrons from engaging in *any* conduct within, or use of, the library. . . ." Armstrong, 154 F.Supp.2d at 75 (emphasis in original). Consequently, "protected First Amendment activities such as reading, writing and quiet reflection are directly limited." Id. This all-out ban is very different from the challenged regulations in both Kreimer cases and in Neinast, where patrons desiring access to those libraries could secure access merely by complying with the rules. See Kreimer II, 958 F.2d at 1264 ("[W]e do not read the rule to

bar permanently a patron from reentry to the Library once the patron complies with the requirements. . . .”); Neinast, 346 F.3d at 595 (*quoting* Kreimer II, 958 F.2d at 1264 (explaining that “the requirement that patrons wear shoes leaves open alternative channels for communication [because ‘s]o long as a patron complies with the rules, he or she may use the Library’s facilities.’”).

A regulation is “narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” Frisby v. Schultz, 487 U.S. 485 (1988). To be sure, “[a] complete ban *can* be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.” Id. (emphasis added). In this case, the Court does not view the regulation as narrowly tailored because, while the “targeted evil,” based on the City’s *hypothetical* example is (1) an increase in adult male presence, (2) between approximately the hours of 3:00 p.m. and 5:00 p.m., (3) on weekdays, (4) in libraries near schools, the regulation is not correspondingly limited in its sweep but, instead, provides absolutely that “[r]egistered sex offenders are not allowed in public libraries in the City of Albuquerque.” [Doc. 1; Exh. 1]. Thus, while the properly targeted evil is susceptible to pinpointing by time (approximately the hours of 3:00 p.m. to 5:00 p.m.); day (weekdays); location (libraries near schools, which, pursuant to a City-school agreement have been made available for students’ after-school studying); and offender (adult males), the regulation is far more expansive than would appear necessary to combat the unquestionably legitimate harm the City has identified. Accordingly, “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." Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388 (6th Cir. 1996) (city ordinance banning all residential yard signs was not narrowly tailored to serve significant governmental interest in aesthetics, nor did it leave open ample alternative channels for communication of information). Finally, while the government need not employ the absolute least restrictive means to achieve its desired result, "a time, place, or manner regulation may [not] burden substantially more speech than is necessary to further the government's legitimate interests[, since g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward, 491 U.S. at 799. As a wholesale ban that "prevents certain patrons from engaging in *any* conduct within, or use of [City of Albuquerque public] librar[ies]," Armstrong, 154 F.Supp.2d at 75 (emphasis in original) the regulation in question does precisely what is prohibited.

In addition to the fact that the regulation in the instant case is not narrowly tailored, the City has not demonstrated that it leaves open ample alternative channels of communication. In this sense, again, the regulation in question is more analogous to the appearance regulation at issue in Armstrong, and more unlike those challenged in the Kreimer cases and Neinast, where a previously expelled library patron could regain entry by complying with the rules. See Neinast, 346 F.3d at 595 (*quoting* Kreimer II, 958 F.2d at 1264 (explaining that "the requirement that patrons wear shoes leaves open alternative channels for communication [because 's]o long as a patron complies with the rules, he or she may use the Library's facilities.'").

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

The City attempts to show that open ample alternative channels for communication of information exist in the form of the University of New Mexico libraries and the library of Central New Mexico Community College. [See Doc. 47 at 5 ("Plaintiff does not utilize University of New Mexico libraries in Albuquerque. Plaintiff knows that the Central New Mexico Community College has a library in the City, but Plaintiff does not utilize that library.")]. These additional facts, however, do little to advance the City's proposition that ample alternative channels for communication of information exist, where the City has not also shown that these other libraries are available for John Doe's use. With respect to the libraries of the University of New Mexico, John Doe testified through his deposition that

"their book selection and their library contents are different from the public library. There are nowhere near as [many] mainstream works available at the UNM library. *Plus library privileges at the UNM library cost money*." [Id.; Exh. C, John Doe depo. at 34 (emphasis added)]. Given that John Doe undisputably lives on a monthly fixed income, it is not clear that he has the financial means to access the libraries of the University of New Mexico. As for the library at Central New Mexico Community College, John Doe testified that he does not utilize it. [Id.; Exh. C, John Doe depo. at 36]. There is no explanation in the record as to *why* he does not, or even if, as a non-student, he would be allowed to use it. He did, however, testify, that since his privileges at City of Albuquerque public libraries were taken away, he has been denied access to information, as well as "[t]he ability to do fairly extensive research [at] libraries [that] have both periodical and reference material and databases." [Id.; Exh. C, John Doe depo. at 34]. In John Doe's words, "there's been no way to really compensate for the loss that's equal to what the public library system provided." [Id.; Exh. C, John Doe depo. at 34]. Once again, as the nonmoving party, the City bore a summary-judgment burden of making an adequate showing on the essentials element of its case, as to which it would have the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Lopez v. LeMaster, 172 F.3d 756, 759 (10th Cir. 1999). In this case, the City has not satisfied its summary-judgment burden of demonstrating that the regulation in question leaves open ample alternative channels for communication of information.

The regulation in question (1) directly impacts the fundamental and protected First Amendment right to receive information, see Lamont, 381 U.S. at 308 (Brennan, J.,

concurring); (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, see Cleveland Area Bd. of Realtors, 88 F.3d at 388; and (3) does not leave open ample alternative channels for communication of information, cf. Neinast, 346 F.3d at 595. The regulation therefore creates "an unacceptable risk of the suppression of ideas." Am. Target Advertising, Inc., 199 F.3d at 1247. The regulation does not satisfy strict scrutiny.

2. Intermediate Scrutiny

In the alternative, the Court also concludes that the City's regulation banning registered sex offenders from public libraries fails the test of intermediate scrutiny. While

> the most exacting scrutiny [applies] to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content[, . . .] regulations that are *unrelated to the content of speech* are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Turner Broadcasting Sys. Inc. v. F.C.C., 512 U.S. 622, 642 (1994) (emphasis added) (*citing* Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

The Supreme Court has explained that "the 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" Turner Broadcasting Sys. Inc., 512 U.S. at 642 (*quoting* Ward, 491 U.S. at 791). The Court also has noted that, as a general rule, "laws that by their terms distinguish favored speech from disfavored speech on the basis

of the ideas or views expressed are content based[, while] laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." Id. For purposes of its "intermediate scrutiny" analysis, the Court assumes that the regulation in question is content neutral, inasmuch as it is silent with respect to the restricted parties' points of view. See Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

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).

Assuming without deciding that the regulation in question here satisfies elements (1) through (3), for reasons discussed more fully above, 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. The Court has already explained that, while the challenged regulation amounts to an outright ban keeping certain potential patrons from any use of the public libraries, the targeted evil is more precisely identifiable by time (approximately the hours of 3:00 p.m. to 5:00 p.m.); day (weekdays); location (libraries near schools, which, pursuant to a City-school agreement have been made

available for students' after-school studying); and offender (adult males). The Court therefore repeats its observation that the City's regulation is far more expansive than would appear necessary to combat the unquestionably legitimate evil the City has identified.[7]

F. The Fourteenth Amendment: Substantive Due Process

In addition to challenging the regulation on First Amendment grounds, John Doe also asserts that, in extinguishing his fundamental rights to receive information and to assemble at City of Albuquerque public libraries, the City has deprived him of substantive due process, in violation of the Fourteenth Amendment. [See Doc. 44 at 19-21].

The Fourteenth Amendment provides, in pertinent part, that states shall not "deprive any person of life, liberty, or property, without due process of law ." U.S. CONST. AMEND. XIV. The due process clause contains both a procedural aspect and "a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." Cty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (citations omitted).

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[7] Although the Court believes that strict scrutiny applies to the unique circumstances presented by the instant case, the Court, for purposes of making a complete record, nevertheless has analyzed the regulation in question under the alternative but heightened standard of intermediate scrutiny because while it is evident that the regulation directly impacts the fundamental First Amendment right to receive information, see, e.g., Lamont, 381 U.S. at 308 (Brennan, J., concurring); Armstrong, 154 F.Supp.2d at 75, it also can fairly be said that the regulation is content neutral, see Taxpayers for Vincent, 466 U.S. at 804. Because the regulation clearly burdens protected First Amendment rights, the Court does not analyze the regulation under the "rational basis" standard of review. Cf. KT.& G Corp v. Attorney General of State of Okla., 535 F.3d 1114, 1133-36 (10th Cir. 2008) (applying "rational basis" review, not strict scrutiny, where allocable share amendments resulting from tobacco litigation did not burden plaintiffs' First Amendment rights); see also Dodger's Bar & Grill, Inc. v. Johnson Cty. Bd. of Cty. Comm'rs, 32 F.3d 1436, 1441 (10th Cir. 1994) ("When a regulation does not impinge upon a 'fundamental right,' the state need only articulate a rational basis for the exercise of police power. . . .").

The Court need not devote significant time to an analysis of John Doe's due process claims because, with respect to those counts of his *Complaint* in which he had originally asserted *procedural* due process violations, he has voluntarily dismissed those claims and is not reasserting them. [See Doc. 36 (*Stipulation of Dismissal of Counts III and VII With Prejudice*); see also Doc. 51 at 18 ("Plaintiff dropped his procedural due process claim and is not reasserting it[.]")].

With respect to John Doe's claims that he has been denied *substantive* due process, the Supreme Court has held "that '[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Cty. of Sacramento, 523 U.S. at 842 (*quoting* Albright v. Oliver, 510 U.S. 266, 273 (1994)). Because, as explained in great detail above, the First Amendment provides an explicit source of constitutional protection for John Doe's claims, he cannot maintain a substantive due process claim as well. See Haagensen v. Pennsylvania State Police, 2010 WL 256578, at *18 (W.D.Pa. Jan. 20, 2010) (plaintiff could not maintain Fourteenth Amendment substantive due process claim in addition to her First Amendment claims, since First Amendment provided her "an explicit textual source of constitutional protection against" the challenged government behavior).

G. The Fourteenth Amendment: Equal Protection

As his final federal claim, John Doe contends that the effect of the regulation in

question is to deny him equal protection of the laws, as is guaranteed under the Fourteenth Amendment's equal protection provision, and that the City "has discriminated against [him] on the basis of his status as a registered sex offender without a rational basis." [Doc. 1; Exh. A at 6].

The Fourteenth Amendment provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. "'Strict scrutiny' and 'rational basis' are the two traditional standards used to determine the validity of legislation that is challenged as denying equal protection. The strict scrutiny standard is applied when a classification involves a suspect class *or affects a fundamental right.*" Edwards v. Valdez, 789 F.2d 1477, 1482 (10th Cir. 1986) (emphasis added). To be sure, "[g]overnment classification that *actually jeopardizes the exercise of a fundamental right* or a suspect class . . . must be reviewed under a strict scrutiny standard and must be precisely tailored to further a compelling governmental interest." Goetz v. Glickman, 149 F.3d 1131, 1140 (10th Cir. 1998) (emphasis added).

By contrast, if no fundamental right or suspect class is involved, "the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest." Goetz, 149 F.3d at 1140. This "rational basis" review constitutes the lowest level of equal protection scrutiny. Moreover, "legislation subject to rational basis review is presumptively constitutional [and] the burden is on the [challenging party] to establish that the statute is irrational or arbitrary and that it cannot conceivably further a legitimate governmental interest." United States v. Phelps, 17 F.3d 1334, 1344-45 (10th Cir. 1994).

Our Tenth Circuit has held that sex offenders do not constitute a suspect class. Riddle v. Mondragon, 83 F.3d 1197, 1207 (10th Cir. 1996). Accordingly, legislation, rules, and even dissimilar treatment that discriminate on the basis of sex-offender status routinely are reviewed—by the Tenth and other circuits—for a rational basis. See, e.g., Mariani v. Stommel, 2007 WL 3011332 (10th Cir. Oct. 16, 2007) (under rational review, regulation providing prisoner with right to appeal sex-offender classification if he had not been adjudicated of sex offense, but that did not provide such right to adjudicated offenders, did not violate equal protection); Lustgarden v. Gunter, 966 F.2d 552 (10th Cir. 1992) (Colorado sex-offense parole statute that dictated that parole for individuals convicted of sex offenses was discretionary, not mandatory, was rationally related to legitimate state interest of monitoring reintroduction of sex offenders into society); Doe v. Moore, 410 F.3d 1337, 1348 (11th Cir. 2005) ("Florida's various classifications and sub-classifications for sex offender registration are rationally related to a legitimate governmental purpose and, therefore, constitutional under the Equal Protection Clause."); United States v. LeMay, 260 F.3d 1018, 1031 (9th Cir. 2001) (Rule 414 of Federal Rules of Evidence bears reasonable relationship to legitimate governmental interest of allowing introduction at trial of relevant evidence to help convict sex offenders); Cutshall v. Sundquist, 193 F.3d 466, 482-483 (6th Cir. 1999) (Tennessee Sex Offender Registration and Monitoring Act, which required sex offenders to register with law enforcement agencies and allowed law enforcement officials to release registry information when necessary to protect the public, did not violate Equal Protection Clause because Act had rational basis in legitimate concerns about law enforcement and

public safety with respect to sex offenses); Roe v. Marcotte, 193 F.3d 72, 82 (2nd Cir. 1999) (Connecticut statute that, among other things, distinguished between individuals convicted of crimes characterized as sexual offenses and those convicted of other violent offenses, did not violate Equal Protection Clause).

This is not to say, however, that a rule or statute that imposes burdens on the basis of sex-offender status will always be deemed rationally related to a legitimate state interest. Such was the case in Doe v. Pennsylvania Bd. of Prob. and Parole, which involved an equal protection challenge to provisions of Pennsylvania's "Megan's Law" stating that any out-of-state sex offender who transferred his supervision to Pennsylvania was subject to community notification, whereas an individual who was convicted of the same offense in Pennsylvania would only be subject to community notification if, after a civil hearing, he had been designated a sexually violent predator due to a mental abnormality or personality disorder making that person likely to engage in predatory sexually violent offenses. Doe v. Pennsylvania Bd. of Prob. and Parole, 513 F.3d 95, 98 (3rd Cir. 2008) (internal quotation omitted). Applying "rational basis" review, the Third Circuit held that each of the four reasons[8] advanced by the Commonwealth of Pennsylvania as support for its position that its disparate treatment of in-state and out-of-state sex offenders was rationally related to the

[8] Those reasons were that (1) it would be impossible to replicate, for out-of-state offenders, the legal proceedings that Pennsylvania provided in-state offenders; (2) providing such proceedings to out-of-state offenders would increase time and expense; (3) the "harshness" of community notification differed for in-state and out-of-state offenders; and (4) the publicity given to a sex offender's trial in Pennsylvania rationalized the disparate treatment of out-of-state offenders whose trials were less likely to receive media attention in the Commonwealth. Doe, 513 F.3d at 108.

legitimate state interest of pubic safety was meritless and, therefore, irrational, particularly where Pennsylvania was a signatory to the *Interstate Compact Concerning Parole and Probation* ("the Compact"). Id. at 112. By signing and binding itself to the terms of the Compact, Pennsylvania had statutorily promised the other signatories that it would "approximate the same procedures and standards it applie[d] to its own probationers." Id. at 108. In treating out-of-state offenders differently from in-state offenders, Pennsylvania was altering the terms of the Compact by placing additional conditions on the transfer of parolees and probationers who otherwise would satisfy the Compact's requirements. Id. at 110-111. Because each of the four reasons proffered by the Commonwealth in support of the added burdens was contrary to the promises it made when it signed the Compact, none of those reasons could be considered rational. Id. at 112 n.1. In short, the circuit concluded that while "Pennsylvania's interest in protecting its citizens from sexually violent predators [was] certainly compelling . . . , subjecting out-of state sex offenders to community notification without providing equivalent procedural safeguards as given to in-state sex offenders [was] not rationally related to that goal." Id. at 112.

Because it determined that Pennsylvania's disparate treatment of in-state and out-of-state offenders could not survive even the deference accorded under "rational basis" review, the district court in Doe had not addressed whether Mr. Doe possessed a fundamental right subject to strict scrutiny and, therefore, neither did the Third Circuit. Doe, 513 F.3d at 107; see also Doe v. McVey, 381 F.Supp.2d 443 (E.D.Pa. 2005). However, it must be remembered that it is *either* the burdening of a fundamental right, *or* the involvement of a

suspect class that triggers strict scrutiny. See Edwards, 789 F.2d at 1482 ("The strict scrutiny standard is applied when a classification involves a suspect class or affects a fundamental right.").

In this case, even though John Doe, as a registered sex offender, is not a member of a suspect class, he has alleged (and the Court, as explained in depth above, has determined) that he possesses a fundamental First Amendment right to receive information, which the City has "actually jeopardize[d]" by enacting a wholesale ban prohibiting all registered sex offenders from accessing any and all City of Albuquerque public libraries. Goetz, 149 F.3d at 1140. The right to receive information is the necessary corollary to the protected First Amendment right guaranteeing freedom of speech. See Stanley, 394 U.S. at 564; Lamont, 381 U.S. at 308 (Brennan, J., concurring); Conant, 309 F.3d at 643 (Kozinski, J., concurring) ("[T]he right to hear and the right to speak are flip sides of the same coin."). Although the right to receive information may not be specifically guaranteed by the text of the First Amendment, it nevertheless is a fundamental right inasmuch as it is "necessary to make the express guarantees fully meaningful." Lamont, 381 U.S. at 308 (Brennan, J., concurring); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (the answer to whether a right is fundamental "lies in assessing whether [the] right [is] explicitly *or implicitly* guaranteed by the Constitution") (emphasis added).

Additionally, government restrictions on protected First Amendment activity occurring in a public library, which amounts to a designated public forum, see Hawkins, 170 F.3d at 1287, must satisfy the same "narrowly tailored" requirement that applies to

restrictions on protected First Amendment taking place in such "quintessential public fora" as are streets, parks, and public sidewalks." Perry, 460 U.S. at 45. That is to say, "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Carey v. Brown, 447 U.S. 455, 461-462 (1980).

The challenged regulation in the instant case, which, again, amounts to a wholesale ban extinguishing John Doe's fundamental and protected First Amendment right to receive information, is not "finely tailored," which is what the Fourteenth Amendment's equal protection provision demands when a fundamental right is burdened. See Carey, 447 U.S. at 461-462. As already explained above, the City has identified the "targeted evil" in this case as an increase in adult male presence between approximately the hours of 3:00 p.m. and 5:00 p.m. on weekdays in libraries near schools. [See Doc. 47 at 4 n.1]. The regulation, however, demonstrates no fine tailoring, as it provides that "[r]egistered sex offenders are not allowed in public libraries in the City of Albuquerque." [Doc. 1; Exh. 1]. As the challenged regulation is currently written, and employing the level of review that the Court is constrained to apply, the regulation does not satisfy the Fourteenth Amendment's equal protection clause. The City's regulation, in its present form, must be stricken.

III. CONCLUSION

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 possesses 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. In this case, having done just this, the Court concludes that the City's regulation, *as currently written* and *in its present form*, cannot stand. Accordingly, the Court will grant John Doe's summary-judgment motion.

IT IS, THEREFORE, ORDERED that *Plaintiff's Motion for Summary Judgment* [Doc. 43] is **GRANTED;**

IT IS FURTHER ORDERED that the City of Albuquerque be and hereby is **ENJOINED** from enforcing the terms of the Administrative Instruction banning registered sex offenders from public libraries, as that Administrative Instruction is currently written.

SO ORDERED this 31st day of March, 2010, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge