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**
Defendant-Appellant	)	

APPELLANT'S SUPPLEMENTAL BRIEF
ON QUESTION OF MOOTNESS

City of Albuquerque
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I.

INTRODUCTION

The City has not abandoned its initiative to completely ban sex offenders from municipal libraries, and this case is not mooted by the adoption of a partial ban while the complete ban is under review by this Court. The law supports the City's position because a decision will modify the behavior of the Parties, the mootness doctrine does not apply to First Amendment cases such as the case at bar, and there is a substantial likelihood of recurrence in the absence of a decision. The question on appeal is in fact a live controversy, and should not be rendered moot as a matter of law.

On September 16, 2008, the Albuquerque mayor executed an administrative instruction that banned registered sex offenders from the City of Albuquerque's seventeen public libraries at all times with no exceptions. *See, Complaint for Injunctive and Declaratory Relief*, ¶ 6. RP- 2 ("Complete Ban"). The lower court enjoined the Complete Ban on March 31, 2010, reasoning that "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 of communication." *Memorandum Opinion and Order*, RP-231. The lower court suggested sex offenders could constitutionally be banned from the libraries if the

Complete Ban was narrowly tailored and allowed alternative channels of communication. *Id.* The lower court concluded that the ban might survive if re-written according to the lower court's instructions:

> The challenged regulation in the instant case, which, again, amounts to a wholesale ban extinguishing John Doe's right to receive information, is not "finely tailored," . . .
>
> . . . the Court concludes that the City's regulation, *as currently written* and *in its present form* cannot stand.

RP-246 (emphasis in original).

The City appealed the injunction on April 28, 2010. To avoid being in contempt of the lower court's injunction pending the outcome of this appeal, Albuquerque's current mayor signed a new Executive Instruction 25 ("Partial Ban") on May 6, 2010. The Partial Ban allows registered sex offenders to visit the main library in downtown Albuquerque only on Thursdays and Saturdays between 10:00 a.m. and 6:00 p.m., and requires the sex offenders to sign in with security officers, provide photo identification, and stay out of the children's section of the library. *Id., see also,* Ekblaw, Jennifer, Not In My Library: An Examination of State and Local Bans of Sex Offenders from Public Libraries, 44 Ind. L. Rev. 919, 937 (2011).

The Partial Ban's opening sentence states it is written "[i]n response to the court order" appealed by the City a week earlier. The City takes the position that the Partial Ban, while better than no protection, is not as desirable as the Complete

Ban, and the City will revert to the Complete Ban if the injunction is overturned on appeal.

II.

COMPLIANCE WITH REQUIREMENTS OF ORDER FOR SUPPLEMENTAL BRIEFING

On October 20, 2011, this Court entered its Order for Supplemental Briefing ("Order") requiring briefs on the legal question of whether adoption of the Partial Ban moots the appeal. The Order requires "a copy of the revocation of the original Administrative Instruction and a copy of the new Administrative Instruction, together with the date when the original Administrative Instruction was rescinded and the date when the new Administrative Instruction was enacted."

Amended Executive Instruction No. 25 is attached as *Exhibit "A."* There is no separate document that revokes the original. The new Instruction became effective and withdrew the original when signed by the mayor on May 6, 2010. However, the City complied with the lower court injunction when entered on March 31, 2010, and began allowing sex offenders access to the libraries on April 1, 2010. The City takes the position that it should not be required to leave library users with no protection or violate the injunction to preserve this appeal.

III.

ARGUMENT

A. Standard of Review

If there is a live case or controversy, a case is not moot. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction. *Id.* " 'The question is whether granting a present determination of the issues offered will have some effect in the real world.' " *Id.* at 1110 citing *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005). In the case at hand, if the lower court is reversed, sex offenders who are currently allowed to enter libraries at certain times will not be allowed in the libraries at all. This is a real world effect from the perspective of those who want the safest possible access to learning and enjoyment in the public library forum, and from the perspective of the Plaintiff as well.

B. The Question of Whether a Complete Ban is Constitutional is a Live Controversy

1. A Case is Not Moot Where a Decision Will Modify Behavior

In *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010), Plaintiffs sought declaratory judgment that various governmental agencies and entities did not follow mandated procedures prior to adoption of a water distribution methodology that allegedly endangered a protected species. *Id.*,

601 F.3d at 1109-1110. But the key agency had adopted a new policy and ceased the allegedly objectionable conduct while the matter was on appeal. *Id*. at 1113. This Court held that the matter was moot, 601 F.3d at 1109-1110, reasoning that a case is moot if a decision will not affect the behavior of the parties.

In the present case, if the lower court is reversed, the City will change its behavior by reverting to the Complete Ban. Doe's behavior will change because he will no longer have access to the libraries. Additionally, the lower court will be instructed by this court regarding the proper adjudication of a facial challenge. The lower court will place the burdens where they belong and entertain presumptions in favor of the government in a facial challenge, as it should. The error will be corrected and the duty to protect the public will be left, where it belongs, on the mayor and the city council.

2. Vacatur is Necessary if City is Denied Appellate Review

If this Court decides the case is moot, then the decision below should be vacated. Otherwise, the City will have been denied its right to review a court order enjoining local government public safety initiative. As noted by this Court in *Silvery Minnow,* a party should not be forced to acquiesce to an order not reviewed on appeal:

> In general, "[w]hen a case becomes moot on appeal, the ordinary course is to vacate the judgment below and remand with directions to dismiss." *Kan. Judicial Review v. Stout,* 562 F.3d 1240, 1248 (10th Cir.2009). This is because "[a] party who seeks

> review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." [citation omitted].

Silvery Minnow, 601 F.3d at 1129. Therefore, the injunction should be reversed or, if the case is deemed moot, the injunction should be vacated.

C. The Mootness Doctrine Otherwise Does Not Apply

1. The Mootness Doctrine Does Not Apply to First Amendment Challenges

The public interest in a well defined First Amendment deserves consideration in deciding the justiciability of a lawsuit. For example, in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), the Court held that, where the parameters of the First Amendment are concerned, "a public interest in having the legality of practices settled, militates against a mootness conclusion."

Plaintiff-Appellee in the present case ("Doe") argues that the Complete Ban violates his right to receive information under the First Amendment. The City disagrees and argues that, even if the ban infringes Doe's rights under the First Amendment, which it does not, then, *arguendo*, City libraries are not a sole source of information critical to Doe's purported need for informed expression. The legal issue is sharply defined by the present live controversy. Other jurisdictions have banned sex offenders from traditional public fora where First Amendment protections are greater than the protection in a public library and been upheld by the courts. The balance of the alleged rights of a small class of convicted felons

against the safety of all library patrons is a sharply defined legal issue with public policy implications that bring the instant case within the public policy exception to the mootness doctrine.

2. There is a Substantial Likelihood of Recurrence in the Absence of a Decision

A case is not moot if that case is "capable of repetition but evades review." *City of Herriman v. Bell,* 590 F.3d 1176, 1182 (10th Cir. 2010). From the City's perspective, the issue presented may be respectfully framed as follows: Does a local government waive its right to appeal a court's invalidation of an executive instruction by amending the instruction to conform to the court order while the issue of whether the court erred is under review? Library users in Albuquerque should not be prejudiced by the fact that the City complied with a court order while appealing the injunction. A rule of law that moots an appeal under these circumstances denies a party's right to appeal.

Below, Doe sought an order prohibiting the City from infringing, in any way, his alleged fundamental right to enter public libraries. The thrust of Doe's case is that it is illegal for the City to treat sex offenders any differently than other persons in the libraries. The challenged feature of the instruction is the infringement of an alleged right to obtain information in Albuquerque libraries. The challenged feature was not removed by the Partial Ban. Doe would argue that the Partial Ban and Complete Ban disadvantage him in the same fundamental way,

because his access is limited in comparison to those not convicted of a sex offense. This is a zero sum conflict where one party wants a total prohibition and the other wants unlimited exercise of a previously unrecognized right. The controversy is live and the matter is anything but moot.

The case is capable of repetition because, if this Court denies review and vacates the lower court injunction as moot, the City will revert to the Complete Ban and the judicial cycle will repeat itself. Further, if this Court does not render a decision, Doe or others could sue on the Partial Ban or the City could promulgate a third regulation only slightly less effective than the Complete Ban but far more protective than the Partial Ban. If sex offenders have a fundamental right of access to public libraries which was harmed by being banned, then that ostensible harm is capable of repetition, unless a decision is entered. If library users who are not sex offenders are entitled to the full protection the City tried to provide, then the danger they face will continue repeatedly. The present case is not moot.

IV.

CONCLUSION

The present case is not mooted by the adoption of a Partial Ban while the Complete Ban is under review. The mootness doctrine does not apply to First Amendment cases, there is a substantial likelihood of recurrence in the absence of a decision, and a decision will modify behavior.

COMPLIANCE WITH TYPE VOLUME LIMITATION

The Brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Order required a brief of less than ten (10) pages and this Brief is nine (9) pages. 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 the Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman font.

Respectfully Submitted,

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I hereby certify that a true and accurate copy of the foregoing was served by e-mail and U.S. Mail on November 29. 2011, to:

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