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

JOHN DOE,

Plaintiff,

v. **No. CV-08-1041 MCA LFG**

CITY OF ALBUQUERQUE,

Defendant.

CITY OF ALBUQUERQUE'S REPLY TO PLAINTIFF'S RESPONSE TO CITY OF ALBUQUERQUE'S MOTION TO DISMISS

The City of Albuquerque submits this Reply to Plaintiff's Response [Doc. 9] to Defendant City of Albuquerque's Motion to Dismiss [Doc. 3].

I.

THE COMPLAINT IS SUBJECT TO DISMISSAL WITH PREJUDICE FOR FAILURE TO STATE A CLAIM

Plaintiff argues that the City filed its motion to dismiss prematurely. The argument misconstrues the City's view of the posture of this case in light of recently decided cases. The City filed a motion to dismiss the Complaint with prejudice because Plaintiff cannot plausibly create any set of facts that predicate the relief sought. A complaint may be dismissed with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure where the plaintiff cannot plausibly muster factual support for the claim. *Robbins v. Oklahoma,* 519 F.3d 1242, 1246 (10th Cir. 2008). In *Robbins*, the Court explained the "new" standards pertaining to dismissal of a Complaint with prejudice under 12(b)(6) as follows:

> 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.

519 F.3d at 1247, citing *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir.2007), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

If the executive order is constitutional on its face as a matter of law, the present case presents a perfect example for dismissal with prejudice under the new rule. If the executive order ("Order") is constitutional, Plaintiff is not entitled to relief. If the Order is unconstitutional, Plaintiff is entitled to relief. Plaintiff argues he is entitled to conduct discovery and submit an affidavit before the Court rules on the motion to dismiss. There is no affidavit that could be filed or fact that could be discovered that would change the reality that Plaintiff is a registered sex offender and the Order bans registered sex offenders from City libraries. Under *Twombly*, the Complaint cannot survive based on some "metaphysical possibility that *some* plaintiff could prove *some* set of facts" showing that the Order is unconstitutional on its face.

The legal barrier this Plaintiff cannot overcome is that, even in a traditional public forum such as a public park, where expression and assembly have long been held inviolate under our jurisprudence, government can ban sex offenders because of the danger they present to others, who also have rights of expression and assembly in that forum. Plaintiff's Response relies on authorities that do not address the limited rights of a convicted sex offender in comparison to persons who have not been convicted for sexually victimizing another person.[1] All convicted

[1] For example, felons do not have a right to possess firearms. *Black v. Snow,* 272 F.Supp.2d 21, 30-31 (D.D.C.2003). In many jurisdictions, sex offenders are not allowed to live near school grounds or public parks where children may be found. *Doe v. Schwarzenegger*, 476 F.Supp. 1178 (E.D.Cal. 2007) (reversed on other grounds); *Doe v. Miller,* 405 F.3d 700 (8th Cir. 2005). While sex offenders argue they are entitled to hearings to determine whether they are currently dangerous, no Court has found that other felons are entitled to periodic hearings to determine if they have rehabilitated themselves to the point that society is not at risk if they are allowed to exercise the full panoply of rights reserved for the rest of society. Our laws tip the scales in favor of protection of the public in comparison to the rights of those convicted for a felony and do not accept the premise that felons are entitled to continual periodic process to assess current dangerousness.

felons lost certain rights upon conviction and sex offenders are the most constrained class of felon because of the high rates of recidivism associated with their crimes.

II.

ARGUMENT

A. Plaintiff Does not Have Standing to Vindicate the Rights of Other Sex Offenders

Plaintiff argues the Order sweeps too broadly because it applies to sex offenders registered under sex offender registration statutes from other states where government might not be able to ban sex offenders from libraries without a hearing. *Response* at 6. However, Plaintiff is registered under the New Mexico statute. *Complaint*, ¶ 5 ("Plaintiff is registered with the State of New Mexico as a convicted sex offender.") The Order pertains to sex offenders who had library cards issued by City of Albuquerque libraries. Plaintiff does not explain how the Order violates the rights of sex offenders registered in other states and, even if there was an argument here, Plaintiff does not have standing to vindicate the rights of other sex offenders.

The New Mexico Sex Offender Registration and Notification Act ("SORNA"), pertains to individuals convicted of certain crimes listed in the Act. NMSA 1978 § 29-11A-3 (2007). Depending upon the type of conviction and when they were convicted, some offenders do not have to register or no longer have to register. NMSA 1978, § 29-11A-5 (2007). If Plaintiff is claiming he was wrongfully required to register by the State of New Mexico, the Complaint does not make that allegation and the issue of the constitutionality of SORNA is not before the Court.

If Plaintiff is trying to vindicate the rights of other sex offenders, Plaintiff lacks the required standing. Plaintiff does not have standing to vindicate the rights of others. *American Civil Liberties Union of New Mexico v. City of Albuquerque,* 2008-NMSC-045, ¶ 19, 144 N.M. 471, 479. Standing is particularly important where a plaintiff wants a Court to invalidate a law

enacted by a co-equal branch of government. *D.L.S. v. Utah* 374 F.3d 971 (10th Cir. 2004). In *D.L.S.*, Plaintiff challenged the constitutionality of a Utah Statute, and the Court reasoned Plaintiff lacked standing as follows:

> Article III of the Constitution limits the jurisdiction of the federal courts to particular "cases" or "controversies." The case or controversy requirement helps preserve appropriate separation of powers between the courts and the other branches, [citation omitted] and provides courts with "that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." [citation omitted]

374 F.3d at 973. Under New Mexico and Tenth Circuit law, John Doe does not have standing to challenge the Order on behalf of others. The Order applies to registered sex offenders and Plaintiff is a registered sex offender. To the extent John Doe seeks to invalidate the Order as applied (procedural due process), the Complaint also fails as demonstrated in the Motion to Dismiss and the sections that follow.

B. Convicted Sex Offenders no not have a Fundamental Right of Access to Limited Public Forums

There is no fundamental right at issue under existing precedent. Plaintiff argues that he has a fundamental right to receive information in a public library. *Response* at 2 citing *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) and *Armstrong v. Dist. of Columbia Public Library*, 154 F.Supp.2d 67 (D.D.C. 2001). *Reno* held that the government cannot censor information available on the internet at large and does not deal with libraries. *Reno* simply stands for the proposition that content based restrictions of free expression are subject to strict scrutiny. John Doe was not excluded from the libraries because of the content of the information he seeks or content of the message he supposedly wants to convey after assimilating that information. *Reno* does not shed any light on the issue at bar.

Armstrong is one vein of a split in authority holding that the strict scrutiny test applies when a public library adopts a rule that allows librarians to exclude certain homeless persons based on their appearance or personal hygiene. 154 F.Supp.2d at 77 ("Accordingly, because plaintiff's access to the Library was restricted based upon his appearance, the appropriate standard to apply in this case is the stricter, 'narrowly tailored' standard of review.") The *Armstrong* Court held that such a regulation is inherently vague and therefore subject to procedural guarantees to insure fair application. *Id.* The City does not dispute the fact that government has to provide due process to review subjective determinations that impact constitutional rights. However, the Order in the present case is purely objective and based on a State of New Mexico registry. *Armstong* is not helpful.

Plaintiff asserts that the right to receive information is inextricably linked to the right of free expression, *Response* at 3 citing *LaMont v. Postmaster General*, 381 U.S. 301 (1965); *Providence Journal Co. v. City of Newport*, 665 F.Supp. 107 (D.R.I. 1987); *Board of Education v. Pico,* 457 U.S. 853 (1982). John Doe does not allege that he cannot exercise his right to free expression unless he has access to information that is only available to him in Albuquerque public libraries. To the extent John Doe's Complaint could be construed to assert a protected right of expression of ideas John Doe can only form from information he obtains at City of Albuquerque libraries, there is no authority on that issue and the Court is faced with an issue of first impression should it elect to construe the Complaint that broadly. In the context of a motion to dismiss, the Court is not required to assume that Plaintiff can prove an impossible or highly unlikely premise, particularly where the premise is not plead. *VanZandt v. Oklahoma Dept. of Human Services,* 276 Fed.Appx. 843, 847 (10th Cir. 2008) (Plaintiff's Complaint must cross the line of the conceivable into the realm of the plausible).

In *Pico*, the School Board ordered certain "offensive" books removed from the library. The *Pico* Court held that this kind of censorship is the purest form of an unconstitutional prior restraint on protected speech. 457 U.S. at 872. *Pico* does not hold that free expression depends on information available only at public libraries. The Order does not pertain to the content of information available at Albuquerque libraries. *Pico* does not advance the issue at hand.

C. A Convicted Sex Offender Does not Have a Right to Attend a Meeting in a Library

John Doe argues that the Order violates his right to freely associate with others at meetings at the libraries. *Response* at 4. There is no need to analyze the general authorities Plaintiff cites for the proposition that there is a right to association under the First Amendment because the City certainly does not dispute the existence of that right. However, Plaintiff does not cite any authority holding that this right extends to a sex offender who wants to attend a meeting in a public meeting room in a library. Plaintiff's case falls apart because he compares the rights of convicted sex offenders to the rights of the rest of society. Plaintiff cannot avoid the legal distinction by ignoring it. For example, people can live where they choose, but sex offenders cannot live near schools or parks where children tend to be found. *Doe v. Schwarzenegger*, 476 F. Supp. 1178 (E.D.Cal. 2007) (reversed on other grounds); *Doe v. Miller,* 405 F.3d 700 (8th Cir. 2005).

A meeting room in a library is a limited public forum. *Concerned Women for America, Inc., v. Lafayette County*, 883 F.2d 32, 34-35 (5th Cir.1989) (library's auditorium was a forum created by government designation for First Amendment purposes); *Faith Center Church Evangelistic Ministries*, 480 F.3d 891, 910 (9th Cir.2007) (holding that library's meeting room was a limited public forum). Research does not reveal any case holding that a meeting room in a library is a traditional public forum. In the Motion to Dismiss, the City cited cases holding that

government can ban sex offenders from parks, which are traditional public forums. Plaintiff has not distinguished or addressed the parks cases. If government can ban sex offenders from traditional public forums, then it can ban sex offenders from limited public forums as well.

D. Procedural Due Process

Plaintiff's due process argument requires a brief overview of sex offender registration laws because Plaintiff is arguing he is entitled to a hearing to ascertain whether he currently presents a danger to others and current dangerousness is not at issue in the type of registration law the State of New Mexico has adopted. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. §14071 et seq., was enacted in 1994. *United States v. Kapp*, 487 F.Supp.2d 536, 538 (M.D. Pa. 2007). The Jacob Wetterling Act is a federal funding statute that "condition[ed] certain federal law enforcement funding on the States' adoption of sex offender registration laws and set minimum standards for state programs." *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). These sex-offender registration laws and state programs are commonly referred to as "Megan's Laws," and have been enacted on a state-by-state basis throughout the country. *Id.*

Some states enacted Megan's Laws that require all persons convicted of certain sex offenses to register for various periods of time. Other states enacted Megan's Laws that require registration but additionally stratify sex offenders into various tiers depending upon the nature of the conviction or the degree of dangerousness the offender currently presents. Different tiers impose different restrictions on the offender. Sex offenders frequently litigate the propriety of a tier assignment. No law requires a state to adopt a tiered system.

States that do not have tiered systems can be referred to as "blanket" registration states in the sense that they require all sex offenders convicted of certain crimes to register without

reference to how dangerous they may be. Blanket registration is subject to criticism because it arguably gives the sex offender little incentive to improve through rehabilitation to move to a less restrictive tier. On the other hand, blanket registration is arguably fairer because it turns on objective criteria established by the legislature and not upon the subjective determinations of probation officers, psychiatrists and others.

New Mexico uses a blanket system that requires certain sex offenders convicted after July 1, 2005 to register. NMSA 1978, § 29-11A-5.1 (2005), citing L. 2005, Ch. 279, § 14. In a tiered system, an offender may be entitled to a hearing when the state assigns the offender to a tier based on current dangerousness. But in a blanket system where registration is based solely upon conviction for a listed crime, a hearing is not required because there are no facts a hearing could resolve. The Court in *Helman v. State*, 784 A.2d 1058 (Del. 2001), explained an important distinction in the case at hand as follows:

> As noted, under Delaware's Sex Offender Registration Statute, there is no discretion in tier level assignment. Unlike other states' statutory schemes, there is no independent decision-making under the Delaware statute to determine to which Risk Assessment level a convicted offender will be assigned. The discretionary risk assessments used in classifying sex offenders for notification purposes in states such as New Jersey involve factual determinations necessarily implicating concerns of procedural due process. Those factual determinations are absent in Delaware's statutory scheme.

784 A.2d at 1069. See also, *Doe v. Pataki,* 3 F.Supp.2d 456, 470 (S.D.N.Y. 1998) (sex offender entitled to hearing to challenge tier assignment). New Mexico is like Delaware and not like New Jersey. There is no independent decision making in New Mexico to determine whether a particular offender is currently dangerous or what tier assignment applies. The Order is based on SORNA and surely cannot be construed to require that which SORNA does not require. The Order is not required to apply only to registered sex offenders who are currently dangerous.

John Doe's due process argument herein is a collateral attack on SORNA and all blanket type statutes. The due process issue was rejected in *State v. Druktenis*, 2004-NMCA-032, ¶ 49, 135 N.M. 223, 239, 86 P.3d 1050, 1066, where the Court approved the New Mexico scheme's lack of current dangerousness assessments. As applied to John Doe, the Order pertains exclusively to a class defined by a State law.

John Doe relies on *State v. Bani,* 36 P.3d 1255 (2001), probably because it is the only case in the nation where a court invalidated a blanket type statute and held that hearings on current dangerousness are required. There is no federal case holding that tiered statutes are required and the Jacob Wetterling Act does not specify which type of statute a state must adopt. In *Druktenis*, the New Mexico Court of Appeals, like every other State in the nation that has reached the question (except Hawaii), approved the blanket approach and held that sex offenders are not entitled to a hearing on current dangerousness. 2004-NMCA-032, ¶ 49, 135 N.M. 223, 239, 86 P.3d 1050, 1066. John Doe is asking this Court to make a finding that the New Mexico legislature has not been willing to make and only the Hawaii Supreme Court has made. *Bani* is an inapplicable anomaly.

As far as John Doe's argument that some form of process is required when free speech is at issue, the argument is extinguished by the cases which have held that government can ban sex offenders from parks. e.g., *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004); *Standley v. Town of Woodfin,* 186 N.C.App. 134, 650 S.E.2d 618 (Ct. App. N.C. 2007). Parks are traditional public forums where free expression is more sacrosanct that in limited public forums like libraries. If government is not required to give a sex offender a hearing before banning him from a public park, then government is not required to give him a hearing before banning him from a public library.

E. John Doe is not Entitled to Conduct Discovery on the Issue of Whether the Order was Necessary

John Doe asks for discovery so he can depose Albuquerque librarians to supposedly establish that the libraries were safe without the Order. The question before the Court is whether the Order is Constitutional on its face, not whether City staff or John Doe thinks the Order was unnecessary.

The sex offender in *Standley v. Town of Woodfin*, 186 N.C.App. 134, 650 S.E.2d 618 (N.C.App. 2007), argued that the city had to show a compelling interest in banning sex offenders from parks and that the ordinance failed because it did not state that the purpose of the ordinance was to protect children from sex offenders. 650 S.E.2d at 621. In disposing of the argument, the *Woodfin* Court noted that the United States Supreme Court has already recognized the inherent danger in reintegrating sex offenders into society and a law need not facially declare a proposition firmly established as a matter of law. *Id*. at 622. While it could be true, *arguendo*, that some people thought the libraries were safe enough before sex offenders were banned, the determination of whether safeguards were required is for Albuquerque's elected officials.

F. The New Mexico Constitution Does Not Grant Sex Offenders a Right of Access to Public Libraries

John Doe argues that free expression under the New Mexico Constitution is interpreted more liberally than free expression under the First Amendment to the United States Constitution and that this additional protection invalidates the Order. *Response* at 11, citing *City of Farmington v. Fawcett*, 114 N.M. 537, 843 P.2d 849 (Ct. App. 1992). In *Fawcett*, the Court held that the First Amendment allows government to regulate "obscenity" based on a "prurient

interests of the community" standard while the question in New Mexico is whether the obscenity is "intolerable." *State v. Rendleman,* 2003-NMCA-150, ¶ 41, 134 N.M. 744, 756 (Ct. App. 2003). Plaintiff does not explain how *Fawcett* helps him. While it is true that the *Fawcett* Court held that obscenity standards are more liberal under the New Mexico Constitution, the holding has no value in the present case because the standards for obscenity are not at issue.

Research does not reveal any New Mexico case holding that more free speech is allowed on public property in New Mexico than elsewhere. New Mexico Courts follow the same sliding scale federal courts follow with respect to the scope of the right being measured by the nature of the forum. *State v. McCormack*, 101 N.M. 349, 353, 682 P.2d 742, 746 (Ct. App. 1984). In *McCormack*, the Court held that streets and parks are traditional public forums where free expression and assembly rights are protected by strict scrutiny, but jails and military bases are limited public forums where the government need merely show a rational basis for banning protestors. *Id.* The *McCormack* Court followed federal precedent for its holding. *Id*., citing *Adderley v. Florida*, 385 U.S. 39 (1966); *Greer v. Spock*, 424 U.S. 828 (1976); *United States Postal Service v. Greenburgh Civic Assns*., 453 U.S. 114 (1981). Thus far, no case has held that sex offenders have a right of access to limited public forums and several cases have held that sex offenders can be banned from traditional public forums. There is no reason to conclude that a New Mexico Court would come to a different conclusion.

III.

CONCLUSION

The legal barrier Plaintiff cannot overcome is that, even in a traditional public forum such as a public park, where expression and assembly have long been held inviolate under our jurisprudence, government can ban sex offenders because of the danger they present to others,

who also have rights of expression and assembly in that forum. Plaintiff's Response relies on authorities that do not address the limited rights of a convicted sex offender in comparison to persons who have not been convicted for sexually victimizing another person. The Complaint fails the state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully Submitted,

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