IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOHN DOE,

Plaintiff,

vs. No. CV 08 1041 MCA LFG

CITY OF ALBUQUERQUE,

Defendant.

RESPONSE TO DEFENDANT CITY OF ALBUQUERQUE'S MOTION TO DISMISS

COMES NOW THE PLAINTIFF, through the undersigned counsel, and respectfully submits this response to Defendant City of Albuquerque's *Motion to Dismiss* (Doc. No. 3, filed November 6, 2008).

I. STANDARD OF REVIEW[1]

> [In reviewing a Rule 12(b)(6) motion to dismiss,] "we must accept as true all well-pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff." *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1164 (10th Cir.1996). "The 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." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999) (quotation omitted).

Sunrise Valley, LLC v. Kempthorne, 528 F.3d 1251, 1254 (10th Cir. 2008). For the reasons set forth herein, the motion should be denied because all of Plaintiff's claims are pled with the requisite legal sufficiency.

[1] In its *Motion to Dismiss*, Defendant employs various arguments that ignore the pertinent standard under Fed. R. Civ. P 12(b)(6). For example, the City argues that "There is no authority supporting the proposition than an executive order that bans sex offenders from libraries is unconstitutional. Therefore, the Complaint fails to state any claim upon which relief may be granted." *Motion* at 6. Plaintiff respectfully submits that such arguments are unfounded. The Court must engage in the analysis of whether Plaintiff's *Complaint* has pled claims for relief with the requisite legal sufficiency.

In its *Motion to Dismiss*, the City spends a great deal of its argument discussing various points of fact and law that are irrelevant to this Court's analysis of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), an analysis that tests the legal sufficiency of the *Complaint*. Plaintiff feels compelled to raise the concern that the City's motion seems more properly pled as a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Should the Court construe the motion in that manner, the Plaintiff would respectfully request the opportunity to file a Fed. R. Civ. P. 56(f) affidavit. Absolutely no discovery has been had in this matter.[2] "[I]t strikes us as unfair to decide a motion for summary judgment improperly styled as a motion to dismiss without benefit of discovery to plaintiff." *Taylor v. Unifund Corp*., 1999 WL 33545372 at 1 (N.D.Ill. 1999).

II. THE MOTION SHOULD BE DENIED BECAUSE ALL CLAIMS HAVE BEEN PLED WITH THE REQUIRED LEGAL SUFFICIENCY.

A. Plaintiff has properly pled his First Amendment claims.

1. Plaintiff possesses First Amendment rights to receive information and the right to free speech that have been violated by Defendant.

The City contends that Plaintiff cannot prevail on his First Amendment claims but fails to acknowledge the fundamental rights at stake and the proper test to be applied when those rights are affected by governmental action.[3] Plaintiff possesses a First Amendment right to receive information at libraries. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F.Supp.2d 67, 75

[2] Unless the parties are able to reach an agreement on stipulated facts, Plaintiff anticipates the need to conduct some limited discovery to develop the record on the factual issues that are currently in dispute. For example, the Plaintiff is entitled to information relied upon by Defendant City in adopting its Administrative Instruction. Such information will go directly to whether the City's action was taken to address a significant or compelling state interest, and whether the action taken was the least restrictive means to that end. Under Rule 56(f), Plaintiff should have the opportunity to gather this evidence before the Court rules on Defendant's motion.

[3] For a discussion of the proper test, please see *Section III, infra.*

(D.D.C. 2001)(there is "long-standing precedent supporting plaintiff's First Amendment right to receive information and ideas, and this right's nexus with access to public libraries") citing *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 482-483 (1965); *see also Kreimer v. Bureau of Police for Town of Morristown,* 958 F.2d 1242, 1256 (3d Cir. 119) ("This right, first recognized in *Martin* and refined in later [F]irst [A]mendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information."(citation omitted)). In addition to the right to receive information, John Doe has a First Amendment right to speak that is inextricably linked to his right to receive information.

The right to free speech necessarily contains the right to receive information and vice versa. *LaMont v. Postmaster General,* 381 U.S. 301, 308 (1965). In *LaMont,* the Supreme Court recognized that any right to free speech or free expression contains the right to receive information. "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. See also Providence Journal Co. v. City of Newport,* 665 F.Supp. 107, 110 (D.R.I.1987) ("[T]he right to receive information is the indispensable reciprocal of any meaningful right of expression.")(internal quote omitted). Moreover, in *Board of Education v. Pico,* 457 U.S. 853 (1982), a case involving a school library, the Supreme Court noted that the right to free speech and the right to receive information are inextricably linked. "[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them… More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Id*. at 867. Plaintiff claims the City has violated these rights,

and has pled claims for these violations in his *Complaint for Injunctive and Declaratory Relief* (Doc. No. 1, Ex. 1 filed with this Court on November 6, 2008), ¶¶ 5- 15.

2. Plaintiff's claim brought to vindicate his First Amendment right to peaceably assemble has been pled with the requisite legal sufficiency.

The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). The right to assemble is protected by the First Amendment to the United States Constitution. Restrictions of the right are proper only when they relate to the time, place, or manner of the assembly and are narrowly tailored to serve significant governmental interests and leave open ample alternative channels of communication. *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985).

The right of assembly is the right to physically hold and attend meetings, marches, pickets, demonstrations, parades, and the like. *See Hague v. Committee for Indus. Org.*, 307 U.S. 496, 512 (1939). To prevail on a First Amendment claim for violation of the right to freely associate and assemble in public areas, a plaintiff must show that the defendant's actions unduly restricted his or her rights. *Big Momma's Soul Kitchen v. Louisville-Jefferson County Metro Government*, 551 F.Supp.2d 620, 626 (W.D.Ky. 2008); s*ee also ACT-UP v. Walp*, 755 F.Supp. 1281, 1290 (M.D.Pa. 1991) (holding that plaintiffs would suffer irreparable harm to First Amendment rights if not allowed to attend various government hearings and other meetings in government buildings). Here, Plaintiff alleges that Defendant's ban on his right to enter the library affects his rights to attend meetings and to

peaceably assemble with other Albuquerque citizens. In the past, Plaintiff has attended numerous such events at the City's libraries and, but for the ban, would have continued doing so. *See Complaint*, ¶ 10. Under the current ban, Plaintiff's First Amendment right to peaceably assemble is severely curtailed. Plaintiff's claim regarding the right to peaceable assemble has been pled in a legally sufficient manner. Accordingly, Defendant's motion should be denied.

B. Plaintiff has properly pled that Defendant City's Administrative Instruction violates Procedural Due Process.

Procedural due process claims undergo a two-step analysis: "the first asks whether there exists a liberty or property interest which has been interfered with by the State, … the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky v. Dep't of Corrections*, 490 U.S. 454, 460 (1989). The City is wrong when it argues that *Connecticut Dep't of Public Safety v. Doe* ("*CDPS*") forecloses Plaintiff's procedural due process argument in this matter for two reasons: 1) in *CDPS*, there were no fundamental First Amendment rights at stake, and 2) unlike here, the website registry in *CDPS* was based explicitly and *solely* on criminal conviction.

In *CDPS*, the Supreme Court held that "[u]nless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness [of the sex offender] is a bootless exercise." *Id.*, 538 U.S. at 7-8. That is precisely what Plaintiff in this case *does* allege – that the City's regulation conflicts with the substantive protections of the First Amendment – and accordingly, Plaintiff is entitled to more process than the plaintiffs in *CDPS.*

In *CDPS*, the interest at issue was one commonly known as "stigma-plus," that is, the stigma of being classified as a sex offender on website. *Id.*, 538 U.S. at 6. Without deciding

what the liberty interest was at stake, the Supreme Court held that the pre-deprivation process provided was sufficient because the website was explicit in its inclusion of offenders based solely on their criminal conviction and no hearings on that fact were necessary, beyond those provided in the criminal process. *Id.* However, the City's ban in this case is not based on *conviction* but rather on *registration* requirements, including the ambiguous requirement that all persons are banned who "currently register under the Megan's law of any state"; there is no requirement that conviction serve as the basis for that registration. *See* Exhibit 1 to Plaintiff's *Complaint*. This broad requirement sweeps much broader than the website in *CDPS* and accordingly, more pre-deprivation process is required.

Because *CDPS* does not necessarily preclude the full procedural due process analysis, the Court must examine whether the City's ban provides sufficient process by employing the well-established balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous depravation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id., 424 U.S. 319, 335 (1976).

Unlike the website registration at issue in *CDPS*, the private rights implicated here are fundamental in nature. *See* Section II., A., *supra.* Accordingly, the first prong of the *Mathews* must weigh heavily in the Court's calculation regarding what process is due.

Regarding the second prong, the risk of erroneous deprivation of the right to access library information is great. The Supreme Court of Hawaii addressed the risk of erroneous deprivation under that state's registration law as follows:

> Without any preliminary determination of whether and to what extent an offender represents a danger to society, the level of danger to the public posed by any particular sex offender, if any, remains unknown. Surely, not all offenders present a significant danger to the public. Yet, [Hawai'i Revised Statutes] chapter 846E currently deprives *all* offenders--including those who present no danger to the community and are not likely to recidivate--of these interests *automatically*, for life. Therefore, persons convicted of crimes listed under HRS chapter 846E who do not pose a significant danger to the community are at substantial risk of being erroneously deprived of their liberty interests.

State v. Bani, 36 P.3d 1255, 1267 (Haw. 2001) (emphasis in original). Similarly, the risk of erroneous deprivation under the City's comprehensive ban is great.

Finally, the interest of the City in this matter is not perfectly clear at this point and, like other issues in this matter, lacks the benefit of discovery.[4] It is unknown what less restrictive means of vindicating its interest are available to the City. What is clear that is that Plaintiff has sufficiently pled this claim (*see Complaint* ¶¶5-13, 19-21), and accordingly, the motion must be denied.

C. Defendant's motion should be denied as to Plaintiff's Substantive Due Process and Equal Protection claims.

1. Plaintiff has alleged that fundamental rights are at stake.

Since, as set forth above, a Plaintiff's fundamental rights have been infringed upon, the government must prove that the infringement is narrowly tailored to serve a compelling state interest in order to meet the protections of the substantive component of the Due

[4] Additionally, whether the chosen method is the least restrictive means of the City to accomplish its goals (or whether it is even an effective means of doing so, at all) should be explored in discovery before the Court enters a judgment for either party. In discovery, for example, Plaintiff will discover evidence by way of depositions of City librarians that demonstrates that the City's purported interest is less significant than that which is proffered *ipse dixit* by the City in its motion to dismiss. A deposition will illuminate what current safeguards utilized by the City libraries protect the City's interest. If discovery reveals the extent of current safeguards, the City's interest (the third prong of the *Mathews* test) in the Administrative Instruction would be lessened and more process would be required prior to depriving the Plaintiff of his fundamental rights. Under those facts, Plaintiff would certainly prevail on his procedural due process claim.

Process Clause of the Fourteenth Amendment. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). While protecting children from sexual assault is a compelling state interest, the City's ban is not narrowly tailored. "A narrowly tailored ordinance would not strike at an evil with such force that constitutionally protected conduct is harmed along with unprotected conduct." *State v. Burnett*, 755 N.E.2d 857, 867 (Ohio 2001). Plaintiff has adequately pled his substantive due process claim because he has alleged that the City's ban burdens his fundamental rights and is overbroad. *Complaint*, ¶ 27-29.

2. Even under rational basis, Plaintiff alleges that the ban violates substantive due process and equal protection.

a. Substantive Due Process and Equal Protection merge only when a fundamental right is *not* at issue.

The City incorrectly merges the substantive due process and equal protection analyses in this matter, relying upon *State v. Druktenis*, 2004-NMCA-032, ¶55, 135 N.M. 223, 86 P.3d 1050. The respective analyses only merge should the Court make certain findings (*e.g.*, that no fundamental right is at stake in this matter). It is true that Plaintiff's equal protection claim will be analyzed under the "rational basis test" (whether the governmental action is rationally related to a legitimate governmental interest); this is so because there is no "suspect class" at issue. *Nordlinger v. Hahn***,** 505 U.S. 1, 21 (1992). However, under Plaintiff's substantive due process claim, the lowest tier scrutiny - rational basis - only applies if the Court decides that a fundamental right is not at issue. Only *then* do Plaintiff's substantive due process and equal protection claims merge, because both tests would employ the rational basis test. *State v. Druktenis*, 2004-NMCA-032, ¶55; *see also Pearson v. Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir.1992) (equal protection and substantive due process merge when no suspect classifications are involved).

b. Even if the Court decides that the substantive due process and equal protection claims do merge, Defendant's motion fails.

For the reasons set forth above, Plaintiff alleges that rational basis does not apply to Plaintiff's substantive due process claim, because fundamental rights are at stake. *Glucksberg*, 521 U.S. at 721. Even if, at the appropriate time, the Court should disagree and apply rational basis when reviewing Plaintiff's substantive due process and equal protection claims, Plaintiff has still pled his claims with the required legal sufficiency. *Complaint* ¶¶ *Complaint*, ¶ 27-29, 32-34. Plaintiff has alleged that the ban is overbroad and lacking a rational basis. *Id.*

When a regulation is a result of public animus aimed at a particular group (even if the group is not a "suspect class"), the Court should employ what is called "rational basis with bite." *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (applying rational basis under the equal protection clause to strike a local ordinance as unconstitutional that was aimed at individuals with developmental disabilities); *Romer v. Evans*, 517 U.S. 620 (1996)(striking down a state constitutional amendment aimed at blocking civil rights laws based on sexual orientation).

Additionally, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. While this argument lacks the benefit of discovery to discern what basis the City relied upon (and whether it was rational or arbitrary), the obvious overbreadth of the City's ban undermines an effort to portray it as reasonable. *See Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (striking a law forbidding distribution of contraceptives to

unmarried persons as underinclusive, overbroad, and without a rational basis). For this reason, the City's motion should be denied as to the claims.

D. Plaintiff has pled legally sufficient state law claims which must be interpreted independently from the federal claims because the of the broader protections granted by the New Mexico Constitution.

For the reasons set forth above, Plaintiff has pled legally sufficient claims for relief regarding both federal and state claims. However, in its motion to dismiss, the City alleges that only federal should apply (*Motion* at 4-5). With the exception of the Plaintiff's due process claims, the City is wrong regarding each independent state law claim. A bona fide, separate, adequate and independent state law ground exists under the New Mexico Constitution for each of the other state claims alleged (*see Complaint for Injunctive and Declaratory Relief*, Counts V, VII, IX). Accordingly, the Court should rule separately on each of those claims under state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Alternatively, the Court should certify the question of the scope of the state constitutional provisions to the New Mexico Supreme Court, which is within this Court's sound discretion. *Oliveros v. Mitchell*, 449 F.3d 1091, 1093 (10th Cir. 2006).

1. New Mexico courts have explicitly departed from federal precedent on free speech claims and equal protection claims.

New Mexico courts rely upon the "interstitial approach" when deciding whether to apply a state constitution analysis instead of one pursuant to the federal constitution. Under this approach, the Court may diverge from federal precedent because of "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 783, 932 P.2d 1, 7.

It is now axiomatic that the New Mexico Constitution may be construed so as to offer greater protection for individual rights than the U.S. Supreme Court has afforded under the

federal constitution for free speech and equal protection claims. *City of Farmington v. Fawcett*, 114 N.M. 537, 545-47, 843 P.2d 839, 847-49 (Ct. App. 1992) (interpreting N.M. Const. art. II, § 17, as providing greater protection than the First Amendment); *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413 (2005) (interpreting N.M. Const. art. II, § 18's equal protection clause more broadly).[5]

The Plaintiff agrees with Defendant that, *only* with regard to Counts VI and II (substantive and procedural due process under the New Mexico Constitution, Article II, Section 17), the state and federal analyses are the same. *See e.g., Pamela A.G.*, 2006-NMSC-019, ¶ 13, 139 N.M. 459, 134 P.3d 746. (adopting the *Mathews v. Elridge* test). For the reasons set forth above in Section II, B and C, the Court should deny the motion to dismiss regarding Plaintiff's due process claims, under both the state and federal constitutions.

2. Plaintiff has stated a valid claim for relief under Article II, Section 4 of the New Mexico Constitution.

Unlike the foregoing provisions, there is no federal analog to Article II, Section 4, and, accordingly, the Court must address it independent of federal law. This Court should deny Defendant's motion to dismiss Plaintiff's claim brought pursuant to Article II, Section 4 of the New Mexico Constitution.

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[5] New Mexico appellate courts have consistently interpreted other state constitutional provisions more broadly, as well. *See State v. Cardenas-Alvarez*, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225 (2001) (interpreting N.M. Const. art. II, § 10 (search and seizure more broadly); *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (1999) (interpreting N.M. Const. art. II, § 15's double jeopardy clause regarding civil forfeitures more broadly *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1 (interpreting N.M. Const. art. II, § 10; holding that state must show exigent circumstances to justify warrantless search of automobile); *State v. Breit*,1996-NMSC-067, 122 N.M. 655, 930 P.2d 792 (interpreting N.M. Const. art. II, § 15's double jeopardy clause); *Campos v. State*, 117 N.M. 155, 870 P.2d 117 (1994) (interpreting N.M. Const. art. II, § 10 regarding warrantless arrests); *State v. Attaway*, 117 N.M. 141, 870 P.2d 103 (1994) (interpreting N.M. Const. art. II, § 10 regarding knock-and-announce rule for entry to execute warrant); *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052 (1993) (interpreting N.M. Const. art. II, § 10 regarding warrant guarantees of the New Mexico Constitution); and *State v. Cordov*a, 109 N.M. 211, 784 P.2d 30 (1989) (interpreting N.M. Const. art. II, § 10; holding that New Mexico would retain two-pronged test for probable cause established).

N.M. Const. art. II, § 4 provides:

> All 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.

This provision is generally referred to as the "safety and happiness" clause under state law. This Court should give full meaning to this constitutional codification of basic human rights. This language is not merely hortatory rhetoric from the Eighteenth Century. Indeed, New Mexico appellate courts have already indicated that the language is judicially enforceable. *See State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App. 1991) (Article II, Section 4 might provide additional protections from search and seizure); *State v. Booken*, 19 N.M. 404, 143 P. 479, 481 (1914)(Article II, Section 4 limits the power of the legislature). New Mexico courts have recognized that Article II, Section 4 addresses the more intimate relationship existing between a state government and its people. *California First Bank v. State*, 111 N.M. 64, 76, 801 P.2d 646, 658 (1990). Accordingly, Article II, Section 4 obligates this Court to enforce the basic human rights of the Plaintiff in this matter.

Numerous other state constitutions contain some variation of this inherent rights provision.[6] These inherent rights provisions provide protections for interests beyond those grounded in federal law. *See e.g., Doe v. District Attorney*, 932 A.2d 552, 570 (Me. 2007) (Alexander & Silver, JJ., concurring) (the safety and happiness clause demonstrates the "State's commitment to providing citizens, even those who have committed heinous acts, the possibility of a secure and content existence"). On its face and as interpreted, the inherent

[6] Many other state courts have found meaning in their states' respective "safety and happiness" clause. That case law bolsters the fact that New Mexico's "safety and happiness" clause is judicially enforceable. Precisely the same language that appears in the New Mexico Constitution's Art. II, § 4 also appears in the state constitutions of California, Colorado, Iowa, Nevada, New Jersey, North Dakota, Ohio, and Vermont. Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1, 3 & n.6 (1997).

rights clause of the New Mexico Constitution should be interpreted by this Court as providing more than the protections offered by the U.S. Constitution.

Defendant's motion should be denied as to this claim because the fundamental rights at stake here are inherent to safety and happiness of Plaintiff protected by the New Mexico Constitution. Plaintiff has pled violations of these rights. *See* Complaint ¶¶ 35-36. As Justice Douglas wrote forty years ago:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The 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, freedom of thought, and freedom to teach.... Without those peripheral rights the specific rights would be less secure.

Griswold v. Connecticut, 381 U.S. 479 (1965). For these reasons, Plaintiff has set forth a legally sufficient claim and the City's motion should be denied.

E. The Plaintiff has properly plead claims for Declaratory and Injunctive Relief and claims pursuant to 42 U.S.C. § 1983 and 1988.

1. The City errs in alleging that Plaintiff seeks damages; he does not and authority from Section 1983 damage cases does apply.

The City appears to proffer an argument arising out of the mistaken impression that Plaintiff is seeking damages and that seems to borrow from law regarding *respondeat superior* in Section 1983 cases. First, Plaintiff has not pled a claim for damages in his complaint. Accordingly, the City's argument that Plaintiff has conceded that an adequate remedy of law exists (*Motion* at 19) must fail, as do all arguments based on that notion. To the contrary, the Plaintiff respectfully submits that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Injunctive relief is imminently appropriate in such cases.

2. The "deliberate indifference" standard does not apply.

Second, the City appears to argue that the Section 1983 (and correlative Section 1988) claims must be dismissed because, having not sued an individual officer, the suit fails because the Plaintiff cannot demonstrate that the City, as an entity, acted with "deliberate indifference" in adopting the Administrative Regulation. The "deliberate indifference" standard is borrowed from authority discussing municipal liability for acts of its employees. *See e.g., City of Canton v. Harris,* 489 U.S. 378 (1989)(municipality may only be liable for failure to train when policy or customs constitutes a deliberate indifference to the rights of citizens in contact with police). That standard simply does not apply here.

This case presents a facial challenge for injunctive and declaratory relief challenging an express policy of the City. *See Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 690 (1978):

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

On its face, 42 U.S.C. § 1983 permits a "suit in equity." The municipality is a person for purposes of 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. The City's arguments are unfounded and should be rejected.

III. THE CITY APPLIES THE WRONG LEVEL OF SCRUTINY UNDER THE FIRST AMENDMENT.

While irrelevant to the decision of whether Plaintiff has stated claims for relief sufficient to prevail against a Rule 12(b)(6) motion to dismiss, Plaintiff feels compelled to address Defendant City's extensive argument as the level of scrutiny that must apply. He does so only in the hope of clarifying for the Court the issues before it.

The City is correct that a library is a limited or designated public forum. *Kreimer*, 958 F.2d at 1259; *Neinast v. Board of Trustees of Columbus Metropolitan Library,* 346 F.3d 585, 591 (6th Cir. 2003). However, the City is wrong to suggest that, under the First Amendment, the level of scrutiny to be applied to the City's ban is mere rational basis. In *Kreimer* and in *Neinast*, the library rules at issue regulated the dress and the hygiene of its patrons. The court in *Kreimer* noted that a library "is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum." *Kreimer*, 958 F.2d at 1262. In both *Kreimer* and *Neinast*, the Third and Sixth Circuits used the rational basis standard to analyze the regulations at issue because, unlike here, the regulations did not have a direct impact on speech. *Neinast*, 346 F.3d at 591-592. In other words, the First Amendment right to receive information was not directly affected by the regulation.

The Sixth Circuit in *Neinast*, however, recognized that a heightened level of scrutiny should have been applied in the case if the regulation had a direct impact on speech. *Id.*, 346 F.3d at 591-592. The Sixth Circuit cited *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), for the proposition that even when a regulation on speech is content-neutral, a court should apply heightened scrutiny if that regulation directly affects the ability to speak. *Id.* In *Neinast*, the Sixth Circuit employed the rational basis test only because the regulation at issue did not directly affect speech. "While the Library regulation at issue in this case is also content-neutral, it does not directly impact the right to receive information. Therefore, applying the heightened scrutiny standard of *Ward* to the Library regulation is not appropriate." *Id.*, 346 F.3d at 591-592.

In *Ward*, the Supreme Court held that if content-neutral regulations (such as volume limitations at outdoor performances) directly affect speech, then a heightened standard of review must be employed. That standard of review, and the correct standard to use in the case at bar, is:

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

Id., 481 U.S. at 791 (internal citations omitted). *See also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Here, unlike in *Neinast* and *Kreimer*, the regulation at issue directly affects the Plaintiff's right to receive information, right to free speech, and right to peaceful assembly. This is significantly dissimilar to the issues in *Kreimer* or *Neinast* where so long as a patron complied with the rules, he or she was permitted to use the Library's facilities. *Kreimer*, 958 F.2d at 1264. The City's ban is a complete and non-appealable revocation of the Plaintiff's firmly established First Amendment rights. Accordingly, heightened scrutiny should be applied in this matter.

IV. CONCLUSION

> Basic constitutional rights fundamental to ordered liberty . . . impose on each of us certain burdens. We will remain a free people only so long as we accept those burdens, even in the face of the very safety of our children. Recognizing the rights of released sex offenders, unpalatable though that may be, is one of them.

E.B. v. Verniero, 119 F.3d 1077, 1128 (3d Cir. 1997)(Becker, J., concurring in part and dissenting in part). For the reasons set forth herein, Plaintiff respectfully requests that that the City's motion to dismiss be denied.

Respectfully submitted,

ACLU of NEW MEXICO

/s/ George Bach 11/20/08

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I HEREBY CERTIFY that on November 20, 2008, I filed the foregoing pleading electronically through the CM/ECF system and caused the following parties and/or counsel to be served electronically through the CM/ECF system:

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