IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Case No. 30380

STATE OF NEW MEXICO,
CITY OF ALBUQUEQUE,

Appellee,

V.

PANGAEA CINEMA LLC d/b/a
GUILD CINEMA LLC,
HENLEY, KEIF, Registered Agent,

Appellants.

Appeal from the Second Judicial District Court, County of Bernalillo

(The Honorable Carl J. Butkus)

BRIEF IN CHIEF OF APPELLANTS

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STATEMENT OF COMPLIANCE WITH RULE 12-213(F) NMRA

Undersigned counsel certifies that the body of this brief-in-chief has a total of 10, 566 words, is in 14-point font, is proportionately spaced, and complies with the Rule 12-213(F) NMRA. The brief was created using Microsoft Office Word 2003, and we used that program to obtain the above word count.

RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

When citing to the record proper and the supplemental record proper, counsel for Appellants uses the numbers assigned by the clerk to the trial court in preparing the record for transmission to the Court of Appeals, e.g. RP.

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STATEMENT OF THE CASE

Pangaea Cinema L.L.C., d/b/a, Guild Cinema L.L.C. ("the Guild") is an art-house theater in the city of Albuquerque ("Albuquerque") located in the Nob Hill district. (RP 0095). The parties agree that this area is not zoned for adult amusement establishments. (Id.)

Other than one weekend a year, the Guild shows movies of the art-house variety, including both independent fictional and documentary films. (Id., 0094-0095.) For one weekend each year, the Guild hosts the "Pornotopia" erotic film festival. (Id.) In November of 2008, the Guild hosted its second annual erotic film festival. (Id., 0093.)

According to surrounding business owners, the festival's effects on the area were all positive. (Id., 0095-0097.) It did not attract criminal activity and, in fact, was a boon for local businesses, dramatically increasing sales and broadening awareness of the Nob Hill district. (Id.)

During the festival, Albuquerque zoning enforcement inspectors viewed two festival films to determine if the Guild was in compliance with its zoning. (Id., 0094.) The first film they watched did not emphasize anatomical areas or include people engaging in sexual acts specified in § 14-16-1-5, Albuquerque's adult amusement ordinance ("§ 14-16-1-5"); the second film did. (Id.) Although the enforcement inspectors had only watched

a single film that fell under the definition found in the Albuquerque zoning ordinances, they charged the Guild with operating as an "Adult Amusement Establishment" in violation of § 14-16-1-5, which reads:

"Adult Amusement Establishment" is defined in as follows:

> An establishment such as an auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other commercial establishment that provides amusement or entertainment featuring one or more of the following:
>
> (1) A live performance, act or escort service distinguished or characterized by an emphasis on the depiction, description, exposure, or representation of specified anatomical areas or the conduct or simulation of specified sexual activities; or
>
> (2) Audio or video displays, computer displays, films, motion pictures, slides or other visual representations or recordings characterized or distinguished by an emphasis on the depiction, description, exposure or representation of specified anatomical areas or the conduct or simulation of specified sexual activities.
>
> ***SPECIFIED ANATOMICAL AREAS.***
>
> (1) Less than completely and opaquely covered human:
>
> (a) Genitals, pubic region;
>
> (b) Buttock or anus;
>
> (c) Female breast below a point immediately above the top of the areola to and including the bottom of the breast; covering of only the nipple and areola of the breast shall not constitute such covering;
>
> (2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered; and
>
> (3) A covering or device that, when worn, gives the appearance of or simulates the above listed anatomical areas.
>
> ***SPECIFIED SEXUAL ACTIVITES.***

> (1) Human genitals in a state of sexual stimulation or arousal;
> (2) Actual or simulated sex acts of human masturbation, sexual intercourse, sodomy, or similar acts; and
> (3) Fondling or other erotic touching of human genitals, pubic region, buttock, anus, or female breast.

(RP 0094).

For this single showing of a film that emphasized "specified anatomical areas" and "specified sexual activities" ("adult film"), the city issued a criminal summons. (RP 0016). The Guild moved to dismiss, arguing the ordinance violated Article II, § 17 of the New Mexico Constitution ("Article II, § 17"). (Id., 0039.) The metropolitan court refused to hear the Guild Cinema's motion to dismiss and entered a judgment against it. (Id., 0113, 0217.)

The Guild timely sought de novo review in district court. (Id., 0001.) The parties filed joint stipulated facts and stipulated exhibits with the district court. (Id., 0093-0098.) And, again, the Guild moved to dismiss, arguing that as applied to the Guild's single showing of an adult film, the zoning ordinance violated Article II, § 17. (Id., 0138.)

The district court concluded in a written opinion that the Guild's single showing of an adult film violated the zoning ordinance and was not

protected speech under the state or federal constitutions and imposed a criminal fine of $500.00. (Id., 0243.)

First, in response to the Guild's argument that "featuring," as set forth in § 14-16-1-5, should only be understood to include ongoing conduct, not single showings, the district court held "featuring" could include a single showing, but acknowledged that some courts have concluded that "featuring" means the regular showing of such films. (Id., 0220-0222.) Pointing to the extremely broad language of the ordinance, the court concluded that a single adult film violates the enactment. (Id., 0222.)

Second, the court rejected the Guild's argument that Article II, § 17 grants broader free speech rights than the First Amendment. (Id., 0223.) However, the court did state that its rulings were based on both provisions. (Id., 0218.)

And finally, the court refused to consider the Guild's as-applied challenge. In short, the court held that there is no means of making such a challenge to a facially valid ordinance. (Id., 0225-0227.)

After the court entered its sentence, the Guild moved for reconsideration under NMSA 1978 § 39-1-1, arguing foremost that "if [the] Court's reasoning endures, it would be a legal impossibility for a litigant to successfully assert an as-applied challenge in the context of Article II, § 17,

despite the Supreme Court's explicit direction to state courts to limit adult entertainment zoning ordinances through as-applied challenges." (Id., 0254.) Also, in light of the district court's broad reading of the ordinance, the Guild argued that the ordinance was unconstitutionally vague as applied to the Guild's single showing. (Id., 0257.)

The district court denied the motion for reconsideration after the Guild filed its notice of appeal and docketing statement. (SRP 0379; RP 0337.)

ARGUMENT

The principal issue in this appeal is whether screening one adult film as defined in § 14-16-1-5 transforms an art-house theater into an adult amusement establishment, thereby subjecting it to criminal prosecution. The Guild appeals the constitutionality of the ordinance as-applied to its single showing under Article II, § 17.

While pornography is protected by the First Amendment, the United States Supreme Court acknowledges a municipality's ability to curtail the secondary effects of adult amusement establishments through zoning schemes. This authority is entirely premised on the theory that, in regulating secondary effects, a municipality's aim is not the content of the speech, which would be impermissible under the First Amendment, but rather the urban blight and criminal activity often attendant with establishments that

regularly provide adult material. This is not to say, however, that municipalities have unfettered discretion to cite and punish any establishment that shows a film it may deem pornographic.

In fact, in the lead case establishing a municipality's authority to zone to prevent the secondary effects of adult amusement establishments, Young v. American Mini Theaters, 427 U.S. 50, 58-59 (1976), the Supreme Court indicated that if the litigants before it had not intended to offer adult fare on a regular basis, the Court would have addressed a municipality's ability to constitutionally restrict occasional screenings. The Young Court further noted that adult amusement ordinances were readily subject to narrowing construction by state courts if an ordinance is applied unconstitutionally. Id., at 61.

Since the Young decision, only a handful of courts have addressed the constitutionality of municipalities applying adult amusement ordinances to businesses that do not principally deal in adult entertainment. And although, as discussed in greater detail below, the legal bases have varied significantly, the overwhelming majority of courts reject the application of such ordinances to businesses that only have partial sexually explicit inventory or rarely present sexually explicit performances.

I. Standard of Review

Appellate courts review constitutional questions and issues of statutory construction de novo. ACLU of NM v. City of Albuquerque, 2006-NMCA-078 ¶ 10, 139 N.M. 761, 768, 137 P.3d 1215, 1222. And "if there is any doubt about the meaning of a statute, it will be construed against the state or agency which enacted it and in favor of the accused." State v. Ortiz, 78 N.M. 507, 510, 433 P.2d 92, 95 (1967).

II. The District Court Erred in Holding that § 14-16-1-5 Prohibits Showing a Single Adult Film

To resolve the constitutionality of the Guild's conviction or to potentially avoid the constitutional questions altogether, this Court must first establish the parameters of the term "featuring" as used in § 14-16-1-5.[1] Albuquerque charged the Guild with one count of operating an adult entertainment establishment in violation of its zoning for "featuring" one adult film. The district court concluded that the term "featuring" encompasses the showing of one adult film[2]. (RP 0298-0300). Noting that the pertinent language was extremely broad, it held the broad language

[1] The Guild preserved this issue in Defendant's Additional Briefing Pursuant to Court's Order of December 8, 2009. (RP 0194-0198.) Additionally, as courts have often muddied the distinction between narrowly tailored and statutory construction analyses when addressing adult amusement ordinances, the Guild also preserved this issue throughout its briefing.

[2] See above Statement of the Case at 2-3.

covered the facts before it. (Id., 0300.) Under that holding, if code enforcement determines a film emphasizes specified anatomical areas, a single showing of an adult film will convert any theater into an adult establishment. This construction does violence to the Article II, §17, is contrary to the plain language of § 14-16-1-5, and violates the principle of constitutional avoidance.

The primary goal of courts when they interpret statutory language is to ascertain and give effect to the intent of the enacting legislative body. State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 174, 74 P.3d 1064, 1066. In doing so, courts "examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the [enacting body] sought to accomplish." Maes v. Audubon Indem. Ins. Group, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 238, 164 P.3d 934, 937.

Statutes should be construed, if possible, to avoid constitutional questions. See, e.g., Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988); Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 340, 805 P.2d 603, 607 (N.M.1991). And if there is any doubt about the meaning of a statute, it will be construed against the state or agency which enacted it and in favor of the accused. State v. Ortiz, 78 N.M. 507 at 510, 433 P.2d 92 at

95. But in recognition of the risk that municipalities may exceed constitutional authority to regulate the secondary effects of adult amusements, instead utilizing that power to regulate content, in the lead adult amusement zoning case, the Supreme Court has gone even further. In Young, 427 U.S. 50 at 61, the Court gave state courts leeway to narrow the reach of zoning ordinances similar to the one at issue here. The Court anticipated the need for courts to limit the scope of zoning ordinances which seek to curb the secondary effects related to adult entertainment establishments through narrowing statutory construction: "[w]e see no reason why the ordinances are not readily subject to a narrowing construction by the state courts." Id.

In accord with the Young court's edict, many courts have determined that "featuring" and "use," in the context of adult amusement enactments, must relate to the ongoing use of a business, not a single instance. The California Supreme Court narrowed the definition of "use" in an ordinance similar to the one before this Court in order to maintain that ordinance's constitutionality. See People v. Superior Court (Lucero), 774 P.2d 769, 777 (Cal.1989). The court noted that the purpose of such ordinances, curbing the secondary effects of adult entertainment establishments, is not achieved by restricting theaters from showing occasional or incidental adult movies. Id.

Thus, the court gave actual meaning to the term "use" to avoid the ordinance's constitutional infirmity: "[b]y interpreting the term 'used' in this case to mean a regular and substantial course of conduct, we give the ordinance a construction that is rationally tailored to support its asserted purpose of preventing neighborhood blight without allowing Long Beach to use the power to zone as a pretext for suppressing expression." Id. (internal quotation marks and citation omitted).

In reviewing the constitutionality of an adult amusement ordinance that preemptively limited its application to businesses that "regularly" feature adult fare—unlike the ordinance in the instant case—the Seventh Circuit has also acknowledged that such an ordinance could only be applied constitutionally if a business always featured adult entertainment because local governments can only regulate the negative secondary effects of adult entertainment establishments. Schultz v. City of Cumberland, 228 F.3d 831, 849-850 (7th Cir. 2000). The court declined to invalidate the ordinance on its face for overbreadth under the First Amendment because the ordinance clearly applied to the party before the court, an exotic dancer and owner of a strip club, and the ordinance "is readily susceptible to a narrowing construction that saves the potentially unconstitutional applications from dwarfing the Ordinance's legitimate reach." Id. at 851.

Likewise, in Schmitty's City Nightmare, LLC v. City of Fond Du Lac, 391 F.Supp.2d 745, 755-758 (E.D.Wis. 2005), the court vigorously stated that the application of an adult amusement ordinance to businesses that only occasionally present adult fare would be constitutionally repugnant. While the ordinance clearly applied to its business, the plaintiff argued that the ordinance was facially invalid under First Amendment overbreadth analysis because it unconstitutionally applied to businesses that presented occasional adult fare. While rejecting the plaintiff's overbreadth argument and ultimately refusing to invalidate the ordinance on its face,[3] the court spent considerable time addressing the propriety of applying adult amusement ordinances to single uses. Id. Fundamentally, the court concluded that the adult amusement ordinance "only makes sense as it is applied to establishments that regularly feature adult entertainment." Id. at 756. "Zoning rules generally only apply to the regular use of a building; a residential house, for example, does not become zoned as a commercial hotel by virtue of having the occasional overnight guest." Id.

[3] Specifically, the court declined to invalidate the ordinance because the "plainly legitimate sweep of this ordinance vastly outweighs any potentially unconstitutional applications. Accordingly, even if the definition of adult cabaret did apply to venues that infrequently offered adult performances, it would be better to evaluate those claims on an as-applied basis rather than on a facial overbreadth challenge like this one." Id. at 757.

Moreover, in Stevens v. Matanuska-Susitna Borough, 2007 WL 2143008 (Alaska App., July 25, 2007) (unpublished), the court discussed whether a restaurant that presented a single performance of live adult entertainment could be classified as an "adult cabaret." Under the pertinent city ordinance, an adult cabaret was defined as "a restaurant...which features topless dancers...for commercial purposes at any time or any number of times" Id. at 1 (emphasis added). The court discussed at length whether the term "features" includes businesses that offer a single or isolated presentation of adult entertainment, concluding that a narrowed construction would avoid the constitutional failing:

> ...the courts that have had to construe similar ordinances- i.e., ordinances regulating businesses that "feature" nude dancers or other forms of adult entertainment-have tended to construe the verb "features" as meaning "regularly presents" or "always presents" or "normally presents"....courts have limited the operation of the ordinances to commercial enterprises...whose primary draw is their offering of live adult entertainment-thus avoiding the First Amendment difficulties that would arise if the ordinances applied to single or isolated theatrical performances.

Id. at 2.

In contrast to the present case, the majority of the above-described cases address live performances, which performances receive less First

Amendment protection than films,[4] yet those courts still identified constitutional concerns with construing the ordinances to prohibit single performances as opposed to ongoing conduct. The Guild presented a single adult film. Concordant with Young, Lucero, Schultz, Schmitty's City Nightmare, and Stevens, and in deference to the historically heightened protection for films, the Guild cannot be cited for operating as an "adult entertainment establishment" because showing one adult film does not constitute "featuring" adult entertainment. And even if this court is hesitant to impose narrowed construction to avoid the unconstitutional application of Albuquerque's adult amusement ordinance, the plain text of the ordinance dictates narrowed construction.

Under § 14-16-1-5(B), a business is an "Adult Amusement Establishment" if it features one or more of an enumerated list detailed in sections (1) and (2). Section (1) includes "a live performance, act or escort service distinguished or characterized by an emphasis on the depiction,

[4] See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (nude dancing is protected as "expressive conduct within the outer perimeters of the First Amendment, though ... only marginally so"); Richland Bookmart, Inc. v. Knox County, Tenn., 555 F.3d 512, 520 (2009) (acknowledging that adult movies and nude dancing are different categories of protected speech: "A regulation of sexually oriented businesses...implicates at least two protected categories of speech: first, sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, 'symbolic speech' or 'expressive conduct,' such as nude dancing.")

description, exposure, or representation of specified anatomical areas." And Section (2) provides, "Audio or video displays, computer displays, films, motion pictures, slides or other visual representations or recordings characterized or distinguished by an emphasis on the depiction...of specified anatomical areas." (Emphasis added.) The use of the singular in Section (1) and the plural in Section (2) merit consideration, are especially striking given the clauses' proximity, and require a narrow construction of the ordinance to avoid its unconstitutional application to the Guild's conduct.

Granted, Albuquerque's code of ordinances provides that the plural includes the singular and vice versa. § 1-1-6(A). Notwithstanding, even when a court's statutory interpretation does not implicate protected speech, a court can contemplate the use of the plural verses the singular in its interpretation when failure to do otherwise would be inconsistent with the manifest intent of the rule making body or repugnant to the context of the ordinance. See, State of N.M. ex rel. Richardson v. 5th Judicial Nominating Comm'n, 2007-NMSC-023 ¶ 17, 141 N.M. 657, 662, 160 P.3d 566, 571 (2007) (holding that "persons" in fact meant more than one person).

To construe the ordinance to reach single presentations of adult entertainment would be inconsistent with the manifest intent of the City Council and repugnant to the context of the ordinance. The stated purpose of

§ 14-16-1-5 is to "promote the health, safety, convenience, and general welfare of the citizens of the city." §14-16-1-3. The Council's use of the singular with respect to performances and the plural next to films suggests that it determined one live performance may attract crime or cause blight whereas one showing of an adult film would not. And even if the council did not intend a distinction, a constitutional construction of the ordinance would acknowledge it. If the ordinance is understood to mean that the showing of a single film that emphasizes, for instance, the "female breast below a point immediately above the top of the areola to and including the bottom of the breast" transforms a business into an adult amusement establishment, then every theater in the city could qualify under this definition. See § 14-16-1-5. A constitutional interpretation of Albuquerque's zoning ordinance would give meaning to the use of the plural and singular as modified by featuring.

III. Albuquerque's Adult Amusement Establishment Ordinance Is Unconstitutionally Vague

Albuquerque's adult amusement ordinance is unconstitutionally vague because it does not give ordinary persons notice of what conduct is prohibited and lacks sufficient guidelines for enforcement. This is particularly true given the government's heightened duty to clearly specify prohibited conduct that receives some protection under the First Amendment

and Article II, § 17. The Guild either preserved this argument in its motion for reconsideration to the district court or it did not have to do so because vagueness is a jurisdictional issue.

A. The Guild's claim that Albuquerque's adult amusement establishment ordinance is void-for-vagueness is properly before the Court.

In its motion for reconsideration, the Guild raised a void-for-vagueness argument in response to the district court's holding,[5] the district court had the opportunity to rule on the issue, and the city had fair opportunity to respond. (RP 0257). The Tenth Circuit has indicated that a motion for reconsideration may preserve an issue for appeal. In Century 21 Real Estate Corp. v. Meraj Intern. Inv. Corp., 315 F.3d 1271, 1278 (10th Cir. 2003), the court noted that "[t]o preserve an issue for appeal, a party must alert the district court to the issue and seek a ruling. Because [appellant] made no request for reconsideration, it cannot now rely on evidence submitted at trial after the district court interpreted the addendum." (Internal citations omitted). Other courts have also held that post-judgment motions can preserve an issue for appeal. See, e.g., New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 n.4 (5th Cir. 1996); First Nat'l Bank of Commerce v. de

[5] See RP at 0257.

Lamaze, 7 F.3d 1227, 1229 n.9 (5th Cir. 1993). Under these authorities, the Guild preserved its vagueness claim.

In any event, the Guild can raise vagueness for the first time on appeal as vagueness is a jurisdictional question and its challenge implicates the First Amendment. While parties generally are precluded from raising unpreserved issues on appeal, questions of jurisdiction may be raised at any time. See Rule 12-216(B) NMRA ("[t]his rule shall not preclude the appellate court from considering jurisdictional questions"); see also, e.g., State v. Arnold, 51 N.M. 311, 312, 183 P.2d 845, 845 (N.M. 1947) ("Lack of jurisdiction at any stage of a proceeding is a controlling consideration to be resolved before going further.").

Pursuant to Rule 12-216(B) NMRA, New Mexico courts frequently consider unpreserved vagueness claims. See, e.g., State v. Myers, 2010-NMCA-007, ¶12, 147 N.M. 574, 577, 226 P.3d 673, 676, cert. granted ("Although Defendant did not raise [void-for-vagueness] in the trial court, we accept the parties' agreement that the issue is nonetheless properly before us."); State ex rel. Children, Youth and Families Dept. v. Shawna C., 2005-NMCA-066, ¶ 24, 137 N.M. 687, 695, 114 P.3d 367, 375 ("A void-for-vagueness attack need not be preserved to enable our review"); State v. Laguna, 1999-NMCA-152, ¶ 18, 128 N.M. 345, 349, 992 P.2d 896, 900.

And while there have been occasions where this Court has refused to hear an unpreserved void-for-vagueness challenge, the Laguna court explained that if there has been any ambiguity with respect to the permissibility of raising a void-for-vagueness challenge for the first time on appeal, it is clear that in instances where the challenge is based in the First Amendment—and presumably the state constitutional equivalent—the challenging party need not have preserved the issue. Id. at ¶ 21.

As further detailed below, the Guild challenges the vagueness of § 14-16-1-5 under Article II, § 17. This is a jurisdictional attack against a criminal ordinance under the state's First Amendment analogue. Therefore, this court should review this challenge even if it concludes that the claim was not preserved.

B. The City's zoning ordinance is unconstitutionally vague as applied to the Guild.

In light of the district court's broad reading, § 14-16-1-5 as applied to the Guild's single display of an adult film is unconstitutionally vague. An ordinance cannot survive an as-applied vagueness challenge if it either 1) does not allow individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited, or 2) "permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards

or guidelines and therefore allows, if not encourages, subjective and *ad hoc* application." Myers, 2010-NMCA-007 at ¶ 14, quoting Laguna, 1999-NMCA-152 at ¶ 26. In addition, when the law interferes with free speech, as it does here, the Supreme Court has determined that "a more stringent vagueness test should apply." Hoffman Estates v. Flipside, 455 U.S. 489, 499 (1982).

§ 14-16-1-5 cannot survive a vagueness challenge in light of this rigorous standard. After reviewing the provision, a person of ordinary intelligence would not conclude that showing one film emphasizing specified body parts would turn his art-house theater into an adult establishment. Furthermore, the ordinance invites arbitrary and discriminatory enforcement.

1. The ordinance does not allow individuals of ordinary intelligence a fair opportunity to determine whether conduct such as the Guild's is prohibited.

Courts often consider "factors such as the enactment's purpose, the harm it attempts to prevent...and the interpretations of individuals charged with enforcement" in order to determine whether an enactment provides fair notice. Jordan v. Pugh, 425 F.3d 820, 825 (10th Cir. 2005). In addition, an enactment should "be interpreted to mean what the legislative body enacting it intended it to mean, and to accomplish the ends sought to be accomplished

by it." Texas Nat. Theatres, Inc. v. City of Albuquerque, 97 N.M. 282, 285, 639 P.2d 569, 572 (1982). Applying this analysis, § 14-16-1-5 did not provide fair notice to the Guild.

The stated purpose of the § 14-16-1-5 is incongruent with the definition of adult amusement establishment as applied to the Guild. The purpose of the ordinance is to "promote the health, safety, convenience, and general welfare of the citizens of the city." §14-16-1-3. And while the text of § 14-16-1-5 may encompass an art-house theater showing one adult film, "such a literal meaning would mandate an application far beyond what was plausibly intended." Dickerson v. Napolitano, 604 F.3d 732, 746 (2nd Cir. 2010). Considering the ordinance's stated purpose, an individual of ordinary intelligence would likely conclude that "only those businesses which are likely to promote [crimes such as] obscenity and prostitution...should be licensed as 'adult entertainment establishments.'" Richardson v. Wile, 535 A.2d 1346, 1349 (Del. 1988).

In fact, the previous "interpretations of individuals charged with enforcement," Jordan, 425 F.3d at 825, did not provide fair notice to the Guild; to the Guild's knowledge, Albuquerque code enforcement officers have never before disregarded a "general use" standard in favor of a "single use" standard. Moreover, courts have regularly found that the "single use"

standard is unconstitutional. The stated purpose of § 14-16-1-5, the absence of any similar historical prosecutions in Albuquerque, combined with the narrow interpretations of several courts of similar zoning regulations, would leave the average person to conclude that a single showing of adult material would not turn its business into an adult amusement establishment.

The ordinance's definition of an "adult store" gives additional reason to believe that the Guild's actions were protected. An adult store is defined as "[a]n establishment having 25% or more of its shelf space or square footage devoted to the display, rental, sale or viewing of adult material for any form of consideration." § 14-16-1-5 (emphasis added). Clearly the city council believed that a store would not produce "negative secondary effects" until it featured a threshold level of adult material. Upon reviewing this definition, an individual of ordinary intelligence would logically assume that the council also intended there to be some threshold of adult material before its business would be converted into an "adult amusement establishment."

At the very least, the definition of "adult amusement establishment" is not "clear in [its] application to plaintiff's proposed conduct," Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2720 (2010), as would be necessary to give the Guild fair notice. If the language of a statue "is so general and indefinite as to embrace not only acts commonly recognized as

reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." State v. Diamond, 27 N.M. 477, 202 P. 988, 989 (1921). The plain meaning of adult amusement establishment would not include a single showing. "One would not call a bar a 'martini bar' if it served martinis only once a year, just as one would not call a club a 'jazz club' if 99% of its music was rock and roll." Schmitty's City Nightmare, 391 F. Supp. 2d 745 at 757. And, one would not call a theater an adult amusement establishment if it showed one adult film. If the council meant to create a more restrictive definition than the one used in common English, it should have explicitly stated that an establishment providing a single instance of adult entertainment would qualify as an adult amusement establishment. Cf. Stevens, 146 P.3d at 3, (noting that the pertinent ordinance defined an adult cabaret as a business featuring live adult entertainment "at any time or any number of times," thus specifically mandating a "single use" standard). The Albuquerque ordinance contains no such explicit statement.

Considering the purpose of the ordinance, the harm it seeks to prevent, the interpretations of individuals charged with enforcement, the ordinance's definition of "adult store," it is not at all clear to a person of

ordinary intelligence that an independent theater showing one adult film would qualify as an adult amusement establishment.

2. The ordinance has no standards or guidelines and therefore allows law enforcement to engage in arbitrary and discriminatory enforcement.

An enactment can also be found void for vagueness if it encourages arbitrary enforcement, as the Albuquerque ordinance does. Indeed, the Supreme Court has stated that a statute's potential for arbitrary enforcement is the most significant consideration in determining whether it is unconstitutionally vague. See Kolander v. Lawson, 461 U.S. 352, 357-58 (1983). When the government fails to provide minimal guidelines for enforcement, those charged with enforcing a criminal enactment are left with too much discretion, defendants are denied due process of law, and an enactment is unconstitutionally vague. Id. This obligation to set forth clear guidelines is further heightened and an enactment must provide greater specificity "[w]here a statue's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment." Id. at 573. It is plain in the instant case that the city's ordinance lacks the requisite standards for enforcement, wholly entrusting enforcement decisions to the moment-to-moment judgment of the code

enforcement officers, thereby inviting arbitrary and discriminatory enforcement.

Most adult amusement ordinance cases involve parties that consistently present adult entertainment. See, e.g., People Tags Inc. v. Jackson County Legislature, 636 F.Supp. 1345, 1355 (1986) ("the parties stipulated that [the plaintiff] is an adult bookstore, adult motion picture theater, and/or an adult mini motion picture theater;" "[a]ny vagueness that exists in the ordinances does not affect plaintiffs.") And many courts have declined to review adult amusement ordinances for vagueness because if there was any vagueness in the ordinances, the ordinances clearly applied to the parties before the court. See, e.g., Young, 427 U.S. 50, 58-59 (declining to consider whether ordinance at issue was unconstitutionally vague because, "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents" which were theaters that "propose[d] to offer adult fare on a regular basis").

In Pensack v. The City and County of Denver, 630 F.Supp. 177, 178 (U.S. Dist. Co. 1986), however, the court was faced with the application of an adult amusement ordinance to a business that occasionally profited from sexually explicit material. In that case, a bakery owner challenged an adult

amusement zoning ordinance as applied to its business; the bakery baked and sold some cakes that had strong sexual themes and other cakes that did not. Id. Denver notified the bakery that its sale of sexually explicit cakes had converted it into an adult bookstore and a sexually-oriented commercial enterprise in violation of its zoning ordinance. Id. The court held that the ordinance was vague as applied to the bakery and, because the ordinance did not provide adequate notice to the bakery of what conduct was prohibited, there were insufficient standards for law enforcement to follow. Id at 181.

Like the ordinance in Pensack, § 14-16-1-5 does not offer clear direction to enforcement officers. Indisputably, the Guild is not the first conventional theater in Albuquerque to present a film that zoning enforcement could conclude emphasizes body parts specified by the ordinance. Yet, to the Guild's knowledge, it is the first non-adult movie theater that the city has prosecuted for presenting a single film which emphasized said parts. This fact, alone, demonstrates arbitrary enforcement. Still, the ordinance's failings come into sharper focus when one turns to the multitude of questions left unanswered by the ordinance, including: How many films must a theater show before converting itself into an adult amusement establishment? If only one, how long must the film be? Would a single showing of a five minute short film with two topless women

discussing Descartes violate the ordinance and turn an art-house theater into an adult establishment? The ordinance does not come close to answering any of these questions, instead leaving those determinations to the moment to moment discretion of enforcement officers. Albuquerque's failure to provide specificity sufficient to guide those charged with enforcement of the ordinance in is direct violation of the very thrust of a vagueness challenge as articulated in Kolender: under Albuquerque's zoning ordinance, enforcement depends wholly on the mood and predilections of a given enforcement officer. As such, the ordinance is unconstitutionally vague as applied to the Guild, which showed one allegedly prohibited film in a year.

IV. § 14-16-1-5 violates Article II, § 17.

If this Court finds that the language of § 14-16-1-5 supports prosecution for a single showing and rejects the Guild's contention that the ordinance is unconstitutionally vague, then the ordinance, as applied to the Guild's conduct, is a content-based suppression of its right to free speech.

A. The district court erred in holding that Article II, § 17 does not afford greater protection than the First Amendment in the context of an art-house theater's single showing of an adult film.

This Court has plainly stated that Article II, § 17 affords greater protection than the First Amendment, and the district court erred when it

held otherwise.[6] (RP 0223-0224.) New Mexico courts rely on the interstitial approach in determining whether to depart from federal precedent and examine the state constitution independently. See e.g. State v. Gomez, 1997-NMSC-006, ¶¶ 19, 20, 122 N.M. 777, 783, 932 P.2d 1, 7.

As the Guild argued in the district court, in City of Farmington v. Fawcett, 114 N.M. 537, 545-47, 843 P.2d 839, 847-49 (Ct. App. 1992), this Court diverged from federal precedent in holding that Article II, § 17 provides greater protection than the First Amendment. Taking note of the significant textual differences between the Article II, § 17 and the First Amendment, the Fawcett court stated, "[w]e can...assume that the authors of the New Mexico Constitution were aware of the language of the First Amendment...and consciously chose to adopt a different formula." Id. at 847. That choice, the Court concluded, has consequence: Article II, § 17,

[6] The Guild preserved its argument that Article II, § 17 affords greater protection than its federal counterpart throughout its briefing, citing the expanded protections afforded under City of Farmington v. Fawcett, 843 P.2d 839, 847-49 (Ct. App. 1992). See, e.g., RP 0140, 0172-0173, 0201-0203. The Guild also noted that "[b]ecause most of the relevant authority is federal, [the Guild] will make reference throughout to arguments and federal authorities discussing the application of the First Amendment....[The Guild] respectfully submits that the federal authorities are applicable, generally, when construing Article II, § 17..., but emphasizes that the defense raised herein is pled only under the *state* constitution, for which a separate and independent ground exists." See RP 0140, 0172-0173, 0201-0203.

dictates the application of a more rigorous standard than afforded to challenges under the First Amendment. Id. at 847-51.

Admittedly, Fawcett is an obscenity case and the case at bar is not; however, that distinction is inconsequential. Fawcett is relevant precedent. That the court examined the breadth of Article II, § 17 within the framework of an obscenity case does not limit that clause's heightened protection to that context.

The Fawcett court held that the protections of Article II, § 17 are broader than the First Amendment. Therefore, the Guild respectfully requests that this Court bear this heightened protection in mind in application of the precedent informing adult amusement zoning, the bulk of which falls under the First Amendment.[7] Where there is a split in the law, this Court should favor free speech.

B. The district court erred in holding that the Guild could not succeed in an as-applied challenge if it did not challenge § 14-16-1-5 facially.

The most fundamental error that this Court must address is the district court's misapplication of the law of as-applied challenges. As explained below, despite the unequivocal and abundant precedent cautioning courts to

[7] Although the Guild brings this challenge to Albuquerque's Adult Amusement Ordinance under Article II, §17, the ordinance is unconstitutional under First Amendment analysis as well.

apply the strong medicine of overbreadth only in instances where an enactment is constitutional as applied to the litigant before the court—but could be unconstitutionally applied to others who are not—the district court concluded that because the Guild had not challenged the facial validity of Albuquerque's adult amusement ordinance, it could not successfully mount an as-applied challenge. See Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 39 (1999) ("Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is strong medicine and have employed it with hesitation, and then only as a last resort.") (Internal citations and quotations omitted). If the district court's reasoning endures, the law of facial challenges will be turned on its head, and it would become a legal impossibility for a litigant to successfully assert an as-applied challenge in the context of Article II, §17, despite the Supreme Court's explicit direction to state courts to limit adult entertainment zoning ordinances through as-applied challenges.

The Guild will first describe the law of facial challenges in general and then turn to the district court's misapplication of that law. In short, it is clear that a law can be facially valid but applied unconstitutionally, and the district

court's refusal to review the law as applied to the facts of the case was erroneous.

1. Under the First Amendment, facial challenges are permitted, but as-applied challenges are preferred.

Generally, a facial challenge to an ordinance or statute is only successful if the "statute is void in all its applications." State ex rel. Children, Youth & Families Dept. (In re Candice Y.), 2000-NMCA-035, ¶¶ 14-18, 128 N.M. 813, 818, 999 P.2d 1045, 1050-1052. In City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 477 (U.S. 1985), the Court held that addressing as-applied challenges before facial challenges "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." New Mexico courts' approach is consistent with that of the United States Supreme Court. Both state and federal courts have adopted an approach to constitutional review that is conservative: permitting the courts to decide whether a law fails to pass constitutional muster as applied to the facts before them, without making broad judgments on the constitutionality of statutes. However, in the context of free speech cases, courts have made an exception to the general rule that "as-applied" challenges are the first, and usually only, points of analysis.

Although facial challenges are still generally disfavored, they are more readily accepted in the First Amendment context. See Forsyth County

Ga. v. Nationalist Movement, 505 U.S. 123, 129 (1992) ("It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation"). This is true because courts appreciate that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." Id. Courts entertain First Amendment facial challenges because the rights at stake are so important and often the ordinance or statute on review would obviously apply to the parties. That an exception has been made in the context of the First Amendment does not mean that an as-applied challenge somehow becomes more difficult to mount than a facial one, particularly in light of the magnitude of the rights at issue:

> Just as there are two classifications of statutes for First Amendment free speech purposes, there are two ways to challenge a statute on First Amendment free speech grounds. A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual. An 'as-applied challenge,' on the other hand, requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right.

Field Day, LLC v. County of Suffolk, 463 F.3d 167, 174 -175 (2d Cir. 2006) (internal citations omitted). And although facial challenges are permissible in the First Amendment context,

> [i]t is not the usual judicial practice...nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily-that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is substantial, not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep.

Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 484-485 (1989), quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

2. The district court should have reviewed Albuquerque's zoning ordinance as applied to the Guild's single showing of an adult film.

The Guild did not challenge Albuquerque's adult amusement ordinance on its face and has not taken a position with respect to the constitutionality of the ordinance in general. Rather, the Guild contends that the application of § 14-16-1-5 to its single showing of an adult film is unconstitutional.

The district court, however, refused to review the application of the ordinance to the facts of this case because the Guild had not challenged the ordinance facially, instead holding that facial validity has several results: "One is that the ordinance is a valid time, place and manner restriction.

Another is that the ordinance is justified by a valid concern for secondary effects. Another is that it is sufficiently narrowly tailored. Yet another is that there are sufficiently alternative locations for comparable expression." (RP at 0226.) This is simply not true. See, e.g., Executive Arts Studio, Inc. v. City of Grand Rapids, 391 F.3d 783, 795-99 (2004) (holding that even if the ordinance were facially valid, it violated the First Amendment as applied to the plaintiff because it did not provide for reasonable alternative avenues of communication). An ordinance that may be constitutional on its face can clearly fail when applied to a specific situation. See, e.g., Id. at 797-98. Even assuming facial validity, the district court was required to address the as-applied challenge. See Id. at 797.

The first step in assessing an as-applied challenge to an enactment is determining which level of constitutional scrutiny is appropriate. "The precise protection available to a particular type of expression 'turns on the nature both of the expression and of the governmental interests served by its regulation.'" New Mexico Life Ins. Guar. Ass'n v. Quinn & Co., 111 N.M. 750, 760, 809 P.2d 1278, 1288 (1991) (finding a statute unconstitutional as applied to commercial speech) (quoting Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980)). The district court erred in holding that "[i]n the absence of a facial challenge, the criteria for a content

neutral time, place and manner regulation must be accepted as having been satisfied." (RP 0226.) Even though the Guild did not challenge § 14-16-1-5 facially, the Court still needs to ascertain the applicable level of scrutiny, then examine whether the ordinance, as applied here, passes that level of scrutiny. See State v. Setser, 1997-NMSC-004, ¶ 15, 122 N.M. 794, 798, 932 P.2d 484, 488 (1996) (where this Court employed this two-step approach).

In the instant case, the district court abandoned part of the requisite constitutional analysis, holding that the absence of a facial challenge compelled it to do so. See, e.g., RP at 0231, ("Tollis involved facial challenges. The present case does not."); Id., pages 0232-0233 (". . . the Court, in an 'as applied' context, does not believe that a single showing standard is per se constitutionally invalid . . . ."). This approach misses the required analysis by permitting the parties' reliance on cases involving facial challenges to be the reason for distinguishing the analyses in those cases. The Court is not so constrained by the absence of a facial challenge; it must still examine whether § 14-16-1-5 is constitutional on these facts.

C. Albuquerque's prosecution of the Guild for a single showing of an adult film is not narrowly tailored nor does it advance its interest.

Faced with significant precedent holding or suggesting that the application of adult amusement ordinances to single performances or showings is unconstitutional, the district court instead relied on an ill-reasoned, aberrant case—the only of its kind—permitting prosecution for a single use See BZAPS Inc., d/b/a, Buster's Bar v. City of Mankato, 268 F.3d 603 (8th Cir. 2001). This reliance is error. While the "power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities...the zoning power is not infinite and unchallengeable; it must 'be exercised within constitutional limits.'" Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981) (quoting Moore v. East Cleveland, 431 U.S. 494, 514 (1977)). In the context of adult establishment zoning, this limitation is particularly important. The Supreme Court in Young held that "with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be revised under the standards applicable to 'content-neutral' time, place, and manner regulations." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986). But the court also indicated adult amusement ordinances could be challenged as-applied, specifically

referring to business that may not offer adult fare on a regular basis. Young at 427 U.S. 50 at 61.

Although adult amusement regulations are generally reviewed with intermediate scrutiny, when a municipality has applied the ordinance to suppress content, not to shrink the secondary effects of adult establishments, that action is subject to strict scrutiny. Renton at 475 U.S. 41 at 46-7. Courts have identified a number of indicia of content-based suppression of adult entertainment, including the application of adult amusement ordinances to single uses, as opposed to ongoing conduct, and the application of generally valid ordinances to categorically different businesses than those for which cities have evidence of unwanted secondary effects.

To determine whether Albuquerque's application of § 14-16-1-5 to the Guild's showing of a single adult film is subject to strict scrutiny or intermediate scrutiny, this Court must examine whether the "predominate concern" motivating application of the ordinance to the Guild's single showing was the secondary effects of the movie or the content of movie. R.V.S., LLC v. City of Rockford, 361 F.3d 402, 409 (7th Cir. 2004). And, in order for the city's application of § 14-16-1-5's to the Guild's single showing of an adult film to receive intermediate scrutiny, it must prove that its application was predominately motivated by negative secondary effects,

not that concern for negative secondary effects was one of many motivations. Joelner v. Village of Washington Park, IL, 378 F.3d 613, 624 (7th Cir. 2004).

As applied to an art-house theater's single showing of an adult film, the city cannot establish that it was motivated by negating the secondary effects of adult films, given the absence of any such effects. In this case, Albuquerque agrees that neither the erotic film festival in general nor the showing of one adult film in particular brought any negative secondary effects to the street block or the neighborhood. (RP 0119). In fact, as business and restaurant owners/managers in the area attested to, the effects were all positive. (RP 0121-0122). Therefore, because Albuquerque did not act to curb unwanted secondary effects, its actions were the result of disdain for the Guild's speech.

The city must satisfy strict scrutiny in this matter because the Guild only presented a single adult film and the utter absence of negative secondary effects in this case demonstrates that Albuquerque was targeting the Guild's speech. In any event, Albuquerque cannot satisfy either tier of scrutiny, strict or intermediate, under Article II, § 17.

1. § 14-16-1-5 is not narrowly tailored as applied to the Guild, and therefore, does not survive strict scrutiny.

Because Albuquerque is regulating content, and not unwanted secondary effects, its application of § 14-16-1-5 to the Guild's single showing of an adult film must pass strict scrutiny under Article II, § 17. Under strict scrutiny, regulations may be upheld only if they are justified by compelling governmental interests and are narrowly tailored to that interest. See In re Vincent, 2007-NMSC-056, ¶ 5, 143 N.M. 56, 57, 172 P.3d 605, 606 (citations omitted); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991); Boos v. Barry, 485 U.S. 312, 329 (1988). The application of § 14-16-1-5 to the Guild's single showing of an adult film is not 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects. See Schad v. Mount Ephraim, 452 U.S. 61, 74 (1981), and Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

a. Prosecution for single use is not narrowly tailored to address unwanted secondary effects.

Courts have required that adult entertainment zoning ordinances be targeted at theaters that regularly show adult films, not ones that do so only on occasion. The free speech protections of the state and federal constitutions require that zoning ordinances be tailored to their purpose. A regulation's "incidental restriction on ... First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." Young,

427 U.S. at 80 (Powell, J., concurring) (citation and internal quotation omitted). Here, the city is utilizing a "single use" approach, citing the Guild for operating as an adult amusement establishment for the showing of a single film.

In People v. Superior Court (Lucero), 774 P.2d 769, 777 (Cal.1989), the California Supreme Court rejected a "single use" approach, like the approach Albuquerque attempts here.

> Because adult entertainment ordinances are aimed at regulating the clustered establishment of adult entertainment businesses and not at prohibiting theater owners from occasionally exhibiting an "adult" film, we conclude a "regular and substantial course of conduct" standard most appropriately defines the constitutional level of "use" for purposes of such ordinances.
> ....
>
> Under this standard, zoning restrictions ...would apply to all adult entertainment theaters offering adult fare as a substantial part of their regular business, but would not apply to theaters showing only occasional or incidental adult movies.

Lucero, 774 P.2d at 777. See also, Tollis Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987):

> Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." Renton, 106 S.Ct. at 931. Nor do we see how the County could make

> such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects.

In BZAPS, 268 F.3d 603, 606 (8th Cir. 2001), however, the Eighth Circuit held that a city need not offer evidence that an isolated, live, nude performance would cause secondary effects. Relying on Renton, 475 U.S. 41, 51, which held that a city could use studies from other municipalities in support of adult amusement ordinances in order to prove that adult establishments cause unwanted secondary effects, the BZAP court concluded that the same reasoning could apply to a single performance and a city need not have direct evidence that a single performance causes negative secondary effects. Id.

Despite New Mexico's broader speech protections under Article II, §17, the district court relied on BZAPS to uphold § 14-16-1-5. This reliance is error. BZAPS is both factually distinguishable and ill reasoned. BZAPS dealt with "live" adult entertainment and nude dancing. Under pertinent freedom of expression analysis, movies are subject to greater constitutional protection than live nudity or other forms of expressive conduct. Courts are in agreement that depictions of conduct, such as in films, are provided greater protection than the actual conduct itself, as movies are "inherently expressive and entitled to constitutional protection." Cockrel v. Shelby

County School Dist., 270 F.3d 1036, 1049 (6th Cir. 2001). "States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." Milller v. California, 413 U.S. 15, 26, n. 8 (1973). Therefore, BZAPS is distinguishable because it deals with actual physical conduct and not films.

More importantly, BZAPS ignores the well-established rule that a narrowly tailored ordinance only encroaches upon free speech by the least restrictive means possible. See Tollis, 827 F.2d 1329 at 1333 (relying on Young, 427 U.S. 50, 80, and stating "a regulation's 'incidental restriction on ... First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.'").

The "regular and substantial course of conduct" adopted by the court in Tollis is a more constitutionally sound test than a "single use" test for the occasional showing of an adult film because it ensures that the government uses the least restrictive means possible to address any legitimate concerns it may have about neighborhood blight, without unduly infringing upon free expression rights. See Tollis, 827 F.2d at 1333; Lucero, 774 P.2d 769 at 776. Forcing a theater that only occasionally shows an adult movie to comply with zoning regulations designed for "full-time" adult entertainment

establishments does not entail a "logical relationship between the evil feared and the method selected to combat it." Id.

Lucero and Tollis, and not BZAPS, should inform this Court's analysis under Article II, § 17. Albuquerque's alleged interest in this matter is not furthered by citing the Guild for showing one adult film, or even one weekend of adult films, in a year. Albuquerque's method here, as in Tollis, is not narrowly tailored to serve the government's interest in combating negative secondary effects and, as a result, is not the least restrictive means available to the city to address concerns it may have about the showing of an adult film. For this reason the Court should find that, as applied to the Guild, the city's application of § 14-16-1-5 fails strict scrutiny and is thereby unconstitutional, particularly given the broader protections provided by Article II, § 17. See Fawcett, 114 N.M. 537 at 546, 843 P.2d 839 at 848.

b. The misapplication of generally valid ordinances to categorically different businesses is not narrowly tailored to thwart unwanted secondary effects.

Even outside of the "single use" context, courts consistently find unconstitutional the application of generally valid ordinances to categorically different businesses than those for which cities have evidentiary support cause negative secondary effects. See, e.g., Doctor John's Inc. v. City of Roy, 465 F.3d 1150, 1168 (10th Cir. 2006); Z.J. Gifts

D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 687 (10th Cir. 1998) (holding that "examining similarity of the businesses utilized in the studies relied on to the businesses regulated" may well be relevant in determining whether the ordinance is 'narrowly tailored' to regulated only those adult uses shown to have caused adverse secondary effects under Renton." (quoting ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994)); Video-Home-One, Inc. d/b/a V-H-One Video v. Brizzi, 2005 WL 3132336, *5 (S.D. Ind. 2005) (holding that if state had been seeking to enforce statute against more typical adult entertainment provider, issues would have been different, but finding First Amendment violation because state has threatened to apply statute "to a store that has only a small fraction of its business in sexually explicit materials and which has no on-site viewing facilities" without providing evidence of relevant secondary effects.).

In Doctor John's, 465 F.3d at 1168, the Tenth Circuit required a district court to consider evidence presented by the store owner undermining the city's evidence of unwanted secondary effects. The court stated that while it is true that a city does not need to prove the secondary effects of each precise business or business type regulated under its ordinance, "a plaintiff may be able to challenge a city's rationale for its ordinance by pointing to evidence that its type of adult business (*e.g.*, 'off-site') is

relevantly different than those types of businesses analyzed in the studies supporting the ordinance." The Court went on to hold:

> ...given that a review of the parties' evidence supporting and countering a city's rationale is essential to determining whether an ordinance is narrowly tailored to the City's substantial interest in preventing secondary effects...we... remand this case to allow the district court to conduct a thorough analysis of the evidence....

Id. at 1169 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. at 438-39).

In addition, the Doctor John's court emphasized that the city's ordinance must "not attempt to regulate businesses which have a minimal or nonexistent connection to sexually oriented entertainment." Id. at 1167 (internal quotes and citation omitted); see also Z.J. Gifts, 136 F.3d at 689-90 ("Unlike other zoning provisions held unconstitutional, Aurora's ordinance does not attempt to regulate businesses which have a minimal or nonexistent connection to sexually oriented entertainment...").

Similarly, the Sixth Circuit found an adult entertainment ordinance not narrowly tailored because "its language sweeps up mainstream bookstores [and] it is then evidence that the ordinance is controlling the dissemination of objectionable reading material rather than the effects upon a neighborhood from the businesses that disseminate and specialize in such

material." Executive Arts Studio, Inc. v. City of Grand Rapids, 391 F.3d 783,796-97 (6th 2004).[8] The court stated:

> Since the ordinance as interpreted by the state court encompasses multiple establishments which would never be defined as adult bookstores in everyday English, such as a Walden's or Borders which carry "a section or segment" or adult reading material, it would have been appropriate for the City to have produced some type of evidence of secondary effects from these establishments. Yet the City has cited no basis, study or third party experience that would lead one to believe that such a broad ordinance is needed to control undesirable blight rather than merely being an attempt to control undesired speech.

Id. at 796.

Like the ordinances above, § 14-16-1-5 is remarkably untailored, and cannot constitutionally apply to a business that does not specialize in adult films. Unlike the city in Doctor John's, Albuquerque is attempting to regulate a business that has a "minimal or nonexistent connection to sexually oriented entertainment." See Id. Albuquerque prosecuted the Guild, an art-house theater, for the single showing of an adult film without providing any evidence that such single showings produce harmful secondary effects.

2. Even if the Court decides the City was regulating "secondary effects" by enforcement of its ordinance, the ordinance fails to pass "intermediate scrutiny" as applied to the Guild.

Assuming *arguendo* that the city's application of § 14-16-1-5 to the Guild's single showing of an adult film was intended to reduce negative secondary effects, the city must still establish under immediate scrutiny that its enforcement advanced that goal but did not burden more speech than necessary to do so. Ward 491 U.S. 781 at 799-800. In other words, Albuquerque's prosecution of the Guild for the single showing of an adult film must have been "designed to serve a substantial governmental interest" and left open reasonable alternative avenues of communication. Alameda, 535 U.S. 425 at 434. The city cannot meet this standard.

Albuquerque claims, and the district court agreed, that its prosecution of the Guild for a single showing of an adult film advances its interest in curbing negative secondary effects: if one non-adult movie theater is permitted to show a film in violation of § 14-16-1-5 once a year, then every theater may show such a film, and the cumulative effect would be the same as an adult theater that regularly purveys adult material. (RP 0085, 0169). First, these are not the facts before this Court and present a hypothetical question substantially different than the one at issue. The Guild has been cited for showing one adult film. Second, this argument is also inconsistent with the broad protections of Article II, § 17 and demonstrates a lack of appreciation for the nature of the deleterious effects attendant with adult

entertainment, which effects could not possibly arise from every theater in Albuquerque showing a single film in a year. If every theater in Albuquerque showed a film in violation of § 14-16-1-5 every year, there would be around ten such showings. Ten showings—and certainly not the single showing that is the subject in this case—cannot incite "... sex-related crimes such as prostitution, selling obscene material to juveniles, indecent exposure, assignation, and solicitation to commit an unnatural sex act... gambling, assault and battery, and public drunkenness...semen and blood on the walls, floors and video screens; dirty Kleenex stuck to the walls; condoms on the floors; and defecation and urine on the floors....'glory holes' or holes cut or smashed out between the booths to permit inter-booth sexual activity." Broadway Books, Inc. v. Roberts, 642 F. Supp. 486, 491 (E.D. Tenn. 1986). Thus, the city's application of § 14-16-1-5 has burdened more speech than necessary and does not advance its goal of negating secondary effects.

Furthermore, the City must allow the Guild reasonable alternative avenues of communication. The Guild acknowledges that there are areas zoned for adult entertainment within the Albuquerque city limits. However, a cinema should not be forced to rent out another cinema across town just to show a single adult film. This is especially true for a business such as the

Guild that is an independent art-house theater attracting regular customers who may not desire to frequent an adult establishment. See generally Burkey v. Adams County, 1996 WL 444577 at 4 (D. Colo., March 4, 1996) ("There may be an audience for plaintiffs' on-location [adult] motion pictures that would not be reached through the sale or lease of [adult] videos."). The Guild does not have any practical alternative avenues for showing an occasional adult film.

Accordingly, this Court should reverse the Guild's conviction under intermediate scrutiny because Albuquerque's prosecution of the Guild's single showing of an adult film did not advance its goals and alternative avenues of communication are not available.

V. Conclusion

For the foregoing reasons, the Guild respectfully requests that the Court reverse its conviction under § 14-16-1-5.

Respectfully submitted,

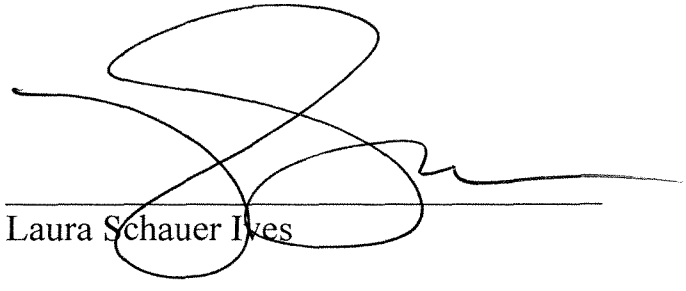
Laura Schauer Ives

Counsel for Appellant, The Guild

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via U.S. mail, on this 18th day, of February 2011, to:

John E. DuBois
Assistants City Attorney
P.O. Box 2248
Albuquerque, NM 87103



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