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)

REPLY OF APPELLANTS

ORAL ARGUMENT IS REQUESTED

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

Undersigned counsel certifies that the body of this reply brief has a total of 4,724 words, is in 14-point font, is proportionately spaced, and complies with the Rule 12-213(C) 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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INTRODUCTION

The City of Albuquerque has failed to respond to the bulk of the arguments that the Guild made in its opening brief and the overwhelming case law barring municipalities from applying adult amusement ordinances to businesses that rarely present adult material. That the city was unable to formulate a response to these cases is telling—the law simply does not support the application of Albuquerque's adult amusement ordinance §14-16-1-5(B) (1994), ("§14-16-1-5" or "Albuquerque's adult amusement ordinance"), to an art-house theater's single showing of an adult film.

Instead, the city echoes the obvious: although pornography is protected speech under the First Amendment of the United States Constitution, 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. But there are limits to this authority, limits that the city refuses to address or even acknowledge, but this Court should.

Unlike the city, most municipalities codify the requirement that a business regularly feature adult fare to be subject to zoning requirements for adult amusements in accord with First Amendment protections. For this reason, the majority of the case law does not address the issue before this Court. Of the courts that have addressed the issue of whether a municipality can properly prohibit the occasional showing of adult material—some of which were struggling with the question of whether regularly presenting adult fare should mean always presenting adult fare for purposes of zoning—only one court has reached a conclusion that supports the city's position. Be it through statutory construction, under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, or under the First Amendment, all of the other courts have rejected such an application, and the city has failed to address any of these holdings in its response.

The city also makes the unbriefed contention that the Guild's motion for reconsideration, filed after the district court convicted the Guild for showing a single adult film, "is actually a motion for a new trial and was therefore untimely." (Answer Brief of Appellee at 3.) As explained below, the Guild's motion was indeed a motion for reconsideration, permitted under NMSA 1978, Section 39-1-1 and New Mexico case law, and was thus timely.

I. This Court should avoid the constitutional questions in this case and hold that Albuquerque's adult amusement ordinance cannot support prosecution for showing a single adult film.

In its response, the city wholly avoids the series of cases cited by the Guild in its opening brief where courts have construed enactments similar to the adult amusement ordinance at issue in this case to require ongoing presentation of sexually explicit material, not single presentations. (Brief in Chief of Appellants at 7-15.) The city's avoidance is understandable: under this line of cases, the city would be prohibited from citing the Guild, an art-house theater, for presenting a single film that emphasized body parts as set forth in its ordinance, and the city is unable to point to any cases where a court has construed adult amusement ordinances otherwise.

Instead of attempting to distinguish those cases or presenting an argument as to why the Court should run afoul of this precedent, the city incorrectly contends that the parties' stipulations prevent the Court from determining the meaning of § 14-16-1-5, explaining that "the issue of statutory interpretation should have been precluded based on the stipulations of the parties." (Answer Brief of Appellee at 5.) The parties, however, did not stipulate that § 14-16-1-5 meant what the city understood it to mean, and the city does not direct this Court to any such stipulation in its response. The Court cannot question the city's application of § 14-16-1-5 in a vacuum: in order to decide whether the city constitutionally applied

the ordinance to an art-house theater's single showing of an adult film, the Court must first determine the reach of the ordinance. And in doing so, the ordinance must be construed, if possible, in such a manner that avoids 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).

The district court analyzed the issues in exactly this sequence: first determining what § 14-16-1-5 mandates, then addressing its constitutionality.[1] Pursuant to the district court's request for supplemental briefing, both parties had opportunity to brief the issue and the Guild cited cases where similar constitutional questions to the one before this Court had been avoided through statutory interpretation.[2] (RP 0194-0198, 0205-0207-0208.) At that time, the city did not

[1] Although the district court addressed the constitutionality of Albuquerque's adult amusement ordinance in the abstract, it 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. (RP 0225-0227.)

[2] The city's claim that "Appellant's [statutory construction] argument to the District Court was basically concluded when the Court's question came" grossly misstates the record. (Answer Brief of Appellee at 6.) The district court requested

claim the inquiry was unfair or beyond the scope of the district court's proper consideration nor request opportunity to present evidence to the court in addition to the stipulations. If the city thought details of its interpretation of § 14-16-1-5 germane to the district court's determination, it should have included facts related to its interpretation in the parties' stipulations or presented additional evidence to the district court. See, e.g., Cordova v. Taos Ski Valley, Inc., 1996-NMCA-009, 121 N.M. 258, 263, 910 P.2d 334, 339 ("Waiver of an argument on appeal is a reasonable consequence for failing to formally alert the court to a potential error, thus depriving the trier of fact of the opportunity to address or correct the problem in the first instance.").

In any event, the Court does know the facts pertinent to statutory interpretation in this case: the Guild admits it showed a single, qualifying adult film under the City's adult amusement ordinance—as a result, the specifics of how the city defines a film with an emphasis on specified body parts is not at issue—and the city cited the theater for this single showing. The Court therefore knows everything it needs to know about the city's interpretation of § 14-16-1-5. The city

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supplemental briefing on the issue, both parties complied, and the Guild again briefed this issue in its motion for reconsideration. (RP 0194-0198, 0205-0207-0208, 0250-0253.)

believes it applies to a single showing of an adult film at an art-house theater. And the Guild, and all of the courts that have addressed this issue, disagree.

Consistent with those holdings, this Court should avoid the constitutional questions in this case and hold that the term "featuring," as set forth in Albuquerque's adult amusement ordinance, refers only to businesses that purvey adult material on a regular basis.

II. Albuquerque's Adult Amusement Ordinance is Vague as Applied to the Guild's Single Showing of an Adult Film.

The city also failed to address the Guild's argument that 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. (Brief in Chief of Appellants at 15-26). Although Section IV of the City's Response is entitled "The City of Albuquerque's Adult Amusement Zoning Ordinance, §14-16-1-5(B), ROA 1994, is not unconstitutionally vague as-applied," all of the analysis that follows centers on First Amendment case law and does nothing to inform a void-for-vagueness inquiry. An attack on the vagueness of an enactment is based in the Due Process Clause of the Fourteenth Amendment, not the First Amendment.[3] And the legal

[3] "The void-for-vagueness doctrine is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, and it is a general principle of statutory law

tests for vagueness under the due process clause and a First Amendment violation are entirely distinct.

In the city's only substantive mention of vagueness[4] it contends that in Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) the Court found that

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that a statute must be definite to be valid. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. To pass constitutional muster, therefore, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. Stated otherwise, a statute is so vague as to violate the Due Process Clause where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices or where its language is such that people of common intelligence must necessarily guess at its meaning." 16B Am. Jur. 2d Constitutional Law § 972. (Footnotes omitted).

[4] The city also misstates the district court's holding in this case, claiming that "the District Court correctly concluded that the ordinance is not vague as-applied." (Answer Brief of Appellee at 17.) The Guild first raised vagueness in its motion for reconsideration, and the district court did not address the Guild's argument that

the adult amusement zoning ordinances before it were not unconstitutionally vague. But that Court, in fact, outright rejected the adult theater's vagueness arguments without any analysis because the litigants offered adult fare on a regular basis. Specifically, the adult theaters in Young argued "that they cannot determine how much of the described activity may be permissible before the exhibition is characterized by an emphasis on such matter" and the challenged adult amusement ordinances were therefore unconstitutionally vague. Id. at 58. However, "[the Court found] it unnecessary to consider the validity of ...this argument [ ] in the abstract. For even if there may [have been] some uncertainty about the effect of the ordinances on other litigants, they...unquestionably appli[ed] to the[ ] respondents. The record indicate[d] that both theaters propose[d] to offer adult fare on a regular basis." Id. at 58-59. Consequently, although it held that the ordinances clearly applied to the plaintiffs conduct, the Young holding does not further the city's argument.

By contrast to the business in Young, the Guild is an art-house theater that does not offer adult fare on a regular basis. As set forth in detail in the Guild's

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§ 14-16-1-5 is unconstitutionally vague as applied to an art-house theater's single showing of an adult film. (RP at 0257.)

opening brief, the Guild therefore contends that the city's application of Albuquerque's adult amusement ordinance to this single showing is unconstitutionally vague because it forces ordinary persons to guess at its meaning and invites arbitrary enforcement. (Brief in Chief of Appellants at 15-26.) The city has not rebutted this argument.

III. The Application of Albuquerque's Adult Amusement Ordinance to a Single Showing of an Adult Film Violates Article II, § 17 of the New Mexico Constitution

Holding steadfast to Young and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the city again fails to address the raft of case law supporting the Guild's position that Article II, § 17 of the New Mexico Constitution prevents the prosecution of an art-house theater for a single showing of an adult film. The Guild concedes that Young states that a municipality can zone adult amusements and that Renton states that municipalities need not conduct their own studies to prove the secondary effects of adult amusement establishments, but these cases do not assist the Court's decision here, and Young actually encourages state courts to narrow adult amusement ordinances in as-applied challenges. Id. at 61.

Free speech is fundamental to democracy, and even pornography finds protection under the First Amendment. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

Texas v. Johnson, 491 U.S. 397, 413-414 (1989). Pursuant to this basic tenet, municipalities can zone adult amusement establishments, but any such zoning must be aimed at the secondary effects of those establishments, not the content of their speech. The city, however, appears to take the position that once it has enacted a content neutral adult amusement ordinance in compliance with Young, that ordinance can never be applied unconstitutionally.

In support of this position, the city amazingly compares the non-existent right to burn wood, with the recognized right to free speech. (Answer Brief of Appellee, Page 19.) The city fears that if one non-adult theater shows a film that emphasizes body parts specified in § 14-16-1-5 once a year, other theaters will follow suit and the cumulative effect (like the cumulative effect of smoke) will be equal to an actual adult amusement establishment. Id. Inexplicably, the city also imagines other theaters relocating to the Guild's zone, even though it is not zoned for adult amusements, so that those theaters could show one film a year that emphasizes body parts specified in its adult amusement ordinance. Id. This argument misses the mandates of the First Amendment and is illustrative of the disregard the city has for the free speech rights of its residents.

True, smoke accumulates. But movies would not. And burning wood is not protected activity under the First Amendment. If every theater in Albuquerque moved to the Nob Hill district, where the Guild is located, there would only be

approximately eleven films presented a year that emphasize body parts specified in Albuquerque's adult amusement ordinance in the area. Eleven showings could not possibly equal the secondary effects of a business that deals exclusively in adult fare. It is the consistency of offering adult fare that gives rise unwanted secondary effects, not the content in and of itself, and certainly not an occasional showing. For those reasons, the city's argument is factually untenable, but is also unsupported in law, law the city has failed to address.

In reviewing First Amendment claims, courts are not concerned with the accumulation of speech. Rightly, courts look to the citizen speaker before them and determine whether their right to speak has unlawfully been impinged. And courts are also not in the business of imagining what may happen if everyone speaks at once. Pursuant to the First Amendment, 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. See People v. Superior Court (Lucero), 774 P.2d 769, 777 (Cal.1989) ("Under [the regular and substantial course of conduct] 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 movies."), and Tollis Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (refusing to apply an adult amusement ordinance to a single showing because "it is difficult to

imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects."). And courts have found the application of generally valid adult amusement ordinances to categorically different businesses than those for which cities have evidentiary support cause negative secondary effects repugnant. See, e.g., Executive Arts Studio v. City of Grand Rapids, 391 F.3d 783, 796-97 (6th Cir. 2004) (striking down a broad adult amusement ordinance that would encompass any bookstore that had a section of adult reading because the city did not establish that such a business could cause unwanted secondary effects.), and 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).

Instead of addressing the above cases, and the many others cited in the Guild's opening brief, the city clings to the Guild's stipulation that its adult amusement ordinance is facially valid, arguing that this stipulation somehow weakens the Guild's claim and precludes it from asserting that the application of the ordinance to the Guild's conduct was content based. (Answer Brief of Appellee at 11-12.) For all the reasons set forth in the Guild's opening brief, the

Guild rejects the city's and the district court's reasoning. In short, if that reasoning endures, the law of facial challenges will be turned on its head, and it would become legally impossible 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. (Brief in Chief of Appellants at 28-32.) But even if the Court agrees with the city and the district court, and the Guild must facially challenge Albuquerque's adult amusement ordinance to test its application in a criminal case, the Guild's stipulation should be reasonably construed and parties cannot , through stipulations, limit the power of the court to elect one remedy over another.

Foremost, the district court misconstrued the Guild's stipulation when it concluded that by stipulating to facial validity, the Guild precluded itself from challenging what it believes to be a content based application of the Albuquerque adult amusement ordinance. In its reliance on this stipulation, the district court treats the distinction between as-applied and facial challenges as test based, or in other words, dictating a court's analysis.[5] However, more courts have treated the

[5] Even if the district court is right, and the distinction between facial and as-applied challenges is analysis based, this conclusion would not prevent, as the district court concluded, any analysis: there must be some means of satisfying Young's dictate

distinction as relating exclusively to the remedial doctrine of severability, or in other words, whether a given enactment will be invalidated in whole, in part, or just with respect to the application before a court. See Alex Kreit, Making Sense of Facial and As-Applied Challenges, 18 Wm. & Mary Bill Rts. J. 657 (2010). The Guild obviously intended to concede the latter, as it has consistently argued in both the metropolitan and district court that the city's application of Albuqueruque's adult amusement ordinance was content based. (RP 0143-0146. 0043-0050.) "In construing stipulations made by the parties, the agreements are subject to a fair and liberal construction in harmony with the intent of the parties [and] they will not be interpreted to admit facts which were obviously intended to be controverted." Lea County Good Samaritan Vill. v. Wojcik, 108 N.M. 76, 83, 766 P.2d 920, 927 (N.M. Ct. App. 1988) The Guild's stipulation was not intended to limit the constitutional tests available to it under the First Amendment. Rather, the Guild's clear intention was that § 14-6-1-5 could be constitutionally applied to an adult theater presenting adult fare on a consistent basis, not that the ordinance's application to its single showing was not content based. In conformity with the

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for state courts to narrow the reach of adult amusement ordinances via as-applied challenges. Young at U.S. 50, 61.

intent of the Guild, this Court should give fair interpretation to its stipulation and full review of its claims.

Further, because the distinction between facial and as-applied challenges arguably speaks only to the breath of remedy, it is the sole province of the Court to determine which remedy is appropriate. As a result, the parties cannot bind the Court to one remedy over another:

> [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved....[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 893 (2010) (internal cites and quotations omitted). The Court should therefore disregard the party's stipulation to facial validity if that stipulation bars full review of the Guild's conviction.

Therefore, the Court, unlike the district court, must reach the Guild's as-applied challenge.

IV. The Guild Timely Filed its Appeal

In its statement of the case, the city alleges, without explanation or cites, that the Guild's motion for reconsideration, filed in this case nineteen days after the district court entered its judgment and sentence, was "actually a motion for a new trial and [ ] therefore untimely." (Answer Brief of Appellee at 3.) Although this argument is meritless, so meritless that the city did not brief the issue, and the case law on point expressly anticipates a district court's reconsideration of its decisions in criminal cases under NMSA 1978, Section 39-1-1, the Guild is compelled to respond because it implicates the timeliness of its appeal. If the motion for reconsideration was really a motion for new trial under NMRA Rule 5-614, then it was untimely as was the Guild's appeal; if the motion was in fact a motion for reconsideration, filed pursuant to Section 39-1-1 and New Mexico case law, the motion was timely and it extended the Guild's time for appeal.

Foremost, there was not a trial in the instant case, and it is therefore logically impossible for the Guild to request a new trial. (RP 0118.) In addition, the district court retains control over a final judgment for a period of thirty days. § 39-1-1 provides: "[F]inal judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any

motion..." And our courts have held that "any motion" would include a motion for reconsideration that would effectively vacate or reverse a final judgment. See e.g., Nichols v. Nichols, 98 N.M. 322, 326, 648 P.2d 780, 784 (1982) (holding that, "the district court is authorized under Section 39-1-1 to change, modify, correct or vacate a judgment on its own motion."), and Laffoon v. Galles Motor Co., 80 N.M. 1, 450 P.2d 439 (Ct.App.1969) ("The trial court has jurisdiction for a period of thirty days to vacate or modify its prior judgments or final orders."). Further, this Court has based the distinction between a motion for reconsideration and a motion for a new trial in timing, not substance. See Chapel v. Nevitt, 145 N.M. 674, 681 203 P.3d 889, 896 (Ct.App. 2009) ("Because a motion for reconsideration filed within ten days of the final judgment is deemed to be a Rule 1-059(E) motion, a motion filed outside of the ten-day period should logically be deemed to have been filed under Section 39-1-1, which only requires motions to be filed within thirty days of the final judgments.").

New Mexico courts have applied Section 39-1-1 to criminal cases and, independent of this Section, have found support for motions for reconsideration of final criminal judgments in common law. In State v. Gonzales, 110 N.M. 218, 226, 794 P.2d 361, 369 (1990), the New Mexico Supreme Court reviewed a district court's authority to reconsider and reverse its original dismissal of a criminal case for pre-indictment delay. The Court held that a district court, even in criminal

cases, retains control of its judgments for a period of thirty days after entry and for such further time as may be necessary to pass upon and dispose of any motion directed against a judgment under Section 39-1-1. The Court also noted that, "the correction of errors by lower courts could lead to more speedy disposition of criminal cases and relieve appellate courts of an unnecessary burden." Id.

More recently, this court in State v. Roybal, 2006-NMCA-043, ¶ 13, 139 N.M. 341 346-347, 132 P.3d 598, 603-604, went even further, holding that a district court can rule on a motion for reconsideration following a final ruling under the common law when such a motion is not authorized under Section 39-1-1. In that case, the state filed a motion for reconsideration of the district court's dismissal based on lack of venue following a jury trial. Id. at 346. This Court explained that Section 31-1-1 does not apply after a case has gone before a jury; however, even though there is no rule or statutory authority expressly authorizing a motion for reconsideration after a judgment has been entered, common law supports such motions. In fact, motions for reconsideration, "are a traditional and virtually unquestioned practice and serve judicial economy by permitting lower courts to correct possible errors and thus avoid time-consuming and potentially unnecessary appeals." Id. at 347.

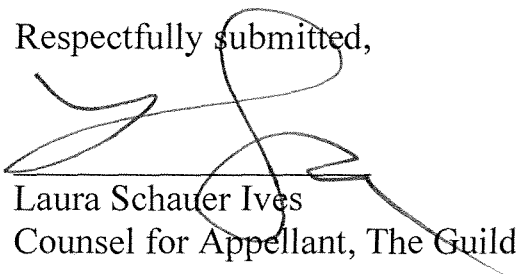
The above described cases do not lend support to the city's passing assertion that the Guild's motion for reconsideration was actually a motion for a new trial:

and, if it reaches this issue, this Court should find that the Guild's appeal was therefore timely.

V. CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via U.S. Postal Services, on this 23rd day, of May 2011, to:

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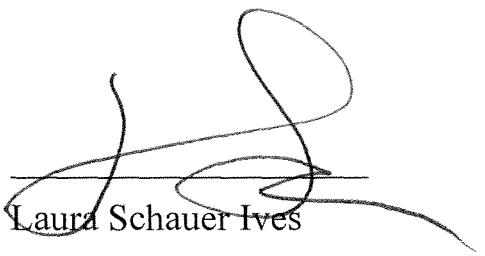

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