IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:17-cv-53

NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS; NC RSOL; and JOHN DOES #'s 1 and 2,

Plaintiffs,

v.

JOSHUA STEIN, Attorney General of the State of North Carolina;

ERIK A. HOOKS, Secretary of the North Carolina Department of Public Safety;

DISTRICT ATTORNEYS

Andy Womble (District 01), Seth Edward (District 02), Kimberly Robb (District 03A) Scott Thomas (District 03B), Ernie Lee (District 04), Ben David (District 05), Valerie Asbell (District 06), Robert Evans (District 07), Matt Delbridge (District 08), Mike Waters (District 09), Wallace Bradsher (District 09A), Lorrin Freeman (District 10), Vernon Stewart (District 11A), Susan Doyle (District 11B), Billy West (District 12), Jon David (District 13), Roger Echols (District 14), Pat Nadolski (District 15A), Jim Woodall (District 15B), Kristy Newton (District 16A), Johnson Britt (District 16B), Reece Saunders (16C), Craig Blitzer (District 17A)

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Ricky Bowman (District 17B), Doug Henderson (District 18), Roxann Vaneekhoven (District 19A), Andy Gregson (District 19B), Brandy Cook (District 19C), Maureen Krueger (District 19D), Lynn Clodfelter (District 20A), Trey Robison (District 20B), Jim O'Neill (District 21), Sarah Kirkman (District 22A), Garry Frank (District 22B), Tom Horner (District 23), Seth Banks (District 24), David Learner (District 25), Andrew Murray (District 26), Locke Bell (District 27A), Mike Miller (District 27B), Todd Williams (District 28), Ted Bell (District 29A), Greg Newman (District 29B), Ashley Welch (District 30);

Defendants.

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DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Now come Defendants and hereby submit this Reply Brief in Support of their Motion to Dismiss, ECF # 15 and in reply to Plaintiffs' First Amended Response Memorandum, ECF #18.[1]

ARGUMENT

I. Defendants Do Not Have Fair Notice of Plaintiffs' "Whole Registry Law" *Ex Post Facto* Claim.

This Complaint exposes Defendants to unreasonable uncertainty as to its claims and fails to provide plain notice pursuant to Fed. R. Civ. P. 8. In Claim 1 ¶¶600-603, Plaintiffs raise an *ex post facto* challenge to the "retroactive application of amendments" made in 2006, 2008, 2009, and 2016 to Article 27A. This Article consists of Parts 1 through 5 and contains 44 statutes. Plaintiffs, however, now state that Paragraphs 600 and 602 should not reference "Article 27A," but instead should reference the "registry law," which is a term created by Plaintiffs to cover Article 27A and the statutory provisions not included therein: N.C.G.S. §14-202.5, §14-202.5A, and §14-202.6. *See* ECF #18 at 7. Although Plaintiffs argue that this error is not material, Defendants disagree. The Complaint did not give plain notice that the "non-Article 27A" statutes were included in the *ex post facto* claim. In fact, Defendants addressed N.C.G.S. §14-202.5 as a miscellaneous claim potentially arising

[1] Plaintiffs' response memorandum filed the day prior and docketed as ECF #17 does not appear to contain content substantially different from ECF #18, and accordingly the State Defendants' reply to ECF #18 is effectively a reply to ECF #17, to the extent a separate reply is warranted.

under the 1st Amendment. *See* Defendants Memorandum Supporting Motion to Dismiss, ECF #16 at 42-43. Defendants did not argue N.C.G.S. §14-202.5A specifically, nor did Defendants argue §14-202.6 in their original filing. ECF #16. Neither statutory cite appears in the body of the Complaint and neither is contained within Article 27A. The fact that Plaintiffs included these "non-Article 27A" statutes in their Appendix does little to alleviate Defendants' Rule 8 concern when Claims 1, 4, and 5 themselves make such broad sweeping reference to "Article 27A" or to the "registry law." Plain notice under Rule 8 is not satisfied by placing the burden on Defendants to comb through 657 Complaint paragraphs trying to match conclusory factual allegations to conclusory claims in order to divine which 47 statutes are the subject of a legal challenge, whether in Claim 1, 4, or 5.

Plaintiffs point out that Defendants "misapprehend[] the nature of Plaintiffs' *ex post facto* challenge." ECF #18 at 15. This admission is direct evidence of the confusion in the Complaint, which is compounded by its length. Despite having pled only that Article 27A amendments in 2006, 2008, 2009, and 2016 were retroactive "*ex post facto* laws" (Compl. ¶¶600-603), Plaintiffs now argue that "as a whole, the post-1995 amendments take the registry law across the line from valid regulatory measure to punitive statute." ECF #18 at 15. Claim 1, however, did not plead a challenge to the "registry law" as a whole. The "history of the registry law" in Complaint ¶¶110-182 (*see* Plaintiffs' argument, ECF #18 at 5) reads as background material, and not as separate statutory challenges incorporated into Claim 1, especially since the historical recitation includes a *former* version of N.C.G.S.

§14-208.18 found to be unconstitutional. (Compl. ¶¶172-73) [2] Claim 1 does not give Defendants plain notice of an *ex post facto* claim against the registry law "as a whole" under Fed. R. Civ. P. 8.

Moreover, under Plaintiffs' "whole law" theory, John Does 1 and 2 do not have standing to pursue an *ex post facto* claim because the "whole law" is not retroactive to them. *See* Defendant's Memorandum ECF #16 at 12-13. Retroactivity is required for an *ex post facto* challenge, *see* ECF #16 at 7, and Plaintiffs' "whole law" theory is not sustainable. Based on the face of the Complaint, only the 2016 amendments to N.C.G.S. §14-208.18(a)(2) and (3), which post-date the Does' conviction dates of 2009 and 2011, would be retroactive. [3]

As to NARSOL and NC RSOL's standing to bring an *ex post facto* challenge to the "entirety of" the registry law, Plaintiffs rely on *Weaver v. Graham*, 450 U.S. 24, 29 (1981), arguing that their "identifiable members are disadvantaged" by the "whole registry law." ECF #18 at 15-16. *Weaver* does not set forth a "corporate standing" test. *Weaver* did, however, suggest that the analysis for an *ex post facto* challenge included whether a law "disadvantaged" a defendant. 450 U.S at 28-29. The Supreme Court has disavowed this language. *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506-507, n. 3

[2] Complaint Paragraphs 175-176, which mention an alleged ban on access to certain internet sites and a ban on name changes access, also read as background material, and not as separate statutory challenges incorporated into Claim 1, because they are not part of Article 27A.

[3] The Doe Plaintiffs lack standing as to the 2016 amendments for the reasons in Defendants' ECF #16 at 13-14.

(1995)(*citing Collins v. Youngblood*, 497 U.S. 37 (1990)). After *Collins,* the analysis is whether a retroactive law increases the penalty for punishment of a crime, not whether the law adds a burden, or disadvantage. *Morales*, 514 U.S. at 506, n. 3. More recently, in *Smith v. Doe*, the Supreme Court applied a two-part analysis to an *ex post facto* challenge to a sex offender registration statute: whether the legislature intended a civil scheme and whether the "clearest proof" showed that the statute was "so punitive either in purpose or effect as to negate the [legislative] intention to deem it civil." 538 U.S. 84, 92, 96 (2003).

The affidavits submitted by NC RSOL (ECF #18-1) and NARSOL (ECF #18-2) do not meet the legal tests for organizational member standing. The affidavits do not support NARSOL's or NC RSOL's standing as to the 2006, 2008, 2009, and 2016 retroactive amendments *ex post facto* Claim 1 ¶¶600-603, nor as to the new "whole registry law" claim in Plaintiffs' Response Memorandum. Both affidavits—void of a name, conviction description, residence, occupation, or any other facts-- are wholly conclusory with no plausible allegations that an identified member has suffered harm in a concrete and personal way from any "registry law" statutory provision that might be part of a claim. *Southern Walk at Broadlands Homeowner's Ass'n, v. Openband at Broadlands, L.L.C.*, 713 F.3d 175, 184 (4th Circuit 2013); *see also* Defendant's ECF #16 at 8 (citing additional case law).

It remains entirely speculative as to which of the 44 district attorney defendants are in a position to allegedly threaten prosecution of these nameless affiants, much less which district attorney has threated prosecution and for which potential violation. Plaintiffs argue

that Attorney General Stein must be a defendant in order to close the loophole wherein a district attorney, enjoined from enforcing the "registry law," might ask the Attorney General to prosecute the law instead. ECF #18 at 13. It strains professional imagination to think that a district attorney would ask the Attorney General to bring a special prosecution action to enforce a statute found by this court to be unconstitutional and that the Attorney General would even entertain the request. This argument is utterly speculative and not plausibly supported by any factual allegations in the Complaint.

McBurney v. Cucinelli, cited by Plaintiffs in ECF #18 at 13, does not stand for Plaintiffs' asserted proposition of "closing the loophole." In *McBurney*, the Fourth Circuit declined to find a special relationship between the defendant Attorney General and the enforcement of an Act sufficient to waive 11th amendment immunity. The Court explained that the Attorney General's authority over the Act was "significantly… attenuated" and even if it were not, the Court could not "apply *Ex parte Young* because the Attorney General [had] not acted or threatened to act." 616 F.3d 393, 401-02 (4th Cir. 2010). Attorney General Stein's relationship to any potential prosecution is attenuated, as it is speculative that any such prosecution would ever occur. Although Plaintiffs also rely on *Mobil Oil Corp. v. Attorney Gen. of Virginia* in ECF #18 at 9 and 14, this case is distinguishable because the challenged statute expressly gave the attorney general power to file a civil action. 940 F.2d 73, 75 (4th Cir. 1991). Attorney General Stein does not have independent prosecutorial power. N.C.G.S. §114-11.6.

Plaintiffs argue that the North Carolina appellate court decisions, holding that North Carolina's sex offender registration statutes do not violate the *ex post facto* clause, are not binding on this court. ECF #18 at 18. Federal courts, however, are to follow a state appellate court's construction of a state statute. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997). In the North Carolina appellate court decisions cited by State Defendants, ECF #16 at 14-15, the state courts have determined that the legislature intended the sex offender registry requirements to create a non-punitive civil regulatory scheme. *See In re Hall*, 238 N.C. App. 322, 330-31 (2014), *cert. denied*, 136 S. Ct. 688 (2015). The *In re Hall* decision specifically addresses the 2006 amendment increasing the registration period to ten years, which is the Article 27A amendment challenged by Plaintiffs in Claim 1, ¶600, in concluding the legislature intended the registry to remain a non-punitive regulatory scheme. *Id*.

Plaintiffs argue that *Smith v. Doe* is not a bar to their *ex post facto* challenge due to the alleged "network of affirmative disabilities and restraints" and "intensive surveillance akin to probation or parole" (Compl. ¶¶211-291). ECF #18 at 20. Plaintiffs, however, have yet to identify a plaintiff to whom this "whole registry law" network applies retroactively and who has suffered an Article III injury. Thus, for example, while the Complaint grieves about the employment "ban" on childcare work and commercial passenger bus licensing, no Plaintiff has alleged a particularized injury in relation to these bans. Additionally, an employment ban would not render the sex offender registry so punitive in purpose or effect

as to negate the civil intent of the registry, since the sanctions of occupational debarment have not even been held to be punitive. *Smith*, 538 U.S. at 100.

II. The First Amendment Substantial Overbreadth Claim 2, Count I Should be Dismissed.

Plaintiffs limit their free speech claim to N.C.G.S. §14-208.18(a)(2) and (a)(3) and incorrectly claim that the recent amendments to this statute independently and directly bar registrants from "libraries" and "parks" and any other "public place" where minors "frequently congregate." ECF #18 at 22. Plaintiffs omit key portions to both N.C.G.S. § 14-208.18(a)(2) and (a)(3). First, subparagraph (a)(2) only applies to those registrants who have committed registrable offenses against a minor, or who are found to be a danger to minors by the court. N.C.G.S. §14-208.18(c)(2). Second, subparagraph (a)(3) only applies to those types of places listed in the statute (libraries, arcades, etc.) when minors are present. These narrow restrictions are not complete and direct bars, and therefore are not subject to the heightened review, as Plaintiffs argue. ECF # 18 at 23.

Consequently, Plaintiffs' reliance on *Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012), as authority for applying the heightened scrutiny standard is without force. ECF #18 at 22. In *Doe*, the city ordinance banned sex offender access to all public city libraries, thus infringing on the sex offender's right to some level of access to public libraries. 667 F.3d at 1116.[4] N.C.G.S. §14-208.18(a)(3), in contrast, is not a ban on libraries

[4] Additionally, the Tenth Circuit decision striking down the city's ban was based on the city's failure to properly litigate the matter and not persuasive authority. The court stated that had the city properly defended the ordinance, the ban might have survived. 667 F.3d at 1115.

per se, but leaves open alternative channels for communication, including access to libraries where minors do not frequently congregate, such as the State Library. There also is not a ban on online library access. Plaintiffs Doe 1 and 2 also have not alleged facts to support the purported as-applied challenge set forth in Complaint ¶605.

Lastly, Plaintiffs' facial challenge in Claim 2, Count I ¶¶604-05, appears improperly characterized as an overbreadth challenge. The overbreadth doctrine allows a party whose speech is constitutionally restricted to raise the rights of third parties in a facial challenge when the free speech rights of these third parties may be chilled by the challenged law. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). An overbreadth challenge rarely, if ever, succeeds against a law not addressed to speech or speech associated conduct, such as picketing or demonstrating. *Id.* at 124. The 10th Circuit rejected the application of the overbreadth doctrine to a city library ban on sex offenders because there was no likelihood that non-sex-offenders would be unsure of whether the statute applied to them. *Doe*, 667 F.3d at 1123 n. 7. There is no likelihood or facts to support that non-registrants would be unsure of whether N.C.G.S. §14-208.18(a)(3) applies to them.

III. The Freedom of Association Claim 2, Count I Should Be Dismissed.

Plaintiffs argue that alleged restrictions on their ability to enter religious communities of their choice infringes upon their freedom of association, which is pled in Claim 2, Count III ¶607. ECF #18 at 25. Plaintiffs appear to conflate this claim with their free exercise of religion claim in Claim 2, Count II ¶606. Defendants' research has yet to

uncover a freedom of religious community association separate and apart from the 1st Amendment free exercise clause.

> It is obvious that freedom of association could logically include the freedom to associate for the purpose of fostering religious beliefs, but the Supreme Court has not specifically dealt with such a question since 1958, basing its decisions involving religion on the specific guaranty of freedom of religion found in the First Amendment.

Annotation: The Supreme Court and the First Amendment Right of Association, Donald T. Kramer, J.D., 33 L.E.2d 856, n. 8 (2012). Thus, Defendants defend this associational claim based on their arguments responding to the free exercise of religion claim. ECF #16 at 33-34.

Plaintiffs also argue that their right to associate with their children is impacted by N.C.G.S. §14-208.18(a)(2) and (a)(3). ECF #18 at 25. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), upon which Plaintiffs rely in ECF #18 at 25, does not support their argument. Defendants discuss this case *infra.* herein in Section IV. Plaintiffs also argue that the "statute effectively prevents registrants from living in many communities." ECF #18 at 25. N.C.G.S. §14-208.18(a)(2) and (a)(3), however, do not restrict the place where registrants may live and thus this argument may be rejected. Lastly, as to their argument about going to public places for assembly, referring to streets and parks (ECF #18 at 25), the Doe Plaintiffs do not allege particularized facts to demonstrate a plausible injury to a right to assemble.

IV. Plaintiffs' Substantive Due Process Claim 4 Should Be Dismissed.

Plaintiffs argue that parental rights, including the opportunity to interact with their children, are a fundamental right within the ambit of the substantive due process doctrine. ECF #18 at 27. Plaintiffs quote *Lassiter*, 452 U.S. at 27, for the proposition that parents have the right to "companionship, care, custody, and management of [their] children." This quote arises in the context of termination of parent rights, with the issue being whether the *Matthew v. Eldridge* procedural due process factors required a court-appointed attorney in a civil proceeding to terminate mother's parental rights to infant. The Supreme Court held that it could not say that the Constitution required appointed counsel in every parental termination proceeding, adopted the standard in *Gagnon v. Scarpelli*, and left the decision to be answered first by the trial court subject to appellate review. *Lassiter*, 452 U.S. at 31-32. *M.L.B. v. S.L.J*., 519 U.S. 102, 116 (1996), also cited by Plaintiffs in ECF #18 at 27, was decided in the context of the State's termination of parental rights. The Court held that the State may not withhold the transcript needed by petitioner-parent to gain appellate review of the order ending her parental status, as she was "endeavoring to defend against the State's destruction of her family bonds." 519 U.S. at 125.

Neither case supports Plaintiffs' contention that a parent has a fundamental right, for substantive due process purposes, to associate or interact with his child in public places. Instead, the right has been analyzed by the courts in the context of state action dissolving a parent's right to the care, custody and management of a child. *See Williamson v. Virginia Beach*, 786 F. Supp. 1238, 1257 (E.D.Va. 1992)(rejecting parent's "right to care custody

and management of her child" claim because officer had no intent to dissolve the parent-child relationship), *aff'd,* 991 F.2d 793 (4th Cir. 1993); *see also, Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 180 (4th Cir. 1996)(substantive due process has been expanded only to rights that "involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"), *cert. denied,* 519 U.S. 1111 (1997). The premises restrictions in N.C.G.S. §14-208.18(a)(2) and (a)(3) are not tantamount to the termination of parental rights and destruction of family bonds. Even in the context of the parental right to direct the education and upbringing of children, the Supreme Court has only applied a "strict scrutiny" analysis when First Amendment rights were involved, which is not pled by Plaintiffs in Claim 4, Count I. Otherwise, the test is the rational basis test. *Herndon,* 89 F.3d at 178-79. N.C.G.S. §14-208.18(a)(2) and (a)(3) meet this rational basis test for the reasons set forth in Defendant's Memorandum ECF #16 at 22-23, 30-31.

Plaintiffs' response with respect to the "right to pursue common occupations" in Claim 4, Count II, illustrates another Rule 8 problem with the Complaint. *See* ECF #18 at 28-29. Claim 4, Count II ¶¶617-20 challenges the entire "registry law" as infringing upon the right to pursue common occupations, but does not specify a statute. Plaintiffs now argue in their Response Memorandum that Claim 4, Count II is intended to challenge: N.C.G.S. §14-208.19A, preventing registrants from driving passengers for hire; N.C.G.S. §14-208.17, preventing registrants from the instruction, supervision or care of minors; and N.C.G.S. §14-208.18(a), creating alleged "exclusion zones" for occupations, such as

delivery persons. ECF #18 at 28-29. The Fourteenth Amendment protects "'the liberty to pursue a particular calling or occupation, . . . not the right to a specific job.'" *Habhab v. Hon*, 536 F.3d 963, 968 (8th Cir. 2008)(*quoting Piecknick v. Com. of Pa*., 36 F.3d 1250, 1259-60 (3d Cir. 1994)). The Complaint is void of factual allegations that the Doe Plaintiffs, or an identifiable member of NARSOL or NC RSOL, have a calling to pursue being a licensed, commercial bus driver (including a school bus driver)[5] or a childcare worker; that they were previously engaged in these occupations and now cannot engage in the same; or that they meet the general qualifications required by employers for performing such occupations.[6] In any event, to rise to the level a substantive due process claim, challenged conduct must be "'so egregious or outrageous that it is conscience-shocking.'" *Id*. (*quoting Forrester v. Bass*, 397 F.3d 1047, 1058 (8th Cir. 2005)).

> Substantive due process is concerned with violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience.

Golden v. Anders, 324 F.3d 650, 652-53 (8th Cir. 2003) (internal marks and quotations omitted). It does not shock the conscience that North Carolina's legislature

[5] Driver licenses are a matter of state law and do not constitute a "fundamental right." *State v. Oliver*, 343 N.C. 202, 210, 470 S.E.2d 16, 21 (1996)(driver license "is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked")

[6] Defendants originally determined that N.C.G.S. §14-208.18(a) was the "registry law" statute most likely to be in play in Claim 4, Count II. *See* ECF #16 at 27-28.

would restrict persons convicted of sex offenses or crimes against minors from employment in the childcare industry or employment in a position of trust and authority in driving commercial passenger vehicles, such as school buses. [7]

Plaintiffs argue that N.C.G.S. §14-208.18(a)(3) restricts persons in the performance of their jobs. ECF #18 at 29. Plaintiffs, however, do not allege employment as delivery persons or postal workers. A "trade person" may include John Doe 1's work as a construction supervisor (Compl. ¶360), who alleges that his opportunity for advancement in his profession is hampered by his registrant status. He is, however, working in his chosen field. "The liberty interest is in the chosen field, not the specific position therein. One simply cannot have been denied his liberty to pursue a particular occupation when he admittedly continues to hold a job−the same job−in that very occupation." *Abcarian v. McDonald*, 617 F.3d 931, 941-42 (7th Cir. 2010); *Cityspec, Inc. v. Smith*, 617 F. Supp. 2d 161, 169 (E.D.N.Y. 2009) (14th amendment liberty interest is freedom "to engage in any of the common occupations of life," not right to particular job within that field), *cert. denied*, 562 U.S. 1288 (2011); *see also Board of Regents v. Roth*, 408 U.S. 564, 575 (1972)("It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another").

[7] As to Plaintiffs argument that they have pled more than "stigmatic injury" ECF #18 at 29, "stigma plus" is a procedural due process concept that is immaterial to a substantive due process claim. In either case, Plaintiffs have not alleged "stigma plus." *See infra argument* at Section VII.

Conn v. Gabbert, 526 U.S. 286 (1999), cited by Plaintiffs, does not advance their position that the "right to be free from occupational bars and wholesale denial of substantial opportunities for employment" (ECF #18 at 28) is a fundamental substantive due process right. *Gabbert* involved the temporary interference with an attorney's representation of client when prosecutors initiated a search warrant against the attorney during a grand jury proceeding. The Supreme Court held that the prosecutor's conduct did not violate the attorney's 14th Amendment right to practice his profession. 526 U.S. at 293. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) does not advance Plaintiffs' argument either. The case involved federal denial of employment opportunities of resident aliens, whom the Court indicated were protected as a discrete class whose right to work for a living could not be refused solely upon the ground of race or nationality. 426 U.S. at 102-03, n. 23. Plaintiffs are not such a class. Claim 4, Count II does not state a substantive due process claim because the liberty interest in pursuing a common occupation is not *per se* a fundamental, substantive due process right

In support of their "right to acquire useful knowledge" in Claim 4, Count III, Plaintiffs rely on four cases. ECF #18 at 30. These cases all address procedural due process. None of them found the "right to acquire useful knowledge" to be a fundamental right under the substantive due process clause. *Marin v. University of Puerto Rico*, 377 F. Supp 613 (D.P.R. 1974)(public college students expelled due to misconduct were entitled to a hearing under 14th Amendment procedural due process); *Jackson v. Astrue*, No. 3:08-cv-461-J-34TEM at 12 (M.D.Fla. Jan. 21, 1999)(right to acquire useful knowledge was

protected liberty interest for procedural due process purposes, but Plaintiff failed to allege facts to support his claim); *Newsome v. Baca*, No. 94-2087 at *5-6, 1994 U.S. App. LEXIS 18387(10th Cir. July 20, 1994)(district court held that denial of access to public records was not fundamental right protected by substantive due process; 10th Circuit affirmed, adding that liberty interest in acquiring useful knowledge did not require that public records access be codified in a public records act versus administrative procedures act)(decision not binding precedent); *Miller v. Northwest Region Library Bd*., 348 F. Supp. 2d 563, 570 (2004)(Plaintiff entitled "at a minimum, [to] a notice of the charge or proceeding and an opportunity to defend oneself" prior to being, barred permanently from internet use at regional libraries).

Plaintiffs cite *San Antonio Independent Sch. Distr. v. Rodriguez*, 411 U.S. 1, 30 (1973), to support their claim that attendance or enrollment in a community college in order to acquire useful knowledge is a fundamental right. ECF #18 at 30-31. But the Supreme Court in *Rodriguez* disclaimed the existence of a fundamental right to an education under the Federal Constitution. 411 U.S. at 35-37; *see also, Charleston v. Bd. of Trs. of the Univ. of Ill. at Chi*., 741 F.3d 769, 774 (7th Cir. 2013)(no fundamental right to public higher education), *cert. denied*, 134 S. Ct. 2719 (2014); *Galdikas v. Fagan*, 342 F.3d 684, 688 (7th Cir. 2003)(no substantive due process right to continuing higher education), *abrogated on other grounds by Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004); *M.B. v. McGee*, No. 3:16cv334, 2017 U.S. Dist. LEXIS 44796 at *32 (E.D.Va.) (education not explicitly or implicitly protected federal right)(*quoting Rodriguez*, 411 U.S. at 35).

In their Response Memorandum ECF #18 at page 30, Plaintiffs argue that if a state provides public education then this education becomes "'a right which must be made available to all on equal terms.'" This quote, found in *Rodriguez*, 411 U.S. at 29-30, originates from *Brown v. Board of Education*, 347 U.S. 483 (1954), in the context of racial discrimination in compulsory education. This quote does not advance Plaintiffs' position. Compulsory education is primary and secondary education. Community college is post-secondary education, not compulsory education. Moreover, Plaintiffs fail to identify a North Carolina statute creating a property interest in higher education such that a substantive due process claim might be predicated on a state created property interest. *See Grant v. Trs. of Ind. Univ*., No. 1:13-cv-00826-TWP-DML, 2016 U.S. Dist. LEXIS 40732 at *33 (S.D. Ind. March 28, 2016)(setting forth elements of substantive due process claim for deprivation of a state-created property interest); *see generally, McCoy v. E. Va. Med. Sch.*, Civil Action No. 2:11cv494, 2012 U.S. Dist. LEXIS 25777 at *6-7 (E.D.Va. Feb. 28, 2012)(finding no property interest in continuing, post-secondary education under Virginia law).

V. Plaintiffs' Claim 3 That N.C.G.S. §14-208.18(a)(3) Is Unconstitutionally Vague Should be Dismissed.

Plaintiffs raise a facial challenge in Claim 3, alleging that N.C.G.S. §14-208.18(a)(3) is unconstitutionally vague under the 5th Amendment. (Complt. ¶¶608-10) The Supreme Court generally disfavors facial challenges. *United States v. Hamilton*, 699 F.3d 356, 366 (4th Cir. 2012). Facial challenges tend to rest on speculation and risk the "premature interpretation of statutes." *Wash. State Grange v. Wash. State Republican*

Party, 552 U.S. 442, 450 (2008). Plaintiffs argue that Defendants' have incorrectly relied upon *Hoffman Estates v. Hoffman Estates, Inc*., 455 U.S 489, 497 (1982), which has set forth the standard for a facial challenge on vagueness grounds. Plaintiffs cite *Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015), in which Justice Scalia stated that prior Court holdings contradicted the "theory" that a vague provision is unconstitutional merely because some conduct constitutionally falls within the provision. ECF #18 at 31. In *Johnson*, the Court interpreted the residual clause of the Armed Career Criminal Act, which allowed a judge to impose an increased sentence upon a finding that a prior conviction presented "a serious potential risk of physical injury to another." The Court held that this phrasing was unconstitutionally vague because the judicial assessment of risk depended upon a judicially imagined "ordinary case" of a crime, rather than upon real-world facts or statutory elements, while simultaneously leaving uncertain how much risk was needed for a crime to qualify as a violent felony. 135 S. Ct. at 2557. Notably, the Court had spent nine years "trying to derive meaning from the residual clause," and was convinced it had "embarked upon a failed enterprise." 135 S. Ct. at 2560. The J*ohnson* Court then overruled two of its prior decisions construing the residual clause. 135 S. Ct. at 2563.

The *Johnson* Court, however, did not overrule *Hoffman Estates v. Hoffman Estates, Inc*., 455 U.S 489, 497 (1982). Justice Alito in his dissent stated that the Court did not abrogate the "no-set-of-circumstances" rule in its entirety (set forth in *Hoffman Estates*), but just refused to apply it. 135 S. Ct. at 2580 (Alito, dissenting). Nevertheless, the *Johnson* Court's remarks may create ambiguity in the law, as reflected in two unpublished Fourth

Circuit opinions. *See and cf. Johnson v. Quattlebaum*, 664 Fed. Appx. 290 (4th Cir. 2016)(UP)(noting Supreme Court had "backed away" from the pronouncement that a statute must be impermissibly vague in all of its applications) with *Maages Auditorium v. Prince George's County*, No. 16-1321, No. 16-1699, 2017 U.S. App. LEXIS 4532 (4th Cir. Md. March 15, 2017)(UP)(citing *Hoffman Estates* that a law must be impermissibly vague in all of its applications). Ultimately, however, this Court need not resolve the "standards" issue raised by the *Johnson* Court because fundamentally the "core" provisions of N.C.G.S. §14-208.18(a)(3) provide notice to a reasonable person as to what conduct is prohibited.

To sustain a vagueness challenge, plaintiff must prove vagueness, not in the sense "that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). N.C.G.S. §14-208.18(a)(3) restricts some registrants from knowingly being at places where minors frequently congregate, when minors are present, and provides a list of examples (libraries, arcades, amusement parks, recreation parks, and swimming pools). Similar language from other jurisdictions has survived constitutional challenge. *See, e.g., United States v. Taylor*, 338 F.3d 1280, 1286 (11th Cir. 2003) (upholding a Florida probation condition that referenced areas "where children frequently congregate"), *cert. denied*, 540 U.S. 1066 (2003); *see also Doe v Cooper*, 148 F. Supp. 3d 477 (M.D.N.C. 2015)(citing the 11th Circuit *Taylor* case, among others). N.C.G.S. §14-208.18(a)(3) further clarifies that the places are restricted only when the minors are actually present. Plaintiffs strain to argue otherwise. ECF #18 at 33.

N.C.G.S. §14-208.18(a)(3)'s scienter, or mens rea requirement, of "knowingly" further defeats Plaintiffs' vagueness challenge. *United State v. Jaensch*, 665 F.3d 83, 90 (4th Cir. 2011)(scienter requirement mitigates law's vagueness), *cert. denied*, 556 U.S. 975 (2012). Additionally, "[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Plaintiffs admit that they have notice that going to libraries with child-dedicated spaces and parks with equipment for children are proscribed. (Compl. ¶¶592-93) Thus, Plaintiffs' recognize a "core" standard of conduct that defeats their vagueness claim.

To the extent that Plaintiffs are unsure about a location, vagueness challenges to statutes not threatening First Amendment interests must be examined on an as-applied basis. *United States v. Mazurie*, 419 U.S. 544, 550 (1975). Plaintiffs allege vague, abstract hypotheticals (e.g, "sporting events"), not facts, and in doing so, attempt to use abstract hypotheticals to create indefiniteness in the law. *See Johnson*, 135 S. Ct. at 2573 (Alito, dissenting)(indefiniteness itself is an indefinite concept). Plaintiffs' speculation about the application of the statute to Plaintiffs' vague examples, does not support their facial attack, especially when they have admitted in their allegations that the statute is understandable in its core provisions (i.e., libraries and parks). *Hill v. Colorado*, 530 U.S. 703, 733 (2000). A "statute need not spell out every possible factual scenario with 'celestial precision' to avoid being struck down on vagueness grounds." *United States v. Whorley*, 550 F.3d 326, 334 (4th Cir. 2008).

VI. The Procedural Due Process Claim 5 Should Be Dismissed.

Although Plaintiffs contend that Secretary Hooks maintains the registry, and as such is a proper defendant ECF #18 at 35, it is actually the sheriff of the county where a registrant resides with whom a registrant must "maintain registration." N.C.G.S. §14-208.7(a). The Department of Public Safety provides forms for the sheriff's use, N.C.G.S. §14-208.7(b), but the sheriff is the one who collects the information, sends the registration information to the Department and "compiles the information that is public record into a county registry." N.C.G.S. §14-208.7(c); *see also* §14-208.8A. The Department keeps the central registry and is custodian of the registry as to "all sex offender registrations, changes of address [and] changes of academic or educational employment status" *received* from the sheriff. N.C.G.S. §14-208.14(a)(1). The Department provides access to the public to photographs *provided by* the "registering sheriffs." N.C.G.S. §14-208.15. Thus, the sheriffs maintain Plaintiffs' registration, not Secretary Hooks.

Contrary to Plaintiff's assertion in ECF #18 at 36, the registry does not label registrants as "dangerous." The form that sheriffs use to collect registration information asks for the "type of offense for which the person was convicted, the date of the conviction, and the sentence imposed." N.C.G.S. §14-208.7(b)(2). The form as prescribed by statute does not have a "box to check for dangerousness." Since the registry contains the information collected on the form, N.C.G.S. §14-208.7(a), (a1),(b), and (c), the word "dangerous" is not found anywhere on the public registry website. Although Plaintiffs assert that the classification of a registered offender as a "sexually violent predator" lends

support to their due process claim, *see* ECF #18 at 36, this classification only happens after a sentencing hearing on the topic, which affords the registrant an opportunity to be heard. N.C.G.S. §14-208.20. Further, Plaintiffs have not asserted that they are classified as "sexually violent predators," therefore any such claim must fail. Plaintiffs are really arguing about, and taking issue with, society's public perceptions of sex offenders. The State Defendants are not responsible, much less liable in this civil suit, for the public's perceptions.

VII. Fed. R. Civ. P. 12(f) Permits Striking Immaterial Allegations, Which Include Any Allegations Supporting a Purported "Stigma-Plus" Claim.

Plaintiffs concede that this Court does not have jurisdiction over the state law defamation claim, but take issue with Defendants' request to strike as immaterial the allegations pertaining thereto. ECF #18 at 39-40. Motions to strike are proper "where the challenged allegations have no possible relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice" to the other party. *Bandy v. Advance Auto Parts, Inc*., No. 7:11-cv-00365, 2012 U.S. Dist. LEXIS 29852, 2012 WL 831027, at *7 (W.D. Va. Mar. 6, 2012), *aff'd*., 535 Fed. Appx. 260 (4th Cir. 2013). Although Plaintiffs cite *Whittlestone, Inc. v. Handi-Craft Co*., 618 F.3d 970, 974-75 (9th Cir. 2010), as authority for denying Defendants' request, this case addressed striking claims for damages, which do not apply to Plaintiffs' lawsuit. Defendants also have not requested to strike the whole pleading, which was the context of the Fourth Circuit's statement disfavoring Rule 12(f) motions in *Waste Mgm't Holdings v. Gilmore*, 252 F.3d 316, 347(4th Cir. 2001), *cert. denied*, 535 U.S. 904 (2002). *See* ECF #18 at 40.

Plaintiffs' 88-page Complaint contains 657 paragraphs, excluding the 28 page Appendix. The allegations in support of the state law defamation claim add no relevancy to this action. Streamlining this lengthy complaint by striking immaterial allegations protects all parties from unnecessary discovery, or needlessly complicated discovery. Although Plaintiffs argue that allegations about the "State" falsely labelling registrants as dangerous are relevant to the *ex post facto* claim or due process claim (ECF #18 at 39), the *State* is not a proper defendant. Additionally, these allegations are legal conclusions, which this Court need not accept. As previously argued in Section VI, the registration form mandated by N.C.G.S. §14-208.7 does not have provisions for "dangerousness" of the registrant and the State is not publishing "false information" about dangerousness.

Plaintiffs argue that the allegations about defamation and falsehoods are relevant to (procedural) due process claim (ECF #18 at 39-40), but Plaintiffs' argument misunderstands "stigma plus." Injury to reputation by itself is not a protected liberty interest under the 14th amendment. *Siegart v. Gilley*, 500 U.S. 226, 233 (1991). There is no constitutional right to be free from "stigma." *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 147 (4th Cir. 2009). While "stigma-plus" may be actionable, "stigma plus" requires reputational injury *in conjunction with*, (typically), the loss of government employment. *Paul v. Davis*, 424 U.S. 693,708-09 (1976)(defamation perpetrated by a government official but unconnected with any refusal to rehire would not

be actionable under the 14th Amendment")[8]; *Cox v. Northern Virginia Transp. Com.*, 551 F.2d 555, 558 (4th Cir. 1976)(when a government employee is dismissed without a hearing, having been publicly charged with dishonesty or other wrongdoing that will injure his or her liberty to obtain other work, the federal tort is not the defamation, but the denial of a hearing where the dismissed employee has an opportunity to refute the public charge.)(*citing Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

Grimes v Miller, 448 F. Supp. 2d 664, 673-74 (D. Md. 2006), cited by Plaintiffs in ECF #18 at 40, does not support Plaintiffs' "stigma-plus theory." *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004), cited in *Grimes*, specifically states that the "state-imposed burden or alteration of status" must be in addition to the stigmatizing statements. The burden that can satisfy the plus prong includes "deprivation of property, termination of employment, or a direct interference with plaintiffs' business." *Id*. None of these things apply here. Finally, there is no claim in the Complaint denominated as a "stigma plus" claim. Defendants do not have plain notice under Fed. R. Civ. P. 8 of such a claim.

CONCLUSION

For the reasons stated herein, and in Defendants' Memorandum in Support of their Motion to Dismiss, ECF # 16, the State Defendants' respectfully request that their Motion to Dismiss be granted.

[8] In citing *Paul v. Davis* in ECF #18 at 40, Plaintiffs confuse and/or conflate procedural due process with substantive due process. The right to be free of a "false categorization," *see* ECF #18 at 39, is not a fundamental, substantive due process right.

Respectfully submitted this 5th day of June, 2017.

ROY COOPER
Attorney General

/s/ Lauren Clemmons
Special Deputy Attorney General
N.C. Bar No. 15987
lclemmons@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629
Tele: (919) 716-6920
Fax: (919) 716-6764

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS** electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for Plaintiff:

Paul Dubbeling
paul.dubbeling@gmail.com

Respectfully submitted this 5th day of June, 2017.

/s/Lauren M. Clemmons
Lauren M. Clemmons
Special Deputy Attorney General