UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS; *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 1:17-CV-53
JOSHUA STEIN, Attorney General of the State of North Carolina; *et al.*	)	
Defendants.	)	

PLAINTIFFS' RESPONSE AND BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

This Response and Brief is filed by undersigned counsel on behalf of all Plaintiffs in Response to Defendants' Motion to Dismiss under Federal Rules of Procedure 8(a), 12(b)(1), 12(b)(2), and 12(b)(6). For the reasons outlined below, Defendants' Motion should be denied except with respect to the state law defamation claim.

Standard of Review

Defendants present arguments under Federal Rules of Civil Procedure 8(a) (improper pleading), 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (personal jurisdiction), and 12(b)(6) (failure to state a claim upon which relief can be granted). *See* Mot. to D. at 3.

Rule 8(a) dismissal is appropriate only when, after multiple amendments, Plaintiffs' complaint is "essentially incomprehensible" such that it cannot be said to give fair notice of the claims. *See United States v. Lockheed Martin Corp.*, 328 F.3d 374, 376, 378 (7th Cir. 2003).

Defendants style their 12(b)(1) and 12(b)(2) arguments as challenges to Plaintiffs' standing in this suit. Plaintiffs' bear the burden of establishing standing. *S. Walk at Broadlands Homeowner's Ass'n v. Openband at Broadlands, LLC*, 713 F.3d 175, 181-82 (4th Cir. 2013). When determining whether they have met this burden the court will accept "as true all material allegations of the complaint and construe the complaint in favor of the [plaintiffs]." *Id.*

Dismissal under Rule 12(b)(6) is proper only when the complaint lacks a cognizable legal theory or does not allege facts that, when taken as a whole, raise the claim for relief above mere speculation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Coleman v. Md. Ct. of App.*, 626 F.3d 187, 190 (4th Cir. 2010). As with standing, the court will assume all factual allegations are true and draw all reasonable inferences in favor of the plaintiff. *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). When, as here, a 12(b)(6) motion is used to test the sufficiency of the complaint in a civil rights case, the court will be "especially solicitous of the harms alleged." *Id.*

II. Statement of the Case

This is a suit for declaratory and injunctive relief under 42 U.S.C. § 1983. As alleged, the corporate plaintiffs (NARSOL and NC RSOL) represent individuals subject to affirmative disabilities and restraints that have been retroactively imposed upon them by amendments to the North Carolina registry law. The individual plaintiffs (John Does 1 and 2) are North Carolina registrants subject to meaningful deprivations of their First Amendment rights and other fundamental liberties.

On these grounds, Plaintiffs collectively challenge the North Carolina registry law as a whole and in regard to specific amendments on the grounds that it violates the *Ex Post Facto Clause* of the U.S. Constitution; that various provisions of the registry law are not sufficiently "tailored" to justify its deprivation of fundamental liberties; and that various provisions of the registry law work such deprivations without sufficient due process; and the North Carolina General Statute (N.C.G.S. § 14-208.18(a)(3)) is void for vagueness.

III. Argument

A. The Complaint Does Not Violate Fed. R. Civ. P. 8(a).

A Complaint does not violate Rule 8(a) simply because it is long. 2A Moore's Federal Practice, 2d ed. § 1708; *see also Karlinsky v. N.Y. Racing Ass'n*, 52 F.R.D. 40, 43 (S.D.N.Y. 1971) ("[T]he question of compliance with the Rule 8 requirement of conciseness is not to be judged by the length of the complaint."). A complaint violates Rule 8 when, after multiple amendments, it remains "essentially incomprehensible." *See*

United States v. Lockheed Martin Corp., 328 F.3d 374, 376 (7th Cir. 2003). For instance, the complaint in *Westinghouse Securities Litigation*, cited by Defendants, was 240 pages long, contained a 50 page "overview," included voluminous material irrelevant to Plaintiff's remaining claims, and each individual allegation covered nearly half a page. *In re Westinghouse Sec. Litig.*, 90 F.3d 696 (3d Cir. 1996) (600 paragraphs in 240 pages). In *Med. Supply Chain, Inc. v. Neoforma, Inc.*, the complaint was largely made up of "quotes from President George W. Bush, U.S. Senate Committee Testimony Hearing, and quotations from newspaper articles and study findings," as well as "discussions of disciplinary complaints lodged against [plaintiff's counsel]." 419 F. Supp. 2d 1316, 1331 (D. Kans. 2006); s*ee also McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996) ("The complaint is mostly 'narrative ramblings' and 'storytelling or political griping'"); *Allen v. Life Ins. Co. of N. Amer.*, 267 F.R.D. 407, 413 (N.D. Ga. 2009) (providing overview of cases involving Rule 8(a) claims). The uniting principle of these cases is that Rule 8 dismissal is appropriate only when the complaint fundamentally fails to give Defendants fair notice of Plaintiffs' claims. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512-13 (2002) (linking rule 8(a) to notice pleading standard).

The present complaint gives such notice and is, in fact, structured to explain the nature of each claim and the facts alleged in support. It begins with an overview explaining the nature of the registry law, the identity of the individual and corporate Plaintiffs, the effects the registry law has on these Plaintiffs, and the source and nature of Plaintiffs' claims for relief (¶¶ 1 -39); it then alleges jurisdictional facts (¶¶ 40-44); facts establishing that the named defendants are proper in a suit for declaratory and injunctive

relief under 42 U.S.C. § 1983 (¶¶ 40-44); and that the individual and corporate Plaintiffs have standing to bring these claims (¶¶59-109).

After establishing these jurisdictional facts the Complaint gives a history of the registry law (relevant and necessary to Plaintiffs' *ex post facto* claim) (¶¶ 110 – 182); and then describes the various burdens placed upon registrants by the amendments just detailed (¶¶ 183-423). The Complaint is divided into allegations related to specific constitutional burdens and, in general, specifically identifies that portion of the registry law that most directly infringes the asserted interest. *See* ¶¶ 382,266, 278 (speech and association); ¶285 (religious exercise); ¶¶ 303, 313 (housing); ¶¶ 339, 342, 347 (employment); ¶ 405 (upbringing of children); and ¶¶ 416, 421 (education); or more generally the creation of a surveillance regime (¶ 210 *et seq*.). This section is long simply because the registry law substantially impacts a broad range of constitutionally protected activity. These impacts are fundamental to Plaintiffs' case as they establish that the State must now show that the referenced statutes survive under heightened scrutiny. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The Complaint then turns specifically to Plaintiffs' *ex post facto* challenge, showing how these burdens "map" onto the *Kennedy-Mendoza* factors (¶¶ 424-491), *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (outlining factors for consideration in an *ex post facto* challenge); and follows with detail of the grounds upon which Plaintiffs raise their facial challenge under the First Amendment (¶¶ 492-498). The following section (¶¶ 498-582) alleges facts showing that these statutory provisions do *not* meet the applicable standard of review. *See Reno*, 507 U.S. at 301-02.

In previous litigation challenging portions of the registry law, the State of North Carolina has asserted that it need not produce any evidence in support of its burden under heightened review because the requisite "narrow tailoring" has been found in other cases. *See Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016). Plaintiffs preempt this argument here by demonstrating that the statements made and studies relied upon in those previous cases are not applicable to the present case (¶¶ 499 – 582). While Defendants may object that this section is not *necessary* to a well-pled Complaint, Defendants include it to demonstrate to the Court at the outset that there is, at least, a material issue of fact as to the basic predicates of the registry laws – (1) that sex offenders as a class are uniquely dangerous enough to justify the deprivation of constitutional rights and (2) that the statutes working these deprivations do anything to mitigate any such danger. Similarly, the final section (¶¶ 583 – 598) provides information relevant to both Plaintiffs' vagueness claim and the intent of the legislature in passing the 2016 amendments. These facts substantially undercut the notion that the legislature's amendments to the registry law are based upon a considered decision-making process as opposed to the politically expedient targeting of a disfavored group.

Defendants argue that they cannot determine *which* claims are asserted against *which* Defendants, but this argument is simply misplaced. Suits for declaratory and injunctive relief under §1983 are properly brought against those charged with *enforcing* the unconstitutional statute. *Fitts v. McGhee*, 173 U.S. 516, 529-30 (1899); *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324 332-34 (4th Cir. 2008). As discussed in detail later in this Brief, in North Carolina those persons are the attorney general, the individual district

attorneys and Mr. Hooks. Defendants are not being charged individually with misconduct, rather, Plaintiffs seek injunctive relief to prevent Defendants from enforcing unconstitutional statutes. Threatened arrest for engaging in constitutionally protected activity is the "harm" Plaintiffs hereby seek to remedy and the "notice" required to Defendants is the grounds upon which Plaintiffs allege the statute is unconstitutional. *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 329-30 (4th Cir. 2001).

Plaintiffs do concede there is an error in paragraphs 600 and 602 of the Complaint – "Article 27A" in those paragraphs should read "registry law." However, Plaintiffs dispute that this error is material. In Paragraph 7, the Complaint makes clear that this a challenge to "Article 27A and related statutes (collectively the 'registry law')". These "related statutes" are N.C.G.S. §§ 14-202.5 (ban on commercial social networking site); 14-202.5A (liability of such sites); and 14-202.6 (ban on name changes). The text of these statutes is included in the Appendix which itself is called "the full text of the registry law" and §§ 14-202.5 and 14-202.6 are specifically discussed as part of Plaintiffs' *ex post facto* claim (¶¶ 174 – 177, 457). To the extent this clarification is insufficient, Plaintiffs respectfully request to amend their Complaint to replace "Article 27A" with "registry law" in paragraphs 600 and 602.

B. The Plaintiffs Have Standing

As shown below, the Complaint properly establishes that each of the Plaintiffs

(both individual and corporate) have standing in this case.[1]

As an initial issue, there is an Article III "case or controversy" (and hence jurisdictional standing) provided that *any* of the Plaintiffs have standing to bring each of the claims asserted. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (standing exists when one member of plaintiff class has standing). While Plaintiffs must show standing separately with regard to each form of relief sought, this distinction is generally between equitable relief and claims for damages. S*ee Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000). When Plaintiffs are faced with the ongoing, credible threat of prosecution under an unconstitutional statute (as alleged in the Complaint), the standing inquiry for both declaratory and injunctive relief will be the same. *See, e.g., Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001) (discussing requirement of "injury in fact" to confer standing for declaratory and injunctive relief).

i. Injury in Fact

Under the now canonical *Lujan* standard, Plaintiffs have Article III standing when (1)they are suffering a judicially cognizable harm (injury in fact), (2) that harm is fairly traceable to the action complained of (traceability), and (3) a decision in the plaintiff's favor will likely redress that harm (redressability). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th

[1] Defendants argue at various points throughout their Brief that Plaintiffs lack standing. Plaintiffs' standing will be addressed generally in this section and particular notes will be made elsewhere as necessary.

Cir. 2010). As to the first prong, citizens suffer injury in fact when they are forced to choose between foregoing constitutionally protected activity and subjecting themselves to the possibility of penalty for violating unconstitutional statutes. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("The plaintiff's own action (or inaction) in failing to violate the law eliminates the threat of imminent prosecution, but nonetheless does not eliminate Article III jurisdiction."); *see also Ex Parte Young*, 209 U.S. 123, 146 (1908) (noting that "the officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them"). Pre-enforcement suits such as this one are entirely appropriate where the State has not disclaimed an intent to enforce the challenged statute. *Mobil Oil Corp. v. Attorney Gen. of Com. of Virginia*, 940 F.2d 73, 76 (4th Cir. 1991) ("We are not troubled by the pre-enforcement nature of this suit [, where t]he State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."), *quoting Virginia v. American Booksellers Ass'n Inc.*, 484 U.S. 383, 393 (1988), *vacated on other grounds* 488 U.S. 905 (1988); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

Defendants cite *Doe v. Duling*, 782 F.2d 1202, 1205-06 (4th Cir. 1986) for the proposition that the existence of a statute does not necessarily mean there is a "credible threat" of prosecution under the standards set forth in *Mobil Oil*. 940 F.2d at 75. Defendants neglect to point out though that *Duling* dealt with a 200-year old anti-fornication statute that had last been enforced in 1849. *Duling*, 782 F.2d at 1204. Subsequent opinions, such as those cited above, have made clear that, absent a decades

long lack of enforcement or some other concrete reason to believe the law will not be enforced against them, citizens suffer a "credible threat of prosecution" for violating the statute. *See, e.g.*, *Mobil Oil*, 940 F.2d at 76.

The institutional Plaintiffs, NARSOL and NC RSOL, have standing to sue in their representational capacity upon showing that (1) their members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Laidlaw*, 528 U.S. at 181 (*citing Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). To demonstrate that its members would otherwise have standing, an organization must do more than simply state that "its members" would be harmed. It must make "specific allegations that at least one identified member has suffered or would suffer harm." *S. Walk at Broadlands*, 713 at 184 (*quoting Summers v. Earth Island Inst.*, 55 U.S. 488, 498 (2009)). This requirement is to ensure that, at the heart of the matter, there is a genuine injury in fact separate from organizational aims. *See generally*, *Summers*, 555 U.S. at 492-94. As an evidentiary issue, when a defendant challenges standing via a Rule 12(b)(1) motion to dismiss, the court may consider the pleadings and other pertinent evidence on the matter without converting the proceeding to one for summary judgment. *See Velasco v. Gov't of Indon.,* 370 F.3d 392, 398 (4th Cir. 2004).

The Complaint properly alleges that both the individual and organizational Plaintiffs have suffered injury in fact. The Complaint alleges that the registry law is currently being enforced in all its aspects (¶37); that multiple persons have been arrested

for violating the registry law (¶¶ 299, 300); and that the State has not declared any intention to cease enforcing the law (¶ 38). As to the individual Plaintiffs, both are registrants subject to the registry laws (including N.C.G.S. §14-208.18(a)) (¶¶94, 102); both desire to engage in activity proscribed by the registry law (including N.C.G.S. § 14-208.18(a)) (¶39); and would do so if not for those laws (¶39). John Doe 1 specifically alleges that he would like to attend church, sessions of the General Assembly, and go to the library and parks (¶259); that he would like to access proscribed websites (¶281); and that the registry law burdens both his ability to find employment and to parent his children (¶¶ 360, 361, 398 *et seq.*). John Doe 2 alleges substantially the same (¶¶259, 281, 353, 356) and, further, that he is unsure of the meaning of N.C.G.S. § 14-208.18(a)(3) as it relates to these activities (¶596). Both allege facts showing that they are *not* a danger to minors (¶¶100-101, 106-108).

As to the corporate Plaintiffs, the Complaint specifies that each organization has members whose reportable offense occurred prior to enactment of the registry and the challenged amendments (¶¶ 65 *et seq.*, ¶¶ 83 *et seq.*); that they have members who desire to engage in First Amendment activities but cannot do so because of the law (¶¶ 261, 262); that individual members would like to access proscribed websites (¶¶ 283, 284); that a member of NC RSOL has been arrested for attending church (¶ 296); and that individual members have suffered significant employment burdens (¶¶ 379 *et seq.*). At this stage of the proceedings, each of these material allegations is accepted as true and the complaint should be construed in Plaintiffs' favor. *S. Walk*, 713 F.3d at 181-82. To the extent the court is concerned that these averments are insufficient to properly "identify"

the individual members, affidavits in support of representational standing are attached to this Brief. As noted above, the court may properly consider these affidavits. *Velasco*, 370 F.3d at 398.

Taken together, these facts establish that at least one of the individual Plaintiffs has suffered sufficient "injury in fact" sufficient to bring Claims 2, 3, 4, and 5 and that the corporate Plaintiffs have individual, identified members with standing to bring Claim 1. As there is a proper Plaintiff for each Claim, the Complaint sufficiently alleges injury in fact.

ii. Traceability

As to the second prong under *Lujan*, it is also well established that citizen suits for injunctive relief are properly brought against those state officials "clothed with some duty in regard to the enforcement of the laws of the State[.]" *Ex Parte Young*, 209 U.S. at 155-56; *see also South Carolina Wildlife*, 549 F.3d at 332 ("Where a state law is challenged as unconstitutional, a defendant must have some connection with the enforcement of the act in order to properly be a party to the suit.") (internal citation and quotation omitted).[2] The harm alleged in this case, threatened prosecution under an unconstitutional statute, is undoubtedly "traceable" to the State officials with the power to prosecute. Otherwise, there would be *no* appropriate Defendants for Plaintiffs' suit seeking injunctive relief. The same logic shows that this harm is "redressed" by such

[2] Defendants' Brief treats the question of personal jurisdiction as part of the Article III standing inquiry rather than separately as an issue of personal jurisdiction under Fed. R. C. Proc. 12(b)(1). Plaintiffs follow suit.

declaratory and injunctive relief.

Whether considered as a constitutive element of standing or separately as a jurisdictional issue under Rule 12(b)(2), the named Defendants in this case are precisely those officials "clothed with some duty in regard to the enforcement of the laws of the State[.]" *Ex Parte Young*, 209 U.S. at 155-56; *see also Limehouse*, 549 F.3d at 332. Under North Carolina law, Attorney General Joshua Stein is charged with defending the interests of the State in all civil and criminal suits; he is authorized by statute to bring or assist in criminal suits; and he consults with and advises district attorneys, provides legal opinions, and handles all criminal appeals from state courts (¶¶ 46-48). This statutory authority to bring and assist in criminal suits is the necessary "connection" with the enforcement of the challenged statutes. *See Limehouse*, 549 F.3d at 332 (discussing the necessary "connection" between state officials and enforcement of the law); *see also Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016) (hearing challenge to predecessor of N.C.G.S. § 14-208.18(a) naming the North Carolina Attorney General as a defendant). An injunction that does not include the Attorney General leaves open a loophole whereby the district attorneys themselves would be enjoined from enforcing the registry law but could simply request that the Attorney General do it for them. As *McBurney* and *Limehouse* suggest, the class of defendants should be designed to close such loopholes. *See McBurney*, 616 F.3d at 399-401; *Limehouse*, 549 F.3d at 332-34.

As to the individual district attorneys, Defendants do not argue they lack the requisite "connection" under *Limehouse*. Instead, they appear to argue that the individual district attorneys have not sufficiently "threatened" prosecution to give rise to an Article

III "case or controversy." As discussed above, this argument is foreclosed by *Mobil Oil* and related cases. All district attorneys (rather than just those of the judicial districts in which individual Plaintiffs reside) are proper Defendants as the Plaintiffs have specifically alleged that they wish to engage in proscribed conduct outside the judicial districts in which they live (Compl. ¶ 57). *See Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016) (hearing challenge to predecessor of N.C.G.S. § 14-208.18(a) naming as defendants district attorneys outside judicial district of plaintiffs' residence). In light of this allegation, Defendants offer "no authority to support their contention that the defendants should be limited to only those District Attorneys of the prosecutorial districts in which Plaintiffs reside." *Doe v. Cooper*, No. 1:13-cv-711, Mem. Op. and Order, Doc. 36 at *21 (M.D.N.C Aug. 22, 2014).

Secretary Erik Hooks is a named defendant due to his statutory responsibility to maintain the North Carolina statewide sex offender registry (specifically the duty to collect and disseminate information about registrants) (¶¶ 51-52). As the Plaintiffs have specifically alleged, the registry does not simply report the fact of conviction and other publicly accessible data. Instead, it falsely (and actively) communicates to the public that each individual registrant is dangerous to minors (¶¶195-98, ¶¶ 202-03). Secretary Hooks, as the state official responsible for both the information contained in the registry and the dissemination of that information is a proper Defendant for Plaintiffs' allegations that the statute constitutes an *ex post facto* law (¶¶ 436 – 438; 442 – 444); and that the registry law violates their procedural due process rights (¶¶ 626 – 627). Both these claims seek a court order requiring removal of certain individuals from the registry and such

order is properly directed to Secretary Hooks in his official capacity.

iii. Redressability

Defendants do not argue that Plaintiffs injuries would not be redressed by a favorable ruling. That an injunction issued against the named Defendants would fully redress Plaintiffs' constitutional injuries further shows that these are exactly the proper Defendants.

iv. Participation of Individual Members of the Corporate Plaintiffs

Outside the *Lujan* analysis, Defendants argue that the corporate Plaintiffs should be dismissed because the *ex post facto* claim requires the participation of the individual members. However, Defendants cite no authority nor reason why the corporate Plaintiffs cannot adequately represent the rights of the relevant members.

The Defendants' actual argument appears to be that the corporate Plaintiffs cannot bring an *ex post facto* claim without demonstrating that some identified member suffers harm stemming from each, individual disability or restraint occasioned by the registry law. *See* Mot. to D. at 12. But this argument misapprehends the nature of Plaintiffs' *ex post facto challenge.* The Plaintiffs are not only asserting that individual subsections of the registry law violate the *Ex Post Facto* Clause. In addition, they state a claim that, as a whole, the post-1995 amendments take the registry law across the line from valid regulatory measure to punitive statute. Plaintiffs have standing to make such a challenge upon a showing that (1) the statute is punitive; (2) it has been retroactively applied to them; and (3) identifiable members are disadvantaged by it. *See Weaver v. Graham*, 450

U.S. 24, 29 (1981) (discussing "critical elements" of an *ex post facto* law). With regard to the first element, Defendants cite no legal authority for the odd proposition that the court should not look to the entirety of the law in making that determination or that the "threshold" inquiry into standing so limits the courts review. *See Warth v.* Seldin, 422 U.S. 490, 518 ("The rules of standing . . . are "threshold determinants[.]" To impose such a standard would require any plaintiff to cast about for a collection of confederates in order to seek to vindicate their constitutional rights or allow the State to achieve incrementally what it cannot do wholesale by limited *ex post facto* review to individualized enactments rather than the law as a whole.

C. Plaintiffs' State Valid Claims under Fed. R. Civ. Proc. 12(b)(6)

Defendants challenge each of Plaintiffs' claims under Rule 12(b)(6). This Brief will consider those arguments in the order of claims presented.

i. Plaintiffs State a Valid *Ex Post Facto Claim*

Plaintiffs' *ex post facto* claim is neither barred by the statute of limitations nor precluded by state court decisions.

(a) Statute of Limitations

As Section 1983 contains no statute of limitations, courts look to the "analogous" state statute. *Nat'l Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1161 (4th Cir. 1991). Most often the appropriate statute of limitations will be the "general or residual" statute for personal injury actions, which is three years in North Carolina. *Id.*, N.C.G.S. §1-52(16).

However, it is well established that the existence of an unconstitutional statute is a "continuing violation" of Plaintiffs' constitutional rights. *See Virginia Hosp. Ass'n. v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (noting "the continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations") (internal citations and quotations omitted); *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (same) (*quoting Virginia Hosp. Ass'n*, 868 F.2d at 663); *see also Waste Mgm't*, 252 F.3d at 330 ("The requirement that a violation of federal law be 'ongoing,' is satisfied when a state officer's enforcement of an allegedly unconstitutional statute is threatened, even if that threat is not yet imminent."). As the *Kuhnle* Court put it: "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within [the statute of limitations from] its enactment." 103 F.3d at 122.

In this case, the Plaintiffs have pled, and are prepared to show, facts that the registry law is currently being enforced in all respects and the State has declared no intention to cease such enforcement (Compl. ¶¶ 37-39); these laws place ongoing, substantial burdens on Plaintiffs' fundamental liberties (Compl. ¶¶ 237 – 423, 492 – 498); and that they are both retroactive and punitive in intent and/or effect (Compl. ¶¶ 424-491). These facts, taken as true in a motion to dismiss, demonstrate that the North Carolina registry laws "work an ongoing violation of Plaintiffs' constitutional rights." *Kuhnle*, 103 F.3d at 522 (Plaintiff suffered a "new deprivation of constitutional rights each day the unconstitutional statute remained in place"); *Waste Mgm't*, 252 F.3d at 330 (threatened enforcement of allegedly unconstitutional statute is "ongoing" harm).

(b) Effect of State Court Decisions

Defendants are correct that the North Carolina Court of Appeals has rejected *ex post facto* challenges to previous versions of the registry law, but these decisions are neither binding nor even persuasive authority in this case. Federal courts, whether sitting in diversity or subject matter jurisdiction, are not bound by *any* state court decision on issues of federal constitutional law. *See Grantham v. Avondale, Indus.*, 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question."); *In re Asbestos Litigation*, 829 F.2d 1233, 1237 (3d Cir. 1987), *cert denied*, 485 U.S. 1029 (1988) ("The federal district court . . . takes as its authority on federal constitutional issues decisions of the United States Court of Appeals and the United States Supreme Court, rather than those of the state supreme court."); *see also Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942) ("Since [the] determination of a federal question was by a state court, we are not bound by it.").

At best, state court decisions might be persuasive if they contained a cogent, reasoned analysis that speaks to the issues presented in the case. But Defendants' primary case, *In re Hall*, offers no meaningful analysis of the modern North Carolina registry scheme. *See* 768 S.E.2d 39, 45-6 (N.C. 2014), *cert. denied*, 136 S. Ct. 688 (2015). *In re Hall* itself involves a constitutional challenge limited *only* to the extension of the period of registration enacted by the 2006 amendment to N.C.G.S. § 14-208.12A(a). *See id.* And in reviewing this single provision, the *Hall* court cites *Kennedy-Mendoza*, but then conducts no independent *ex post facto* analysis, saying only "our Courts have consistently

held that the sex offender registration provisions . . . do not amount to *ex post facto* violations. *Id.* at 45.

Hall is referring to cases decided *before* the amendments to the statute challenged here – particularly *State v. White*, 590 S.E.2d 448 (N.C. 2004). While *White* does conduct a *Kennedy-Mendoza* analysis in finding that the pre-2006 version of the North Carolina registry law does not violate the *Ex Post Facto Clause*, it reaches that conclusion only after specifically noting that registrants are not required to periodically appear in person before law enforcement officials; they may "work wherever they choose;" they are not subject to residency restrictions, and they may attend school freely. *Id.* at 195. As Plaintiffs make clear in their Complaint, each of these statements is now untrue.

White also notes that the petitioner in that case raised no substantial argument that the registry scheme under consideration was excessive in relation to its purpose. *Id.* at 197. However, in a previous challenge to N.C.G.S. § 14-208.18(a), the Fourth Circuit found subsection (a)(2) overbroad because the State could produce no substantial evidence that persons who committed reportable crimes against adults presented an appreciable danger to minors. *Doe v. Cooper*, 842 F.3d 833, 846-47 (2016). Though the State has since modified N.C.G.S. §14-208.18(a)(2) so that it applies only to "minor-victim" offenders, every other provision of the registry law applies without such distinction. Continuing to apply affirmative restraints to an entire class of people for which the State has so far produced no evidence of dangerousness is precisely the type of "excessiveness" supporting an *ex post facto* claim.

Defendants also argue that *Smith v. Doe*, 538 U.S. 84 (2003), precludes an *ex post*

facto claim. *See* Mot. to D. at 16. But *Smith* does not give to the State *carte blanche* permission to legislate against sex offenders as a class. While *Smith* does note that class-based legislation does not itself demonstrate a statute is punitive, nowhere does *Smith* suggest that class-based legislation is somehow immune from *ex post facto* analysis. *See Smith*, 538 U.S. at 103-04 (noting that the "*Ex Post Facto* Clause does not *preclude* a state from making reasonable categorical judgments.") (emphasis added).

Nor does *Smith* stand more broadly as a bar to Plaintiffs' suit. In *Smith*, the Court considered the then current Alaska registry scheme – which did nothing more than create a publicly accessible database of otherwise available information about the registrant and their conviction. Noting that the statute at issue did not involve extensive supervision; did not require in-person reporting; left registrants free to live and work where they wished; and that there was "no evidence of substantial occupational or housing disadvantages[;]" a divided Court concluded that the statute created only "minor and indirect" effects of registration. *Id.* 100-01. As the Complaint alleges, the current North Carolina registry law imposes all of these restraints and then some. The effects of registration are no longer "minor and indirect," but consist of a network of affirmative disabilities and restraints touching housing, education, work, association, religion, speech, parenting and the like while at the same time subjecting registrants to ongoing, intensive surveillance akin to probation or parole. Compl. ¶¶211-291. For this reason, courts have now recognized that *Smith v. Doe* is no bar to *ex post facto* challenges *See Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (allowing *ex post facto* challenge to Michigan registry law); *U.S. v. Juvenile Male*, 590 F.3d 924, 931 (9th Cir. 2009), *vacated as moot*, 564 U.S. 932 (2011) (while

"[i]t would be tempting to conclude . . . that in light of [*Smith*], sex offender registration does not constitute punishment . . . the case before us presents substantially different facts and issues that significantly affect our analysis[]") (holding that the juvenile registration and reporting requirements of the Federal Sex Offender Registration and Notification Act (SORNA) violate the *Ex Post Facto* Clause); *see also Doe v. District Attorney*, 932 A.2d 552, 560 (Me. 2007) (prior decisions upholding registry law do not bar *ex post facto* challenge where "a challenger can demonstrate that, through amendments, the Legislature changed the character and effects of [the law] from civil to criminal").

ii. Plaintiffs State Valid First Amendment Claims

(a) Substantial Overbreadth (Free Speech)

In 2016, the Fourth Circuit struck down the predecessor statute to N.C.G.S. § 14-208.18(a)(2) on the grounds that it was substantially overbroad in violation of the First Amendment. *Doe v. Cooper*, 842 F.3d at 845. The predecessor statute was identical to the amended version before the Court today except that it did not include subsection (c)(2), which now specifies that subsection (a)(2) only applies to "minor-victim" offenders or persons adjudicated to be a danger to minors. In striking down the statute, the Fourth Circuit expressly recognized that the statute substantially burdened the rights of all registrants by "inhibiting the[ir] ability . . . to go to a wide variety of places associated with First Amendment activity" such as "public streets, parks, and other public facilities." *Id.*, *citing Hague v. CIO*, 307 U.S. 496, 515 (1939) (other citation omitted). The Fourth Circuit did not rule on the overbreadth of subsection (a)(3) because that statute was found

to be unconstitutionally vague.

In anticipation of this ruling, the North Carolina legislature amended N.C.G.S. §§ 14-208.18(a)(2) and (a)(3), and, in the process, made clear that the new (a)(3) *independently and directly* bars registrants from "libraries" and "parks" and any other "public place" where minors "frequently congregate." As Plaintiffs have alleged, (a)(3) also *effectively* bars registrants from community colleges, many government buildings, public museums and the like. Compl. ¶¶ 247- 48.

The direct bars alone are sufficient to subject the statute to heightened review. *See Doe v. Cooper*, 842 F.3d at 845-46; *see also Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012) (applying heightened scrutiny to city ban on registrants in libraries); *see also Miller v. Northwest Region Library Bd.*, 348 F. Supp. 2d 563, 569 (M.D.N.C. 2004) (right of access to public libraries). Through the 2016 amendments, the State legislature made explicit in (a)(3) what had formerly been implicit in (a)(2) and thus imported precisely the same constitutional problem that caused the Fourth Circuit to strike down the pre-2016 version of (a)(2). These burdens are not alleviated by the requirement that minors be "present." Minors will almost always be present in any library, park, or other designated or limited public forum nor can registrants effectively utilize these fora if they have to depart anytime a minor shows up. Compl. ¶¶ 249 – 256.

With regard to the revised subsection (a)(2), the 2016 amendment did address the immediate overbreadth problem identified by the Fourth Circuit by limiting its application to "adult-victim offenders," but this limitation does not warrant dismissal of Plaintiffs' (a)(2) claims here. As the Fourth Circuit made clear, subsection (a)(2) is

subject to heightened scrutiny and Defendants make no argument that even the revised statute meets this standard. *See* M. to D. at 31-33. Moreover, Plaintiffs have alleged facts showing that "registrants" as a class, even when limited to "minor-victim" offenders, are insufficiently "dangerous" to justify the First Amendment burdens of subsection (a)(2). Compl. ¶ 499 *et seq.* Second, Plaintiffs have alleged facts showing that subsection (a)(2), even if it *were* appropriately targeted, simply fails to materially advance the State's interest. Compl. ¶ 575 *et seq.* These facts create a material dispute as to whether subsection (a)(2) survives under heightened scrutiny.

In sum, that N.C.G.S. § 14-208.18(a)(2) and (a)(3) create substantial First Amendment burdens requiring heightened scrutiny has been previously established. Defendants make no argument that the current version meets this standard while Plaintiffs have alleged material facts that it does not. The claim is therefor valid and should move forward.

(b) "Free Exercise"

Defendants are correct in the general proposition that a "neutral law of general applicability need not be justified by a compelling State interest even if the law has the incidental effect of burdening religious practice." Mot. to D. at 33, *citing Church of Lukimi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). But the North Carolina registry law is not "generally applicable." Instead, it targets a specific subset of the populace and creates not a "minor" or "indirect" burden on religious liberty but a *de facto* ban on corporate worship – a central tenet of Judeo-Christian religious practice.

Though there has been little if any judicial exposition of the phrase "generally applicable," it is difficult to see how a law that picks out a certain subset of the population and burdens only that group can be considered "general" – particularly where the targeted group is clearly susceptible to the type of "arbitrary and vindictive legislation" the Constitution most fundamentally protects against. *See Weaver*, 450 U.S. at 29 (discussing *Ex Post Facto* Clause).

The principle relied upon by Defendants was articulated in *Employment Division v. Smith.* 494 U.S. 872 (1990). In deciding *Employment Division*, the Court was not attempting to upset settled First Amendment jurisprudence, but acting out of recognition that the State has an ongoing and compelling interest in its ability to pass and enforce general legislation. *See id*. at 888 ("Any society adopting [a compelling interest test for generally applicable legislation] would be courting anarchy, [and] that danger increases in direct proportion to the society's diversity of religious beliefs[.]"). This concern is simply not implicated when a targeted group challenges legislation on First Amendment grounds as the test is not of the ability of the State to regulate generally, but of the appropriateness of such targeting.

Moreover, *Employment Division* itself expressly upheld those previous cases in which the asserted right implicated not only religious practice but related fundamental liberties – specifically stating its opinion that "religious association" would be one such case. *Id.* at 882, *citing Robert v. United States Jaycees*, 468 U.S. 609, 622 (1984); *see also City of Boerne v. Flores*, 521 U.S. 507, 513-14 (1997) (reaffirming this distinction). Here, the statute places a *de facto* ban on the right to gather with others for corporate

worship. Compl. ¶¶ 283-295. As such, *Smith* expressly contemplates that a challenge such as Plaintiffs will be allowed to go forward.

(c) Freedom of Association Claim

Defendants do not challenge that a significant burden on associational rights gives rise to a substantive due process claim. Instead, they argue that Plaintiffs have not pled sufficient facts to support standing to bring the claim.

A review of the Complaint reveals otherwise: (1) Plaintiffs have pled the statute substantially burdens their ability to enter into religious communities of their choice (Compl. ¶ 285 *et seq.*); (2) they have pled significant burdens on their right to associate with their children (Compl. ¶ 405 *et seq.*) (*see Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (the parental right encompasses the "*companionship*, care, custody and *management* of their children.") (*quoting Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (emphasis added)); and they have described how the statute effectively prevents registrants from living in many communities (Compl. ¶ 307 *et seq.*). More generally, Plaintiffs have described how the registry law precludes them from a wide variety of public and semi-public places, including those "immemorially . . . held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly[.]" *Doe v. Cooper*, 842 F.3d at 845 (referring to streets and parks); Compl. ¶ 245 *et seq.* These burdens constitute an ongoing deprivation of Plaintiffs' rights of association and the State has made no argument that the registry law is sufficiently tailored to survive heightened review. As with Plaintiffs' other First Amendment claims, this one should go forward.

iii. Plaintiffs' State Valid Substantive Due Process Claims

The substantive component of the Due Process Clause protects "fundamental rights . . . so implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Conn.*, 302 U.S. 319, 325 (1937). To discern whether an asserted right qualifies for Due Process protection, the Court should look to "history, legal traditions, and practices" as these provide "the crucial guideposts for responsible decision-making." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). In the context of litigation regarding "sex offender" registries, the Supreme Court has specifically noted that "substantive due process" claims are an appropriate vehicle for challenging alleged "overreach" by the State. *See Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 8 (2003). To survive constitutional review, legislation that infringes upon such fundamental rights must be "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302.

In this case, Plaintiffs assert that the registry law infringes upon three such rights: (1) the right to direct the education and upbringing of one's children; (2) the right to pursue the common occupations of life; and (3) the right to acquire useful knowledge. Each is discussed in turn.

(a) Right to Direct the Care and Upbringing of One's Children

The Supreme Court has made clear that "the interest of parents in the care, custody and control of their children . . .is perhaps the oldest of the fundamental liberty interests[.]" *Troxel v. Granville*, 530 U.S. 57, 65 (2000). And while the Court has not

specifically articulated the parameters of the parental right, it has subsequently made clear that this right encompasses the "companionship, care, custody and management of their children." *Lassiter* 452 U.S. at 27 (1981). The parental right is an "associational" right, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and it is difficult to imagine a meaningful right to parent one's children that does not encompass the right to their "companionship" and "management" – that is, to be present at the meaningful and mundane events of their lives. This does not, of course, mean that the State must allow all parents to be present in schools, or that there are no situations in which a parent is properly barred from youth activities. Rather, in refusing a parent access to their children, the State bears the burden of demonstrating the necessity and proportionality of the rule by which it does so. *See Lovern v. Edwards*, 190 F.3d 648, 655-56 (4th Cir. 1999) (recognizing State's authority to regulate access to schools when necessary for safety and educational mission).

In this case, the Plaintiffs have alleged that they are generally barred from school grounds and absolutely barred from libraries, parks, swimming pools, and the like. Compl. ¶¶ 406 – 410. Additionally, they cannot use standard social media platforms to communicate or supervise their children. Compl. ¶¶ 269-271, 413. All of which substantially diminish their opportunities to interact with their own children.

Defendants respond that the Plaintiffs do not have an *independent* constitutional right to be at places like libraries and parks. While this is clearly untrue at least in so far as such places have First Amendment associations, the argument simply misses the point. *See Doe v. City of Albuquerque*, 667 F.3d 1111 (7th Cir. 2012) (striking down ban on

"sex offenders" in libraries); *Doe v. Cooper*, 842 F.3d at 845 (striking down predecessor statute to N.C.G.S. § 14-208.18(a)(2) on grounds that it prevented North Carolina registrants from being in "parks and other public facilities"). At issue is not the right to be in these places independently, but the *effect* banning parents from such places has on parental rights. As Plaintiffs have properly alleged a significant burden on parental rights, the burden now shifts to the State to demonstrate that the statute strikes the proper balance between parental rights and the interests of the State in protecting children generally.

(b) Right to Pursue the Common Occupations of Life

Without doubt," the Constitution protects the "right of the individual . . . to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). A person's right to pursue the common occupations of life is implicated by the denial of the right "to follow any lawful calling, business, or profession he may choose." *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889); *see also Meyer* 262 U.S. at 401 (recognizing right to pursue employment as a teacher of modern languages). This right certainly encompasses the right to be free from occupational bars and wholesale denial of substantial opportunities for employment. *See Conn. v. Gabbert*, 526 U.S. 286, 291 (1999) (recognizing attorney's right to practice profession); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976).

The cases cited by Defendants do not change this analysis. *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005), involved a neutral economic regulation on fishing permits. *Pollard v. Cockrell*, 578 F.2d 1002, 1011 (5th Cir. 1978), does *not* say there is

no due process right to engage in a lawful business or profession. *Pollard* specifically states that it is *not* opining on the nature of the right to pursue the common occupations of life articulated in the above cases. *Id.* at 1012. And while *Custhall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999) does suggest that reduced employment opportunities stemming from mere "stigmatic" injuries may not be cognizable as a Due Process Claim, Plaintiffs here have pled much more than stigmatic injury.

The North Carolina registry law creates both direct and indirect bars to employment in multiple sectors. N.C.G.S. § 14-208.19A prevents registrants from driving passengers for hire (Compl. ¶ 339). N.C.G.S. § 14-208.17 prevents any registrant from working at any job involving the "instruction, supervision, or care of minors" (Compl. ¶342). And N.C.G.S. § 14-208.18(a) creates "exclusion zones" in which a registrant cannot work at *any* occupation – thus effectively precluding work as a delivery person, postal worker, trades person, or any other job involving travel to different sites (Compl. ¶ 348).

As both John Doe 1 and 2 have pled, this restriction substantially impedes their current ability to work in construction and any business involving delivery of goods or services. Compl. ¶¶360-61, 366. Taken together, these direct bars and indirect effects clearly amount to "wholesale denial of substantial employment opportunities." Again, the question at this stage is not whether these restrictions are *ultimately* valid as a necessary means to serve a compelling state interest, merely whether these statutes burden the Plaintiff's right to seek and maintain gainful employment in the field of their choice. Clearly, they do.

(c) Right to Acquire Useful Knowledge

In *Meyer v. Nebraska*, the Supreme Court recognized the fundamental right "to acquire useful knowledge." 262 U.S. at 399. In *Meyer* itself, the Court describes the right as a "right of education and acquisition of knowledge." *Id.* at 400.

Those the contours of this right have not been subsequently elucidated, those courts to consider the issue have accepted the near tautology that the right to acquire useful knowledge necessarily includes a right to be present at those places where knowledge is dispensed and stored. *See, e.g.*, *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 622 (D.P.R. 1974) ("[T]he right to acquire useful knowledge implies a right of access to institutions dispensing such knowledge."); *Jackson v. Astrue*, No. 3:08-cv-461-J-34TEM at *12 (M.D. Fla. Jan. 21, 2009) (finding no infringement of this right where Plaintiff voluntarily withdrew from college); *Newcome v. Baca*, No. 94-2087 at *4 (10th Cir. July 20, 1994) (suggesting protected interest in access to public records); *Miller* 348 F. Supp. 2d at 569 (finding right of access to libraries on First Amendment grounds).

As above, the cases cited by Defendants again do not undercut this analysis. *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) found that a student had no substantive due process right to a degree she had not earned under the standards promulgated by the University. And while the Second Circuit has stated that there is no fundamental right to public education, the Supreme Court has made clear that *if* a state undertakes to provide public education, it becomes "a right which must be made available to all on equal terms." *Compare Bryant v. N.Y.S. Dep't of Educ. Dep't*, 692 F.3d 202, 217 (2d Cir. 2012), *cert denied* 133 S. Ct. 2022 (2013), *with San Antonio Indep. Sch. Dist. v.*

Rodriguez, 411 U.S. 1, 30 (1973).

Contrary to Defendants' assertion, Plaintiffs here do not "broadly allege" that sex offenders are not allowed to be on community college campuses. They allege that registrants have been prevented from registering at community colleges and forcibly removed from campus (Compl. ¶¶ 418-19). Nor is it a "legal conclusion" that registrants cannot be at libraries, N.C.G.S. § 14-208.18(a)(3) specifically prohibits registrants from going to libraries whenever any minor is present (which is almost always) (Compl ¶ 251); and subsection (a)(2) prevents many registrants from being in any library that has a children's section – (which is all of them). Compl. ¶¶ 251-52. And both John Does 1 and 2 have specifically alleged that they would like to go and would go to public libraries if not made off-limits by the registry law. Compl ¶¶ 257-60.

iv. Plaintiffs' State a Valid Claim that N.C.G.S. §14-208.18(a)(3) Is Unconstitutionally Vague

Defendants misstate the standard for a facial challenge on vagueness grounds. While *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), does say that a statute must be "impermissibly vague in all of its applications" the Supreme Court has since made clear that this is not the proper standard. *See Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015) ("although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is unconstitutional merely because there is some conduct that clearly falls within the provision's grasp."

Considering the predecessor to N.C.G.S. § 14-208.18(a)(3), the Fourth Circuit

clearly laid out the current, applicable standard for vagueness challenges. *See Doe v. Cooper*, 842 F.3d at 842-43 (specifically rejecting theory that a statute must have no "core" to be unconstitutionally vague). Under this standard, "the Supreme Court distinguishes between statutes that require a person to conform his conduct to an imprecise but comprehensive normative standard and those that specify no standard of conduct." *Id.* at 842 (internal quotations and citations omitted). A statute fails to provide such a standard when it fails to define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 843, *quoting Kolender v. Lawson*, 461 U.S. 352, 357 (1983). And where a statute fails to provide such standards, "the fact that it has one or more clearly constitutional applications cannot save it." *Id.* (striking down predecessor statute to N.C.G.S. § 14-208(a)(3)). Further, the Court has long held that criminal statutes require greater precision than civil statutes, *Kolender*, 455 U.S. at 498, as do laws that that threaten to inhibit the exercise of constitutionally protected rights such as free speech and association. *Hoffman Estates*, 455 U.S. at 499 (noting that this is "perhaps the most important factor affecting the clarity the Constitution demands").

In *Doe v. Cooper*, the Fourth Circuit noted that phrases such as "regularly scheduled" and "where minors gather" did not provide the constitutionally required notice or guidance as to what conduct was prohibited. *Id.* But in the current version, the State has simply replaced the phrase "where minors gather for regularly scheduled programs" to "where minors frequently congregate" and added the caveat that (a)(3) only

applies "when minors are present." Neither this change nor addition alleviate the core problem with the statute – registrants and law enforcement officials are still left to essentially guess as to what places are covered by (a)(3).

As a matter of text, to "congregate" means "to collect together in a group, crowd, or assembly." Webster's Third New International Dictionary at 478 (2002). This suggests that the statute is directed at places where minors "come together" to interact with each other, as opposed to just being present or attending for some other purpose. But this reading is then undercut by inclusion of the phrase, "when minors are present." The use of this phrase suggests that it is not necessary that minors be congregated, only that they be "present," and the statute provides no guidance on how many minors must be present or within what proximity. Nor does the statute provide any guidance on the necessary size of the "congregation" (the word suggests more than two?) or with what "frequency" they must so congregate.

The examples provided do not clarify but further confuse the issue. A basic principle of statutory construction is that statutes should not be read so as to render other, related statutes superfluous. *See, e.g.*, *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). We presume that subsection (a)(3) is directed at "places" distinct from those proscribed by subsections (a)(2) and (a)(3), but the examples provided then fail to show what the distinction *is*. "Arcades" and "amusement parks" are clearly places "for minors" (proscribed by (a)(1)) while "libraries" and "recreation parks" are only "places where minors congregate" because they have dedicated spaces and equipment *for* minors

(and are thus effectively proscribed by (a)(2)).[3] This leaves "swimming pools" as the only example in (a)(3) signaling the specific "sort of places" to which (a)(3) was meant to apply. And yet it is not clear why a "swimming pool" is, on its face, a place where "minors frequently congregate," particularly as the ban, on its face, applies to *all* pools, not simply municipal pools or those specifically made available to children.

Subsection (a)(3) then, applies to places that aren't places "for minors" or places that "have a section dedicated to minors," but are otherwise "places where minors frequently congregate" (like all swimming pools) but only when "minors are present but not necessarily gathered together." As Plaintiffs John Does 1 and 2 have specifically pled, they would like to go to sporting events, bowling alleys, city parks and the like, but are unsure *if* and *when* these places are off-limits. Compl. ¶ 597. They would go to such places if they could tell, with reasonable certainty, whether doing so subjected them to the possibility of felony conviction. *Id.*

Further, as *Doe v. Cooper* recognized, a statute prohibiting registrants from going to parks, libraries, and other designated and limited public fora creates substantial burdens on registrants' free speech rights. 842 F.3d at 845. Section 14-208.18(a)(3) then is a felony criminal statute creating substantial burdens on civil rights that must meet a heightened level of clarity before it can pass constitutional muster. The current N.C.G.S. § 14-208.18(a)(3) simply fails to meet this bar.

[3] The predecessor statute of N.C.G.S. § 14-208.18(a)(2) was struck down as overbroad because it substantially impaired First Amendment liberties of registrants who were no demonstrable threat to minors. To the extent that the revised (a)(3) proscribes *more* places (by excluding, for example, registrants from *all* parks) it would seem to necessarily suffer the same fate.

v. Plaintiffs State Valid Procedural Due Process Claims under the XIVth Amendment.

At various points Defendants argue generally that Plaintiffs' procedural due process claims fail because Plaintiffs do not allege specific acts by the named Defendants depriving Plaintiffs of their due process rights. As noted earlier, however, it is well-settled law that a complaint for declaratory and injunctive relief from an unconstitutional statute is properly brought against those state officials responsible for enforcing those laws. *Fitts*, 172 U.S. at 529-530; *Limehouse*, 549 F.3d at 332-34. The named defendants (including Secretary Hooks in so far as he is the state official responsible for maintaining the registry itself) are those officials. *See* N.C.G.S. §§ 114-3, 114-11.6, 114-2(1) (attorney general); 7A-61 (district attorneys); 14-208.14, 14-208.15 (secretary of public safety).

Defendants' primary argument is that Plaintiffs' procedural due process claims are foreclosed by *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (finding no procedural due process right to an individualized determination of "dangerousness"). But as with *Smith v. Doe*, 538 U.S. 84 (2003), Defendants reliance on *Dep't of Public Safety* is outdated.

In *Dep't of Public Safety*, the Court held that under the Connecticut sex offender registration law in effect at that time, registrants had no right to an individualized determination of dangerousness because the registry law at issue did nothing more than publish correct, publicly-available information about registrants (including the fact of their conviction). 538 U.S. at 7. Since the registry law did not label the registrants

"dangerous" (in fact, it specifically stated that placement on the registry was *not* a determination that any individual was dangerous), any hearing on the issue of dangerousness would be a hearing to prove an irrelevant fact. *Id.* at 8.

But North Carolina's registry *does* effectively label all registrants as dangerous. Whereas the registry at issue in *Dept of Public Safety* specifically disclaimed that the State had made a determination that any individual was dangerous, the North Carolina registry does the opposite. As alleged, the North Carolina registry law incorrectly asserts that all registrants are "sex offenders" and "sexual predators," and encourages residents to create a "safety plan" by signing up for text alerts whenever a registrant moves into a particular zip code." Compl. at ¶¶ 196-97, 202-203. In North Carolina, to be placed on the registry is to be labelled "currently dangerous" by the State. On the basis of this label, which registrants are *not* given an opportunity to contest during conviction proceedings[4], the State then deprives all registrants of substantial constitutional freedoms and liberty interests. Compl. at ¶¶ 211-422.

The issue in *Dep't of Public Safety* was whether the State had to hold an individualized hearing on "dangerousness" before publishing true information that it specifically disclaimed indicated that the individual was dangerous. But the North Carolina registry law, as alleged, involves the publication of false information which is then used as the justification for imposing a "byzantine code governing in minute detail

[4] As noted elsewhere, the registry law is aimed generally at protecting minors, particularly from physical assault, but it is applied to "adult-victim offenders" and those who have committed consensual offenses (such as strict liability statutory rape) and non-contact offenses (such as possession of child pornography). An overarching "dangerousness" towards minors is not somehow implicit in a judgment of conviction.

the lives of the state's sex offenders[.]" *Doe v. Snyder*, 834 F.3d at 697 (describing Michigan registry law substantially similar to North Carolina's). The State cannot impose these restrictions "based on the fact of the previous conviction," when the fact of previous conviction does not demonstrate the single fact (dangerousness) necessary to justify these restrictions. Simply put, it is a violation of the XIVth Amendment Due Process Clause to deprive individuals of substantial liberty interests on the basis of an asserted fact the individual has no opportunity to challenge. *Cf. Dep't of Public Safety*, 538 U.S. at 7 (noting lack of cognizable liberty interest implicated by Connecticut statute). Nor does *Dep't of Public Safety* stand for the proposition that the State is free to impose any restrictions upon a targeted class without due process concerns. Where the defining feature of the class is an insufficient proxy for the relevant trait such a proposition effectively eviscerates due process protections.

The State cannot here claim exception on the grounds that it is somehow necessary to legislate as a class with respect to registrants. While administrative efficiency is a legitimate state purpose, it does not override the right to due process. *See, e.g.*, *U.S. Dep't of Agriculture v. Murry*, 413 U.S. 508, 513 (1973). Moreover, as alleged in the Complaint, the State of North Carolina is largely already aware of which individual registrants represent a current threat and routinely conducts individualized risk assessments and uses those results in determining whether to place *further* restrictions on individual registrants. Compl. ¶¶ 190-191; 193; *see also* N.C.G.S. § 14-208.18(a)(2) (applies only to certain registrants).

Nor is it reasonable for the State to argue that this due process violation is

remedied by N.C.G.S. § 14-208.12A (allowing for petition to be removed from the North Carolina registry after ten (10) years). In the first place, removal after ten (10) years is available only for *some* registrants. *See* N.C.G.S. § 14-208.18A(a1). Second, that a deprivation of liberty *might* last "only" a decade or so does not suggest that no substantial deprivation has occurred.

With regard specifically to Count 2 of Plaintiffs' Due Process Claim, Defendants argue further that any claim is barred under *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). For the Court's convenience, Plaintiffs also note that *Pension Benefit* has been interpreted by the Fourth Circuit in *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1076 (4th Cir. 1995). As Defendants point out, these cases stand for the proposition that retroactive legislation is not subject to procedural due process challenge so long as it "serves a legitimate purpose that is furthered by rational means." *Id.*

Neither *Pension Benefit*, *Shadburne-Vinton*, nor the cases cited therein, however, stand for the general proposition that the State can retroactively deprive an individual of substantial liberty interests without due process so long as it has a "rational" reason for doing so. As noted before, the State here is not retroactively imposing regulatory burdens on the basis of some fact that has been previously adjudicated. *Cf. Conn. Dep't of Pub. Safety*, 584 U.S. at 7. Nor is it imposing economic burdens or potential legal liabilities. *See Shadburne-Vinton*, 60 F.3d at 1075-76. It is lengthening the period during which an individual is deprived of substantial liberty interests on the basis of a fact, dangerousness, that the individual has *never* had an opportunity to contest. *Pension Benefit* and its

progeny allow this no more than they authorize a State to retroactively place all persons convicted of a crime on ten (10) years' probation.

vi. Plaintiffs Concede that Claim 6 (State Law Defamation) Is Foreclosed by the State's Assertion of XIth Amendment Immunity

The State has asserted XIth Amendment immunity as a bar to Defendants' state law claim of defamation. And while the State has waived its immunity for tort claims pursuant to N.C.G.S. § 143-291, the Plaintiffs must concede, after review, that the language of this statute does not contain a sufficiently "express" statement of legislative intent to waive immunity to suit in federal court. *See Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir. 1997), *citing Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). XIth Amendment immunity concerns *where* a State may be sued as much as *if*. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *see also Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293 (4th Cir. 2001). That the Court is here exercising supplemental jurisdiction under 28 U.S.C. § 1367 does not change this outcome. *Pennhurst*, 465 U.S. at 121.

This does not mean, however, that the State's active publication of defamatory statements is irrelevant to this lawsuit. That the State actively labels all registrants "dangerous sexual predators" is clearly relevant to Plaintiffs *Ex Post Facto* Claim. An intent to punish may be inferred from the State's active dissemination of false information about the registrants.

It is also relevant to Plaintiffs' Due Process Claims. Where the State falsely categorizes an individual and then, on the basis of that false categorization places a

material burden or state imposed alteration on the Plaintiffs' status or rights, the Plaintiff has a substantive due process claim against the State. *See Paul v. Davis*, 424 U.S. 693, 701-02 (1976) (discussing background and holding of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)). Such claims are well recognized and often referred to as "stigma plus" claims under the rubric of *Paul*. *See Grimes v. Miller*, 448 F. Supp. 2d 664, 673-74 (D. Md. 2006) (providing overview of Fourth Circuit "stigma plus" law).

Finally, that the State is literally declaring that all registrants are dangerous predators and then depriving them of basic constitutional freedoms on the grounds of such dangerousness, is clearly relevant to the question whether the Plaintiffs have a due process right to challenge that assertion.

Even if these facts were not relevant, Defendants' Rule 12(f) Motion would be inappropriate. While Rule 12(f) permits a district court to strike "redundant, immaterial, impertinent, or scandalous matter" from a pleading, it does "not authorize district courts to strike claims for damages on the grounds that such claims are precluded as a matter of law. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75 (9th Cir. 2010); *cf. Waste Mgm't*, 252 F.3d at 347 (Rule 12(f) Motions viewed with disfavor). Defendants cite no authority for the proposition that when a claim is dismissed under Rule 12(b)(6) a "follow-on" Rule 12(f) Motion is appropriate to then reform the Pleading.

Conclusion

Plaintiffs in this suit, both individual and corporate, have alleged a wide-range of specific burdens placed upon them and their members by the North Carolina registry law. These allegations, taken as true at this stage of the proceedings with all reasonable

inferences given to Plaintiffs, show a punitive system of surveillance and affirmative restraints and disabilities that substantially impairs First Amendment and other fundamental rights. Plaintiffs' allegations show further that it the basic factual predicates of this regime deserve judicial scrutiny.

In light of these allegations, and for the reasons set forth above, this case should go forward.

Respectfully submitted this 19th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PLAINTIFF'S RESPONSE AND BRIEF IN REPSONSE TO PLAINTIFF'S MOTION TO DISMISS** electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for Defendants:

Laren M. Clemmons
lclemmons@ncdoj.gov

This is the 19th day of May, 2017.

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