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)

MEMORANDUM IN SUPPORT OF 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.

INDEX

NOW COME all named Defendants, by and through Special Deputy Attorney General Lauren M. Clemmons, and submit this Memorandum of Law in Support of Defendants' Motion to Dismiss.

BACKGROUND

This 42 U.S.C. §1983 action challenges the constitutionality of North Carolina's sex offender registry law and seeks declaratory and injunctive relief. Plaintiffs John Doe 1 and John Doe 2 are registered sex offenders. In 2009, John Doe 1 pled guilty two counts of misdemeanor sexual battery[1] against his 30 year old female victim. He is a registered sex offender living in Alamance County. (Compl. ¶¶94-96) He alleges that he is not a danger to minors based on a psychological evaluation (*Id*. ¶¶98-101) and on findings from a divorce court that awarded him joint custody of his son and daughter. (*Id*. ¶¶399-401) He works as a construction supervisor. (*Id*. ¶360) John Doe 2, also a registered sex offender, lives in Wake County. (*Id*. ¶102) He pled guilty to misdemeanor sexual battery arising from a consensual sexual relationship with a 16 year old girl whom he had coached. This plea was either in 2009 or 2011—(the complaint allegations are internally inconsistent). (*Id*. ¶¶102-103) He is married and has a 12 year old son. (*Id*.

[1] Under N.C.G.S. §14-27.33 a person guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person by force against the will of the other person, or engages in such contact with a person who is mentally disabled, mentally incapacitated, or physically helpless. Sexual contact is defined in N.C.G.S. §14-27.20(5). Mentally disabled, incapacitated, and physically helpless are defined in N.C.G.S. §14-27.20(1)-(3).

¶¶105, 399, 402) He has completed a sex offender counseling and treatment program and is a "low" risk for recidivism. (*Id*. ¶¶108-109) Both Doe Plaintiffs challenge N.C.G.S. §14-208.18(a)(2) and (3)(2016). (*Id*. ¶¶257, 285, 361, 372, 405)

Plaintiffs NARSOL (National Association for Rational Sexual Offense Laws) and NC RSOL are member organizations that advocate on behalf of sex offenders. NARSOL's members are registered sex offenders who were convicted prior to 2006, 2008, and 2009. (*Id*. ¶¶59-75). NCRSOL's members are registered sex offenders, family members of these offenders, and concerned citizens. (*Id*. ¶¶76-93) Plaintiffs, including NARSOL and NC RSOL on behalf of their members, "wish to engage in conduct proscribed by the registry laws" and are concerned they will be prosecuted. Plaintiffs' fear of prosecution "is not limited to the judicial district in which they currently reside." (Compl. ¶¶56-57) NARSOL and NC RSOL do not allege where their members reside within North Carolina. Additional allegations are presented in the below argument.

In Claims 1 and 5, Plaintiffs' challenge the retroactive application of legislative amendments in 2006, 2008, 2009, and 2016 to "Article 27A" and the "registry law" under the *ex post facto* Clause (Claim 1, ¶¶600-603) and under the 14th Amendment due process clause. (Claim 5, Counts 1-3, ¶¶626-644) In Claim 4, Counts I-III, Plaintiffs seek relief on the grounds that the "registry law" burdens fundamental rights. (Claim 4, Counts I-III, ¶¶611-625) Plaintiffs specifically challenge N.C.G.S. §§14-208.18(a)(2) and (a)(3)(2016) as facially overbroad and as-applied, as well as a burden on the free exercise of religion and freedom of association. (Claim 2, Counts I-III ¶¶604-607). They also

claim that N.C.G.S. §§14-208.18(a)(3) is void for vagueness in violation of the 5th and 14th amendments. (Claim 3, ¶¶608-610) Lastly, Plaintiffs raise a state law defamation claim arising from their placement on the registry. (Claim 6, ¶¶645-655). Named as defendants are Attorney General Josh Stein, Secretary Erik Hooks of the North Carolina Department of Public Safety, and North Carolina's forty-four (44) District Attorneys. Defendants move to dismiss this Complaint pursuant to Rules 8(a)(2), 12(b)(1), 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

A motion to dismiss filed under Rule 12(b)(1) tests the federal court's subject matter jurisdiction, *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982), while one filed under Rule 12(b)(2) test's the court's jurisdiction over an individual. The plaintiff bears the burden of showing that jurisdiction is appropriate in relation to both challenges. *Evans v. B.F. Perkins Co*., 166 F.3d 642, 647 (4th Cir. 1999)(Rule 12(b)(1)); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989)(Rule 12(b)(2)). A Rule 12(b)(6) motion tests the legal sufficiency of the complaint, which must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *accord Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). Although all well-pled allegations are presumed to be true, *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008), "[t]hreadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Twombly*, 550 U.S. at 555); *see also Brown*, 716 F.3d at 350. Similarly, a court need not accept as true a plaintiff's legal conclusions and "unwarranted inferences, unreasonable conclusions, or arguments," *Giarratano*, 521 F.3d at 302 (citation omitted) (internal quotation marks omitted).

ARGUMENT

This Complaint should be dismissed pursuant to Fed. R. Civ. P. 8, 12(b)(1), 12(b)(2) and 12(b)(6). Defendants first address the Rule 8 argument and then address the Rule 12(b) arguments in the following order: Claims 1, 5, and 4 challenging Article 27A and the "registry law"; Claims 2 and 3 challenging N.C.G.S. §14-208.18(a)(2) and (a)(3); and the state law defamation claim in Claim 6. Lastly, Defendants address Plaintiffs' failure to show that Defendants are proper defendants under §1983 and to plead facts sufficient to overcome 11th Amendment immunity.

I. THE COMPLAINT VIOLATES FED. R. CIV. P. 8.

At the outset, the State Defendants move to dismiss this Complaint for failure to comply with Rule 8(a)(2) of the Federal Rules of Civil Procedure. Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Plaintiffs' Complaint is eighty-eight (88) pages long

and contains 657 numbered paragraphs. It is neither short nor plain. The Complaint contains conclusory, naked assertions devoid of factual enhancement intermixed with legal conclusions, opinions, unauthenticated commentary and study findings that render the Complaint needlessly unwieldly, convoluted, and confused. A monumental effort is required for the reader to discern which allegations may be connected to which claims and whether claims are being asserted by the individual plaintiffs, the organizational plaintiffs, or both. *See In re Westinghouse Secs. Litigation*, 90 F.3d 696, 703 (3d Cir. 1996) (complaint more than 600 paragraphs and 240 pages was too long); *Med. Supply Chain, Inc. v. Neoforma, Inc*., 419 F. Supp. 2d 1316, 1331 (D. Kan. 2006)(115 page, 613 paragraph complaint violated Rule 8).

The claims are also internally inconsistent and/or vague. Claims 1, 4, and 5, challenge "Article 27A" and the "registry law." Article 27A, found at N.C.G.S. § 14-208.5 (2016), *et seq*., consists of five separate parts, each legislating on different topics. Although Plaintiffs identify some Article 27A statutory provision in Complaint ¶¶211-225, they also attach the full text of the "North Carolina Registry Law" via Complaint ¶183. Later, in Claims 1-6, Plaintiffs do not refer to the statutes previously listed in ¶¶211-225, and do not identify the challenged statutory text or provisions. Instead, they resort back to global references to "Article 27A" or the "registry law." This internal inconsistency results in ambiguity as to which Article 27A provisions are at issue in Claims 1, 4 and 5.

Additionally, there may be causes of action within the Complaint that are not set forth in the claims. For example, Claims 1, 4, and 5, pertain to Article 27A and/or the "registry laws." In Complaint ¶¶266-284, Plaintiffs allege that N.C.G.S. §14-202.5 infringes on 1st Amendment free speech rights. In ¶(e) of the Prayer for Relief, Plaintiffs ask that §14-202.5 be enjoined. However, N.C.G.S. §14-202.5 is in Article 26, not Article 27A, and is not part of the "registry laws." The Complaint fails to give the Defendant State Officials fair (and plain) notice as to what Defendants must defend and thus fails to comply with Rule 8.

The Complaint also fails to give notice of claims against each Defendant. In Complaint ¶¶45-58, Plaintiffs present general duties of Attorney General Stein, the District Attorneys, and Secretary Hooks, but never again refer to a Defendant by name as to alleged conduct or misconduct, or in relation to any of the six Claims. Instead, the Complaint names the "State" as the alleged wrongdoer in the context of "falsely" identifying registrants as dangerous or as recidivists (*see, e.g.*, ¶¶15, 16, 18, 186, 198, 200, 201, 204, 205, 319, 358, 436, 438, 441, 647, 648, 649) and publishing information about registrants (*see, e.g.*, ¶¶203, 226, 227, 278, 357, 359, 437, 439), as well as in the context of how the State itself, or through its registry law, impacts or burdens registrants (*see, e.g.*, ¶¶ 21, 22, 23, 24, 25, 26, 27, 28, 31, 36, 38, 194-197, 203, 337, 395, 448-57), or acts in other miscellaneous ways (s*ee, e.g.*, ¶¶190,191, 279, 280, 439, 440, 444, 447, 530, 539, 563, 567, 575, 636). While it is clear that Plaintiffs challenge *the "acts" of the State of North Carolina, through the North Carolina General Assembly's enactment of*

the "registry law," the named Defendants lack clear notice as to which claims, if any, are asserted against each of them, and what conduct/misconduct is attributable to them. The Complaint violates Rule 8 and should be dismissed. *Williams v. North Carolina*, No. 4:03-CV-119-H4, 2004 U.S. Dist. LEXIS 28552 (E.D.N.C. Oct. 8, 2004)(failure to satisfy fair notice of Rule 8(a) was separate grounds for dismissal); *see McHenry v. Renne*, 84 F.3d 1172, 1177, 1178-80 (9th Cir. 1996)(lengthy, confusing complaints lead to discovery disputes, lengthy trials and do not perform essential functions of complaint).

II. PLAINTIFFS' "ARTICLE 27A" AND "REGISTRY LAW" CLAIMS MUST BE DISMISSED FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM.

A. Claim 1: The Ex Post Facto Challenge to Article 27A.

Plaintiffs allege that the retroactive application of amendments to "Article 27A" in 2006, 2008, 2009, and 2016, resulted in "more burdensome… punishment" for "offenses committed prior to the enactment of those amendments" in violation of the *ex post facto* clause. (Claim 1 ¶¶600-603) The *ex post facto* clause of U.S. Const. art. 1, §10, cl. 1, "is aimed at laws that retroactively… increase the punishment for criminal acts." *Ca. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (*quoting Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). A law is retroactive if it "appl[ies] to events occurring before its enactment." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997).

(1) <u>NARSOL and NC RSOL Lack Standing</u>. Under Fed. R. Civ. P. 12 (b)(1), if a party lacks standing, the court automatically lacks subject matter jurisdiction. *See Long*

Term Care Partners, LLC v. United States, 516 F.3d 225, 231 (4th Cir. 2008). To meet the constitutional Article III "case and controversy" requirement, a party must demonstrate that: (1) he has suffered an injury in fact that is concrete, particularized, and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the action of the defendants, thus satisfying the causal connection between the injury and the challenged action; and (3) the injury may be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000); *see also Long Term Care Partners, LLC* 516 F.3d at 231. An organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Md. Highways Contractors Ass'n v. Maryland*., 933 F.2d 1246, 1251-52 (4th Cir.), *cert. denied*, 502 U.S. 939 (1991). Representational standing requires specific allegations establishing that at least one identified member has suffered or would suffer harm in a concrete and personal way. *Summers v. Earth Island Inst*., 555 U.S. 488, 498 (2009). A "terse allegation" of injury—"without specific mention of any individual member's injury" "stops short of the line between possibility and plausibility." *Southern Walk at Broadlands Homeowner's Association, Inc., v. Openband*, 713 F.3d 175, 185 (4th Cir. 2013)(*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Plaintiffs allege that the "collective burdens" of the registry law, along with the history of the registry law, demonstrate the intent to punish or create the effect of punishment in violation of the *ex post facto* clause. (Compl. ¶424) In Complaint ¶¶ 425-491, Plaintiffs offer legal conclusions or arguments concerning the "*ex post facto*" impacts of the "registry law" on "registrants" in general, but not on an individual member. Complaint ¶¶11, 33, 39, 56, 63-68, 69, 167, 206, 261, 293, 300, contain generalized references to NARSOL and NC RSOL "members" such as: "these laws have been retroactively applied to some members" (¶11); and the law extended the registration of some NARSOL members from 10 to 30 years (¶¶63-69).

NARSOL and NC RSOL fail to meet the first prong of the *Hunt* test because they offer no allegations showing that any individual member has Article III standing in his own right. *Hunt*, 432 U.S. at 343. The vague, non-specific allegations about "some" members fall short of the required individual member specificity. *See Goode v. City of Phildelphia*, 539 F.3d 311, 325 (3rd Cir. 2008)(nonspecific statements about members owning property and being potentially affected by outcome of action was nothing more than generalized grievance that failed to show injury in fact demonstrating members had standing in own right). Allegations about "registrants" are not particularized--these registrants may or may not be NARSOL or NC RSOL members. Such allegations say nothing about how a member is affected in a personal and individual way. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)(injury must be particularized).

Also, NARSOL and NC RSOL do not plead an injury in fact traceable to the 44 named District Attorney Defendants. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 180-81. A credible threat of prosecution is needed to establish a live case and controversy. *Doe v. Duling*, 782 F.2d 1202, 1205-06 (4th Cir. 1986). NARSOL and NC RSOL members have not refused to register under the alleged retroactive provisions, but instead are registered sex offenders (Compl. ¶65-68, 83-86), who are compliant with the registration laws and do not face a credible threat of prosecution.

To the extent that they complain about alleged retroactive childcare employment restrictions in N.C.G.S. §14-208.17 (2008) (Compl. ¶¶154-55), or about the residential living restrictions in N.C.G.S. §14-208.16 (2006) (*Id.* ¶¶152-53), NARSOL and NC RSOL fail to plead an injury in fact. NARSOL and NC RSOL do not identify an individual member impacted by these restrictions under the first *Hunt* prong. They fail to plead an injury in fact traceable to a District Attorney—e.g., a credible threat of prosecution in relation to these statutes. "Persons having no fears of state prosecution, except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Duling*, 782 F.2d at 1205-06. NARSOL and NC RSOL members do not plead a credible threat of prosecution from one or more of the 44 named district attorneys sufficient to constitute an Article III injury arising under the alleged retroactive application of 2006, 2008, 2009, or 2016 amendments.

Additionally, although Plaintiffs allege a subjective "fear of prosecution" in judicial districts other than those where members reside (Compl. ¶¶56-57), NARSOL and NC RSOL do not allege where their members reside. This failure is significant--- there is no factual predicate to determine if *each* Defendant District Attorney is geographically positioned to hypothetically (much less credibly) threaten a member with prosecution. *See Summers*, 555 U.S. at 500 *(*organization failed to establish that member would ever visit one of the small parcels at issue and therefore did not show standing). Despite having named all 44 district attorneys, NARSOL and NC RSOL fail to establish any member's injury fairly traceable to each prosecutor. NARSOL and NC RSOL also fail to establish an injury fairly traceable to Attorney General Stein—his powers of "special prosecution" are at the exclusive discretion of a district attorney. The Complaint is silent as to how and when, if ever, this authority would be triggered as to a NARSOL or NC RSOL member; the Attorney General has no authority to initiate a prosecution on his own. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991). A case is not fit for judicial decision when it is "dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). Rule 12(b)(1) supports dismissal of Claim 1. NARSOL's and NC RSOL's "*ex post facto*" claim otherwise would appear to be lodged against the State of North Carolina, which is not a "person" within the meaning of §1983 due to 11th Amendment immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The claim is alternatively subject to dismissal pursuant to Rule 12(b)(1),(2), and (6).

NARSOL and NC RSOL also fail to meet the third *Hunt* prong because the "*ex post facto*" claim requires individual member participation. The retroactive application of a "registry law" amendment depends on the date of a person's conviction. Injury allegedly arising from such an application would be specific to an individual because not every provision of Article 27A applies or affects a registrant in the same way. *See, e.g.*, N.C.G.S. §14-208.8A (establishing temporary residence); §14-208.9(c)-(d)(enrollment or employment at institution of higher learning). The "retroactive burdens" from 2006, 2008, 2009, and 2016 amendments that Plaintiffs challenge in Claim 1 require the participation of individual members in this lawsuit. NARSOL and NCRSOL lack representational standing under Rule 12(b)(1) for Claim 1.

(2) <u>John Doe 1 and John Doe 2 Lack Standing</u>. John Doe 1 and Doe 2 lack standing to pursue an *ex post facto* claim as to all "Article 27A" provisions *pre-dating* their conviction dates, including the 2006 and 2008 amendments. These amendments are not retroactive as to Doe 1's 2009 conviction, and Doe 2's 2009 or 2011 conviction. A particularized, concrete injury cannot plausibly arise from a statute that <u>*is not retroactive*</u> to them. Additionally, both fail to allege facts demonstrating an injury concerning the requirements or prohibitions contained in a 2006 or 2008 amendment. As to the 2009 amendment (i.e., N.C.G.S. §14-208.19A) legislating on commercial licensing for passenger vehicles and school buses (*see* Compl. ¶178), neither Doe Plaintiff has pled facts showing that this statute is retroactive to him. Doe 1 fails to allege the month and day of his conviction in relation to the amendment's December 1, 2009, effective date,

see N.C. Session Laws 2009-491, s. 7, while Doe 2 inconsistently alleges a conviction date of 2009 and of 2011. (Compl. ¶¶102-03). Even if the 2009 amendment were retroactive to these Plaintiffs, neither alleges facts demonstrating an injury in relation to commercial drivers licensing. The *ex post facto* claim as to 2006, 2008, and 2009 amendments should be dismissed for lack of standing pursuant to Rule 12(b)(1).

Lastly, as to N.C.G.S. §§14-208.18(a)(2) and (3), amended in 2016, both Doe 1 and Doe 2 lack standing. These provisions contain premises restrictions applicable to registrants in relation to minors. Doe 1, whose victim was 30 years old, does not fall within the provisions of N.C.G.C. §14-208.18(a)(2) and lacks standing. *See* N.C.G.S. §14-208.18(c)(2)a-b (subsection (a)(2) applies to persons whose crime was against a minor under the age of 18). Otherwise, the Doe Plaintiffs provide "naked assertions devoid of factual enhancement," *Iqbal,* 556 U.S. at 678: they would like to go to places, such as libraries and museums, restricted by this statute (*see, e.g.*, Compl.¶¶410, 597), but are concerned about prosecution (¶56), including prosecution in judicial districts where they do not reside. (¶57) As a jurisdictional matter, a plaintiff complaining about State officials' conduct must show "some threatened or actual injury resulting from the putatively illegal action." *Warth v. Seldin*, 422 U.S. 490, 499 (1975)(*quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)); *Duling*,782 F.2d at 1205-06 (credible threat of prosecution required for case and controversy); *accord, Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014).

The Doe Plaintiffs, who live in Alamance and Wake County, fail to allege a credible threat of prosecution from the Alamance or Wake County District Attorneys. The Complaint is silent as to the remaining 42 District Attorneys, as well as to Attorney General Stein, in relation to any plausible prosecution by these Defendants against the Doe Plaintiffs. Accordingly, the Doe Plaintiffs fail to allege an injury fairly traceable to the conduct of Defendants and lack standing under Rule 12(b)(1) to assert an *ex post facto* claim as to N.C.G.S. §14-208.18(a)(2) and (a)(3).

(3) <u>The 3 Year Statute of Limitations Bars Ex Post Facto Claims</u>. The three (3) year statute of limitations expired in 2009, 2011, and 2012, respectively, as to the alleged retroactivity of amendments enacted in 2006, 2008, and 2009. The *ex post facto* Claims as to 2006, 2008, and 2009 amendments are time-barred as a matter of law and subject to dismissal pursuant to Rule 12(b)(6). *Williams,* 2004 U.S. Dist. Lexis (dismissing inmates §1983 claims arising from charge 12 years ago).

(4) <u>The Ex Post Facto Claim Fails</u>. North Carolina's Court of Appeals has determined that North Carolina's sex offender registry requirements create a non-punitive civil regulatory scheme and do not amount to *ex post facto* violations. In *In re Hall*, the Court of Appeals analyzed the *ex post facto* issue by applying the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), and relying in part on *Smith v. Doe*, 538 U.S. 84 (2003), which held that Alaska's sex offender registration statutes were non-punitive civil statutes and did not violate the *ex post facto* clause. *In re Hall*, 238 N.C. App. 322, 330-32, 768 S.E.2d 39, 45-6 (2014), *cert denied,*136 S. Ct. 688 (2015); *see*

also State v. White, 162 N.C. App. 183, 191-98, 590 S.E.2d 448, 453-58 (2004)(applying *Smith v. Doe*, 538 U.S. 84 (2003) and finding "no meaningful distinction between Alaska's registration law and North Carolina's Article 27A," which was not unconstitutional *ex post facto* law). Based on this authority, Plaintiffs fail to state an "*ex post facto*" claim for relief as to the "retroactive application of amendments made… to Article 27A" in 2006, 2008, and 2009. *See* Compl. ¶¶600-602; *see also Doe v. Miller*, 405 F.3d 700, 704-05 (8th Cir.)(upholding Iowa's sex offender residency and employment restrictions against an *ex post facto* challenge), *cert. denied*, 546 U.S. 1034 (2005).

The *ex post facto* claim as to the 2016 amendment to N.C.G.S. §§14-208.18(a)(2)-(a)(3) in Claim 1,¶603, also should be dismissed for failure to state a claim. The Doe Plaintiffs claim that this statute is punitive because: the Does are not a risk or danger to minors (Compl. ¶462); the statute prevents "all registrants" from being at places associated with young children; and there is no fit between the restrictions and the class of persons subject to them. (Compl. ¶489; *see also* ¶¶482-85). These allegations implicate the fifth *Kennedy v. Mendoza-Martinez* factor, which is whether the statute is excessive with respect to its non-punitive purpose. *Smith v. Doe*, 538 U.S. at 97 (citing and applying this fifth factor).

Doe 1 and Doe 2 fail to allege plausible facts sufficient to state a claim that the statute's premises restrictions are so punitive in effect as to violate the *ex post facto* clause under *Smith v. Doe* and the fifth *Kennedy v. Mendoza-Martinez* factor. *See Iqbal*, 556 U.S. at 677-79 (plausibility not sheer possibility). The gravamen of the Does' claim

is that N.C.G.S. §§14-208.18(a)(2)-(a)(3) apply based on the fact of a prior conviction without regard to an individual's risk of recidivism over time. The Supreme Court in *Smith v. Doe* held, however, that a "State's determination to legislate with respect to convicted sex offenders *as a class*," and not with respect to an individual determination of dangerousness, did not render an act punitive in violation of the *ex post facto* clause. 538 U.S. at 104.

Smith v. Doe applies to Plaintiffs' claim. The North Carolina General Assembly created a regulatory tracking and notification system based on *offenders as a class* "in order to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies." N.C.G.S. §14-208.5. N.C.G.S. §§14-208.18(a)(2) and (3) add restrictions based on offenders as a class who have been convicted of Chapter 14, Article 7B offenses, similar federal or out-of-state offenses, or offenses against victims under 18 years of age. *See* N.C.G.S. §§14-208.18(c). Under *Smith v. Doe*, N.C.G.C. §§14-208.18(a)(2) and (3) is not punitive as a matter of law. The Doe Plaintiffs fail to state an *ex post facto* claim as to the 2016 amendment pursuant to Rule 12(b)(6).

B. Claim 5: Plaintiffs' 14th Amendment Due Process Challenge.

Plaintiffs style Claim 5, Counts 1-3, as procedural due process claims arising under the 14th Amendment. The essential elements of a due process claim are a life, liberty, or property interest of which a plaintiff was deprived by defendants without the

due process of law. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 826 (4th Cir. 1995). Counts 1-3 fail for the below reasons.

(1) Count I (Deprivation of Liberty Interests). Claim 5, Count 1 is lodged against the State and must be dismissed. The Doe Plaintiffs claim that the "registry law" violates 14th Amendment due process because it fails to account for the dangerousness of an individual. (Claim 5, Count 1, ¶¶626-34) They seek relief on the theory that they are subject to the registration requirements even though they allegedly are not dangerous to children, minors, or the general public, and allege protected liberty interests in the 1st amendment and "other fundamental rights." (*Id*. ¶¶626-28) There are no allegations in the Complaint that Attorney General Stein, Secretary Hooks, and the 44 District Attorneys have acted to deprive the Doe Plaintiffs of a liberty or property interest. Instead, the Doe Plaintiffs claim that the *State* violates Due process because: the "State ignores judicial determinations that an individual is not dangerous" (*Id*. ¶632); the "State violates the individual's [14th] amendment right to due process" (*Id*. ¶633); and the State fails to provide "minimal due process protections" on this issue. (*Id*. ¶634) The State, however, is not a person within the meaning of §1983. *Will*, 491 U.S. at 71. The 11th Amendment bars this claim against the State. *Id*. Accordingly, Claim 5, Count 1 must be dismissed pursuant to Rules 12(b)(1), (b)(2), and/or (b)(6).

Count 1 also fails generally to state a claim for relief. Plaintiffs' due process theory was rejected in *Conn. Dep't of Pub. Safety v. Doe*, where the Supreme Court considered a procedural due process challenge to Connecticut's sex offender law that

applied "to all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose." 538 U.S. 1, 4 (2003). The federal circuit court had held that the failure to provide a pre-deprivation hearing to determine a registrant's current dangerous violated the due process clause. The Supreme Court reversed, noting that "Connecticut … has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness." *Doe*, 538 U.S. at 4. The Court held that "due process does not require the opportunity to prove a fact [e.g., current dangerousness] that is not material to the State's statutory scheme." *Id*. "[A]ny hearing on current dangerousness [would be] a bootless exercise." *Id*. at 7-8 (citations omitted).

The *Doe* analysis applies here. The North Carolina legislature has decided that the Registry's registration and public notification requirements, as well as its other provisions, flow from the fact of a "reportable conviction," *see* N.C.G.S. §14-208.7(a), and not from a fact of current dangerousness.[2] Both John Doe 1 and John Doe 2 received a "procedurally safeguarded opportunity" to contest the fact of a reportable conviction during their criminal pleas and sentencing. *See Doe*, 538 U.S at 7. Additionally, N.C.G.S.

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[2] N.C.G.S. §14-208.18(c)(2)a.(2016) provides that N.C.G.S. §14-208.18(a)(2) applies to a person convicted of an Article 7B offense and where a "*finding has been made in any criminal or civil proceeding that the person presents, or may present a danger to minors*." (Italics added). This language is not the equivalent of a "current finding of dangerousness," which Plaintiffs argue is required. The case-by-case application of this provision, however, might involve a "current finding" depending upon the timing of the criminal or civil proceeding.

§14-208.12A provides registrants the opportunity to petition for termination of registry after ten years. Claim 5, Count 1 fails to state a due process claim for relief.

(2) Count 2 (Extension of Time on Registry). Plaintiffs claim that the "registry law's" retroactive increase in registration requirements from 10 to 30 years violates the 14th Amendment due process clause. (Claim 5, Count 2, ¶¶635-640) NARSOL and NC RSOL bring Count 2 on behalf of their members whose registration requirements were retroactively increased from 10 years to 30 years to life under a 2006 amendment. (Compl. ¶¶636-639) This increase was "made without any due process protections for registrants on the registry at that time." (*Id*. ¶638) NARSOL and NC RSOL claim that the "*North Carolina registry law* violates those individual's [14th] amendment right to due process as it deprives them of substantial liberty interests without sufficient due process." (*Id*. ¶640)(italics added) Plaintiffs do not claim that a named Defendant has violated their rights. The Complaint is devoid of alleged acts by Attorney General Stein, Secretary Hooks, or the District Attorneys depriving an organization's member of procedural due process. Thus, the claim appears to be brought against the State and its law enacted by North Carolina's General Assembly, not against a named Defendant. Claim 5, Count 2 must be dismissed pursuant to Rule 12(b)(1), (2), and (6) because the State is not a person under §1983 and the 11th Amendment bars this claim. *See Will*, 491 U.S. at 71.

Count 2 is also subject to dismissal under Rule 12(b)(1) because NARSOL and NC RSOL lack standing under the 1st and 3rd prongs of the *Hunt* test. They fail to identify an individual member harmed by the retroactive 30 year registration requirement.

Additionally Claim 5, Count 2, (like the *ex post facto* Claim 1), requires individual participation by the members of the organization. *See supra*. Argument II.A.(1) at 7-12. This Court lacks subject matter jurisdiction over NARSOL and NC RSOL.

Count 2 also fails as a matter of law. Although NARSOL and NC RSOL attribute the 10 to 30 year increased registration period to the 2006 amendment (Compl. ¶637), this conclusion is wrong as a matter of law. The 2008 amendment, not the 2006 amendment, increased the registration period from 10 to 30 years. *See State v. Surratt*, __ N.C. App.__, 773 S.E.2d 327, 330 (2015)(explaining amendments). Thus, the claim must be dismissed. Moreover, the Complaint on its face shows that NARSOL's and NC RSOL's challenge to a 2006 or 2008 statutory amendment is barred by the three-year statute of limitations, which expired as to these amendments in 2009 or 2011, respectively. Claim 5, Count 2 must be dismissed pursuant to Rule 12(b)(6). *See Williams*, 2004 U.S. Dist. Lexis 28552.

Even if the statutes of limitations were not a bar to Count 2, the claim still fails as a matter of law. Retroactive legislation meets the test of due process if the legislation is justified by a rational legislative purpose. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). In 2008, the General Assembly increased the registration period in N.C.G.S. §14-208.7, *see* N.C. Sess. Laws 2008-117, s. 8, and at the same time amended N.C.G.S. § 14-208.12A to allow a registrant to petition for termination of the 30 year requirement ten (10) years after the date of the initial county registry. *See* N.C. Sess. Laws 2008-117, s. 11. The General Assembly enacted the amendment for the legitimate

legislative purpose of conforming State law to federal law. *See In re Hall*, 238 N.C. App. at 323, 768 S.E.2d at 41 (N.C.G.S. §14-208.12A "shows clear [legislative] intent" to incorporate federal sex offender registration requirements into State law). The increased registration period also served the General Assembly's stated purpose "to assist law enforcement agencies' efforts to protect communities" from sex offenders who "often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment." N.C.G.S. §14-208.5. Claim 5, Count 2 fails to state a due process claim for relief and should be dismissed under Rule 12(b)(6).

(3) Count 3 (Fundamental Fairness). In Claim 5, Count 3, the Doe Plaintiffs claim that the retroactive application of the "registry law" without consideration of the dangerousness of the Doe plaintiffs is fundamentally unfair. (Claim 5, Count 3, ¶¶641-44) The Doe Plaintiffs lack standing under Rule12(b)(1). They contend that the retroactive application of the "registry law" is "harsh or oppressive" under the 14th Amendment due process clause because its application to them limits the exercise of their constitutional liberties and they are not dangerous to children, minors, or the public. (Compl. ¶¶641-644) To succeed, the Doe Plaintiffs must show which provisions of the registry law are "retroactive," as well as allege a concrete, particularized injury arising from said retroactive application. Count 3 repackages the Doe Plaintiffs' *ex post facto* challenge in Claim 1. The Doe Plaintiffs lack standing to bring Count 3 for the same reasons that they lack standing as to the *ex post facto* claim in relation to 2006, 2008,

2009, and 2016 amendments. *See supra.* Argument II.A.(2) at 12-14. Claim 5, Count 3 must be dismissed under Rule 12(b)(1).

Count 3 also fails to state a claim for relief. The Doe Plaintiffs do not identify a protected liberty or property interest in a *finding* that they are not a *danger*—thus, a legislative scheme that allegedly fails to account for the same does not implicate a constitutionally protected property or liberty interest as a matter of law. The "harsh and oppressive" language (Compl. ¶641) cited by the Doe Plaintiffs "is simply shorthand for 'the [general] prohibition against arbitrary and irrational' legislation." *Holland v. Keenan Trucking Company*, 102 F.3d 736, 740 (1996)(quoting *Pension Benefit Guaranty Corp*., 467 U.S. at 733). The test for retroactive legislation under the due process clause is whether the legislation is rationally related to a legitimate legislative purpose. *Holland*, 102 F.3d at 740. N.C.G.S. §14-208.18(a)(2) and (a)(3)(2016), arguably retroactive as to the Doe Plaintiffs, meet this test. By restricting registrants' proximity to minors, N.C.G.S. §14-208.18(a)(2) and (3) serve the legislative purpose stated in N.C.G.S. §14-208.5 to protect the public and children against persons whom the General Assembly recognizes "often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment." Legislation "need not place the remedial burdens on the 'most responsible' party to survive rational basis scrutiny. The legislative means need only be reasonably related to some legitimate governmental end." *Holland*, 102 F.3d at 741.

The General Assembly recognized that sex offenders *often* pose a high risk of re-engaging in sex offense—not always. Plaintiffs' allegations arguing about sex offender recidivism (*see, e.g.*,¶¶507-74), or Plaintiffs' own alleged "non-dangerousness," do not negate the legislative determination. The weighing of interests---in this case the risk of recidivism among classes of offenders--and the wisdom of the legislation is for the State's legislature, not the courts. *Star Sci., Inc., v. Beales*, 278 F.3d 339, 350 (4th Cir.), *cert. denied*, 537 U.S. 818 (2002). Mathematical precision is not required. *Id*. Even if a law seems unwise, or works to the disadvantage of a particular group, the legislative choice is not subject to courtroom fact-finding, but may be based on rational speculation unsupported by evidence of empirical data. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993). There need only be some conceivable purpose not prohibited by the Constitution. *Beales*, 278 F.3d at 350; *accord Northside Sanitary Landfill v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990)(government action passes rational basis test if sound reason may be hypothesized for legislation).[3] Claim 5, Count 3 fails as a matter of law and should be dismissed pursuant to Rule 12(b)(6).

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[3] John Doe 1 focuses on the fact that his sexual battery was against a 30 year old adult. Doe 1 does not allege that he picked his victim based on her age. In any event, the actual age of Doe 1's victim is immaterial to a rational legislative purpose of protecting minors. Many teens are physically mature and adult-like in appearance, but lack the social skills and sophistication to appreciate potential danger or to navigate "romantic" or illicit relationships instigated by an adult. The legislature could rationally conclude that precluding sex offenders, such as Doe 1, from places where minors congregate under N.C.G.S. §14-208.18(a)(3) serves the purpose of protecting a sub-group of minors, such as teens, from potential harm.

C. Claim 4: The "Burden on Fundamental Liberties."

Plaintiffs contend that the "registry law" burdens the fundamental rights "to direct the education and upbringing of their children, pursue the common occupations of life, and acquire useful knowledge" because the registry law does not allow for "individualized consideration before restricting Plaintiffs' rights." (Claim 4, ¶¶611-625) Claim 4 conflates the procedural due process "individualized consideration" argument in Claim 5 with substantive due process "fundamental rights." The Supreme Court has held, in the context of sex offender registration requirements, that a sex offender does not have an additional right to process over and above the process afforded him during his original trial. *Conn. Dept. of Public Safety v. Doe*, 538 U.S. at 7. The alleged right to "individualized consideration" is otherwise not a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702 (1997), *discussed infra.* at 25. Claim 4 fails to state a claim for relief. To the extent Claim 4 challenges the registry's impact on fundamental rights standing alone (without "individualized consideration"), the claim still fails because Plaintiffs lack standing and fail to identify "fundamental rights" as a matter of law.

(1) <u>Count I (Right to Direct Education and Upbringing of Children)</u>. All Plaintiffs lack standing as to Count I. NARSOL and NC RSOL fail to identify an individual registered sex-offender parent-member and how any alleged acts by Defendants infringe the parent-member's ability to rear a child and direct a child's education. John Doe 1 and 2 do not allege specifically how they are being denied the opportunity to direct the upbringing of their children, or their education. Instead, they

assert, without further factual enhancement, that they unable to participate in the educational and public lives of their children due to the burden of N.C.G.S. §14-208.18 (Compl. ¶¶405-406); that the "escort requirement of the parent-teacher conference exception" stigmatizes and/or subjects their children to harassment; and they cannot be present in places where their children are likely to go such as libraries, museums, parks, or swimming pools. (*Id*. ¶¶408-410) These barebones, broad-sweeping conclusions do not rise above sheer possibility and into the realm of plausibility sufficient to establish an injury-in-fact. Instead they are generalized grievances about the law and do not differentiate the Doe Plaintiffs from other sex offender registrants who may have children. The Doe Plaintiffs' children are not plaintiffs and standing for the "stigma/harassment" claim fails. These vague conclusory allegations fail to crystallize the particularized, concrete injury required for Article III standing. "Rule 8…does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678. Count I must be dismissed as to all Plaintiffs under Rule 12(b)(1) for lack of standing.

Count I also must be dismissed pursuant to Rule 12(b)(6). Precious few rights have been found by the Supreme Court to be fundamental in nature. They are, as noted in *Washington v. Glucksberg*, the right to marry, to have children, to direct the upbringing of one's child, to marital privacy, to use contraception, to bodily integrity, and to abortion. 521 U.S. 702 (1997). The "registry law," including N.C.G.S. §14-208.18(a)(2) and (a)(3), however, does not ban or restrict a sex offender parent from the fundamental

right to choose a suitable education for his child, which was the nature of the right recognized in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The registry law does not direct or restrict parental decisions as to how to "bring up a child," nor does the Complaint allege otherwise. To the extent that the Doe Plaintiffs complain that they do not have unrestricted access to their children's schools, the Fourth Circuit has declined to recognize that parents have a fundamental right to enter school property. *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999).

Although the Doe Plaintiffs allege (conjecturally) that they may not be able to be present "in places where their children are likely to go" (Compl. ¶ 410), this concern does not implicate a fundamental right. The premises restrictions in N.C.G.S. §14-208.18 pertain to places where children may be present or congregate. There is not a fundamental right to be on the premises of a public library, public parks and other areas where children may gather for sporting events or other social programs. In *Doe v. City of Lafayette*, the Seventh Circuit rejected a sex offender's challenge to his ban from public parks, holding that plaintiff's right to enter parks to wander and to loiter for an innocent purpose was not a fundamental right. 377 F.3d 757 (7th Cir. 2004). Similarly, the North Carolina Supreme Court has held that a sex offender does not have a fundamental right to enter a park and that such a ban does not constitute a violation of the offender's constitutional rights under the Fourteenth Amendment. *Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E. 2d 728 (2008). In *Carey v. Brown*, the United States Supreme Court held that "no mandate in our Constitution leaves states and governmental units powerless

to pass laws to protect the public [in] …buildings… such as …libraries, schools and hospitals." 447 U.S. 455, 470 (1980)(*quoting Gregory v. Chicago*, 394 U.S. 111, 118 (1969). Count I fails to state a claim pursuant to Rule 12(b)(6).

(2) <u>Count II (Pursuit of the Common Occupations of Life)</u>. Count II fails for want of standing. Count II asserts that the "registry law" interferes with the fundamental right to pursue the common occupations of life. NARSOL does not identify an individual member harmed by the "registry law" in relation to a job and fails to establish standing. NC RSOL alleges general employment problems encountered by an out-of-state sex offender who moved to North Carolina (Compl. ¶¶373-382), by a painter (*Id*.¶¶383-84) and by a registered sex offender PhD member who had worked at a university. (*Id*. ¶¶385-94) Their problems, however, resulted from decisions made by *non-defendant* employers (*Id*. ¶¶379-80, 384, 386), not from acts by a named Defendant infringing on any employment interest. *Shirvinski v. United States Coast Guard*, 673 F.3d 308, 317-18 (4th Cir. 2012)(state action required; government normally not liable for private decision absent coercion or encouragement). NC RSOL lacks representational standing because the alleged harm is not fairly traceable to the conduct of a named Defendant. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992); *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1547.

John Doe 2, who quit a retail job after a trampoline park opened within 300 feet of the store, (Compl. ¶353), has been fired from four jobs after his employers found out he was on the registry. (*Id*. ¶366) He now works for a family business, but is restricted from

making deliveries to places off-limits based on his registry status. (*Id*. ¶¶368-69) He fears he will lose his business because of the false implication from the registry that he is a danger. (*Id*. ¶¶370-71) John Doe 2 works in construction and many of the project sites are allegedly off-limits under N.C.G.S. §14-208.18, such as school sites where his company does projects, and the registry restrictions materially limit his opportunity for advancement or switching jobs. (*Id*. ¶¶361-365) These allegations give some insight into the Doe Plaintiffs' occupations, but are again barebones and lacking in any particularized detail to rise to the level of a concrete injury. Additionally, the employment problems alleged by the Does are not the result of interference by a named Defendant in this lawsuit and the generalized, alleged injury is not traceable to Defendants. *Lujan*, 504 U.S. at 560-61. Count II fails for lack of standing under Rule 12(b)(1).

Even if Plaintiffs had standing, the right to make a living is not a fundamental right for substantive due process. *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005), cert. denied, 548 U.S. 904 (2006); *Pollard v. Cockrell*, 578 F.2d 1002, 1011 (5th Cir. 1978)(no substantive due process right to engage in lawful business, trade, or profession); *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999)(no general right to private employment), *cert. denied*, 529 U.S. 1053 (2000). Count II fails to state a claim for relief and must be dismissed under Rule 12(b)(6).

(3) <u>Count III (Right to Acquire Useful Knowledge)</u>. This Count also fails for want of standing. In Count III, Plaintiffs allege that the "registry law" interferes with their right to acquire useful knowledge. NARSOL offers no allegations concerning a member.

NC RSOL offers the barebones allegation that a "member" was denied access to a community college. The alleged denial, however, was due to the legal opinion of a person acting for the community college and "law enforcement" (Compl. ¶¶416-419), not to the actions of a named Defendant impeding access to a community college. *Lujan*, 504 U.S. at 560-61. NARSOL and NC RSOL fail to establish standing. John Doe 1 and 2 fail as well. They do not allege facts about what "useful knowledge" they have been denied, nor do they allege conduct by a named Defendant denying the same. Count III must be dismissed pursuant to Rule 12(b)(1).

Count III also lacks merit and must be dismissed pursuant to Rule 12(b)(6). The Complaint broadly alleges that sex offender registrants are not allowed to be on community college campuses, take online classes, or go to libraries. (Compl. ¶¶416-423) This allegation is a legal conclusion, which the Court is not required to accept under Rule 12(b)(6). The "registry law" does not ban or restrict a sex offender registrant from higher education or online classes. The law places a notification requirement on a registrant who attends an institution of higher learning or is employed at one. N.C.G.S. §14-208.9(c) and (d). And, although the *Meyer v. Nebraska* Court indicated that individuals have a liberty interest in the right to acquire useful knowledge, that case concerned only "access to broad areas of knowledge" (*e.g.*, imparting knowledge in a foreign language), not a fundamental right to access knowledge through certain forums or in certain ways—such as online or at libraries. 262 U.S. 390 (1923). Moreover, the Supreme Court discussed the "right to acquire useful knowledge" in the context of parental rights in relation to a

child's education, not in the context of an adult's right. *Meyer*, 262 U.S. at 396–97 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Lastly, there is no substantive due process right to public higher education. *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976); *Bryant v. N.Y.S. Educ. Dep't*, 692 F.3d 202, 217 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013). Count III fails as a matter of law.

Finally, Claim 4, Counts I-III assert that the registry law must be justified by a "*narrowly tailored compelling state interest.*" (Compl. ¶¶615, 620, 625)(italics added) The "compelling interest" test does not apply. Unless legislation impinges upon fundamental personal rights or involves a suspect classification, the legislation is presumed constitutional and need only be rationally related to a legitimate state interest. *See, e.g., New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*); *Pollard v. Cockrell*, 578 F.2d at 1013. This minimal rationality standard of review is satisfied if a statute has *any* conceivable rational basis. 578 F.2d at 1013. Since the "registry law," including N.C.G.S. §14-208.18(a)(2) and (a)(3), does not implicate fundamental rights, it need only be rationally related to a legitimate governmental interest. The General Assembly has a legitimate governmental interest in protecting the community and youth from sexual offenders and those who have committed other types of offenses against minors, such as abductions or kidnappings. *See* N.C.G.S. §14-208.6(1m). The registration and notice restrictions in the "registry law," as well as the restrictions in N.C.G.S. §14-208.18 that work in tandem with the registration as an additional regulatory measure, are rationally related to this legitimate interest. *See Doe v. Moore*, 410 F.3d 1337, 1346 (11th

Cir. 2005)(rejecting substantive due process challenge to sex offender act and holding that act met rational basis test), *cert. denied*, 546 U.S. 1003 (2005); *see also supra.* Argument II.B.(3) at 22-23 (rational basis standard). Claim 4, Counts I-III fail as a matter of law under Rule 12(b)(6).

III. PLAINTIFFS' CHALLENGE TO N.C.G.S. §14-208.18 (A)(2) AND (A)(3) MUST BE DISMISSED FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM.

Pursuant to N.C.G.S. §14-208.18(c)(2)b, the 300 foot premises restriction in N.C.G.S.§14-208.18 (a)(2) applies to offenders whose victim was under the age of 18 years. John Doe 1's victim was 30 years old. (Compl. ¶98) He fails to state a claim as to this statute in Counts I, II, and III. Nevertheless, for the sake of argument, the below arguments are offered as to John Doe 1 as well.

A. Claim 2: 1st and 14th Amendment Challenge.

(1) <u>Count I (Substantial Overbreadth-Free Speech)</u>. Only the Doe Plaintiffs appear to bring Count I challenging N.C.G.S. § 14-208.18 (a)(2) and (a)(3) and claiming that the statutes are overbroad and place substantial limits on Plaintiff's free speech. (Compl. ¶605). Plaintiffs fail to allege with specificity any limitations on their freedom of speech under N.C.G.S. §14-208.18 (a)(2) and (a)(3). They cite no instances where any named Defendant has taken any action against them or hindered their freedom of speech. In fact, their Complaint is devoid of any facts showing any Plaintiff has attempted to exercise this right and been denied. The Complaint lacks allegations of injury-in-fact

establishing standing to support a 1st Amendment Free Speech claim and should be dismissed pursuant to Rule 12(b)(1).

Count I also fails to state a claim for relief. The threshold question in a First Amendment Free Speech analysis is whether the challenged governmental action regulates protected activity-- if not, the Court "need go no further." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). N.C.G.S. § 14-208.18 (a)(2) and (a)(3) do not restrict speech or the creation of speech, or regulate the content of speech. Count I fails to state a Free Speech 1st Amendment claim and must be dismissed.

Further, Count I as pled fails under the "overbreadth doctrine." In a facial attack, the plaintiff must show that the statute can never be applied in a valid manner—that "every application of the statute creates an impermissible risk of suppression of ideas." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988)(citations omitted). Alternatively, even though a statute may be validly applied to plaintiff and others, the statute may be so broad as to inhibit the constitutionally protected speech of third parties. *Id*. This latter attack will not succeed unless the statute is substantially overbroad and will realistically and significantly endanger the 1st Amendment rights of parties not before the court. *Id.; see also New York v. Ferber*, 458 U.S. 747, 771(1982) (law should not be invalidated for overbreadth unless it reaches a "substantial number of impermissible applications"). The overbreadth doctrine is "strong medicine" that should only be administered as "a last resort." *N.Y. State Club Ass'n*, 487 U.S. at 14. A statute should never be held to be facially invalid "'merely because it is possible to conceive of a single

impermissible application[.]' *Houston v. Hill*, 482 U.S. 451, 458 (1987) (citations omitted)

Plaintiffs do not allege that N.C.G.S. §14-208.18(a)(2) and (a)(3) reach a "substantial number of impermissible applications." Instead, they claim generally that the provisions limit their rights of free speech (Compl. ¶605), but they do not provide factual support of an injury. Plaintiffs do not have a fundamental right to be present on school property, at a park, on the premises of any one specific church, or at a place where minors are present and congregating. *See supra.* Argument II.C.(1) at 24-27. There are no allegations that Plaintiffs seek access to these places to exercise their right to free speech. Plaintiffs have failed to state a claim for relief with regard to their overbreadth argument.

(2) <u>Count II (Free Exercise of Religion)</u>. Plaintiffs challenge N.C.G.S. § 14-208.18(a)(2) and (a)(3) as an unconstitutional burden on their 1st Amendment free exercise of religion. (Claim 2, Count II,¶ 606). Count II does not state a claim for relief. It is well settled that while the Free Exercise Clause prohibits the government from passing laws that stifle religious beliefs or practices, a statute that is neutral as to religion and generally applicable does not violate the Free Exercise Clause even if the law incidentally affects religious practice. *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 170 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996). "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 531-32 (1993); *see*

also, American Life League, Inc. v. Reno, 47 F.3d 642, 654 (4th Cir.)("[A] neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice."), *cert. denied*, 516 U.S. 809 (1995); *Doe v. Virginia Dep't. of State Police*, No. 3:10CV533-JAG, 2011 U.S. Dist. Lexis 68939 (E.D.Va. June 27, 2011)(rejecting free exercise challenge to sex offender registry law that only incidentally affected plaintiffs ability to attend churches with adjoining daycares), *aff'd on other grounds*, 713 F.3d 745 (4th Cir. 2013).

John Does 1 and 2 claim their freedom of religion is unconstitutionally stifled because they are prohibited by these statutes from attending church services in churches that contain day care centers and/or Sunday School classrooms. (Compl.¶¶ 257; 259; 288-295). N.C.G.S. §14-208.18 (a)(2) and (a)(3) do not prohibit Plaintiffs, or any registrant, from practicing religion. These statutes (and the "registry law" as a whole) are facially neutral since they lack reference to religion or the incidences of religious practice, are generally applicable to all registrants without regard to age, sex, race, or religion, and only incidentally affect the practice of Plaintiffs' religion. *See Doe,* 2011 U.S. Dist. LEXIS at *33-34. Additionally, the General Assembly enacted the laws for reasons wholly unrelated to religion or the practice of religion, as demonstrated in N.C.G.S. § 14-208.5. *See id.,* at *33-34. Count II fails to state a claim for relief pursuant to Rule 12(b)(6).

(3) <u>Count III (Freedom of Association)</u>. In Count I, Plaintiffs challenge N.C.G.S. §14-208.18 (a)(2) and (a)(3), claiming the statutes substantially restrict their

associational rights. (Compl. ¶605) To the extent that NARSOL and NCRSOL bring this claim on behalf of their members, their allegation in ¶261 concerning "many members" being "unable to exercise their First Amendment rights," fails to establish standing as there are no allegations of injury to an individual member. *See case law cited supra.* Argument II.A.(1) at 7-8. All Plaintiffs otherwise fail to identify the alleged limitations or injuries to their "associational rights." While is it possible that Count III pertains to Plaintiffs' alleged desire to go to libraries, movies, sporting events, and recreation parks with their children (s*ee* Compl.¶¶257, 592-93, 597), this blanket allegation lacks any factual enhancement, thus rendering it insufficient to establish a plausible injury in fact. At best, it is the possibility of some future injury, but a possibility does not constitute an injury in fact. "Ripeness" requires that an "injury in fact be certainly impending." *Nat'l Treasury Emp. Union v. United States,* 101 F.3d 1423, 1427 (D.C. Cir. 1996). The doctrine separates matters that are premature because an injury is speculative (and may never occur) from matters that are appropriate for the court's review. *Akella v. Mich. Dep't of State Police*, 67 F. Supp.2d 716, 726 (E.D. Mich. 1999).

To the extent that Count III pertains to Plaintiff Does' association with their children, N.C.G.S. §§14-208.18 (a)(2) and (a)(3) do not regulate the Does' freedom to enter an association with their children. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984)(discussing determination of limits of state authority over an individual's freedom *to enter into a particular association*). Count III fails to state a claim for relief and must be dismissed pursuant to Rule 12(b)(6).

B. Claim 3: (5th and 14th Amendment Vagueness Challenge).

Claim 3 raises a 5th and 14th amendment challenge to N.C.G.S. §14-208.18(a)(3) as unconstitutionally vague. (Compl. ¶¶608-610) This statute provides that a sex offender registrant may not knowingly be "[a]t any place where minors frequently congregate, including but not limited to, libraries, arcades, amusement parks, recreation parks, and swimming pools, when minors are present." The Doe Plaintiffs allege that they are unsure of the meaning and extent of N.C.G.S. §14-208.18(a)(3) and "would like to take their children to sporting events, movies, bowling alleys, city parks and the like, but are unsure whether these 'places' are off- limits anytime 'minors' are present," noting that minors are almost always present at any public location. (*Id*. ¶¶597) These naked allegations are insufficient to support Article III standing. They are devoid of further factual enhancement about the "places" listed in Complaint ¶597, thus rendering Plaintiffs' concern conjectural and hypothetical. *See Friends of the Earth*, 528 U.S. at 180-81. The 44 named District Attorney Defendants are not alleged to have lodged a threat against Plaintiffs as to these "places" and there is no immediacy or imminent harm. *See id*. NARSOL and NC RSOL do not identify a specific member alleged to suffer an injury in relation to Claim 3 and thus lack standing. *See case law supra.*, Argument II.A.(1) at 7-8. In this claim, Plaintiffs essentially ask the Court for advice about which general categories of places are "off-limits." "Federal courts are principally deciders of disputes, not oracular authorities. We address particular "cases" or "controversies,"…[which] "narrows the scope of judicial scrutiny *to specific facts*."

Duling, 782 F.2d at 1205 (italics added). Claim 3 must be dismissed pursuant to Rule 12(b)(1).

Claim 3 also fails to state a claim. "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id*.; *accord United States v. Mazurie*, 419 U.S. 544, 553 (1975). A statute challenged on its face, prior to enforcement, "must be impermissibly vague in all its applications" for a plaintiff to prevail. *Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 497 (1982). The Doe Plaintiffs admit that N.C.G.S. §14-208.18(a)(3) *is not vague* as to libraries or parks that have dedicated spaces and equipment for minors versus those that do not. (Compl. ¶¶592-593) Consequently, on the face of the Complaint, Plaintiffs cannot demonstrate that N.C.G.S. §14-208.18(a)(3) is impermissibly vague *in all of its applications* and Claim 3 fails as a matter of law.

IV. THE STATE LAW DEFAMATION ACTION IN CLAIM 6 IS NOT ACTIONABLE IN FEDERAL COURT.

The State of North Carolina has not waived its immunity in N.C.G.S. §143-291 for tort claims against State officials in federal court. *Alston v. N.C. A&T State Univ*., 304 F. Supp. 2d 774 (M.D.N.C. 2004); *Perez v. Univ. of North Carolina Bd. of Governors*, No. 7:12-CV-322-BD, 2013 U.S. Dist. Lexis 85309, *8 (E.D.N.C. 2013). The 11th

Amendment bars Plaintiffs' state law defamation action in Claim 6, ¶¶645-655. Moreover, the defamation claim is asserted against the "State" as the alleged wrongdoer in the context of "falsely" identifying registrants as dangerous or as recidivists (*see, e.g*., ¶¶15, 16, 18, 186, 198, 200, 201, 204, 205, 319, 358, 436, 438, 441, 647, 648, 649) and publishing information about registrants (*see, e.g.,* ¶¶203, 226, 227, 278, 357, 359, 437, 439). As previously argued, *see e.g., supra.*, Argument II.A.(1) at 11 (*citing Will*, 49 U.S. at 71), the State is not a person under §1983 and otherwise enjoys 11th Amendment immunity. The defamation claim must be dismissed as to all State official defendants (and the State) pursuant to Rules 12(b)(1),(2) and (6). Alternatively, because §1983 does not create remedies for violations of state law or state constitutions, alleged defamation by a state official does not give rise to a § 1983 action. *Paul v. Davis*, 424 U.S. 693 (1976); *see also Shirvinski v. United States Coast Guard*, 673 F.3d at 314-15. Additionally, the one year statute of limitations in N.C.G.S. §1-54 applicable to libel and slander also bars all purported "defamation" claims based on the 2006, 2008, and 2009 dates alleged in the Complaint and subjects the claim to dismissal under Rule 12(b)(6).

The State Defendants accordingly move to strike under Rule 12(f) all allegations concerning the elements of a defamation claim, inclusive of the "stigma" allegations, on the grounds of immateriality: Complaint ¶¶226, 227, 359 (publication of registry by State); ¶¶208-210, 319-320, 358, 370-371, 436-441 (registry is false assertion/implication of dangerousness, false stigmatization by State, State knowingly mislabels all registrants and propagates false belief); and ¶¶200-207, 322-323,359, 370-371, 458-464 (stigma and

ostracizing by family, friends, employers, isolated due to dangerousness stigma, difficulty in job or housing retention).

V. THE COMPLAINT FAILS TO DEMONSTRATE THAT DEFENDANTS ARE PROPER PARTIES.

Under §1983, claimants must establish that a person acted in such a way as to deprive them of rights, privileges, or immunities secured by the Constitution and laws. *See Cockerham v. Stokes County Bd. Of Educ*., 302 F. Supp. 2d 490, 498 (M.D.N.C. 2004)([t]o state a claim under §1983, a plaintiff must allege that a person acted in such a way as to deprive plaintiff of a Constitutional right and that the person was acting under color of state law)(*citing West v. Atkins*, 487 U.S. 42, 48 (1988)). Although State officials generally enjoy 11th Amendment immunity from suit in federal court, an exception exists for "suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004)(*citing Ex Parte Young*, 209 U.S. 123, 157 (1908)); *accord Will*, 491 U.S. at 71, n.10. This exception is directed toward "officers of the State [who] are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings…to enforce against parties affected [by] an unconstitutional act." 209 U.S. at 155-56. "The requirement that the violation of federal law be ongoing is satisfied when a state officer's enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001), *cert. denied*, 535 U.S. 904 (2002); *McBurney v. Cuccinelli*, 616 F.3d

393, 399 (4th Cir. 2010); *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 334 (4th Cir. 2008).

As previously argued in relation to Article III standing, *see supra.*, Argument II.A.(1),(2)-(3) at 9-14, Plaintiffs have failed to plead facts sufficient to allege a credible threat of prosecution (or any other putative misconduct) by Attorney General Stein and the 44 District Attorneys. By failing to plead sufficient facts, Plaintiffs likewise fail: (1) to demonstrate that the public officials named in this §1983 action are "persons" within the meaning of §1983 who have engaged in a violation of the U.S. Constitution; and (2) to lift the 11th Amendment immunity bar. Plausible facts, not the court's or counsel's imagination, are required to state claims against the Defendants. "A litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws." *Duling*, 782 F.2d at 1206. The "threat of prosecution [must be] real and immediate before a federal court may examine the validity of a statute." *Id*. Subjective fear of prosecution does not establish an objective threat. *Id*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—"that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Rule 8(a)(2)).

Simply alleging that district attorneys have prosecutorial authority, or that Attorney General Stein has "special prosecutorial powers," is not the same as alleging facts tethering Attorney General Stein or the 44 named District Attorney to conduct for the alleged constitutional violations. On the face of this Complaint, it is entirely

speculative as to whether any District Attorney will ever request Attorney General Stein to prosecute a Plaintiff for a violation of the registry law. It is entirely speculative as to whether the Doe Plaintiffs or NARSOL and NC RSOL members will traverse into all 100 counties and violate the registry law such that a District Attorney named in this action might have prosecutorial authority, or whether NARSOL and NC RSOL even have members in all prosecutorial districts. The lack of plausible allegations concerning threatened or ongoing conduct by Attorney General Stein and the 44 District Attorneys in this action fails to qualify them as persons under §1983 and fails to lift the 11th Amendment bar and is an additional basis for dismissal of this Complaint under Rule 12(b)(1), (2) and (6) against these Defendant State officials. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998)(11th Amendment bars actions against state official where there is not ongoing violation of federal law).

As to Secretary Hooks, Plaintiffs mention his name once when citing N.C.G.S. §14-208.15 (Compl. ¶¶50-53), then never refer to him again. The cited statute designates the Department of Public Safety as the custodian of the statewide registry for receipt of registry information from sheriffs and other law enforcement agencies, as well as requires the Department to make the registry information available to law enforcement and accessible to the public. N.C.G.S. § 14-208.14(a)(1)-(5) and (b). Plaintiffs allege in Complaint ¶426 that "registration is handled by criminal justice agencies," not by Secretary Hooks. The gravamen of the complaint is that the State is "falsely stigmatizing" and "mislabel[ing]all registrants" and fostering "false beliefs" by requiring Plaintiffs to

register as sex offenders. (*Id.* ¶¶319-320, 358, 436-441) These allegations are against the State, which is an improper party, not against Secretary Hook. Moreover, since said allegations pertain to alleged defamation, they do not support a §1983 action in federal court. *See supra.* Argument IV at 37-38.

Additionally, the allegations of "stigma" and "falsification" are legal conclusions unwarranted on the face of the Complaint. Plaintiffs admit that they were convicted of sex offenses subject to registration requirements; they do not allege that the information on the registry is *erroneous* as to these convictions. [4] The Complaint is devoid of alleged misconduct by Secretary Hooks. It fails to plead plausible facts qualifying Secretary Hooks as a "person" within the meaning of §1983, and fails to allege facts sufficient to abrogate 11th Amendment immunity in relation to him. Accordingly, Secretary Hooks must be dismissed pursuant to Rules 12(b)(1), (2) and (6).

VI. MISCELLANEOUS CLAIMS MUST BE DISMISSED.

To the extent that Plaintiffs bring a 1st Amendment Free Speech claim concerning the constitutionality of N.C.G.S. §14-202.5, the claim fails. Plaintiffs conclusory allege that they would like to access websites banned by the statute. (Compl. ¶¶281-84) These allegations lack the plausible, concrete particularization required for standing. Additionally, Plaintiffs make legal arguments about how the statute applies (Compl.

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[4] And, consequently, there is no false statement and no "defamation." *See Donovan v. Flumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 573 (1994) (To be actionable, defamatory statement must be false).

¶¶269-74), which the North Carolina Supreme Court rejected in *State v. Packingham* when it upheld the statute against a 1st Amendment Free Speech challenge. 368 N.C. 380, 389-90, 777 S.E.2d 738, 747 (2015), *cert. granted*, 137 S. Ct. 368 (2016)(statute prohibited registered sex offenders from accessing only Web sites that gave them the opportunity to gather information about minors, and left available ample alternative channels of communication). To the extent that Plaintiffs incorporate N.C.G.S. §14-202.5 into their *ex post facto* claims, their allegation that this 2008 statute applies retroactively to all registrants regardless of their conviction date (Compl. ¶277) is an erroneous legal conclusion. A 2008 statute is not retroactive as to persons convicted after the statute's effective date, such as Doe 1 and Doe 2. Plaintiffs fail to establish standing or a claim for relief as to N.C.G.S. §14-202.5 and any claim as to this statute must be dismissed.

To the extent that family members or concerned citizens of NARSOL or NC RSOL attempt to assert a claim, they lack standing and should be dismissed. The "registry law" and "Article 27A', as denominated by Plaintiffs, plainly does not regulate the conduct of any persons who do not fall within its defined group of registrants. Accordingly, family members/concerned citizens do not have constitutional rights infringed by the law and no standing to the extent they are trying to assert it.

CONCLUSION

For the reasons set forth herein, the Defendant State Officials respectfully request that this Complaint be dismissed in its entirety.

Respectfully submitted this 28th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF 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

This the 28th day of April, 2017.

/s/Lauren M. Clemmons
Special Deputy Attorney General