No. 366PA13 FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	From Durham County
v.	)	
	)	
LESTER GERARD PACKINGHAM	)	

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DEFENDANT-APPELLEE'S NEW BRIEF

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ISSUES PRESENTED

I. Whether the First Amendment protects a person from a felony conviction under a statute that criminalizes innocently accessing Internet Web sites.

II. Whether Due Process protects a person from a felony conviction under a statute that criminalizes innocently accessing Internet Web sites where the statute leaves everyone guessing which Web sites are prohibited and what it means to "access" such sites.

STATEMENT OF THE FACTS

Durham Police Officer Brian Schnee began investigating in 2010 whether any registered sex offenders in Durham had accessed Internet social networking Web sites. (T p 131). He said that he found a "user profile page" for "J.r. Gerrard" on Facebook that he believed belonged to Appellee, Lester Gerard Packingham, Jr. (T p 134). A post on the page on 27 April 2010 said "Man, God is good. How about I got so much favor, they dismiss the ticket before Court even started. No fine. No Court costs. No nothing. Praise be to God. Wow. Thanks, Jesus." (R p 77; State's Exhibit 18). Officer Schnee found a traffic citation dismissal in the Durham Clerk's Office dated 27 April 2010 for Mr. Packingham. (T p 135). He served a search warrant on Facebook to get user information for the account that he suspected belonged to Mr. Packingham. (T pp 139-40).

Based on information he received from Facebook, Officer Schnee obtained a search warrant for Mr. Packingham's home in Durham. (T p 142). During the search, he seized innocuous photographs of Mr. Packingham, sex offender registration documents signed in 2009, a power bill, three cell phones, a camera, and two thumb drives. (T pp 149-161). The State presented no evidence to show what was on the seized devices and never asserted anything criminal or inappropriate was on them. The trial court admitted a copy of a page from Facebook from 22 May 2010 that Officer Schnee said he viewed on his own

computer. (State's Exhibit 18; R p 77). The State presented no evidence that Mr. Packingham used Facebook or his computer to communicate with minors, post anything inappropriate or obscene, or otherwise engage in misconduct. Despite the State's insistence on appeal that Mr. Packingham used an "assumed name" or a "fictitious" name on Facebook, State's New Brief, pp 4, 5, 15, the transcript shows Mr. Packingham's full name is "Lester Gerard Packingham, Jr." (T p 1; T p 136, line 14; T p 142, line 14). The State presented no evidence that Mr. Packingham was not known as "Jr. Gerard" or that he "adopted or assumed" the name "J.r. Gerrard" on Facebook "in order to deceive." *See* State's New Brief, p 15 n.3. To the contrary, the State presented evidence that a readily identifiable picture of Mr. Packingham and other identifying information, including his phone number, were posted on the Facebook account in question. (T pp 153, 159).

Mr. Packingham stipulated at trial that he had been convicted of a sex offense involving a minor on 16 September 2002 in Cabarrus County and was subject to the North Carolina requirements for registration. (T pp 128-29; R pp 72-73). There was no evidence that Mr. Packingham's sex offense involved the use of a computer or that he had ever committed any computer-related crimes. At the time of the alleged offense of accessing a commercial social networking Web site, Mr. Packingham was not on probation, parole, supervised release, or subject to satellite-based monitoring (SBM).

At a pretrial hearing on Mr. Packingham's motion to declare North Carolina General Statutes section 14-202.5 unconstitutional, the trial court admitted and relied upon Defense Motion Exhibit 1 without objection from the State. (M-T pp 6, 146). Defense Motion Exhibit 1 consists of screen-shots of Web sites and was submitted to the Court of Appeals pursuant to Rule 9 of the Rules of Appellate Procedure. The undersigned counsel has verified with this Court's Clerk's Office that it has received Defense Motion Exhibit 1 from the Court of Appeals.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS A PERSON FROM A FELONY CONVICTION UNDER A STATUTE THAT CRIMINALIZES INNOCENTLY ACCESSING INTERNET WEB SITES.

The State prohibits Mr. Packingham and all 19,300 sex offenders registered in North Carolina from accessing commercial social networking Web sites.[1] The restrictions eliminate their ability to use innumerable Web sites to affirmatively engage in speech, passively receive information, worship, and associate with others. This prohibition is a prior restraint of their speech and eliminates an entire means of communication and association: Web sites and their e-mail, news feeds, chat rooms, forums, and instant message functions. The penalty for engaging in such speech activity and association is a felony conviction. Here, the State

[1] See http://sexoffender.ncdoj.gov/stats.aspx (last accessed 11 March 2014) (showing current number of registered sex offenders in North Carolina).

convicted Mr. Packingham of a felony for associating with others online, communicating good news, publicly praising God on Facebook, and nothing more. This conviction based on Mr. Packingham's exercise of his constitutional rights violates the First Amendment, and Article I, Sections 12, 13, 14, of the North Carolina Constitution.

1. The First Amendment and the North Carolina Constitution protect the right to use Internet Web sites to communicate, gather information, associate, assemble, and worship.

a. Freedom of speech

The First Amendment protects the right to communicate and express oneself on the Internet. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997). In *Reno*, the United States Supreme Court held that the Communications Decency Act (CDA) was facially unconstitutional under the First Amendment. *Id.* The CDA's purpose was to protect minors from harmful material online by criminalizing Internet transmission of "indecent" materials to minors. In describing the Internet, the Court stated:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Id. at 870, 117 S. Ct. at 2344 (internal citation omitted). The Court held that the CDA violated the First Amendment because ambiguities made enforcement difficult and because it was a content-type of restriction that was not a narrowly tailored restriction of type, manner, or place of speech. *Id*. at 870, 117 S. Ct. at 2344. The Supreme Court recognized the necessity of protecting children but also that such an interest "does not justify an unnecessarily broad suppression of speech addressed to adults." *Id*. at 875, 117 S. Ct. at 2346. Congress' attempt to replace the CDA failed, as the Child Online Protection Act was also held to be an unconstitutional restriction on free speech. *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

In addition to protecting the right to engage in affirmative speech, whether written, oral, or otherwise expressive, the First Amendment protects the right to gather or passively receive information. *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969); *cf. Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012) (upholding sex offenders' First Amendment rights to receive information at a public library). In light of the United States Supreme Court's recognition in *Reno* that the First Amendment protects Internet speech, there should be no question that the First Amendment protects a person's right to gather and passively receive information on the Internet.

North Carolina General Statutes section 14-202.5 is a blanket prohibition of any and all speech, expression, and association on innumerable Internet Web sites, however innocent, even if it is political or anonymous speech, a private family discussion, or an online conversation with a person's pastor. Section 14-202.5 prohibits a person from communicating with anyone on an Internet social networking Web site, no matter the age of the recipient of the communication. The statute requires no proof that a person communicated with minor, attempted to communicate with a minor, or intended to gather information about a minor.

Web sites commonly considered to fall under the statute's restrictions include Facebook.com and MySpace.com. (M-T pp 25-26).[2] All communicative functions of those sites are off-limits, and are off-limits regardless of whether a person engages in affirmative public or private speech, self-expression through posting photographs, or just looks at information on the sites without having an account or logging in. (T pp 44-45).

Innumerable other Web sites are off-limits under the statute, even though at first glance they might not appear to fall within the definition of "commercial social networking Web site." At the motions hearing in this case, the trial court considered screenshots of Web sites like BettyCrocker.com, Scout.com, and

[2] "M-T" refers to the transcript of the pretrial motions hearing regarding the constitutional challenge to section 14-202.5.

MedHelp.com which are apparently prohibited Web sites. Motion Exhibit 1, pp 1-22, 75-93, 126-37. Because these sites fall within the proscriptions of section 14-202.5, a person cannot exchange information about heart disease on MedHelp.com, speculate about UNC sports on Scout.com, or share recipes on BettyCrocker.com. Sites like Google.com, Yahoo.com, and MSN.com are swept within the definition of "commercial social net-working Web site" and are off-limits. Google, Yahoo, and MSN offer e-mail (the State conceded at oral argument at the Court of Appeals that the use of G-mail and Hotmail are prohibited), "instant messaging," and chat rooms, in addition to their more commonly used features--search engines and news stories. Motion Exhibit, pp 94-125. Since the statute does not limit itself to restricting the use of subpages or discrete features of a site, the entire sites are apparently off-limits. Section 14-202.5 eliminates not just sites like Facebook and MySpace, but a substantial number of other Web sites that can be used as a means of speech, communication, and association for people covered by the statute.

Section 14-202.5 prohibits not only the affirmative act of speech on the Internet, but also gathering information and the passive receipt of speech and information, since a person violates the section just by accessing a Web site, even if he does not communicate with anyone. A person can "access" Facebook to receive information without actually logging in to Facebook, as shown in the trial court. Motion Exhibit 1, pp 145, 147, 149, 150-1 (showing information on

Facebook pages that do not require an account or log in to be viewed). Durham Police Officer Schnee testified that he interprets the term "access" to mean a violation of the statute occurs when a person types "facebook.com" into his Internet browser and presses the "enter" key, not just if he actually logs in to the site. (M-T p 44-45). The State agreed with this position at trial, though it has changed its position on appeal. *Compare* M-T pp 272-73 *with* State's Brief of 14 March 2013, p 20, and State's New Brief of 13 January 2014, pp 36-37. Therefore a person who simply tries to look at and receive information from prohibited sites without having an account, logging in, having a membership, or engaging affirmatively in speech with anyone, cannot do so for fear of criminal sanctions.

The State's argument in its New Brief on page 9, that any impact on speech is "incidental" because "[a] huge portion of Internet use is information *gathering*, not any exercise of speech by the user" and because a person "can travel to a Web site with no speech purpose at all," ignores the fact that the First Amendment's right to freedom of speech encompasses the right to receive and gather information. *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969) The State is simply wrong that gathering information "is not any exercise of speech by the user." State's New Brief, p 9.

Three federal courts addressing constitutional challenges to state statutes similar to section 14-202.5 have concluded that the First Amendment protects sex

offenders' use of Internet Web sites to communicate and receive information. *Doe v. Prosecutor*, 705 F.3d 694, 697 (7th Cir. 2013); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1107 (D. Neb. 2012); *Doe v. Jindal*, 853 F. Supp. 2d 596, 603 (M.D. La. 2012). Although the other states' statutes restricting Internet use were not identical to section 14-202.5, they are similar in what they prohibited: innocently accessing Internet Web sites that allow the user to communicate and associate with others and gather information and data. *See* Ind. Code § 35-42-4-12(b) (2011); La. Rev. Stat. Ann. § 14:91.5(A)(1) (2011); Neb. Rev. Stat. § 28-322.05(1) (2012).[3]

The State tries to distinguish the other states' statutes on the basis that those statutes "necessarily implicated speech because those statutes alternately banned both social networking *and* sites that are purely speech-oriented by their nature, such as chat rooms and instant messaging sites." State's New Brief, p 17. The State failed to explain, however, why a commercial social networking Web site such as Facebook, banned by North Carolina's statute, is not "purely speech-oriented" by its nature. An examination of Facebook shows that it is purely speech-oriented in nature. Motion Exhibit 1, pp 138-50. *See generally*, www.facebook.com. There are no non-speech aspects of Facebook. Additionally, the State's analysis of the other states' statutes fails to recognize North Carolina's broad definition of commercial social networking Web site encompasses sites that

[3] These statutes are included in this Brief's Appendix.

have chat rooms and instant messaging functions. The only exception is for Web sites that provide only a single discrete service. Section 14-202.5(c)(1).

b. Freedom of association and assembly

The First Amendment protects the right of citizens to associate as they choose, free from State interference. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544, 107 S. Ct. 1940 (1987). Freedom of association is a "fundamental element of liberty." *Id*. The Constitution protects against unjustified interference with a person's choice to enter into and maintain intimate or private relationships. *Id*. at 544. Freedom of association also means that citizens are free to associate for the purpose of engaging in protected speech or religious activities. *Id*. "[It] is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163 (1958).

Internet Web sites that allow individuals to communicate and interact with friends, family, and anonymous millions of others around the world, are a modern form of association, no less deserving of constitutional protection than traditional associations such as Rotary Clubs or the NAACP. To associate with others does not require a physical presence with them, even in the traditional sense of

association. A person can engage in personal relationships with others by being a member of an organization or group and never physically gather or meet with the other members. Concepts of associational rights are therefore easily transferred to modern forms of association involving the Internet. The use of Facebook and other commercial social networking Web sites to associate with others is therefore protected by the First Amendment.

Associational rights should not be confused with the closely related, but distinct First Amendment right to freedom of assembly. Internet chat rooms and real-time messaging among multiple persons on sites like Facebook provide citizens with a means to assemble. Federal and state elected officials have used platforms such as Facebook to hold "Town Hall" meetings--the functional equivalent of traditional, in-person assemblies. Section 14-202.5 prohibits such "assembling" with adults to discuss politics, health, sports, and religion. It does not just prohibit a person from using the Internet to communicate with minors.

The First Amendment, and Article I, Section 12, of the North Carolina Constitution prohibit the restriction of peaceable assembly, and should apply to assembly on the Internet. The right to assemble protects not only the right to engage in active communication while assembled with others, but also the right to attend an assembly and passively receive information. Mr. Packingham is not just prohibited from contributing to a discussion in an assembly of citizens online such

as on Facebook, he is prohibited from accessing a chat room or news feed and simply viewing the ongoing communications of the assembled users.

c. Freedom of religion

Where the free exercise of religion is impacted in conjunction with other constitutional rights, the First Amendment "bars application of a neutral, generally applicable law to religiously motivated action." *Employment Div. v. Smith*, 494 U.S. 872, 879, 881, 110 S. Ct. 1595, 1600-01 (1990). Section 13, of Article I, of the North Carolina Constitution protects the right to worship. This Court has held that the protections of Section 13 are co-extensive with the federal constitution. *In re Williams*, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

Although section 14-202.5 does not specifically prohibit religious speech on the Internet, or accessing religious sites, it does restrict religious expression on prohibited sites. Religion-specific sites are not exempt from the ban. Off-limits religious sites include jesusklub.com, godtube.com, and the Facebook page for The Church of Jesus Christ of Latter-day Saints. *See* Motion Exhibit 1, pp 40-54, 55-74, 147-48. The statement attributed to Mr. Packingham on Facebook is a religious expression: he thanked God and Jesus for a positive resolution of his traffic ticket. It was not just a comment on sports, the weather, or fashion, but a religiously motivated public statement that was religious in substance and content. For engaging in religious speech on Facebook, the State prosecuted and convicted

Mr. Packingham of a felony. The suppression of this religious expression violates the First Amendment, and Article I, Section 13, of the North Carolina Constitution.

d. Freedom of the press

The First Amendment prohibits prior restraint, or restrictions, of the press. *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931). Only in exceptional cases, such as in times of war, obscenity, and incitements to violence can freedom of the press be infringed. *Id*. at 715-16, 51 S. Ct. at 631. Otherwise, restrictions on the content and means of communication by the press are unconstitutional. The North Carolina Constitution also protects an individual's right to freedom of the press. N.C. Const. Art. I, sec. 14; *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

The constant "news-feed" function of sites like Facebook, and Web sites that allow users to publish web logs ("blogs") are the modern equivalent of the publication of information, news, and ideas, in print media. Facebook posters and bloggers are citizen-journalists. The right to freedom of the press exists to protect not just traditional newspaper and magazine reporters and their publications. It also exists to protect the rights of an individual to express, disseminate, and present his information and ideas for public consumption in any form of media, especially when reporting on actions of the government. *ACLU v. Alvarez*, 679 F.3d 583, 595-98 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012); *Glik v. Cunniffe*, 655

F.3d 78, 84 (1st Cir. 2011). Here, Mr. Packingham did nothing more than publicly post on Facebook an account of what happened in Durham County District Court--the functional equivalent of a news story in a paper. Given the comparable nature of Internet "news feeds" to traditional print media, the suppression of this form of expression violates the First Amendment, and Article I, Section 14, of the North Carolina Constitution.

e. Accepting the State's argument that the First Amendment does not apply to section 14-202.5 would be contrary to the State's position at the trial court, contrary to established federal precedents, and would require this Court to make new law.

The State contends that the Court of Appeals erred in its conclusion that the First Amendment applies to a constitutional analysis of section 14-202.5. State's New Brief, p 6-15. As an initial matter, the State never advanced any arguments that the First Amendment did not apply to a constitutional analysis of section 14-202.5 when the State had the chance to do so at trial. *See generally* Motions Transcript. To the contrary, the State accepted that the statute was subject to strict scrutiny review and that the State bore the burden of establishing that the statute was supported by a compelling state interest and was the least restrictive means available to effectuate that interest. (M-T pp 246-47).

Now on appeal, the State likens the use of Internet Web sites to the physical act of traveling to or being at a certain location, and that section 14-202.5 is a regulation of a person's "presence" in cyberspace. State's New Brief, pp 6-8. The

State then contends that because the Web site in question here, Facebook, in its terms of service indicates that a sex offender may not use Facebook, that Mr. Packingham was "trespassing" on the Web site. State's New Brief, pp 6-7. The State then argues that because the First Amendment would not protect a person convicted of trespassing, even if he were engaged in speech activity while trespassing, the First Amendment would not protect a person who used Facebook against the Web site's terms of service. *Id*.

The State's discussion of Facebook having in its terms of service a provision that convicted sex offenders may not "use" Facebook is a red herring. This is not a property rights case where a land owner has asked the State to enforce property rights and remove the trespasser who then raises the First Amendment as a defense to trespassing. This is a case where, even if Mr. Packingham violated Facebook's contractual terms of use, Facebook never sought a civil remedy, or enforcement with the help of the State, or asked the State to prosecute Mr. Packingham for any crime. Instead, section 14-202.5 is the State's unilateral prohibition of individuals from using certain Web sites.

This Court should reject the State's arguments that the First Amendment does not apply. The State has produced no case from any jurisdiction that holds or even suggests that restrictions on the use of the Internet are to be analyzed under property rights theories or under a theory involving rights to travel. The State's

arguments are contrary to federal precedents, are novel and unsupported by cases from any jurisdiction, and would require this Court to make new law. As argued above, the United States Supreme Court has already held that the First Amendment protects the use of the Internet. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997). Federal courts that have specifically considered criminal statutes restricting sex offenders' use of Web sites have concluded that the First Amendment applies to an analysis of the statutes' constitutionality. *Doe v. Prosecutor*, 705 F.3d 694, 697 (7th Cir. 2013); *Doe v. Nebraska*, 898 F. Supp.2d 1086, 1107 (D. Neb. 2012); *Doe v. Jindal*, 853 F. Supp. 2d 596, 603 (M.D. La. 2012). Further, in *Doe v. Prosecutor*, the United States Court of Appeals for the Seventh Circuit specifically rejected the comparison of sex offender Internet restrictions to restrictions on a sex offender's ability to travel to a city park. *Doe v. Prosecutor*, 705 F.3d at 702 (distinguishing its holding in *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) (en banc) on the grounds that Internet restrictions implicate the First Amendment whereas limitations on visiting a park do not).

The State's proposed analysis incorrectly considers whether the statute implicates First Amendment rights with regard to Mr. Packingham before considering whether the statute implicates the First Amendment under other circumstances. The State's proposed analysis is backwards. Instead, the United States Supreme Court, and the federal courts considering similar statutes, look first

to the statute itself to determine its reach and, if the statute implicates the First Amendment, then it is subject to a facial challenge. *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838 (2008) (indicating that "[t]he first step in overbreadth analysis is to construe the challenged statute"); *Doe v. Prosecutor*, 705 F.3d 694, 702 n.6 (7th Cir. 2013) (holding that "assuming *arguendo* that Doe's (or a different plaintiff's) speech is unprotected or the law could constitutionally be applied to them, it still inexplicably applies to sex offenders whose crimes did not involve the Internet or children. As such, a plaintiff could still bring a successful facial challenge because the law 'applie[s] unconstitutionally to others, in other situations not before the court.' "); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1106 (D. Neb. 2012) (recognizing that "facial challenges may be applied when there 'is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' "); *Doe v. Jindal*, 853 F. Supp. 2d 596, 602-03 (M.D. La. 2012).

2. A facial challenge to section 14-202.5 is appropriate because the statute implicates First Amendment rights.

In the First Amendment context, even if the person accused of a crime has not had his constitutional rights violated by a particular law, that person may still challenge the law on the basis that it infringes on the First Amendment rights of others. *United States v. Stevens*, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973);

State v. Mello, 200 N.C. App. 561, 564, 684 S.E.2d 477, 481 (2009). Facial challenges are appropriate in cases involving restrictions on speech, association, and the time, place, and manner of expressive or communicative conduct. *Broadrick*, 413 U.S. at 612-13, 93 S. Ct. at 2916.

All three federal courts to consider statutes restricting sex offenders' use of the Internet have concluded that because of the restrictions' First Amendment implications, facial challenges were appropriate. *Doe v. Prosecutor*, 705 F.3d 694, 702 n.6 (7th Cir. 2013) (citing *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577 (2010) and *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908 (1973)); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1106 (D. Neb. 2012) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184 (2008) and *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095 (1987)); *Doe v. Jindal*, 853 F. Supp. 2d 596, 603 (M.D. La. 2012). Mr. Packingham may therefore challenge section 14-202.5 on its face, not just as applied to him. *Id*.

3. The First Amendment protects Mr. Packingham's use of Facebook on the facts of this case.

Beyond the religious speech evident on the face of the Facebook page admitted at trial, Officer Schnee testified at trial that he saw evidence on Mr. Packingham's Facebook page of communications between Mr. Packingham and others, including posts on Mr. Packingham's page by other users and "status

updates" by Mr. Packingham. (T pp 212-13). Officer Schnee testified that he saw evidence that Mr. Packingham used the "like" feature. (T p 213). "Liking" on Facebook is a way for a user to share information with others. *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013). The United States Court of Appeals for the Fourth Circuit has held that "liking" something on Facebook is "pure speech" and symbolic expression protected by the First Amendment. *Id*. at 386. The Fourth Circuit recognized in *Bland* that the United States Supreme Court in *Reno v. ACLU* rejected the argument that online speech was not "worthy" of First Amendment protections. *Id*. at 386 n.14.

There was no evidence of inappropriate material posted on the Facebook page or of communications with minors. Mr. Packingham's use of Facebook to "like," to "post," and to otherwise communicate with others specifically or in general was "pure" speech and association, protected by the First Amendment. Mr. Packingham's use of Facebook to praise God was religious expression and worship protected by the First Amendment and the North Carolina Constitution.

4. Section 14-202.5 cannot withstand strict or intermediate scrutiny.

Section 14-202.5 facially discriminates by applying only to discrete speakers. If the speaker or speech recipient is a registered sex offender, his speech is prohibited. The content of speech is thus defined by its speaker or recipient. Content based restrictions on speech are presumptively invalid. *R.A.V. v. City of*

St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 2543 (1992). Such restrictions are subject to strict scrutiny and can survive only if the State establishes a compelling interest in the regulation and that the regulation is narrowly tailored and the least restrictive means available. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459 (1994).

Laws limiting the free exercise of religion and association are also subject to strict scrutiny and require the government to establish a compelling state interest in limiting religion and that the law is narrowly tailored to effectuate the state's interests. *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S. Ct. 1526, 1532 (1972). A facially neutral and generally applicable law impacting the free exercise of religion is not subject to strict scrutiny under the federal constitution unless it also impacts other constitutional rights. *Employment Div. v. Smith*, 494 U.S. 872, 879, 881, 110 S. Ct. 1595, 1600 (1990). Section 14-202.5 impacts Mr. Packingham's right to the free exercise of religion and also his rights to free speech and association. Section 14-202.5 violates Mr. Packingham's right to the free exercise of religion and worship under Article I, Section 13, of the North Carolina Constitution. Religious liberty is so basic and fundamental that government action affecting it can be justified only by a compelling state interest. *In re Williams*, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

Content-neutral regulations of the time, place, and manner of speech are not subject to strict scrutiny, but are subject to intermediate scrutiny. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984). Under an intermediate scrutiny analysis, time, place, and manner regulations of speech violate the First Amendment unless the government can establish both that the regulation is narrowly tailored to effectuate a significant government interest and that there are other ample alternatives for communication available. *Id*.

Mr. Packingham argued to the trial court that strict scrutiny is the proper standard to apply in determining whether section 14-202.5 is unconstitutional under the First Amendment, *and the State agreed*. (M-T pp 246-47). Mr. Packingham argued strict scrutiny at the Court of Appeals, arguing in the alternative that intermediate scrutiny should be applied. The North Carolina Court of Appeals ultimately held that section 14-202.5 is a content-neutral regulation of speech and the Court applied intermediate scrutiny. *Packingham*, 748 S.E.2d at 150. In addition to the North Carolina Court of Appeals, two of the federal courts that have held similar statutes unconstitutional under the First Amendment applied intermediate scrutiny, holding that the statutes were content-neutral time, place, and manner restrictions. *Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1106 (D. Neb. 2012). In *Doe v. Jindal*,

the United States District Court engaged in a First Amendment overbreadth analysis of Louisiana's Internet restrictions and examined "whether a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Doe v. Jindal*, 853 F. Supp. 2d 596, 603 (M.D. La. 2012) (citing *Stevens*, 130 S. Ct. at 1587).

Because section 14-202.5 is a prior restraint on speech that selectively restricts certain citizens from engaging in speech, association, assembly, press, and religious expression, strict scrutiny should be applied. But if this Court does not believe that the State's concession at trial that strict scrutiny applies waives its current argument to apply intermediate scrutiny, and if this Court determines that the regulation of the rights at issue does not require strict scrutiny analysis, then this Court should apply intermediate scrutiny in its review of section 14-202.5. Regardless of whether this Court applies intermediate or strict scrutiny, section 14-202.5 is not narrowly tailored or the least restrictive means available, and ample alternatives for communication do not exist.

a. The State has failed to establish a compelling or significant interest in prohibiting all registered sex offenders from innocently accessing Internet Web sites.

Mr. Packingham does not dispute the general notion that protecting children from sexual abuse is a significant State interest. And Mr. Packingham acknowledges that the North Carolina General Assembly has expressed the State's

interest in requiring convicted sex offenders to register with the State. N.C. Gen. Stat. § 14-208.5. However, the State has not established by presenting evidence at trial or by presenting legislative history surrounding section 14-202.5, that the State has a compelling or significant interest in restricting all registered sex offenders from using commercial social networking Web sites. On appeal, the State asserts for the first time that the State's interest is in protecting children not just from "illicit communications" but also protecting children from the "mere presence" of sex offenders online. State's New Brief, pp 10, 23.

The State makes unsubstantiated assertions to this Court that the legislature enacted section 14-202.5 to address concerns over sex offenders "lurking" in cyberspace and gaining access to information about potential victims. State's New Brief, pp 10, 23. The State contends that section 14-202.5 was enacted to regulate and prevent not just communications between a sex offender and a minor, but also a sex offender's "presence" on a Web site where he could gather personal information about a minor. While a plausible theory, it is also just as plausible, in the absence of any legislative history or statutory statement of intent, that the legislature wanted to punish sex offenders by banishing them from the Internet. "The concept of banishment has been broadly defined to include orders compelling individuals '. . . to quit a city, place, or country, for a specific period of time, or for life.' " *State v. Culp*, 30 N.C. App. 398, 399, 226 S.E. 2d 841, 842 (1976).

Banishment is traditionally considered a punishment that, if ordered by a court, is a void sentence. *State v. Doughtie*, 237 N.C. 368, 369-71, 74 S.E. 2d 922, 923-24 (1953). The location of section 14-202.5 suggests that its purpose might be punishment. Section 14-202.5 is located in Article 26, titled "Offenses Against Public Decency and Morality," along with other crimes. Registration-related statutes, such as premises and residential restrictions, are located in Article 27A, titled "Sex Offender and Public Protection Registration Programs." The statutory preamble cited by the State regarding the need to monitor sex offenders and protect children appears in Article 27A, not Article 26. *See* N.C. Gen. Stat. 14-208.5. It is unclear what the legislature's true purpose and the compelling or significant interests were in enacting section 14-202.5. The State's mere speculation as to the legislature's intent is insufficient for this Court to rely upon in determining whether the State has established a compelling or significant interest.

The State's assertions that section 14-202.5 serves its interest in protecting minors from communications with a sex offender and from having personal information "gathered" by a sex offender are also not substantiated by any evidence in the record. The State presented no expert testimony, statistics, or studies to the trial court to support its current assertions about the dangers of sex offenders lurking online. The State simply makes bald statements that sex offenders could do bad things online and therefore restrictions are appropriate.

The State never established that a real threat exists, at least to the extent necessary to justify sweeping restrictions on First Amendment-protected speech and conduct under a strict or intermediate scrutiny test. For the State to make these assertions for the first time on appeal, without an opportunity for Mr. Packingham to present evidence in opposition, would be fundamentally unfair and would require this Court to engage in unnecessary fact-finding. The State has failed to establish a compelling or significant interest in restricting all registered sex offenders from the broad swath of the Internet covered by section 14-202.5.

b. Section 14-202.5 is not narrowly tailored or the least restrictive means available.

Even if this Court believes that the State has established a compelling or significant State interest, then the statute's broad scope, application to all registered offenders, lack of a requirement for criminal intent, and underinclusivity demonstrate that section 14-202.5 is not narrowly tailored or the least restrictive means available to effectuate the State's interests.

i. Web sites and devices

Section 14-202.5's broad definition of commercial social networking Web site covers innumerable Web sites not commonly considered social networking Web sites. Motion Exhibit 1 shows screen shots of such off-limits sites along with indications of the features that qualify them under the statute. A narrowly tailored statute would not apply to such sites. For example, BettyCrocker.com has recipes,

cooking tips, and product offers, but is a "commercial social networking Web site" because it: 1) derives revenue from advertising on the Web site and other sources related to the Web site; 2) "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges"; 3) allows a user to create a "user profile" that includes personal information such as his name and photograph; and 4) has message boards, blogs, and photo sharing features. *See* Motion Exhibit 1, pp 2-22. The information and photo exchanges tend to be about casseroles and Crockpot recipes. Regardless, the site fits squarely within the definition of a commercial social networking Web site and is entirely off-limits.

The Court of Appeals cited the Web site Foodnetwork.com as the type of innocuous Web site that apparently is prohibited by section 14-202.5. *State v. Packingham*, 748 S.E.2d 146, 153 (2013). The State asserts that Foodnetwork.com does not meet the definition of a commercial social networking Web site, but gives no explanation for its position and does not point out which of the statutory requirements are lacking. State's New Brief, p 19. An examination Foodnetwork.com shows that it is in fact a prohibited site because it: 1) derives revenue from advertising on the Web site and other sources related to the Web site; 2) "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges"; 3)

allows a user to create a "user profile" that includes personal information such as his name and photograph; and 4) has message boards and photo sharing features. *See* www.foodnetwork.com (last accessed 11 March 2014).

Section 14-202.5 is not narrowly tailored because it prohibits the use of entire Web sites, even if only discrete subpages of the site could possibly allow cyber contact with minors. Google.com qualifies as a prohibited site as defined in section 14-202.5: 1) it derives revenue from advertising on the site (Google Ad Words); 2) it has functions that facilitate the social introduction of two or more people; 3) it allows users, including minors, to create personal profiles, including names and identifying information; 4) it allows users to e-mail, communicate in chat rooms, and post on message boards. *See* Motion Exhibit 1, pp 94-120. These functions might be subpages of the main Google.com web address but the statute makes it illegal to "access" a commercial social networking Web site once the site has been defined as such. A person would therefore be unable to use Google's e-mail (which the State conceded at oral argument at the Court of Appeals), maps, search engine, or other functions because the statute is not narrowly tailored to differentiate which parts of sites like Google.com are prohibited.

Another example where subpages disqualify an entire site is Amazon.com: 1) it receives revenue from its Web site; 2) it facilitates the exchange of information and social introduction between two or more people on its message

boards and product reviews; 3) it allows users, including minors, to create profiles with personal information and post comments on message boards; and 4) it provides users mechanisms to communicate with other users. *See* Motion Exhibit 1, pp 163-81. It might seem Amazon is exempt under section 14-202.5 (c)(2), but (c)(2) exempts only those sites that facilitate commercial transactions *between* members or visitors. Amazon's primary purpose is to facilitate transactions between Amazon itself and its visitors, not between users of the Web site and other users. The exemption in subsection (c)(2) seems to be for sites like Craigslist.com, not a business like Amazon.

The statute is not narrowly tailored because it applies not only to a person using a desktop computer to access the Internet, but it also applies to his use of mobile devices that access the Internet simply for data. Such devices would include smart phones, e-readers (Kindles, etc.), and text messages that access a prohibited Web site's server. The statute apparently applies also to voice-over-Internet protocol (VOIP, i.e. Vonage) and Skype, regardless of the device used to gain access, as those services' Web sites fit the broad statutory definition of a "commercial social networking Web site," even if the person is communicating directly with another person.

Section 14-202.5 prohibits "accessing" Web sites even if the person does not have an account or membership or does not log in to the site and is not even able to

communicate with minors through the site. A narrowly tailored statute would at least require some affirmative act to use the Web site in a manner beyond simply viewing publically available pages. A narrowly tailored statute would not prohibit the mere posting of a praise God message or innocent pictures, seeking information about the Governor, sharing a recipe, or sending an instant message to friends. It would not prohibit the use of a search engine. It would not prohibit the use of an e-book reader, or a smart phone that syncs with Google.

ii. All registrants are restricted without regard for the offenses they committed or the likelihood they will reoffend against a child.

Section 14-2025 is not narrowly tailored because it treats all registered sex offenders the same, regardless of the offense committed, the victim's age, whether a computer was used to facilitate or commit the offense, the likelihood of reoffending, and regardless of whether the person has been classified as a sexually violent predator. It burdens more people than needed to achieve the purported goal of the statute. For example, a man who grabbed an adult woman's breast and was convicted of misdemeanor sexual battery would be required to register as a sex offender for up to thirty years and would be prohibited from accessing social networking sites during the period of registration. N.C. Gen. Stat. § 14-27.5A; § 14-208.6(5) (defining sexual battery as a sexually violent offense); § 14-208.7 (setting length of registration at 30 years unless a removal petition is granted no

earlier than 10 years after registration). The statute's wide reach stands in contrast to the premises restrictions statute which applies only to a discrete subset of registered sex offenders. N.C. Gen. Stat. § 14-208.18(c). The State produced no evidence at trial to support such a broad regulation of all sex offenders.

There is no mechanism for "judicial tailoring" of the over-inclusive class of persons and offenses. Unlike other sex offender regulation statutes, there is no administrative or judicial determination of whether a particular person is dangerous, likely to stalk and groom children, likely to commit an offense against a child, or likely to recidivate. *See* N.C. Gen. Stat. §§ 14-208.6, 14-208.40A & 14-208.40B (judge determines applicability and length of registration and SBM after considering evidence); 15A-1343(b2)(4), (5), & (6) (judge sets conditions of probation related to sex offenders being around minors and on certain premises).

Section 14-202.5 is broader in its application to all registrants than any of the three similar statutes held unconstitutional by federal courts. Those statutes specifically limit their application to sex offenders whose victims were minors or had been found to be sexually violent predators. Ind. Code § 35-42-4-12(b) (2011); La. Rev. Stat. Ann. § 14:91.5(A)(1) (2011); Neb. Rev. Stat. § 28-322.05(1) (2012); *see Packingham*, 748 S.E.2d at 152. Even though the other states' statutes were more narrowly tailored than North Carolina's as to the class of registrants

affected, the federal courts still held the statutes violated the First Amendment because they banned an overly broad scope of Internet speech activity.

iii. Strict liability

Section 14-202.5 is not narrowly tailored because it is a strict liability offense that does not allow for "innocent" non-criminal access. A significant indication that a criminal statute is facially overbroad is that it lacks any requirement for proof of criminal intent. *Screws v. United States*, 325 U.S. 91, 103, 65 S. Ct. 1031, 1036 (1945); *Mello*, 200 N.C. App. at 565, 684 S.E.2d at 480. Here, to prove a person violated section 14-202.5, the State does not have to prove he acted with criminal intent or planned any wrongdoing. A person can be convicted for accessing an ill-defined Web site even if doing so for innocent reasons, such as socializing with his family, praising God, or posting pictures of a political rally. There is no requirement for the State to prove the person intended to communicate with or seek out a minor. The offense is strict liability. A person violates the statute simply by typing the prohibited web address into his browser and pressing "enter." (M-T pp 44-45). Because it is a mere access offense without any requirement of criminal intent, a person cannot even visit a site to find out if it meets the statutory definition of a prohibited site without risking a violation of the statute.

Because there is no requirement for the State to prove a person accessed a prohibited Web site with nefarious intent, he cannot use Web sites like Facebook even for business reasons. Officer Schnee testified that a sex offender cannot access Facebook or MySpace as part of his employment. (M-T p 124). He cannot use Facebook even if he uses it exclusively to advertise his own business and sell products. (M-T p 84). Officer Schnee testified a registered sex offender who owns a business might not be allowed to have his employees access and maintain a Facebook or MySpace page for the business, even if he did not access the sites himself. (M-T p 124).

Officer Schnee testified that a sex offender who created a Facebook or MySpace account prior to his sex offense conviction and registration would not be allowed under the statute to log in to the account to close the account, because to do so would amount to "accessing" the account. (M-T p 32). When confronted with the possibility that by *not* closing a social networking Web site account a person might be accused of "maintaining" the site by his inaction, Officer Schnee testified this was a "delicate situation" that the law did not take into account. (M-T p 32).

"Future criminality" is "the common justification" for statutes that criminalize otherwise innocent activity. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, 92 S. Ct. 839, 847 (1972). The purpose of such laws is to "nip"

crime "in the bud." *Id*. at 171, 92 S. Ct. at 848. However, "[a]rresting a person on suspicion, like arresting a person for investigation is foreign to our system, even when the arrest is for past criminality." *Id*. at 169, 92 S. Ct. at 847. A "direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster." *Id*. "A presumption that people . . . who look suspicious to the police are to become future criminals is too precarious for a rule of law." *Id*. Section 14-202.5's purpose is no different than anti-loitering statutes: to prevent future crimes. In an attempt to prevent future crimes, North Carolina has criminalized constitutionally permissible conduct--speech, association, religious expression--without a requirement that the person is using a site with the intent to commit a crime against a minor or adult. The statute allows arrest, prosecution, and deprivation of liberty based solely on suspicion of future criminal behavior.

iv. Section 14-202.5 is underinclusive.

The underinclusive nature of a statute regulating speech is a good indication that it is not narrowly tailored to meet the State's actual, purported, interests. *See Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S. Ct. 2038, 2043 (1994) (noting underinclusivity is "firmly grounded in First Amendment principles" and it "may diminish the credibility of the government's rationale for restricting speech in the first place"). Section 14-202.5 is underinclusive in several ways.

Section 14-202.5 applies only to *commercial* social networking Web sites. Section 14-202.5 does not apply to social networking sites that do not derive income from advertising or membership fees. N.C. Gen. Stat. § 14-202.5(b)(1). The State asserts that section 14-202.5 applies only to "private" commercial social networking sites. State's New Brief, p 11. However, nothing in the statute restricts its application only to private sites. The only limitation is that the site is "commercial" in nature which is defined simply by whether the site generates revenue from advertising or membership fees. N.C. Gen. Stat. § 14-202.5(b)(1). "Private" and "commercial" are not synonymous. Thus, even "public" Web sites could fall within the ambit of the statute. Regardless, the State has never offered a justification for differentiating between for-profit and non-profit Web sites.

Section 14-202.5 is underinclusive because it arbitrarily applies only to persons required to register in North Carolina and not to sex offenders registered in other states who violate section 14-202.5 while in North Carolina. N.C. Gen. Stat. § 14-202.5(a) (applying restrictions only to persons required to register in North Carolina). Limiting the class of possible offenders to North Carolina registrants ignores out-of-state registrants who travel through or visit North Carolina and access prohibited Web sites while here. The limitation also fails to include out-of-state sex offenders who use social networking Web sites to communicate with North Carolina children. Section 14-202.5(d) creates jurisdiction over the offense

if the "transmission that constitutes the offense" originates or is received in North Carolina. This jurisdiction clause still would not allow an out-of-state sex offender communicating with a child in North Carolina to be prosecuted under section 14-202.5 because it applies only to persons required to be registered here.

The period of registration is an underinclusive, arbitrary, limiting, demarcation of which sex offenders are prohibited from Web sites. Nothing in the history of the sex offender control laws or the evidence presented by the State at trial shows that a person becomes less likely to commit an offense against a minor using the Internet simply because he is no longer on the registry. *See* N.C. Gen. Stat. § 14-208.12A (removal can occur after only ten years on the registry). The statute is also underinclusive in allowing registered sex offenders to use Web sites that provide only a chat room, message board, instant message service or photo sharing service.[4] N.C. Gen. Stat. § 14-202.5(c)(1).

If the true purpose of the statute is to protect minors from illicit communications with a sex offender and from a sex offender's "mere presence" online, then why does the statute allow such activity to occur: 1) on non-commercial social networking Web sites; 2) by out-of-state sex offenders; 3) by sex offenders who are no longer registered; or 4) by sex offenders using chat

[4] Neither on appeal nor at trial has the State been able to identify a Web site that would be exempt from regulation under subsection (c)(1) and that would therefore allow a person to communicate on the Internet without fear of prosecution.

rooms, message boards, instant messaging services, or photo sharing services which are exempted from regulation by section 14-202.5(c)(1)? These examples of the statute's underinclusivity are indications that section 14-202.5 is not narrowly tailored to meet the State's actual, purported interests. *Ladue*, 512 U.S. at 51, 114 S. Ct. at 2043.

v. Laws that do not burden First Amendment rights already exist to protect children.

Laws to protect children in the community and on the Internet that are less restrictive of First Amendment rights already exist. *See generally*, North Carolina General Statutes Chapter 14 (prohibiting sexual assaults of minors); N.C. Gen. Stat. § 14-196.3 (prohibiting cyber stalking)[5]; § 14-202.3 (prohibiting use of electronic communications to solicit a minor to engage in a sex act); §§ 14-208.6, 14-208.7, & 14-208.40A & 40B (requiring address and online identifier registration up to 30 years and, in some cases, lifetime SBM); § 14-208.15A (mandating online providers report complaints of on-line solicitation of children); § 14-208.16 (prohibiting residence within 1000 feet of a school or child care center); § 14-208.18 (prohibiting sex offender from being on certain premises); § 15A-1340.50 (allowing permanent no contact order); § 15A-1343(b2) (allowing

[5] Unlike section 14-202.5, section 14-196.3(e) exempts First Amendment protected speech stating that "This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly."

specialized sex offender probation conditions). Lack of success in enforcing these statutes is not sufficient grounds to restrict constitutional rights. *Treants Enterprises, Inc. v. Onslow County*, 94 N.C. App. 453, 460, 380 S.E.2d 602, 606 (1989).

c. Other, ample, speech alternatives do not exist.

Intermediate scrutiny requires that the State show not only that a regulation of speech is narrowly tailored, but also that other, ample alternatives to communicate are available. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984). The Internet is unlike any other medium of communication in the history of the world. Web sites like Facebook and Twitter have literally sparked and sustained revolutions. They provide instant access to real-time news accounts of national and international events. To say that Mr. Packingham can engage in the full range of speech-related activities made possible by the banned Web sites ignores the way that most people conduct their daily lives through the use of Internet resources. Just because other means exist for a person to exercise his rights does not eliminate the unconstitutional nature of an overly restrictive statute. *Reno v. ACLU*, 521 U.S. 844, 880, 117 S. Ct. 2329, 2349 (1997); *Schneider v. New Jersey*, 308 U.S. 147, 163, 60 S. Ct. 146, 151 (1939).

No means of communication offer the ability to easily, instantly, and publically communicate like the Internet. Few mainstream, alternative Web sites

exist which allow a person to fully engage in the speech, religious, and associational freedoms that sites like Facebook, MySpace, and Google provide without violating section 14-202.5. The State has not been able to identify any Web sites that are ample alternatives to the banned sites.

5. The vague nature of this criminal statute chills the exercise of First Amendment freedoms.

Vague criminal statutes that restrict First Amendment freedoms are particularly problematic. *Reno*, 521 U.S. at 870-72, 117 S. Ct. at 2344-45. As argued in Issue II below, section 14-202.5 violates the Due Process Clause of the Fifth Amendment because it is vague. However, even if this Court holds that the statute is not so vague as to violate the Fifth Amendment, the innumerable ambiguities concerning the scope of its coverage still have a chilling effect on the exercise of First Amendment freedoms. And because the statute provides a severe criminal penalty, even for an innocent violation, it may cause people to remain silent and avoid using even lawful Web sites to receive information. Uncertainty as to the statute's true reach undermines the likelihood that it has been carefully tailored to achieve the General Assembly's goal of protecting minors from potentially harmful predators online. *Cf. Reno*, 521 U.S. at 871, 117 S. Ct. at 2344 (concluding same about Communications Decency Act).

The United States Supreme Court recognizes that protecting children is an important government interest, but has said "that interest does not justify an

unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875, 117 S. Ct. at 2346. Section 14-202.5 is an unnecessarily broad suppression of Mr. Packingham's First Amendment rights and is unconstitutional on its face and as-applied. For the foregoing reasons, Mr. Packingham asks this Court to affirm the Court of Appeals' holding that section 14-202.5 violates the First Amendment and the North Carolina Constitution on its face and as-applied.

II. DUE PROCESS PROTECTS A PERSON FROM A FELONY CONVICTION UNDER A STATUTE THAT CRIMINALIZES INNOCENTLY ACCESSING INTERNET WEB SITES WHERE THE STATUTE LEAVES EVERYONE GUESSING WHICH WEB SITES ARE PROHIBITED AND WHAT IT MEANS TO "ACCESS" SUCH SITES.

Section 14-202.5 fails to give persons of ordinary intelligence fair notice of what constitutes a prohibited "Web site" and what it means to "access" such a "Web site." The lack of clarity leaves ordinary persons uncertain on how to adhere to the law. The statute's vagueness allows law enforcement and prosecutors to enforce the law in an arbitrary and discriminatory way and puts in their hands the interpretation, application, and enforcement of the law on an *ad hoc* basis. Section 14-202.5 fails to give fair notice to non-sex offenders who minister to, work with, or spend time with sex offenders online so they do not unwittingly aid and abet or encourage a violation of the law. Even the written information about the statute given to Mr. Packingham by the State upon his registration simply recites the statute's text without explanation, analysis, or examples. (R p 74).

Due Process under the Fifth Amendment requires a criminal statute to be sufficiently precise to give notice of what conduct is prohibited and to ensure that the law does not permit or encourage law enforcement to enforce the law and deprive a person of liberty interests in an arbitrary or discriminatory manner. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859 (1999). A criminal statute can be invalidated if the statute is vague for either reason. *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480 (2000). "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186 (1982).

Vague criminal laws are disfavored because they may discourage the lawful exercise of constitutional rights, trap the innocent by not providing fair warning, and "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2299 (1972). "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should

be set at large.' " *Morales*, 527 U.S. at 60, 119 S. Ct. at 1861 (quoting *United States v. Reese*, 92 U.S. 214, 221, 23 L. Ed. 563, 566 (1876)).

Despite the State's efforts to present this case as involving a single constitutional issue, Mr. Packingham's vagueness challenge is a separate and distinct basis for statutory invalidation that flows from the Fifth Amendment and not the First Amendment. *See* State's New Brief, p 1, 30-45 (designating a single issue and conflating overbreadth and vagueness analyses); *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 1845 (2008) (recognizing distinct and independent nature of overbreadth and vagueness doctrines). Therefore, even if this Court believes the Court of Appeals erred in its holding on the First Amendment issue, this Court must still independently analyze whether section 14-202.5 is unconstitutionally vague. *See Morales*, 527 U.S. at 60, 119 S. Ct. at 1861 (declining to apply overbreadth doctrine where vagueness "permeated" city ordinance and instead invalidating ordinance only on vagueness grounds).

1. A facial vagueness challenge to section 14-202.5 is appropriate because the statute implicates First Amendment rights.

When a criminal defendant raises a vagueness challenge to the statute under which he has been convicted, he usually cannot challenge the vagueness of the statute as applied to the conduct of others where his own conduct was clearly proscribed by the statute. *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 1845 (2008). However, in the First Amendment context, that requirement is

relaxed and a defendant may argue the statute's vagueness not just as it applies to him, but also as it could be applied to others. *Id.*; *Morales*, 527 U.S. at 55, 119 S. Ct. at 1858; *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, and nn.6 and 7, 102 S. Ct. 1186 (1982). As argued above in Issue I, section 14-202.5 implicates First Amendment rights and a facial vagueness challenge is therefore appropriate.

2. Which Web sites are off-limits and does the ban apply to the entire site or just subpages?

What constitutes a "Web site" under section 14-202.5? Does a person violate section 14-202.5 by using a "search engine" or reading news stories on Google.com, Yahoo.com, or MSN.com? Does a person violate 14-202.5 by using Amazon.com, even if he does not use the social networking features? Section 14-202.5 does not indicate whether the actual chat room, instant message functions, or e-mail functions must be used in order to violate the section, or whether merely typing the top-level domain address into the Internet browser and pressing the "enter" key constitutes the offense.

During the trial court hearing on Mr. Packingham's motion to declare section 14-202.5 unconstitutional, Durham Police Officer Schnee presented a thoughtful but complicated analysis of the statute. He testified how he believed section 14-202.5 applies to various scenarios. Whether Officer Schnee properly interpreted section 14-202.5 does not really matter, as his testimony demonstrates

the pains to which law enforcement and sex offenders have to go to interpret and apply the statute to real-life examples. Officer Schnee's testimony revealed an interpretation scheme that essentially classifies Internet Web sites into four categories.

First, Officer Schnee interpreted section 14-202.5 to prohibit a person from "accessing" Web pages on sites commonly known to be "social" in nature, such as Facebook and MySpace. Such sites are always prohibited under the statute. (M-T pp 25-26). He gave no details on how a person knows that such sites are automatically off-limits, other than suggesting they are "common." *Id*.

Second, Officer Schnee testified that sex offenders are not prohibited from accessing any pages on an Internet Web site like Amazon.com, because the entire site falls within the "business exception" in section 14-202.5(c)(2). (M-T p 119). Motion Exhibit 1, pp 163-81, shows that Amazon.com has subpages which allow users to engage in social networking activity virtually identical in nature to that of Facebook and MySpace. Officer Schnee testified, however, that even though Amazon.com has features identical to Facebook, because of the "business exception" in 14-202.5(c)(2), a person would not be prohibited from using *any* of the Amazon Web site, including the commercial social networking features. (M-T p 119). He believed Web sites within this exception are always acceptable for a

person to access, even if subpages are identical in form and substance to Facebook or MySpace. (M-T p 121).

Now on appeal, the State asserts that Amazon.com is not covered by section 14-202.5 because it "does not contain subsidiary social networking pages that allow users to create 'web pages' or 'personal profiles' and that have links to friends that can be accepted by visitors to members' pages or Web sites." State's New Brief, p 35. However, the trial court admitted evidence showing that Amazon.com does have features that fit the statutory definition of commercial social networking Web site, and that it allows users to create personal profiles. Motion Exhibit 1, pp 163-81. Officer Schnee admitted that Amazon.com has features similar to Facebook. (M-T p 119). And the State, through the Assistant District Attorney, agreed that Amazon.com has "subpages which might technically meet the definition of the law." (T p 266). Officer Schnee and the State contended that Amazon.com was exempted from the statute by subsection (c)(2), the "business exception."

Officer Schnee's and the State's interpretation of (c)(2) is likely incorrect, but shows the difficulty that law enforcement face in interpreting section 14-202.5. Subsection (c)(2) exempts sites that facilitate commercial transactions between users, not between the site itself and its users. The exemption is probably for user-driven sites like Craigslist.com, not a Web business like Amazon.com. Regardless

of the "correct" answer to the question "does the statute apply to Amazon.com and if not, why not?" the State's inability to make consistent arguments at trial and on appeal show the *ad hoc* nature of the statute's interpretation by law enforcement and prosecutors.

Officer Schnee testified about a third type of Web site which is a hybrid of the first two described and includes Google.com. Google.com has subpages, including chat rooms, message boards, and e-mail functions, similar in nature and function to the social networking pages of Facebook, MySpace, and Amazon.com. *See* Motion Exhibit 1, pp 94-120. Those subpages would be off-limits to a person under 14-202.5 because Google.com does not fall within the "business exception" in 14-202.5(c)(2). For Google.com and similar sites, according to Officer Schnee's interpretation, the homepage and some subpages *would not* be off-limits, but other subpages *would* be off-limits if the subpages meet the criteria set out in section 14-202.5 for a social networking Web site. (M-T pp 46-50). Thus, with a hybrid site like Google.com, a person could use some, but not all of the Web site, without violating the statute. However, on appeal, the State now contends that subpages of Google *would not* be off-limits *unless* a log in was required to access those subpages. State's New Brief, p 37. Officer Schnee and the State did not make such a distinction at trial and only said that any subpages with the required

statutory characteristics of a commercial social networking Web site would be off-limits--regardless of whether a log in was required.

The fourth type of Web site Officer Schnee interpreted includes sites such as Match.com, an Internet dating/match-making Web site, that purport to be off-limits to anyone under 18 years of age. As such, a person would not violate section 14-202.5 by accessing a page on Match.com, because section 14-202.5 applies only to sites that "allow minors" to become members or create personal pages. However, Officer Schnee testified that if a Web site that purportedly prohibits minors from using the site actually had minors who used the site, even without the Web site's permission, approval, or knowledge, a registered sex offender would violate section 14-202.5 if he learned that minors were in fact using the site and he accessed the site thereafter. (M-T pp 55-56).

On appeal, the State puts forth for the first time an another interpretation of the statute that is incorrect as a matter of statutory interpretation. The State argues that for a Web site to qualify under the statute as a commercial social networking Web site, the Web site must "allow users to create Web pages or personal profiles that contain information" *and* that the user's Web pages or personal profiles must "link to the personal Web pages of other members." State's New Brief, pp 20-21, 35 (citing N.C. Gen. Stat. § 14-202.5(a)(3)). A close reading of the statute shows

the State has incorrectly interpreted subsection (a)(3), which sets out part of the definition of "commercial social networking Web site" and states that such a site:

> (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

N.C. Gen. Stat. § 14-202.5(a)(1).

Contrary to the State's interpretation, subsection (a)(3) sets out a requirement only that the "Web pages or personal profiles" contain certain information, *not* that it also contain "links" to other sites. The subsection then sets out a list of types of "information" the pages or profiles could contain, by using the phrase "such as." The State's error is in interpreting the work "links" as a verb, rather than as a noun. If the word "links" is read as a verb, then the subsection would require the pages or profiles to "link" to other Web pages. Read as a noun, "links" is part of the list of "information" that the page or personal profile *could*, but need not, "contain."

Interpreting "links" as a noun is proper given that a list of items follows after the phrase "such as," and the word "and" precedes the term "links," thereby suggesting that "links" is the last item in the list. For the word "links" to have been intended as a verb, and not as a noun and the last item in the list, the subsection would have needed the word "and" between the items "photographs

placed on the personal Web page by the user, [*and*] other personal information about the user." Had "and" been placed there, then "personal information about the user" would have been the last item in the list of information "such as." But "and" is not located there in the subsection. The State is therefore adding a requirement to the definition of commercial social networking Web site that does not exist. The inability of the State to correctly interpret the statute is further evidence of its vagueness.

3. What does it mean to "access" a Web site?

Does the term "access" mean logging in to an established account? Or does simply navigating to pages that do not require a log in on the Web site constitute the offense? A person does not have to log in or have an account with Facebook or MySpace to view information about individuals or organizations that do have accounts. For example, a person can view former-Governor Perdue's Facebook page, and the Facebook page for The Church of Jesus Christ of Latter-day Saints without logging in or having a Facebook account. Motion Exhibit 1, pp 145-46, 147-48. Is viewing the pages about the Governor and the Mormon Church considered "accessing" Facebook when no login is required? What if a person receives an e-mail with photographs that were posted on Facebook by the e-mail's sender? If he opens the e-mail, and pictures or other content from Facebook

download in the e-mail, has the person accessed Facebook and, if so, did he violate the statute?

Officer Schnee interpreted the term "access" to mean a person commits an offense the instant he types "facebook.com" in the browser's address bar and presses "enter." (M-T pp 44-45). Officer Schnee testified that a person does not have to log in to Facebook, MySpace, or a social networking Web site to commit the offense. (M-T pp 44-45). Instead, even if a person simply seeks information about the federal government, Governor Perdue, or the Mormon Church--all of which maintain public pages on Facebook not requiring a login to view--the person violates the statute by "accessing" those pages, even if he does not log in or have a Facebook account. (M-T pp 39-44). The State agreed with Officer's Schnee's position at the trial court, insisting that to "split hairs" over which portions of the Web site are off-limits would lead to enforcement problems. (M-T pp 272-73).

On appeal the State has taken a contradictory position. Before the Court of Appeals, the State argued that

> Accessing a website is not as easy as defendant presents. Typing "facebook.com" in a web browser only takes you to Facebook's front door. In order to access the site and enter Facebook, you have to do what defendant did: you must register and create a profile. As part of Facebook's registration process for their private social networking site defendant had to agree to terms of use that explicitly prohibit sex offenders. There are few, if any, social networking sites that fit the statutory definition in N.C. Gen. Stat. § 14-202.5 that are accessible without the user joining or becoming a member. Accordingly, defendant and others similarly situated are not

> prohibited from using large segments of the Internet. They are simply prohibited from "accessing" a website in a manner that allows them to interact with children. Typing Google.com, Yahoo.com or even Facebook.com does not give any user the opportunity to interact with children.

State's Brief of 14 March 2013, p 20. Before this Court, the State continues to assert that to "access" a Web site and violate section 14-202.5, a person must "register" or "log in" to the site. State's New Brief, p 36.

The State's current interpretation of "access" is simply not found in the statute. Nothing in section 14-202.5 indicates that "access" requires logging in. The State references North Carolina General Statutes section 14-202.5A for a proposed definition of "access." State's New Brief, p 37. The State omits, however, that by its own terms, the definition of "access" in section 14-202.5A applies *only* to section 14-202.5A. Had the General Assembly intended for the definition to apply to section 14-202.5, it could have included the definition specifically in section 14-202.5, included a general definitions section in Article 26, or not limited the definition in section 14-202.5A with the phrase "For the purposes of this section..." N.C. Gen. Stat. § 14-202.5A(b).

Before this Court the State asserts an additional proposed definition of "access." The State argues that "access" means "to obtain access to data or processes." State's New Brief, p 37. Ignoring the fact that a word's definition should not contain the word itself, the State's proposed definition is actually the

opposite of its other proposed requirement that a person must log in to a Web site to commit the offense. As shown at trial, a person can "access data" from Facebook without ever having to log in. Motion Exhibit 1, pp 145, 147, 149, 150-1. And it is not just data related to the Web site itself, but data about users.

Regardless of the "correct" answer to the question "does a person 'access' a prohibited Web site by navigating to its various pages, including subpages, without 'logging in' or must he 'log in' to commit the offense?" the State's inability to keep its arguments consistent at trial and on appeal shows the *ad hoc* nature of the statute's interpretation by law enforcement and prosecutors and the dilemma ordinary people face in trying to figure out if they are breaking the law when using the Internet. Far from being clear as the State suggests, the term "access" gives no guidance to ordinary people about what they can and cannot do online.

4. <u>What, if anything, must a person "know" in order to violate the statute?</u>

Does a person have to know that the site he accesses fits the statutory definition of a commercial social networking Web site or just know that the site allows minors to use it? The placement of the term "knows" in the statute suggests that a person does not have to know that he accessed a Web site or that the site fits the statutory definition of a prohibited Web site. All he has to know is that the site he accessed allows members to create or maintain personal Web pages.

The distinction on exactly what the statute requires a person to know is important because unknowing and unintentional access to a prohibited site is not farfetched and happens to everyone using the Internet on a regular basis. For example, does opening an e-mail using Microsoft Outlook where the e-mail downloads data or content from Facebook, such as photographs or notifications, into the e-mail, amount to accessing Facebook? If the e-mail recipient can somehow tell that the e-mail will access Facebook for data, should he simply not open it? Does a person access Facebook or Google if the sites "sync" or "push" data, such as contacts, pictures, or books, onto his smart phone? Even if he knows he cannot use Amazon with his desktop computer, does he "access" Amazon (or any site that is a commercial social networking Web site) and commit the offense if he uses an e-reader device to download a book or uses his smart phone to download music? Does a person access Facebook if he uses the Google search engine to search for information about the North Carolina Supreme Court and one of the results is a preview of a Facebook page for a candidate running to serve on the Court? Section 14-202.5 does not appear to require a person to know that he is accessing the site.

The State takes issue with the Court of Appeals' statement that "it is fundamentally impossible to expect an offender, or any other person, to 'know' whether he is banned from a particular Web site prior to 'accessing' it."

Packingham, 748 S.E.2d at 154; State's New Brief, p 32 n.5. The State incorrectly asserts that section 14-202.5 "protects an offender from prosecution unless he knows he is on a prohibited site." State's New Brief, p 32. Instead, the statute requires only that a person "knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." N.C. Gen. Stat. § 14-202.5(a). If a person knows that a Web site allows minors to do those things, then if he access the site accidentally, unintentionally, or unknowingly, he has violated the statute.

5. A limiting construction cannot save the statute.

This Court can impose a limiting construction only if the statute is "readily susceptible" to such an interpretation. *United States v. Stevens*, 130 S. Ct. 1577, 1592, 176 L. Ed. 2d 435, 451 (2010); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1114-15 (D. Neb. 2012) (rejecting Nebraska's proposed limiting constructions and holding statute unconstitutional). Section 14-202.5 is not readily susceptible to the State's suggested limitations. To the contrary, as argued above, any of the State's proposed limitations on interpreting the statute simply lead to more questions of interpretation and will inevitably lead to more questions by law enforcement, prosecutors, and those affected by the restrictions. The State got it right at the trial court, that splitting hairs over which parts of Web sites are off-limits while other parts might be appropriate would lead to even greater confusion and the

impossibility of enforcement. (M-T pp 272-73). To accept the State's proposed "narrowing construction" would require even more *ad hoc* interpretation and enforcement of the statute. Accepting the State's invitation to provide a limiting construction would also be a "serious invasion of the legislative domain" and sharply diminish [the General Assembly's] 'incentive to draft a narrowly tailored law in the first place.' " *Stevens*, 130 S. Ct. at 1592, 176 L. Ed. 2d at 452 (quoting *United States v. Treasury Employees*, 513 U.S. 454, 479 n.26, 115 S. Ct. 1003 (1995) and *Osborne v. Ohio*, 495 U.S. 103, 121, 110 S. Ct. 1691 (1990)); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1114-15 (D. Neb. 2012).

6. Section 14-202.5 is unconstitutionally vague.

Section 14-202.5 leaves too much room for speculation as to which sites are forbidden in whole or in part, how a person violates the statute, and leaves too much discretion to law enforcement to determine which sites and actions regarding those sites fall within the statute. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freed-oms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 1323 (1964)). Asked how a person knows if he accesses an off-limits site, Officer Schnee testified that:

> I guess the non -- either the -- my nonofficial answer, I guess, could be if -- if you don't know, don't do it. Obviously, that's what I would tell folks out on the street. If you have a question about whether you can or can't do something, don't do it. The best way for them -- for somebody not to get in trouble is to not do something.

(M-T p 92). In other words, to avoid possibly violating the law, a person should simply "steer far wider than the unlawful zone" on the Internet. Officer Schnee's "nonofficial" answer exemplifies the chilling effect this vague statute has on the exercise of fundamental, First Amendment freedoms.

Section 14-202.5 fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, leads to arbitrary and discriminatory enforcement, and permits "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 1248 (1974). It therefore violates the Fifth Amendment and Section 19 of Article I, of the North Carolina Constitution. What the State asks this Court to do is rewrite a badly written law. This Court should decline the State's invitation and affirm the Court of Appeals' opinion holding section 14-202.5 unconstitutionally vague. *Cf. Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1122-23 (D. Neb. 2012) (holding Nebraska sex offender Internet restrictions statute unconstitutionally vague); *Doe v. Jindal*, 853 F. Supp. 2d 596, 605-06 (M.D. La. 2012) (holding Louisiana sex offender Internet restrictions statute unconstitutionally vague).

CONCLUSION

For the foregoing reasons, Mr. Packingham asks this Court to affirm the Court of Appeals' opinion that North Carolina General Statutes section 14-202.5 is unconstitutionally overbroad and vague.

If this Court reverses the Court of Appeals on all grounds, then Mr. Packingham asks this Court to remand his case to the Court of Appeals for consideration of the remaining issues that Mr. Packingham briefed but the Court of Appeals did not resolve. The remaining issues are that section 14-202.5: 1) allows arrest without probable cause in violation of the Fourth Amendment; 2) violates federal and state constitutional prohibitions against ex post facto criminal statutes; 3) is a Bill of Attainder; 4) violates federal and state constitutional rights to privacy; and 5) violates federal and state constitutional rights to procedural and substantive due process. *See* Defendant-Appellant's Brief of 10 December 2012.

Respectfully submitted this the 14th day of March, 2014.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellee's New Brief has been filed by uploading the same to the North Carolina Supreme Court's electronic filing Web site.

I further hereby certify that a copy of the above and foregoing Defendant-Appellee's New Brief has been duly served upon Anne Middleton, Assistant Attorney General, North Carolina Department of Justice, P.O. Box 629, Raleigh, NC 27602, by first-class mail, postage prepaid.

This the 14th day of March, 2014.

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No. 366PA13 FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	From Durham County
v.	)	
	)	
LESTER GERARD PACKINGHAM	)	

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INDEX TO
APPENDIX TO DEFENDANT-APPELLEE'S BRIEF

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Indiana Code § 35-42-4-12 (2011)

(a) This section does not apply to a person to whom all of the following apply:
- (1) The person is not more than:
  - (A) four (4) years older than the victim if the offense was committed after June 30, 2007; or
  - (B) five (5) years older than the victim if the offense was committed before July 1, 2007.
- (2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term "ongoing personal relationship" does not include a family relationship.
- (3) The crime:
  - (A) was not committed by a person who is at least twenty-one (21) years of age;
  - (B) was not committed by using or threatening the use of deadly force;
  - (C) was not committed while armed with a deadly weapon;
  - (D) did not result in serious bodily injury;
  - (E) was not facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC XX-XX-XX-X(1)) or a controlled substance (as defined in IC XX-XX-X-X) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge; and
  - (F) was not committed by a person having a position of authority or substantial influence over the victim.

(b) This section applies only to a person required to register as a sex or violent offender under IC 11-8-8 who has been:
- (1) found to be a sexually violent predator under IC XX-XX-X-X.5; or
- (2) convicted of one (1) or more of the following offenses:
  - (A) Child molesting (IC XX-XX-X-X).
  - (B) Child exploitation (IC XX-XX-X-X(b)).
  - (C) Possession of child pornography (IC XX-XX-X-X(c)).
  - (D) Vicarious sexual gratification (IC XX-XX-X-X(a) or IC XX-XX-X-X(b)).
  - (E) Sexual conduct in the presence of a minor (IC XX-XX-X-X(c)).
  - (F) Child solicitation (IC XX-XX-X-X).
  - (G) Child seduction (IC XX-XX-X-X).
  - (H) Kidnapping (IC XX-XX-X-X), if the victim is less than eighteen (18) years of age and the person is not the child's parent or guardian.

(I) Attempt to commit or conspiracy to commit an offense listed in clauses (A) through (H).
(J) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (H).

(c) As used in this section, "instant messaging or chat room program" means a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two (2) or more members or authorized users to communicate over the Internet in real time using typed text. The term does not include an electronic mail program or message board program.

(d) As used in this section, "social networking web site" means an Internet web site that:
(1) facilitates the social introduction between two (2) or more persons;
(2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;
(3) allows a member to create a web page or a personal profile; and
(4) provides a member with the opportunity to communicate with another person.

The term does not include an electronic mail program or message board program.

(e) A person described in subsection (b) who knowingly or intentionally uses:
(1) a social networking web site; or
(2) an instant messaging or chat room program; that the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program commits a sex offender Internet offense, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior unrelated conviction under this section.

(f) It is a defense to a prosecution under this section that the person:
(1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and
(2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.

Louisiana Revised Statutes § 14:91.5 (2011)

A. The following shall constitute unlawful use or access of social media:

(1) The using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender and who was previously convicted of R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.3 (computer aided solicitation of a minor), or R.S. 14:283 (video voyeurism) or was previously convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.

(2) The provisions of this Section shall also apply to any person previously convicted for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses provided for in Paragraph (1) of this Subsection, unless the tribal court or foreign conviction was not obtained with sufficient safeguards for fundamental fairness and due process for the accused as provided by the federal guidelines adopted pursuant to the Adam Walsh Child Protection and Safety Act of 2006.

B. The use or access of social media shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction.

C. For purposes of this Section:

(1) "Chat room" means any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users.
(2) "Minor" means a person under the age of eighteen years.
(3) "Peer-to-peer network" means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server.
(4) "Social networking website" means an Internet website that has any of the following capabilities:
(a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.

(b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.

D. (1) Whoever commits the crime of unlawful use or access of social media shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence.

(2) Whoever commits the crime of unlawful use or access of social media, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

Nebraska Revised Statutes § 28-322.05 (2012)

(1) Any person required to register under the Sex Offender Registration Act who is required to register because of a conviction for one or more of the following offenses, including any substantially equivalent offense committed in another state, territory, commonwealth, or other jurisdiction of the United States, and who knowingly and intentionally uses a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use its social networking web site, instant messaging, or chat room service, commits the offense of unlawful use of the Internet by a prohibited sex offender:

(a) Kidnapping of a minor pursuant to section 28-313;
(b) Sexual assault of a child in the first degree pursuant to section 28-319.01;
(c) Sexual assault of a child in the second or third degree pursuant to section 28-320.01;
(d) Incest of a minor pursuant to section 28-703;
(e) Pandering of a minor pursuant to section 28-802;
(f) Visual depiction of sexually explicit conduct of a child pursuant to section 28-1463.03 or 28-1463.05;
(g) Possessing any visual depiction of sexually explicit conduct pursuant to section 28-813.01;
(h) Criminal child enticement pursuant to section 28-311;
(i) Child enticement by means of an electronic communication device pursuant to section 28-320.02;
(j) Enticement by electronic communication device pursuant to section 28-833; or
(k) An attempt or conspiracy to commit an offense listed in subdivisions (1)(a) through (1)(j) of this section.

(2) Unlawful use of the Internet by a prohibited sex offender is a Class I misdemeanor for a first offense. Any second or subsequent conviction under this section is a Class IIIA felony.

Nebraska Revised Statutes § 29-4001.01 (2012) (Relevant definitions):

(3) Chat room means a web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice transmissions or computer file attachments amongst two or more computers or electronic communication device users;
. . . .

(10) Instant messaging means a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications network;

. . . .

(13) Social networking web site means a web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile....