No. COA12-1287 FOURTEEN JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	From Durham County
v.	)	10 CRS 57148
	)	
LESTER G. PACKINGHAM	)	

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BRIEF FOR THE STATE

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QUESTIONS PRESENTED

I. DOES N.C. GEN. STAT. § 14-202.5 VIOLATE MR. PACKINGHAM'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS?

II. IS N.C. GEN. STAT. § 14-202.5 UNCONSTITUTIONALLY VAGUE?

III. DOES N.C. GEN. STAT. § 14-202.5 ALLOW ARREST WITHOUT PROBABLE CAUSE?

IV. DOES N.C. GEN. STAT. § 14-202.5 VIOLATE THE EX POST FACTO CLAUSE?

V. IS N.C. GEN. STAT. § 14-202.5 A BILL OF ATTAINDER?

VI. DOES N.C. GEN. STAT. § 14-202.5 VIOLATE CONSTITUTIONAL RIGHTS TO PRIVACY?

VII. DOES N.C. GEN. STAT. § 14-202.5 VIOLATE PROCEDURAL AND SUBSTANTIVE DUE PROCESS?

STATEMENT OF THE CASE

This case came on for hearing at the 5 April 2011 session of Criminal Superior Court in Durham County, the Honorable Michael Morgan presiding, on Mr. Packingham's motion to declare N.C. Gen. Stat. §14-202.5 unconstitutional. (App p. 1; R p. 7). Judge Morgan joined Mr. Packingham's motion for hearing with *State v. Johnson* in which a similar motion had been filed. (R p. 19). Judge Morgan held that the trial court lacked jurisdiction to consider the facial challenges. Judge Morgan considered the as-applied challenges but denied them altogether without reference to the individual claims. Mr. Johnson and Mr. Packingham filed a Joint Petition for Writ of Certiorari and Petition for Writ of Mandamus which this Court denied on 22 June 2011.

On 28 May 2012, Mr. Packingham's case came on for trial, the Honorable Osmond Smith presiding. A jury convicted Mr. Packingham of one count of accessing a commercial social networking website. Judge Smith sentenced Mr. Packingham to 6 to 8 months in prison, suspended the sentence, and placed him on supervised probation for 12 months. Mr. Packingham gave oral notice of appeal. (T p. 291). The record on appeal was served on 7 September 2012 and settled by operation of Rule 11 on 8 October 2012. The record on appeal was filed by mail on 23 October 2012 and mailed to the parties on 26 October 2012.

STATEMENT OF THE FACTS

In 2002, Lester G. Packingham was convicted of taking indecent liberties with a 13 year old. (R p. 72) On or about April 30, 2010, Corporal Brian Schnee was employed as a supervisor of the juvenile investigation Division with the Durham Police Department. He was working to identify registered sex offenders living inside the Durham City limits who were illegally accessing commercial social networking websites. Schnee determined that defendant was a registered sex offender living in Durham County. (T p. 132) Schnee found defendant's picture

on the North Carolina Department of Justice Sex Offender Registry. *Id.* Schnee the found a user profile for defendant on Facebook. (T p. 133) Schnee recognized defendant from the photograph on his profile page. Defendant did not use his real name on his Facebook profile. (R p. 77) Schnee saw a posting on the profile page, which mentioned a court date and a ticket being dismissed. (T pp. 134, 135) Schnee obtained a certified copy of defendant's citation and a dismissal order dated April 27, 2010. (T p. 134) The citation listed the defendant's name, address, date of birth. The citation listed a 2001 Nissan with North Carolina license plate YSH-6283. The citation was issued on February 13, 2010 and listed two charges. (T p. 137) Schnee also obtained a dismissal form for defendant, which listed the two offenses on the form and listed the reason for dismissal as "comply". (T p. 138) Schnee sent a search warrant and a preservation request to Facebook. (T p. 139) Schnee received documents from Facebook in June 2010 and obtained a search warrant for defendant's residence. He executed the search warrant on July 21, 2010 and discovered a Nissan pickup truck with license plate number YSH-6283 was parked at defendant's residence. (T p. 142) Schnee determined that defendant was listed as the registered owner. (T pp. 145, 146) Among the items seized at defendant's address was a picture of defendant, which Schnee recognized as the same picture he had seen on defendant's Facebook page. (T pp. 152, 153) Additionally, they seized a Duke Energy bill which listed defendant's phone number. The phone number listed on the Duke energy bill was the same phone number listed on defendant's Facebook page. (T p. 157) They also seized three cell phones and a thumbdrive. (T pp. 160, 161)

BACKGROUND

A. The Internet

The Internet is a global collection of computers, mobile devices, and other electronic devices connected through an ever-increasing system of networks. The physical connections

include, but are not limited to, underground cables, satellites, fiber-optic cables, and telephone lines. The Internet offers numerous ways to communicate and transfer information. The different methods of communicating are called protocols. Among these are file transfer protocol (ftp) hypertext transfer protocol (http).

Most people have used a home or office network. In these networks, one computer usually serves as the host computer. The host computer interacts and shares information with other computers and devices on the network such as printers. The host computer keeps up with all other computers and devices by assigning an Internet Protocol address (IP address) to each device. An IP address is a numerical label. Most home or office networks have an Internet connection that allows each computer on the home network to communicate and access information on other networks that are also connected to the Internet. It is this collection of small and large networks that makes up the Internet. The Internet "backbone" refers to the principal data routes between large, strategically interconnected networks and core routers on the Internet. These data routes are hosted by commercial, government, academic and other high-capacity network centers. The largest backbone providers, known as tier 1 providers, have such comprehensive networks that they never need to purchase transit agreements from other providers. Tier 1 providers in the telecommunications industry, include, but are not limited to Cable & Wireless Worldwide, UUNet, Sprint, and AT&T Corporation.

The World Wide Web ("Web") is a system of interlinked web pages accessed via the Internet. Web pages reside on the Internet and are viewed with a web browser. Often a single web page may contain text, images, videos, and other multimedia. Hyperlinks are text or images that link to other web pages or content. Many web pages have subpages that are accessed through hyperlinks from the site's first page, commonly called the "home page." Advances in computer processing and increased speed in data transmission have caused the Internet to grow

in terms of size and functionality. As mobile devices such as smart phones and tablets increase in processing power, they are rapidly becoming the preferred method of accessing the Internet.

The Internet is a mix of both public and private resources. This global connection of smaller networks has millions of access points; however, that does not mean that everything that is connected to the Internet is public. Facebook is the largest social networking site. If it were a country, it would be the third most populous country on the planet. However, Facebook and many other commercial social networking sites are private entities. If it chose to do so, Facebook could completely block each of its billion users from accessing any part of the Facebook website.

Facebook and many other sites do not allow sex offenders to use their private social networking environments. On the webpage http://www.facebook.com/help/210081519032737/, Facebook gives instructions on how to report a sex offender that is using Facebook. The sex offender information page states that, "Once we're able to verify someone's status as a sex offender, we immediately disable their account and remove their all information associated with it from Facebook."

B. Social Networking Sites and Children

Approximately 73% of teens use social networking sites. (Amanda Lenhart, Kristen Purcell, Aaron Smith, and Kathryn Zickuhr. *Social Media & Mobile Internet Use Among Teens andYoung Adults*. Washington, DC: Pew Internet & American Life Project, February 3, 2010, page 17, accessed October 10, 2011, at www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx.) A survey of 12 to 17 year olds revealed 38% had posted self-created content such as photos, videos, artwork, or stories. *Id*. at 23. Another survey, of 10 to 17 year olds, revealed that 46% admit to having given out their personal information online to someone they did not know. The likelihood that young people will give out personal information over the

Web increases with age; 56% of 16 to 17 year olds report doing so. (Andrea Pieters and Christine Krupin. *Youth Online Behavior*. Santa Clara, CA: Harris Interactive, June 1, 2010, page 11, accessed October 10, 2011, at www.safekids.com/mcafee_harris.pdf.)

Most children and many parents are not aware that child sexual predators often "groom" their victims for weeks or months before attempting to arrange a face to face meeting. The grooming process is made easier by online communication and by the abundance of information children often post about themselves. Something as simple as a photograph of a new puppy can provide a predator with an opening, by feigning an interest in dogs in order to make a connection with a child. Predators will often engage in seemingly innocent communication in order to befriend and ultimately lure an unsuspecting child.

C. Sex Offenders

The North Carolina General Assembly has addressed sex offenders in the following manner:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to

> necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2013).

The North Carolina Sex Offender & Public Protection Registry ("the Registry") applies to all offenders convicted on or after 1 January 1996 and to all prior offenders released from prison on or after that date. *State v. White*, 162 N.C. App. 183, 185, 590 S.E.2d 448, 450 (2004) (citing 1995 N.C. Sess. Laws ch. 545, § 3). The Registry requires individuals who have committed an offense against a minor or a sexually violent offense to register as sex offenders. N.C. Gen. Stat. § 14-208.6(4) and § 14-208.7(a) (2005). "If a person required to register [as a sex offender] changes address, the person shall provide written notice of the new address not later than the tenth day after the change *to the sheriff of the county with whom the person had last registered*." N.C. Gen. Stat. § 14-208.9(a) (2005) (emphasis added). Failing to notify the last registering sheriff of a change of address is a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(2) (2005).

D. Social Networking Ban

The North Carolina Legislature decided to ban sex offenders from using certain commercial social networking Websites. N.C. Gen. Stat. § 14-202.5 makes it unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Website where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Website. N.C. Gen. Stat. § 14-202.5(a) (2013). For the purposes of this section, a "commercial social networking Website" is an Internet Website that meets all of the following requirements:

> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
(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.
(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

N.C. Gen. Stat. § 14-202.5(b) (2013)

If an Internet Web site only provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors, that site is not considered a commercial social networking site.

N.C. Gen. Stat. § 14-202.5(c) (2013).

The ban on commercial social networking sites was created to proactively protect children from the dangers presented by registered sex offenders. Such proactive steps to protect children are within the province of the North Carolina Legislature.

ARGUMENT

I. N.C. GEN. STAT. §14-202.5 DOES NOT VIOLATE MR. PACKINGHAM'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

A. N.C. GEN. STAT. §14-202.5 is not constitutional on its face or as applied.

Defendant is a sexual offender who, when he was twenty-one years old, was convicted of the crime of taking indecent liberties with a 13 year old child. As a result of that conviction, he was required to register as a sex offender. He then created a profile which included his photograph, his phone number, and a pseudonym. After joining Facebook, he proceeded to post comments on his profile. (T p. 157)

Despite the above conduct, defendant now presents a facial challenge to the commercial social networking prohibition for sex offenders. In *Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (2008), our Supreme Court upheld the constitutionality of a local ordinance prohibiting the presence of any convicted sexual offenders in any public park owned, operated, or maintained by the town. In rejecting plaintiff's argument that the ordinance impinged on his liberty interest, our Supreme Court noted:

> Our General Assembly has recognized 'that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.' In fact, released sex offenders are four times more likely to be rearrested for subsequent sex crimes than other released offenders.
>
> *Id*. at 332, 661 S.E.2d at 731 (citations omitted).

Under N.C. Gen. Stat. § 14-202.5, sexual offenders are not prevented from using the Internet; they are restricted from accessing commercial social networking sites that allow minors to join. These sites are frequent trolling grounds for predators seeking to observe, track, and/or groom under-aged victims. This statute is a reasonable restriction in light of the government interest it seeks to achieve. As the North Carolina Supreme Court further has noted:

> . . .[I]t is well settled that "[a]cting for the public good, the state, in the exercise of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens." *In re Moore*, 289 N.C. 95, 103, 221 S.E.2d 307, 312 (1976) (quoting *In re Cavitt*, 182 Neb. 712, 715, 157 N.W.2d 171, 175 (1968)). Indeed, this Court recently noted that the State may properly exercise its police power to enact laws protecting or promoting the safety and general welfare of society. *Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008). . . . To pass constitutional muster, the regulation must be (1) reasonable; and (2) related to preserving public peace and safety. *See id.* at 546-47, 159 S.E.2d at 9-10.
>
> *Britt v. State*, 363 N.C. 546, 551, 681 S.E.2d 320, 323 (2009).

Our Supreme Court has held that, in addressing the facial validity of a statute, the inquiry must be guided by the rule that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485-86 (2005)(citing and quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707(1987)). This is so, because:

> the presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground. An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid. The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

Id. (internal citations and quotation marks omitted).

The trial court found that the statute was constitutional as applied to the defendant. It is evident, therefore, that in the trial court's assessment, there exists at least one set of circumstances under which the act would be valid: that is, the circumstances at issue in this case.

In *Bryant*, our Supreme Court emphasized that:

> the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials. Rather, this Court must "measure the balance struck by the legislature against the required minimum standards of the constitution.

Id. at 565, 614 S.E.2d at 486 (internal citations and quotation marks omitted).

Facial Challenges are strongly disfavored because they "often rest on speculation," and therefore "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 450, 170 L. Ed. 2d 151, 161 (2008) (internal quotation marks and citation omitted). Facial challenges also tempt courts to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 451, 170 L. Ed. 2d. at 161. Facial challenges "threaten to short circuit the

democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*

A facial challenge is governed by the general rule, established in *United States v. Salerno,* 481 U.S. 739, 745, 95 L. Ed. 2d 697 (1987), that "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id*. at 745, 95 L. Ed. 2d at 707, *See als, Horton v.City of St. Augustine, Fla.,* 272 F.3d 1318, 1331-32 (11th Cir. 2001) (discussing application of *Salerno* in First Amendment context).

Defendant's facial challenge must fail on his own facts. After committing a sex crime involving a 13 year old, defendant joined the largest social networking site in the history of the Internet. His facial challenge is an attempt to conceal the fact that he is precisely the type of offender the statute was crafted to keep off of commercial social networking sites and away from minors.

B. N.C. Gen. Stat. § 14-202.5 does not limit speech.

The restriction imposed by N.C. Gen. Stat. § 14-202.5 on entering the social networking environment is similar to the Town of Woodfin ordinance that stated, "It shall constitute a general offense against the regulations of the Town of Woodfin for any person or persons registered as a sex offender with the state of North Carolina and or any other state or federal agency to knowingly enter into or on any public park owned, operated, or maintained by the Town of Woodfin." *Standley v. Town of Woodfin*, 362 N.C. 328, 330, 661 S.E.2d 728,729 (2008) citing, Woodfin, N.C., Ordinance § 130.03(2)(A) (Apr. 19, 2005) that limits access to parks and schools. It is not speech that is restricted in any manner. This restriction is on accessing a place where children are at greater risk than on a playground or a school. Playgrounds and schools offer several deterrents to sex offenders that commercial social networking sites do not. If a sex offender approaches a child in a public place observers can: 1)

immediately see the sex offender; 2) can observe the length and type of interaction; and 3) can observe the frequency of contact, if the child is approached on different days. On social networking sites, sex offenders have unfettered and invisible access to children and information about the children they seek to track, profile, groom, and then harm. This is the access that N.C. Gen. Stat. § 14-202.5 seeks to restrict.

C. N.C. Gen. Stat. § 14-202.5 is content-neutral.

Defendant attempts to characterize this as a conviction for "publically praising God on Facebook, and nothing more." (Def.'s Br. p. 5) Defendant goes on to claim that, "For engaging in religious speech on Facebook, the State prosecuted and convicted Mr. Packingham for a felony. The suppression of this religious speech violates the First Amendment, and Article I. Section 13, of the North Carolina Constitution." *Id*. at 9. Despite defendant's claim, N.C. Gen. Stat. § 14-202.5 does not prohibit speech. As such, if there is any residual restriction on speech, it is content-neutral because it restricts speech without reference to the expression's content. *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 641-42, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). As such, it may impose reasonable "time, place, or manner restrictions." *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 227 (1984). Content-neutral restriction on protected speech must satisfy a variant of intermediate scrutiny--it must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675 (1989).

D. N.C. Gen. Stat. § 14-202.5 promotes a compelling government interest that would be achieved less efficiently without it.

The goal of protecting minors from being targeted on social networking sites by certain registered sex offenders is significant. Indeed, it is compelling. *See, e.g., Sable Communications*

of Cal., Inc. v. F.C.C., 492 U.S. 115, 126, 106 L. Ed. 2d 93, 105 (1989) (observing that the government has "a compelling interest in protecting the physical and psychological well-being of minors"); *see also, e.g., Smith v. Doe, Smith v. Doe,* 538 U.S. 84, 103, 155 L. Ed.2d 164, 184 (2003) (quoting a 1997 U.S. Department of Justice study noting that "[w]hen convicted sex offenders reenter society, they are much more likely than any of type of offender to be rearrested for a new rape or sexual assault").

When seeking to protect children from predators, the state need not wait until a child is actually solicited: rather, it can bar predators from going near schools in the first place. *See, e.g., Kennedy v. Louisiana,* 554 U.S. 407, 457 n.5, 171 L. Ed. 2d 525, 561(2008) (Alito, J., dissenting) (collecting residency restriction laws from 12 states); Indiana Code § 35-42-4-11 (prohibiting registered sex offenders from residing within 1,000 feet of a school, park or youth activity center). For the same reason, the State need not wait until a child is solicited by a sex offender on Facebook; rather, it can bar predators from haunting social networking websites in the first place. In both cases, the actual and the virtual neighborhoods are made safer for children by the broader ban.

By its own terms, the Act bars plaintiffs only from a limited subset of commercial social networking sites. The statute targets the large social networking sites – the sites most often frequented by minors. There is no broad ban on Internet use, there is no significant limitation on the ability to communicate. The one thing the Act does is targets the environments where minor are most vulnerable to the tactics of those seeking to exploit them.

E. N.C. Gen. Stat. § 14-202.5 is valid under the First Amendment as a reasonable time, place, or manner regulation.

The United States Supreme Court has held that Internet communications are expressive activity which warrant scrutiny under the First Amendment. *See, e.g., Reno v.ACLU,* 521 U.S.

844, 868-870, 138 L. Ed. 2d 874, 895-897 (1997) (recognizing expressive dimension of Internet activities). It is settled law, however, that "expression, whether oral or written or symbolized in conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 82 L. Ed. 2d 221, 227 (1984). Such restrictions are valid if:

> "they are justified without reference to the content of the regulated speech"; "they are narrowly tailored to serve a significant governmental interest"; and,"they leave open ample alternative channels for communication of the information."

Id.; see also generally Ward v. Rock Against Racism, Inc., 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675 (1989).

This is not a strict scrutiny standard. *See, e.g., Ward,* 491 U.S. at 798, 105 L. Ed. 2d. at 679-680 (observing that "we have never applied strict scrutiny in this context"). To the contrary, a time-place-or-manner regulation will pass First Amendment scrutiny "'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" *Id.* at 799, 105 L. Ed. 2d. at 680 (quoting *United States v. Albertini,* 472 U.S. 675, 689, 86 L. Ed. 2d 536, 548 (1985)).

This is a classic time, place, or manner regulation because it targets not the content of speech, but rather the place where speech occurs. *Cf. Carey v. Brown,* 447 U.S. 455, 462, 65 L. Ed. 2d 263, 270 (1980) (explaining that, in a content-based restriction, "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition"). Unlike a content based regulation, N.C. Gen. Stat. § 14-202.5 merely "prohibits [offenders] from communicating with the public in a certain manner." *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 803, 80 L. Ed. 2d 772, 785 (1984).

F. N.C. Gen. Stat. § 14-202.5 leaves open ample alternative means of communication.

A law may be struck down as facially overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens,* 130 S.Ct. 1577, 1587, 170 L. Ed. 2d 435, 446 (2010) (quoting *Wash. State Grange,* 552 U.S. at 449 n.6, 170 L. Ed. 2d at 160). But "[t]he overbreadth doctrine is Strong medicine' that is used 'sparingly and only as a last resort.'" *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 14, 101 L. Ed. 2d. 1, 17 (1988) (*Broadrick v. Oklahoma*, 413 U.S. 601, 613, 37 L. Ed. 2d 830, 841 (1973). A law's overbreadth must be "substantial," and "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Bd. of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 96 L. Ed. 2d 500, 507(1987) But here, the Act manifestly does not criminalize the entire Internet for registered child predators. Rather, it seeks to prevent them only from using certain social networking sites on the Internet that provide the easiest access to potential child victims. In addition to blocking access to the victims, it is important to keep predators away from any information that can be used to "groom" a child.

Plaintiffs claim the right to receive information is denied them, claiming that "The First Amendment protects Packingham's right to view and receive information and ideas just as it protects his right to speak on the Internet. *Stanley v. Georgia*, 394 U.S. 557, 564, 22 L. Ed. 2d 542, 549 (1969); *Cf. Doe v. City of Albuquerque* 667 F.3d. 111 (10th Cir. 2012)(Upholding sex offenders' right to receive information at a public library). The access to information argument fails because the social network sites at issue are private sites, not under the control of the government. In *City of Albuquerque*, the Courts analysis began with a lengthy discussion

regarding the forum. Here, there is no question that the sites at issue are private subsets of the Internet.

The defendant repeatedly categorizes "methods of expression" as broadly as possible, borrowing language from cases dealing with complete Internet bans. (Def.'s Br. pp. 23-24) There is no complete ban here, simply a partial restriction on joining commercial social networking sites. What defendant also does not acknowledge is that social networking sites are designed to facilitate connections with people that are known. For example, in order to connect with or communicate with someone on Facebook, you must be a member of Facebook and you must "friend" the person you wish to communicate with. This is an affirmative step each user must take to allow someone to communicate directly with them. Other than very few celebrities, most people do not have more than a few dozen people who are interested in what they say on social networking sites. Even with the social networking restriction, any sex offender could pen an article that could be picked up and distributed through social networking channels.

There is no right to the best or the most preferred method of communicating, merely that communication not be banned altogether or that access to an entire segment of the population not be prohibited. There is no such total ban here. There are thousands of free tools that allow sex offenders to send and receive information throughout the internet.

North Carolina's statute is narrowly tailored to keep convicted, registered sex offenders from accessing children via social networking sites. Internet access remains available to all persons, including convicted, registered sex offenders. The Act is not, therefore, violative of the First Amendment rights of the convicted registered sex offenders listed in the statute.

G. N.C. Gen. Stat. § 14-202.5 is not overbroad.

Defendant's challenge is, in part, that the statute is overly broad. An "overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that

substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 156 L. Ed. 2d 148,159 (2003)(internal quotation marks omitted). *Broadrick,* the Supreme Court's seminal over breadth opinion, instructs that a law will be struck down only where its overbreadth is "substantial. . . judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Nevertheless, the Court expressed a deep reluctance to "invalidate] a statute on its face and so prohibit a State from enforcing [it] against conduct that is admittedly within its power to proscribe." *Broadrick*, 413 U.S. at 614, 37 L. Ed. 2d at 842. The Court warned that the overbreadth doctrine is "strong medicine" and should be "employed ... only as a last resort." *Id.* at 613, 37 L. Ed. 2d at 841.

The Supreme Court has continually reminded us that the state's regulation "need not be the least restrictive or least intrusive means of" combating the state's legitimate interests, *Ward*, 491 U.S. at 798, 105 L. Ed. 2d 661at 680, and post-hoc analyses, like the one we are engaging in, are particularly susceptible to running afoul of this principle. At first glance, this standard seems in tension with language in *Frisby* noting a law must "target and eliminate no more than the exact source of the 'evil' it seeks to remedy," *Frisby*, 487 U.S. 474, 101 L. Ed.2d. 420 (1988), and indeed, that is what the dissenters in *Ward* alleged, *see Ward*, 491 U.S. at 804-07, 105 L. Ed. 2d 661, 683-687 (Marshall, J., dissenting). However, *Ward* scales back *Frisby* in a limited number of situations. On the one hand, *Ward* adds a quantitative component to the *Frisby* language by noting the law must not be "*substantially* broader than necessary." *Id*. at 800, 105 L. Ed. 2d at 681 (emphasis added). On the other hand, *Ward* also embodies an administrability exception in stating "the requirement of narrow tailoring is satisfied so long as the [state interest] would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799, 105 L. Ed. 2d at 680 (original quotations and alterations omitted). In other words, the Constitution tolerates some over-inclusiveness if it furthers the state's ability to administer the regulation and combat an evil. It is well documented that child sexual predators use social networking not only as a

means for "grooming" children, but also for gathering information that allows them to profile and target children who are most vulnerable.

II. N.C. GEN. STAT. § 14-202.5 IS NOT UNCONSTITUTIONALLY VAGUE.

Defendant begins his vagueness argument by claiming, "Section 14-202.5 does not give notice to a reasonable person of whether his conduct is illegal. Even the written information about the statute given to [defendant] by the State simply recites the statute's text without explanation or examples." (Def.'s Br. p. 26, citing R p. 74). Defendant argues vagueness despite conceding that "Web sites commonly considered to fall under this statute's restrictions include Facebook and Myspace." (Def.'s Br. p. 7)

N.C. Gen. Stat. § 14-202.5 makes it unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Website where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Website. N.C. Gen. Stat. § 14-202.5(a) (2013) A precondition for conviction under this statute is for the sex offender to have knowledge that the site permits children to "become members or maintain personal Web pages." *Id.* For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
> (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.

> (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.
>
> N.C. Gen. Stat. § 14-202.5(b) (2013)

If an Internet Web site only provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors, that site is not considered a commercial social networking site. N.C. Gen. Stat. § 14-202.5(c) (2013).

Defendant asks, "Does a person violate 14-202.5 by using the "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? (Def.'s Br. p. 26)

The defendant's brief undertakes an analysis of which sites are covered which is no different than the analysis a sex offender would need to go through to determine if they are in danger of violating the prohibition from certain physical locations. There are a myriad of ways defendant could end up "on the premises of any place intended primarily for the use, care or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds" in violation of N.C. Gen. Stat. §14-208.18 (2013) Is a house that is being used as a child care facility covered? Is a school that does not look like a school covered? Is a park that has no play equipment covered? If so, how would an offender know he has entered a park?

Rather than defend his presence on Facebook, defendant lists: Google, Yahoo, Amazon, and MSN as sites that present confusion. All of the sites mentioned by defendant have generic portions of their sites that allow users to search for information and conduct routine tasks. Additionally, Google, Yahoo, and other sites have features that allow users to become members

and interact with others who have become members. Facebook requires users to become members before they can interact with one another.

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. The risks of violating this statute are remote when compared with the obstacles presented by the physical restrictions placed on sex offenders.

III. N.C. GEN. STAT. § 14-202.5 DOES NOT ALLOW ARREST WITHOUT PROBABLE CAUSE.

Defendant claims that the commercial social networking ban allows arrest without "probable cause" that an offense has been committed. Defendant relies exclusively on *State v. Mello*, 200 N.C. App. 561, 568, 684 S.E.2d 477, 482 (2009). *Mello*, involves a city ordinance that targeted potential drug activity on public streets. *Mello*, did not involve registered sex offenders, the protection of children, or the use of the Internet by a convicted child sex offender to access a private website.

The clear legislative intent and the rule of law that "due process does not require every regulatory provision to contain a state-of-mind element." *Meads v. North Carolina Dep't of*

Agric., 349 N.C. 656, 673-74, 509 S.E.2d 165, 176-77 (1998) (citations omitted) No showing of knowledge or intent is necessary to establish a violation of N.C.G.S. § 14-202.5.

Defendant claims there was no probable cause that an offense had been committed despite the fact that he is a registered sex offender who joined Facebook and proceeded to post content in direct violation of N.C. Gen. Stat. § 14-202.5. After the detective discovered the defendant on Facebook, he was careful to verify that an offense had been committed prior to arresting defendant. This due diligence was necessitated by the fact that defendant was using the alias "J.R. Gerrard" on Facebook. (R p. 77)

This assignment of error is without merit and should be dismissed.

IV. N.C. GEN. STAT. § 14-202.5 DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

Defendant argues that limiting access to certain social networking sites "amounts to an additional, more severe punishment." (Def.'s Br. p. 33) In determining whether a law inflicts a greater punishment than was established for a crime at the time of its commission, we first examine whether the legislature intended the social networking restrictions to impose a punishment or to enact a regulatory scheme that is civil and nonpunitive. See *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 1147, 155 L. Ed.2d 164, 176 (2003); *State v. Johnson*, 169 N.C. App. 301, 307, 610 S.E.2d 739, 743-44 (2005); *State v. White*, 162 N.C. App. 183, 192, 590 S.E.2d 448, 454 (2004).

In *State v. Bare*, a similar challenge was made to the requirement in N.C. Gen. Stat. § 14-208.40B that a sex offender enroll in satellite-based monitoring (SBM) for the remainder of his natural life. *State v. Bare*, 197 N.C. App. 461, 677 S.E.2d 518 (2009).

Rather than additional punishment, restrictions like SBM are part of the State's regulatory scheme crafted for public protection rather than punitive purposes.

V. N.C. GEN. STAT. § 14-202.5 IS NOT A BILL OF ATTAINDER.

Defendant asserts that N.C.G.S. § 14-202.5 operates as an *impermissible* bill of attainder. Bills of attainder are prohibited by the United States Constitution "No State shall . . . pass any bill of attainder." U.S. Const. art. I § 10, cl. 1. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803, 53 L. Ed. 2d 867, 907 (1977) (citations omitted). " In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.'" *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.,* 468 U.S. 841, 847, 104 S. Ct. 3348, 3352, 82 L. Ed. 2d 632, 640 (1984) (quoting *United States v. Brown,* 381 U.S. 437, 447, 85 S. Ct. 1707, 1714, 14 L. Ed. 2d 484, 491(1965)).

In a similar challenge to the prohibition against the possession of firearms by convicted felons, the North Carolina Supreme Court concluded:

> As we have already determined that the statute's prohibition of possession of firearms by felons does not operate as punishment, N.C.G.S. § 14-415.1 cannot be a bill of attainder. Any punishment defendant received pursuant to N.C.G.S. § 14-415.1 followed a judicial trial in which a jury determined defendant was a convicted felon and possessed a firearm in violation of the law. Moreover, the statute does not inflict punishment on those who have committed prior acts, but on those who commit the future act of possessing a firearm after having been convicted of a felony. Even if the N.C.G.S. § 14-415.1 prohibition on possession of firearms by felons did operate as a punishment, it is unlikely that felons would be considered a group protected under the Bill of Attainder Clause, as "[l]aws regulating the conduct of convicted felons have long been upheld as valid exercises of the legislative function." *United States v. Donofrio,* 450 F.2d 1054, 1055-56 (5th Cir. 1971), *reversed and remanded on other grounds,* 450 F.2d 1054, 1056 (5th Cir. 1972) (per curiam). Because N.C.G.S. § 14-415.1 does not impose

> punishment on a selected group of persons without a judicial trial, it is not a bill of attainder**.**
>
> *State v. Whitaker*, 364 N.C. 404, 412, 700 S.E.2d 215, 220 (2010).

Similarly, the statute's prohibition on accessing commercial social networking sites does not operate as punishment; therefore, N.C.G.S. § 14-202.5 cannot be a bill of attainder.

VI. N.C. GEN. STAT. §14-202.5 DOES NOT VIOLATE CONSTITUTIONAL RIGHTS TO PRIVACY?

Defendant begins his privacy argument by stating there is "a 'zone of privacy' or 'penumbra' that encompasses the liberty interest of privacy held by citizens, especially in the privacy of their own homes." (Def.'s Br. p. 34, quoting, *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248 (1969)). This argument must fail because the limitation on his access to certain social networking sites relates to his virtual presence outside of his home. This Court should reject outright the notion that, because defendant is in his home, he can engage in conduct on computer servers and computer services outside of his home, in violation of N.C. Gen. Stat. § 14-202.5 and in violation Facebook's terms of use[1]. There is no expectation of privacy on private commercial social networking sites.

VII. N.C. GEN. STAT. § 14-202.5 DOES NOT VIOLATE PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

Defendant contends "the State restricted Mr. Packingham's fundamental rights inherent in the use of the Internet" in violation of substantive due process. Defendant incorrectly concludes that the State deprived defendant of his "liberty and property interest without a hearing." (Def.'s Br. p. 35)

[1] "You will not use Facebook if you are a convicted sex offender " http://www.facebook.com/legal/terms Facebook, Terms of Use Policy

In *State v. Bryant*, the North Carolina Supreme Court engaged in a detailed analysis of a due process challenge to a South Carolina sex offender's challenge to the North Carolina law that required him to register within 10 days. The South Carolina sex offender claimed that he had no notice of the North Carolina requirement. In response to that claim the *Bryant* Court stated:

> The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees that "No person shall be . . . deprived of life, liberty, or property without due process of law." A similar requirement, that no "State [shall] deprive any person of life, liberty, or property without due process of law" is also contained in the Fourteenth Amendment to the federal constitution. Due process has come to provide two types of protection for individuals against improper governmental action, substantive and procedural due process. *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). Substantive due process ensures that the government does not engage in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 190, 72 S. Ct. 205 (1952), or hinder rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969). In the event that the legislation in question meets the requirements of substantive due process, procedural due process "ensures that when government action deprive[s] a person of life, liberty, or property . . . that action is implemented in a fair manner." *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282.
>
> *State v. Bryant*, 359 N.C. 554, 563-564, 614 S.E.2d 479, 485 (2005)

The *Bryant* Court reversed the Court of Appeals and held that the South Carolina sex offender's due process rights had not been violated.

CONCLUSION

Defendant's entire argument is predicated on a fundamental mischaracterization of the restrictions that have been placed on him. He is a registered sex offender who took indecent liberties with a 13 year old child. He then joined the largest commercial social networking site on the planet. He now presents this Court with a First Amendment argument that has at its core a false premise. Defendant denies that Facebook is a private social networking site. He violated

their terms of use and joined despite having agreed to the terms of use that prohibit him from joining Facebook.

Defendant relies a line of cases that fundamentally miss the technological distinction between the Internet, which has a public component, with commercial social networking sites, which are private.

Defendant's Internet access remains intact. His ability to connect with billions of people remains intact. The only areas that he no longer has access to are the virtual playgrounds and sand boxes where children can be approached and groomed out of the sight and protection of their parents or guardians.

For all of these reasons, this Court should reject defendant's arguments and dismiss this appeal.

Respectfully submitted this 14th day of March, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 28

The undersigned hereby certifies that this Defendant-Appellant's Brief is in compliance with Rule 28(j)(2)(A)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in 12 point Times New Roman font and contains no more than 8,750 words in the body of the Brief, footnotes and citations included, as indicated by the word-processing program used to prepare the Brief.

This the 14th day of March 2013.

Electronically Submitted
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Director, Victims and Citizens Services

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that the foregoing Brief for the State has been filed by uploading the same to the North Carolina Court of Appeals.

I further certify that a copy of the above Brief for the State has been duly served upon Attorney Glenn Gerding, counsel for the defendant-appellant by depositing a copy thereof in the United States mail, first class, postage prepaid, addressed to:

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This the 14th day of March, 2013.

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