No. 366PA13 FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Durham**
	)	
LESTER G. PACKINGHAM	)	

****

NEW BRIEF FOR THE STATE
(Appellant)

****

FILED
JAN 13 2014
SUPREME COURT OF NORTH CAROLINA

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NEW BRIEF FOR THE STATE
(Appellant)

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ISSUE PRESENTED

DID THE COURT OF APPEALS ERR IN HOLDING THAT NORTH CAROLINA'S STATUTE BANNING REGISTERED SEXUAL OFFENDERS FROM ACCESSING COMMERCIAL SOCIAL NETWORKING INTERNET SITES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED?

STATEMENT OF THE CASE

Defendant was indicted by the Durham County Grand Jury for violating N.C.G.S. § 14-202.5, which prohibits use of social networking Web sites by registered sexual offenders.

Prior to trial, defendant filed a motion to dismiss in Durham County Superior Court. On 4-5 April 2011, the Honorable Michael Morgan, Superior Court Judge presiding, conducted a hearing on defendant's motion, along with a similar motion filed by another defendant, Christian M. Johnson. On 7 April 2011, Judge Morgan entered an order denying defendant's and Mr. Johnson's motions to dismiss. On 31 May 2011, defendant and Mr. Johnson jointly filed a petition for writ of certiorari and petition for writ of mandamus in the Court of Appeals. By order dated 22 June 2011, the Court of Appeals denied defendants' petition for writ of certiorari.

On 28 May 2012, the case was tried before the Honorable Osmond Smith, Superior Court Judge presiding, and a jury. Upon defendant's conviction and sentence of 6 to 8 months in prison, defendant appealed to the Court of Appeals.

On 20 August 2013, the Court of Appeals vacated defendant's conviction, declaring N.C.G.S. § 14-202.5 is unconstitutional on its face and as applied to defendant. State v. Packingham, No. COA12-1287 (N.C. Ct. App. Aug. 20, 2013).

On 26 August 2013, this Court allowed the State's petition for temporary stay.

On 7 November 2013, this Court allowed the State's petition for discretionary review and petition for writ of supersedeas.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Review of the decision of the Court of Appeals in this case is based upon this Court's order allowing the State's petition for discretionary review pursuant to N.C. R. App. P. 15 and N.C.G.S. § 7A-31.

STATEMENT OF FACTS

On or about 30 April 2010, Corporal Brian Schnee, a supervisor in the juvenile investigation division of the Durham Police Department, was working to identify registered sex offenders who were illegally accessing commercial social networking Web sites. (T p. 132) Officer Schnee determined that defendant was a registered sex offender living in Durham County. (T p. 132) Defendant had been convicted in 2002 of the registerable offense of taking indecent liberties with a child. (R p. 72).

Officer Schnee located defendant's picture on the North Carolina Department of Justice Sex Offender Registry. (T p. 132) Officer Schnee then found a user profile for defendant on Facebook, on which defendant used the

assumed name "J.r. Gerrard" instead of his own name. (T pp. 133-34; R p. 77) Officer Schnee recognized defendant from the photograph on the profile page. (T p. 133)

Officer Schnee sent a search warrant and a preservation request to Facebook. (T p. 139) After receiving the documents from Facebook, Officer Schnee obtained a search warrant for defendant's residence. (T p. 142)

Officer Schnee executed the search warrant on 21 July 2010. (T p. 142) From defendant's residence, Officer Schnee seized a picture of defendant, which the Officer recognized as the same picture he had seen on defendant's Facebook page, a Duke Energy bill, which listed defendant's phone number as the same phone number listed on defendant's Facebook page, and other items corroborating defendant's identity as the same person who had opened and used a Facebook account. (T pp. 152, 153, 157)

ARGUMENT

STANDARD OF REVIEW

The standard of review for the issues presented for this Court's consideration is whether there is any error of law in the decision of the Court of Appeals. State v. Brooks, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994).

I. THE COURT OF APPEALS ERRED IN HOLDING THAT NORTH CAROLINA'S STATUTE BANNING REGISTERED SEXUAL OFFENDERS FROM ACCESSING COMMERCIAL SOCIAL NETWORKING INTERNET SITES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

This is a case in which a convicted sexual offender established and accessed a Facebook account under a fictitious name. Although the Court of Appeals acknowledged that "persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream social networking sites such as Facebook.com and Myspace.com," slip op. at 18, the Court of Appeals nonetheless declared N.C.G.S. § 14-202.5 unconstitutional, both on its face and as applied to this defendant, under the First Amendment. This was an error of law.

While the First Amendment may be implicated as to some hypothetical defendant's access to some social networking sites, it was not implicated in the present case, where defendant navigated to a privately-owned commercial Web site that specifically prohibits convicted sexual offenders from its site.

In reaching its erroneous conclusion, the Court of Appeals also relied upon authorities from other jurisdictions in which the provisions of those states' statutes were distinct from North Carolina's statute, and in which the purpose behind those other states' statutes was different from North Carolina's. The Court of Appeals further, while acknowledging that North Carolina's statute is content-neutral

legislation and thus subject to intermediate scrutiny, erroneously relied upon federal authorities analyzing content-specific legislation under the strict scrutiny standard, and effectively applied strict scrutiny in this case. The Court of Appeals further erroneously applied the vagueness and overbreadth doctrines. For all of these reasons, the decision of the Court of Appeals was error and should be reversed.

A. The Court of Appeals Erred in Holding that the Statute Violates Defendant's Freedom of Speech Rights Under the First Amendment Where the First Amendment Was Not Implicated Here.

The Court of Appeals summarily declared that North Carolina's statute banning registered sexual offenders from certain social networking sites "plainly involves defendant's First Amendment rights[.]" Slip op. at 7. This is error. North Carolina's social networking statute limits convicted sexual offenders' travel to certain privately owned "commercial social networking" sites on the Internet. See N.C.G.S. § 14-202.5(a)(copy in Appendix). These sites are private commercial sites, not public forums. The particular commercial social networking site at issue in this case, Facebook.com, specifically prohibits convicted sexual offenders from using its site. See www.facebook.com/legal/terms at heading 4, Registration and Account, item 6 ("You will not use Facebook if you are a convicted sex offender."). As such, North Carolina should recognize no First Amendment rights

as to sexual offenders on Facebook or other social networking sites that dissallow sexual offenders from their sites.

Both the United States Supreme Court and this Court have held that the First Amendment does not protect free speech rights of trespassers or uninvited guests. See Lloyd Corporation v. Tanner, 407 U.S. 551, 33 L. Ed. 2d 131 (1972); State v. Felmet, 302 N.C. 173, 177-78, 273 S.E.2d 708, 711-12 (1981).[1] In Lloyd, the United States Supreme Court held that defendant had no First Amendment right to distribute handbills at a mall where this was against the property owner's wishes and contrary to the mall's policy against distribution of all handbills on the property. Lloyd, 407 U.S. at 567-70, 33 L. Ed. 2d at 142-43. The Court noted:

> Although . . . . courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.

Id. at 567-68, 33 L. Ed. 2d at 142. Similarly, in Felmet, this Court held that where owners of a shopping mall had posted no solicitation signs in the mall's private parking lot, it was not a protected exercise of free speech for defendant to approach customers to sign a petition. Id.

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[1] The State filed a memorandum of additional authority citing Felmet, and this issue was discussed in oral argument before the Court of Appeals.

The United States Supreme Court has likened certain aspects of the World Wide Web to "a sprawling mall offering goods and services." Reno v. ACLU, 521 U.S. 844, 853, 138 L. Ed. 2d 874, 886 (1997).[2] North Carolina's statute merely prohibits certain offenders from entering certain privately-owned "sites" within this sprawling mall. As in Lloyd and Felmet, the First Amendment does not protect speech in which a convicted sexual offender might seek to engage on a private web address whose owner has put him on notice he is not welcome to visit.

North Carolina continues to maintain that this is not a speech regulation, it is a regulation on defendant's presence on certain sites in cyberspace. Any impact on

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[2] Reno involved a content-specific speech regulation enacted to protect minors from "indecent" and "patently offensive" communications on the entire Internet, and therefore addresses a different context from the present content-neutral legislation prohibiting registered sexual offenders from visiting certain designated social networking sites. Reno, 521 U.S. at 849, 138 L. Ed. 2d at 883. Reno, however, makes a number of pertinent observations about the Internet, which it describes as "an international network of interconnected computers." Id. at 849, 138 L. Ed. 2d 884. Reno notes the evolving categories of services available on the Internet, including "electronic mail ('e-mail'), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web.'" Id. at 851, 138 L. Ed. 2d at 884. "Taken together, these tools constitute a unique medium--known to its users as "cyberspace" – located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." Id. As to Web pages, such as those at issue here, Reno notes, that each has its own address – "rather like a telephone number." Id. at 852, 138 L. Ed. 2d at 885 (emphasis added). Unlike the legislation at issue in Reno, the legislation at issue here does not cover "the Internet" as a whole, but rather only discrete Web addresses that meet all of the features set forth in the statute. See N.C.G.S. § 14-202.5.

speech is incidental. (See Subsection B, below). A huge portion of Internet use is information gathering, not any exercise of speech by the user. See, eg., Reno, 521 U.S. at 852, 138 L. Ed. 2d at 885 (noting that the "best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites.")(emphasis added).

Just as with a physical site, a person can travel to a Web site with no speech purpose at all. The commercial social networking ban is an exercise of the State's police power to protect potential victims from the danger of being targeted at all, regardless of any actual contact -- much like the restrictions on sexual offenders from certain physical sites where they pose danger to minors. See N.C.G.S. § 14-208.18 ("Sex offender unlawfully on premises); see also Kennedy v. Louisiana, 554 U.S. 407, 457 n.5, 171 L. Ed. 2d 525, 561 (2008)(Alito, J., dissenting)(listing various statutes across the country that restrict sexual offenders from residing within a certain proximity from schools or child care facilities).

This Court likewise has recognized the validly of restricting registered sexual offenders from frequenting certain physical places where they pose a threat to minors. See Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728(2008). In Woodfin, this 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. Id. In rejecting plaintiff's argument that the ordinance impinged on his liberty interest, this 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." N.C.G.S. § 14-208.5 (2007); *see also Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) (discussing the threat posed by sex offenders); *McKune v. Lile*, 536 U.S. 24, 32-33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) (plurality) (same). **In fact, released sex offenders are four times more likely to be rearrested for subsequent sex crimes than other released offenders.** *See* Patrick A. Langan, et al., U.S. Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994*, at 1 (2003).

Id. at 333, 661 S.E.2d at 731 (emphasis added). A sexual offender can merely "lurk" on a site cyberspace, much as one can lurk at a park or other physical space frequented by children. Perhaps presenting a more insidious danger, through commercial social networking sites, sexual offenders remain invisible while gaining access to information about a potential victim's appearance, interests, home life, school, contact information, and other data, which can enable the offender to approach an unwitting victim, either in person or online, under the guise of familiarity or shared interests. The legislature enacted the commercial social networking ban to address this concern, as an exercise of its function to enact laws to protect or promote the health, morals, order, safety, and general

welfare of society. See id. (the police power of the State may be exercised to enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society).

Under the statute at issue here, sexual offenders are not prevented from using the Internet; they are restricted from accessing certain specifically-defined types of private commercial social networking sites, which are frequent trolling grounds for predators seeking to track or groom under-aged victims. Even less restrictive than banning sexual offenders' presence in a public park or other physical location, this is a reasonable restriction in light of the government interest it seeks to achieve.

As the United States Supreme Court has noted, in holding that restrictions on travel are liberty interests and not First Amendment issues:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. **The right to speak and publish does not carry with it the unrestrained right to gather information.**

Zemel v. Rusk, 381 U.S. 1, 16-17, 14 L. Ed. 2d 179, 190 (1965)(emphasis added) (holding that the right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment; its impact on

speech does not make it a First Amendment issue; this is merely a factor to be considered in determining whether appellant has been denied due process of law).

Restraints on a sexual offender's right to travel to certain internet sites in "cyberspace" is likewise a liberty issue under the Fifth and Fourteenth Amendments, not a free speech issue under the First and Fourteenth Amendments. The impact of the statute upon defendant's speech is merely a factor to be considered in determining whether defendant has been denied due process of law. See id. Here, defendant was not denied due process, where, as specifically noted by the Court of Appeals, persons of ordinary intelligence would likely understand that the statute prohibits them from accessing Facebook. See slip. op. at 18; see also Hill v. Colorado, 530 U.S. 703, 732, 147 L. Ed. 2d 597, 621 (2000)(A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement). Defendant had fair notice of what was prohibited, and there is no possibility of "seriously discriminatory enforcement" where the statute applies only to registered sexual offenders.

The right of a sexual offender to go on a private commercial social networking site is not a fundamental right. In determining whether a liberty interest

is fundamental, our appellate courts assess whether it is "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the liberty interest at issue] were sacrificed." Woodfin, 362 N.C. at 331, 661 S.E.2d at 730 (citing and quoting Washington v. Glucksberg, 521 U.S. 702, 720-21, 138 L. Ed. 2d 772 (1997)). In Woodfin, this Court noted that precious few rights – such as the right to marry, the right to have children, and the right to marital privacy – have been considered to be "fundamental rights." Id. (citing Loving v. Virginia, 388 U.S. 1, 87, 18 L. Ed. 2d 1010 (1967)(right to marry), Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L. Ed. 1655 (1942)(right to have children), and Griswold v. Connecticut, 381 U.S. 479, 85, 14 L. Ed. 2d 510 (1965)(right to marital privacy).

Just as defendant's right to go to certain physical sites was determined not to be a fundamental right in Woodfin, see id., neither is defendant's right to go to certain private commercial social networking sites a fundamental right. The Court of Appeals, failing to recognize key distinctions between North Carolina's statute and those other jurisdictions, such as the fact that North Carolina's statute does not forbid access to discrete instant messaging, chat rooms and email services (see Subsection B below), erroneously adopted the incorrect perception that North Carolina's statute somehow amounts to a ban on sexual offenders from going on

the Internet as a whole. It does not. It bans registered sexual offenders from specific commercial social networking sites that meet not some but all of the features described in the statute. See N.C.G.S. § 14-202.5(b)(requiring that all of its subsections be met to meet the definition of a commercial social networking site).

Prohibiting registered sexual offenders from these designated sites has a rational relation to protection of minors from being targeted by these offenders. Here, as in Woodfin, this Court should uphold the statute as an appropriate exercise of the State's police power to protect the public from sexual offenders.

This Court has noted, in addressing the facial validity of a statute, that 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. at 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). This case is an example of a circumstance under which the commercial social networking ban is valid: defendant, a convicted child sexual offender, used a fictitious name.[3] to access Facebook - a private commercial site which prohibits his presence by its own terms of use.

The Court of Appeals erred in second-guessing the balance struck by our legislature against the required minimum standards of the constitution. See Bryant 359 N.C. at 565, 614 S.E.2d at 486. The appropriate standard that applies to this particular case is rational basis, see Woodfin, 362 N.C. 328, 661 S.E.2d 728. North Carolina's commercial social networking ban does not implicate the First Amendment, particularly under the facts of the present case, and passes constitutional muster under the Fifth Amendment. The decision of the Court of Appeals should be reversed on this basis.

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[3] "Fictitious" means, inter alia, "adopted or assumed in order to deceive." American Heritage Dictionary 506 (3ed. 1997)

B. North Carolina's Statute is Constitutional Under the First Amendment Where it Promotes a Substantial Government Interest That Would Be Achieved Less Effectively Absent the Regulation.

The Court of Appeals erred in striking down North Carolina's social networking statute under the First Amendment where defendant had no First Amendment rights as to Facebook. Even in some other hypothetical case in which the First Amendment might apply to a defendant's conduct, North Carolina's social networking statute would be constitutional.

A regulation having an incidental impact on speech receives intermediate scrutiny. See, eg., United States v. O'Brien, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 679-80 (1968)(holding that a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests). The Court of Appeals acknowledged the framework set forth by the United States Supreme Court that content-neutral regulations are subject to intermediate scrutiny: they must be both "narrowly tailored to achieve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Slip op. at 7-8 (citing and quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675 (1989)). As further acknowledged by the Court of Appeals,

> [T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest **that would be achieved less effectively absent the regulation** . . . . So long as the means chosen are not **substantially broader than necessary** to achieve the government's interest, . . . **the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative**.

Slip op. at 8 (quoting Ward, 491 U.S. at 799-800, 105 L. Ed. 2d at 680-81)(emphasis added). Instead of applying this test, however, the Court of Appeals held that the statute was not narrowly tailored based upon its conclusion that the State's interest could be adequately served by some less-speech-restrictive alternative. This was error.

The Court of Appeals failed to perceive that, unlike North Carolina's statute, the statutes of Indiana, Louisiana, and Nebraska that were declared unconstitutional under the First Amendment 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. See Indiana Code § 35-42-4-12 (2011)(Indiana's statute, prohibiting use of "a social networking website or an instant messaging or chat room program")(emphasis added); La. Rev. Stat. Ann. 14:91.5 (2011)(Louisiana's statute, prohibiting use of "social networking websites, chat rooms, **and** peer-to-peer networks")(emphasis added); Neb. Rev. Stat. § 28-322.05 (2012)(Nebraska's

statute, prohibiting use of "a social networking website, instant messaging, **or** chat room service")(emphasis added); see also Doe v. Prosecutor, 705 F.3d 694, 698 (7th Cir. 2013)(invalidating Indiana Code § 35-42-4-12(2011)); Doe v. Nebraska, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012) (invalidating Neb. Rev. Stat. § 28-322.05 (2012)); Doe v. Jindal, 853 F. Supp. 2d 596, 607 (M.D. La. 2012)(invalidating La. Rev. Stat. Ann. 14:91.5 (2011).

Contrary to the sweeping inclusions of purely "speech-dedicated" sites by the other states' statutes, North Carolina's statute expressly exempts such discretely speech-oriented sites from its purview. See N.C.G.S. § 14-208.5(c)(1). North Carolina's statute cordons off certain areas of cyberspace rather than effectively throwing a blanket prohibition on sexual offenders' Internet use, as the courts of the other jurisdictions have viewed their more far-reaching provisions. See, eg., Doe v. Prosecutor, 705 F.3d at 698 (regarding Indiana's statute as effectively constituting a complete Internet ban).

Unlike the statutes at issue in Indiana, Nebraska, and Louisiana, North Carolina's statute does not prohibit sexual offenders from using instant messaging, chat rooms, or peer-to-peer networks. North Carolina instead includes the following express exceptions:

> (c) A **commercial social networking Web site does not include** an Internet Web site that either:

> (1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or
>
> (2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

N.C.G.S. § 14-208.5(c)(1)&(2). The Court of Appeals failed to recognize these important exceptions when it noted that the Seventh Circuit called Indiana's statute "'overinclusive' and a complete 'social media ban.'" Slip op. at 10 (quoting Doe v. Prosecutor, 705 F.3d at 698-99).

Where Indiana, Louisiana, and Nebraska's statutes would have included any Internet site with a message board, such as Foodnetwork.com, North Carolina's does not. North Carolina's statute, unlike the other states' statutes, contains all of the limiting language noted in bold below:

> § 14-202.5. Ban use of **commercial** social networking Web sites by sex offenders
>
> (a) Offense. -- It is 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 Web site **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 Web site.
>
> (b) 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.**
>
> (c) A commercial social networking Web site **does not include** an Internet Web site that either:
>
> (1) **Provides only one** of the following **discrete services**: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; **or**
>
> (2) Has as its **primary purpose** the facilitation of **commercial transactions** involving goods or services between its members or visitors.

N.C.G.S. § 14-202.5 (emphasis added). The Court of Appeals failed to recognize this limiting language, including that the statute pertains only to commercial revenue-producing sites, not to non-commercial sites. Such a commercial site

must also permit minor children to become members or maintain personal Web pages and must also link to the personal Web pages of other members that can be accessed by members or visitors to the site and it must also provide mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. See id. The Court of Appeals' analysis erroneously neglects to consider these differences, and further neglects to recognize that our statute specifically requires that all of the provisions of the statute, not just some of them, must apply in order for a site to be considered a "commercial social networking site." See id. The decision of the Court of Appeals is based upon faulty premises which lead to an erroneous conclusion that our statute is unconstitutional.

It is noteworthy that, since Louisiana's social media statute was declared unconstitutional, see Doe v. Jindal, 853 F. Supp. 2d 596, 607 (M.D. La. 2012), the Louisiana legislature recently amended Louisiana's statute to comport more closely with North Carolina's statute. See La. Rev. Stat. Ann. 14:91.5 (2012). The newly-amended Louisiana statute changed the name from "social media" to "social networking," included that the use must be "intentional," removed "chat rooms and peer-to-peer networks," and excepts many sites that were previously banned, such as "websites that only offer photo sharing, email, or instant messaging[.]" Id. In

juxtaposition to the unconstitutionality of its predecessor, the new version of the Louisiana statute has already been viewed as "likely narrowly tailored to the significant government interest of protecting children from sex offenders on the Internet." See Comment: Why Don't You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.2 Is Unconsitutional. 73 La. L. Rev. 884 (Spring 2013). North Carolina's statute, as written, is already narrowly tailored to the significant government interest of protecting children from sex offenders on the Internet.

There also is an important distinction between North Carolina's government interest and the interest professed in the case heavily relied upon by the Court of Appeals. See slip op. at 9,10, 15-16 (citing and relying upon Doe v. Prosecutor, 705 F.3d 694). Indiana's statute pursued only the narrower goal of "targeting the evil of improper communications with minors." Slip op. at 10 (quoting Doe v. Prosecutor 705 F.3d at 698). Unlike North Carolina, the State of Indiana agreed that there is nothing dangerous about a sexual offender's use of social media "as long as he does not improperly communicate with minors." Doe v. Prosecutor, 705 F.3d at 699. North Carolina does not agree with this limited purpose. (See Subsection A, above).

In light of the State of Indiana's agreement that the purpose of its statute was to regulate improper communication with minors, the Seventh Circuit noted:

> there is no disagreement that illicit communication comprises a minuscule subset of the universe of social network activity. As such, the Indiana law targets substantially more activity than the evil it seeks to redress.

Id. In contrast, North Carolina's statute seeks to redress not simply illicit communications, but rather the presence of sexual offenders on sites upon which they can gather personal information about the home life, address, school, and interests of potential targets.

In North Carolina, illicit communications are addressed by other criminal offenses, see, eg., N.C.G.S. § 14-202.3 (solicitation of a child by computer); N.C.G.S. § 14-196.3 (cyber-stalking). The Court of Appeals erroneously used the existence of these separate offenses as a justification for declaring our social networking statute unconstitutional, see slip op. at 20-21, failing to perceive that these cyber-solicitation and cyber-stalking offenses necessarily involve the extra step of online contact and that these offenses are designed to address the specific evil of certain online activity. The social networking statute is designed to effect the goal of preventing registered sexual offenders from gathering information they can use to target an individual, for instance a child who goes to a nearby church or elementary school. It is designed to prevent access to personal information, the use

of which could extend beyond an online approach to an in-person encounter, enabling the sexual offender to give a false sense of familiarity by knowing the target's name, or personal details such as that they have a golden retriever or play soccer.

In relying heavily on the Seventh Circuit's decision in Doe v. Prosecutor, our Court of Appeals failed to recognize that the very rationale embodied in the legislative purpose of North Carolina's statute was not the same justification for Indiana's statute. The Seventh Circuit specifically noted:

> Despite the infirmity of the statute in this case, **we do not foreclose the possibility that keeping certain sex offenders off social networks advances the state's interest in ways distinct from the existing justifications**. For example, **perpetrators may take time to seek out minors they will later solicit**. This initial step requires time spent on social networking websites before the solicitation occurs. **In the future, the state may argue that prohibiting the use of social networking allows law enforcement to swoop in and arrest perpetrators before they have the opportunity to send an actual solicitation**. This argument remains speculative. . . . We speculate only to make clear that **this decision should not be read to limit the legislature's ability to craft constitutional solutions to this modern-day challenge**.

Doe v. Prosecutor, 705 F.3d at 701-02 (emphasis added). In this jurisdiction, our legislature has noted the dangers of these offenders, and has crafted the statute for the purpose of aiding law enforcement in quickly apprehending sexual offenders in violation of the ban. See slip op. at 2 (noting our legislature had deemed that sexual

offenders pose significant and unacceptable threats to the public safety and welfare of children, and that our legislative scheme with regard to registered sexual offenders is to protect the public and children from the risk of recidivism by these offenders, and to aid law enforcement's efforts to protect communities, conduct investigations, and quickly apprehend offenders).

Here, the requirement of narrow tailoring is satisfied because the statute "promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 799-800, 105 L. Ed. 2d at 680-81. The means chosen are not substantially broader than necessary to achieve the government's interest. See id. Instead, the Court of Appeals erroneously struck down the statute, in direct opposition to the standard, because it concluded that the State's interest could be adequately served by some less-speech-restrictive alternative.

For instance, the Court of Appeals expressly agreed with defendant's argument that the statute "burdens more people than needed to achieve the purported goal of the statute." Slip op. at 13 (quoting defendant's brief). This is not the standard. "More people than needed" does not equate to "a substantial number" of unconstitutional applications to speech, as is required to invalidate a statute as unconstitutional under the intermediate scrutiny standard. See Ward, 491

U.S. at 799-800, 105 L. Ed. 2d at 680-81 (a regulation "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative").

The Court of Appeals noted that, because the legislature made certain other restrictions on sex offenders, such as satellite-based monitoring, applicable only to "specified subsets of offenders," it could have done so under this statute. See slip op. at 14. The Court of Appeals suggested that the statute could have been narrowed to offenders who previously used a social networking Web site to target children. Slip op. at 15. The Court of Appeals failed to apprehend that the ability to further narrow the statute does not render the statute unconstitutional under the intermediate scrutiny standard. See Ward, 491 U.S. at 799-800, 105 L. Ed. 2d at 680-81.

The Court of Appeals further fails to recognize that the possible narrowing it contemplates would vitiate the protection objectives of this particular legislation. For instance, narrowing the statute to apply only to offenders who previously used a social networking site to target children means that the statute would apply only to those offenders who had been caught and successfully prosecuted for actually soliciting a child via this particular means. Trolling social networking sites for potential victims may not lead to an internet solicitation, but rather to an in-person

encounter using the information gleaned from the site. It thus would not effect the purposes of the legislature to limit application of the statute in the manner contemplated by the Court of Appeals.

Likewise, although the legislature could narrow the statute to exclude sexual offenders who committed crimes such as sexual battery and whose previous victims were adults, see slip op. at 15, the ability to further narrow the statute, again, does not render the statute unconstitutional under the intermediate scrutiny test. See Ward, 491 U.S. at 799-800, 105 L. Ed. 2d at 680-81.

Moreover, there are compelling reasons why the legislature would not want to so narrow the statute, and would regard the statute as less effective if these offenses were not included. Sexual battery and attempted rape, regardless of the age of the victim, are considered "sexually violent offenses." See N.C.G.S. § 14-208.6 (5). Including these offenders in the social networking ban is directly in line with the protection purpose of the legislation. For instance, the crime of sexual battery means that the sexual contact must be against the other person's will and done with the specific intent to either sexually abuse them or gratify one's own sexual purpose. See N.C.G.S. § 14-27.5A. This offense protects minors to whom taking indecent liberties would not extend (minors over 16 but under 18), see N.C.G.S. § 14-202.1, as does adult rape or attempted rape (minors over 15 but

under 18), see N.C.G.S. § 14-27.2. Even as it pertains to an offender who, in the past, committed one of these crimes against a 40 year-old adult, the legislature and our courts might rationally conclude that a person willing to take this action against a mature adult would also pose a threat to other, even more vulnerable victims, such as minors.

Violent sexual offenders are on notice that their actions could curtail their constitutional rights. Indeed, in North Carolina, with narrow exception, all convicted felons, including non-violent felons such as tax evaders, forgers, and embezzlers, are subject to loss of their Second Amendment right to bear arms for no fewer than 20 years after conviction.[4] N.C.G.S. § 14-415.1; N.C.G.S. § 14-415. Even when felony firearm statutes stretches to non-violent felons, such restrictions have been deemed reasonable. See District of Columbia v. Heller, 554 U.S. 570, 626, 171 L. Ed. 2d 637, 678 (2008) (affirming that the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" survive Second Amendment scrutiny). North Carolina's felony firearms statute, although it includes non-violent felons and felonies not committed with a firearm in its sweep, has nonetheless been deemed constitutional on its face as a reasonable regulation

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[4] An exception appears to have been carved for felony convictions pertaining to antitrust violations, unfair trade practices, or restraint of trade. N.C.G.S. 14-415.1(e).

pursuant to exercise of the State's police power to enact laws protecting or promoting the safety and general welfare of society. See Britt v. State, 363 N.C. 546, 551, 681 S.E.2d 320, 323-24 (2009)(citing State v. Dawson, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968)). Defendants may, however, still raise "as applied" challenges pertaining to restoration of these rights. See id. at 546, 681 S.E.2d at 320.

This Court has noted that there is a "heightened risk and public concern associated with convicted felons possessing firearms[.]" State v. Jackson, 353 N.C. 495, 501, 546 S.E.2d 570, 573-74 (2001). Similarly, there is a heightened risk and public concern associated with violent sexual offenders' ability to invisibly gain information about and target potential victims via social networking sites. Our legislature has reasonably exercised its power, in an effort to protect the public, by banning violent sexual offenders from limited sites on the Internet.

Instead of facially invalidating our statute, the appropriate remedy to any perceived over-inclusion of affected sexual offenders is to allow an as-applied challenge on that basis. For the above-noted reasons, however, even a sexual offender whose prior conviction involved an adult victim would have difficulty in successfully mounting an as-applied constitutional challenge to inclusion under the ban.

North Carolina's social networking ban is not "substantially broader than necessary" to achieve its protection purpose. See Ward, 491 U.S. at 799-800, 105 L. Ed. 2d at 680-81. Just because the legislature could have narrowed the statute does not mean it should have or must do so in order to achieve constitutionality of the legislation. The Court of Appeals improperly facially invalidated the statute on this improper rationale. See slip op. p. 15.

Where, as here, the statute promotes a substantial government interest that would be achieved less effectively absent the regulation, and where the means chosen are not substantially broader than necessary to achieve this interest, this Court should reverse the decision of the Court of Appeals and uphold the statute as constitutional on its face and as applied.

C. The Court of Appeals Erroneously Declared the Statute to be Overbroad and Vague

Although the Court of Appeals expressly noted that "persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream social networking sites such as Facebook.com and Myspace.com." slip op. at 18, the Court of Appeals nonetheless declared the statute unconsitutional, both on its face and as applied to this defendant. This was an error of law.

This defendant established and used a Facebook account under a fictitious name. The Court of Appeals does not dispute that persons of ordinary intelligence

would understand that the statute applies to Facebook. The statute therefore clearly applies to the conduct of this particular defendant. As such, the vagueness doctrine does not apply in the context of this case.

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. Id. (citing and quoting United States v. Harriss, 347 U.S. 612, 617 (1954)). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974). "The strong presumptive validity that attaches to [a legislative act] has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." Id. (citations omitted).

The vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment, and a person whose conduct is clearly proscribed cannot make the challenge that the law is vague as applied to the conduct of others. United States v. Williams, 553 U.S. 285, 170 L. Ed. 2d 650 (2008)(citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495, 71 L. Ed. 2d 362, 369 (1982)); cf. Chicago v. Morales, 527 U.S. 41, 144

L. Ed. 2d 67 (1999)(noting an exception allowing a First Amendment vagueness challenge where a criminal statute is devoid of any *mens rea* or *scienter* requirement).

North Carolina's social networking statute has the *scienter* requirement that a sexual offender cannot access a commercial social networking site "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 Web site." N.C.G.S. § 14-202.5(a). This is a classic *scienter* requirement, similar to those of other criminal statutes, requiring that an offender have some culpable state of mind in pursuing the action in which he is engaging.[5] See, eg., Hill v. Colorado, 530 U.S. 703, 732, 147 L. Ed. 2d 597, 622 (2000)(noting that vagueness concerns are ameliorated by the fact that the statute at issue contained a *scienter* requirement, applying only to a person who "knowingly" approaches within eight feet of another for certain purposes, without that person's consent). North Carolina's statute protects an offender from prosecution unless he knows he is on a prohibited site. See N.C.G.S. § 14-202.5(a). This *scienter* requirement means that

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[5] The Court of Appeals somehow construes this to mean that "by its plain language, it is assumed that every offender inherently 'knows' which Web sites are banned." Slip op. at 19. This is an illogical construction, against the plain language of this ordinary *scienter* requirement, and against our appellate court's duty to construe the language of the statute in favor of constitutionality. See, eg., Mitchell v. Financing Authority, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

the State must prove that the sexual offender knows that a given site "permits minor children to become members or to create or maintain personal Web pages" on the site. See id. This is a high burden for the State to meet.

Defendant has no vagueness claim here, and he cannot challenge the law based upon the hypothetical application to other defendants whom he imagines could be prosecuted, for instance, for going on Amazon.com, or Foodnetwork or Google. The United States Supreme Court noted, however, in Williams,

> [W]e have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

Williams, 553 U.S. at 304, 170 L. Ed. 2d at 669-70 (emphasis added). Thus, in this particular context, the only "vagueness" inquiry is whether the statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

"Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794, 105 L. Ed. 2d 661 (1989). "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 228-29 (1972). In the present case, it is demonstrable that it is not the language of the statute that lead to

the Court of Appeals' declaration of vagueness and overbreadth, but rather the Court of Appeals' own failure to apply all of the requirements of the statute to its hypotheticals.

The Court of Appeals struck down the statute based upon the incorrect conclusion that it forbids sex offenders from sites such as Amazon.com and Foodnetwork.com. The Court of Appeals erroneously adopted this hypothetical:

> For example, while Foodnetwork.com contains recipes and restaurant suggestions, it is also a commercial social networking Web site because it derives revenue from advertising, facilitates the social introduction between two or more persons, allows users to create user profiles, and has message boards and photo sharing features.

Slip op. at 18. This example ignores the plain language of the statute, which provides that a social networking site must contain not just some, but all of the features in its definition. See N.C.G.S. § 14-202.5(b). Foodnetwork.com, for instance, does not allow minors to "become members or to create or maintain personal Web pages," nor does it link to the personal Web pages of its other members that can be accessed by visitors and members to the site. See N.C.G.S. §§ 14-202.5(a) & (b).

The Court of Appeals engages in the incorrect and unsupported speculation that "the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com because these sites contain subsidiary

social networking pages[.]" Slip. op. at 18. Amazon.com does not contain subsidiary social networking pages that allow users to create "web pages" or "personal profiles" and that have the links to friends that can be accessed by visitors to members' pages or Web sites. See N.C.G.S. § 14-202.5(b). Further, because the operator of any direct merchandising cite could certainly be considered as a member or visitor to its own cite, and because Amazon.com also facilitates secondary merchandising from its user-vendors, Amazon.com would be exempt from the ban because it "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." See N.C.G.S. § 14-202.5(c)(2). No sexual offender will be successfully prosecuted for going on Foodnetwork or Amazon.

Our appellate courts are to presume that "any act passed by the legislature is constitutional," and to refuse to strike legislation down "if such legislation can be upheld on any reasonable ground." Ramsey v. N.C. Veterans Comm'n, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). When considering the constitutionality of a statute or act, "there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." State v. Hales, 256 N.C. 27, 30, 122 S.E.2d 768, 770-71 (1961). Although the Court of Appeals acknowledged this rule, see slip op. at 6-7, it failed to apply it when it went on to note that the statute "could be

interpreted to ban registered sex offenders from accessing sites such as Google.com" because Google.com contains subsidiary social networking sites. Slip op. p. 18 (emphasis added).

The statute could more logically be interpreted not to ban such general parent sites such as Google.com because they own subsidiary social networking sites. This Court should effect such a narrowing interpretation rather than stretching to construe the statute as unconstitutional. See Hales, 256 N.C. at 30, 122 S.E.2d at 770-71. Unlike Amazon, Google's subsidiary site, www.plus.google.com ("Google+"), does contain all of the features of a "commercial social networking site." See N.C.G.S. § 14-202.5. To get to this subsidiary Google+ site, however, one must register to become a member and sign in to the site. See www.plus.google.com. A sexual offender cannot get to Google+ without taking the extra steps to register and log in; he thus is in no danger of violating the social networking ban on the parent Google site, where he demonstrably has no access to the social networking features of the subsidiary site absent actively taking those extra steps to enter the subsidiary social networking site. The most reasonable interpretation, in line with the duty to uphold the statute upon any reasonable ground, is that the subsidiary site Google+ is its own site,

distinct from the larger parent site, and that it is the particular Google+ site that is subject to the ban, not the entire Google search engine.

This interpretation is in keeping with the dictionary definition of word "access." The Court of Appeals notes the dictionary definition of "access" as "[t]he act of approaching." Slip. op. at 19 (citing American Heritage Dictionary 8 (3ed. 1997). This dictionary entry also contains this additional information, which was not considered by the Court of Appeals:

> **Usage Note**: the verb *access* is well established in its computational sense "to obtain access to (data or processes)."

American Heritage Dictionary 8 (3ed. 1997)(emphasis and parentheses in original). As such, one could not obtain access to the data or processes on Google+ from pulling up the general Google search engine. See also N.C.G.S. § 14-202.5A (providing that, for the purposes determining liability of a social network, "access" is defined as allowing the sex offender to do any of the activities or actions described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4) by utilizing the Web site).

The Court of Appeals held the State to the standard that "the State fails to make a convincing argument as to why the statute is not unconstitutionally vague." Slip op. at 17. Even if it were appropriate under the vagueness doctrine to entertain various hypotheticals as to other potential defendants, it is not the State's

burden to establish that the statute is not unconstitutionally vague. The Court of Appeals' vagueness analysis was both unnecessary in the context of the present facts, and it failed to adopt any logical, limiting interpretation that would preserve the constitutionality of the statute. See N.C. Veterans Comm'n, 261 N.C. at 647, 135 S.E.2d at 661 (our appellate courts should refuse to strike down legislation if it can be upheld on any reasonable ground); Hales, 256 N.C. at 30, 122 S.E.2d at 770-71 (when considering the constitutionality of a statute or act, all doubts must be resolved in favor of the act).

In its vagueness analysis, our Court of Appeals has made the same error as did the Eleventh Circuit, whose decision the United States Supreme Court reversed in Williams:

> Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. **The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt**. *See In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Williams, 553 U.S. at 305-06, 170 L. Ed. 2d at 670 (emphasis added). Thus, even assuming that some North Carolina law enforcement agency would deem policing sites such as Amazon or Foodnetwork as a fruitful use of its time in enforcing the social networking statute to protect minors, and further assuming that any such agency had the manpower and ability to police sites such as Foodnetwork.com or

Amazon and to determine that a registered sexual offender was on the site, the State would still have to meet the requirement of proof beyond a reasonable doubt. See id. It could not do so, where these sites do not fall under all of the requirements of the statute.

The Court of Appeals' adoption of defendant's hypotheticals induced it to "demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." Williams, 553 U.S. at 301, 170 L. Ed. 2d at 668. It is, for instance, a "fanciful hypothetical" that an offender might be prosecuted under the statute for inadvertently stumbling onto a site only to then find it was prohibited. See slip op. at 19. This hypothetical ignores the statute's *scienter* requirement. The statute prohibits sexual offenders from accessing a commercial social networking site where the offender "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.G.S. § 14-202.5. In the event that a sexual offender stumbled onto a site that does meet all of the statutory criteria, only then to discover it allowed minors as members, it would only be upon subsequent, repeated visits to such a site that the State might conceivably be able to make a showing under the *scienter* requirement that the defendant knew this was a prohibited site. See Williams 553 U.S. at 305-06, 170 L.

Ed. 2d at 670 (such issues are addressed not by the doctrine of vagueness but by the requirement of proof beyond a reasonable doubt).

As to the hypothetical of an offender being unable to shut down an existing social networking account for fear of prosecution under the statute, the obvious question would be why shutting down an existing account would be necessary. If the offender nonetheless desired to shut down an existing account, he could have his probation officer or friend shut down the account. Even under the farcical scenario of an offender being prosecuted under these facts, the offender would merely have to produce the person who actually did shut down the account to render an already unprosecutable case even worse. In a case in which a sexual offender actually shut down the account himself, pursuit of a case with such unsympathetic facts would both destroy the public's confidence in the prosecution and be self-defeating in effectuating the intent of the statute. See id. at 302, 170 L. Ed. 2d at 668 (noting that defendant's hypothetical that turning over child pornography to police could be a potentially prosecutable offense would be self-defeating for the government). Here, as in Williams, the hypothetical issues noted by the Court of Appeals are not reasons to facially invalidate a statute. See id.

The Court of Appeals erroneously construed all doubts in favor of unconstitutionality of the statute, and held that the statute is "unconstitutionally

vague on its face and overbroad as applied." Slip op. at 20. The statute does not violate the vagueness doctrine, nor is it overbroad. The United States Supreme Court has stressed that overbreadth doctrine is "strong medicine" that it has employed only with hesitation, and then "only as a last resort," insisting that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face. New York v. Ferber, 458 U.S. 747, 769, 73 L. Ed. 2d 1113, 1130 (1982) (citations omitted); see also United States v. Stevens, 559 U.S. 460, 473, 176 L. Ed. 2d 435, 446 (2010)(in the First Amendment context, a law is impermissibly overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep).

Here, defendant was caught in the statute's plainly legitimate sweep. See slip op. at 18 (acknowledging that persons of ordinary intelligence would interpret the statute as applying to Facebook). As shown in Subsection B, above, the Court of Appeals adopted an incorrect standard in agreeing with defendant that the statute "burdens more people than needed" to achieve its goals. Slip op. at 13. As discussed in Subsection B, the statute's inclusion of all registered sexual offenders in its sweep does not render a substantial number, if any, of the statute's applications to these offenders unconstitutional.

As further shown in Subsections A and B, above, North Carolina's statute, unlike the statutes of jurisdictions in which social networking statutes were declared unconstitutional, exempts broad categories of discrete speech-related services from its reach, such as chat rooms or email services or instant messaging sites. North Carolina's statute has a different protection goal, as well. The Court of Appeals' view was distorted through the lens of other jurisdictions' case law that analyzed statutes and rationales distinct from our own. See slip op. at 9-12, 15-16 (citing and relying on Doe v. Prosecutor, 705 F.3d 694, 698 (7th Cir. 2013), Doe v. Nebraska, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012), and Doe v. Jindal, 853 F. Supp. 2d 596, 607 (M.D. La. 2012).

The Court of Appeals further erroneously relied upon First Amendment cases which review content-specific legislation under the strict scrutiny test, rather than content-neutral legislation under the intermediate scrutiny test. See slip op. at 16-17, citing Brown v. Entm't Merchs. Ass'n, 2011 U.S. 4802, 180 L. Ed. 2d 708 (2011)(applying strict scrutiny to content-specific legislation that prohibited the sale or rental of "violent video games" to minors); Reno v. ACLU, (applying strict scrutiny to content-specific legislation that prohibited "indecent" and "patently offensive" communications on the Internet).

Contrary to its acknowledged duty to presume an act is constitutional and to resolve all doubts about an act in favor of constitutionality, see slip op. at 7-8, the Court of Appeals has erroneously failed to do so in this case. The Court of Appeals erroneously resolved all doubts against the constitutionality of the statute, and erroneously declared the ban sexual offenders accessing commercial social networking sites to be unconstitutional on its face and as applied. The Court of Appeals held the statute to be "overbroad as applied," despite the fact that this defendant demonstrated a culpable state of mind by setting up an account in a fictitious name, and despite the fact that this defendant went on Facebook.com -- a site that the Court of Appeals noted that "persons of ordinary intelligence would likely interpret the statute as prohibiting[.]" Slip op. at 18.

This Court should reverse the decision of the Court of Appeals. North Carolina's social networking statute constitutionally places a reasonable restriction on a registered sexual offenders' freedom to travel to certain narrowly-defined sites in cyberspace. It is not a ban on Internet use. Sexual offenders are still free, for instance, to go on non-commercial Internet sites of any kind, to travel to sites that use search engines, go on information sites such as Foodnetwork.com, to advertise a business interest, to use a service to help a business message "go viral," to use sites that provide discrete services such as photo-sharing, electronic mail, instant

messenger, or chat room or message board platforms, and to use sites with the primary purpose of facilitating commercial transactions, such as Amazon.com. Convicted sexual offenders are free to engage in any and all other lawful Internet use, except for accessing sites fitting all of the attributes that define a "commercial social networking" site. See N.C.G.S. § 14-202.5.

Thus, although the Court of Appeals did not reach this aspect of the intermediate scrutiny test, the statute obviously leaves open "ample alternative channels for communication of the information." Ward, 491 U.S. at 791, 105 L. Ed. 2d at 675. Should a defendant wish to express his jubilation over having a traffic ticket dismissed, he is free to email any and all of the potential "friends" he would have on a commercial social networking site, and ask them to "blast out" his message on their social networking accounts, even attributing the message to him. He is free to go on discrete chat rooms or instant messaging services and talk about it. He may post his message on Foodnetwork.com's message board, or take out an advertisement and have it placed on the Internet. He may go on any non-prohibited site and express it. He also may pursue innumerable old-fashioned, non-internet, ways of disseminating a message.

The idea that denial of access to limited commercial social networking sites somehow curtails dissemination of a message misses the point that it is not the

messenger but the message that causes a message to "go viral." The limited restrictions of N.C.G.S. § 14-202.5 do not preempt sexual offenders from this opportunity or from the opportunity to engage in extensive Internet use. The decision of the Court of Appeals striking N.C.G.S. § 14-202.5 as unconstitutional on its face and as applied was error and should be reversed.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Court of Appeals and hold that N.C.G.S. § 14-202.5 is constitutional both on its face and as applied to defendant.

Electronically submitted this the 13th day of January, 2014

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delliott@ncdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

Glenn Gerding
Attorney at Law
210 North Columbia Street
Chapel Hill, North Carolina 27514

This the 13th day of January, 2014

Electronically Submitted
Anne M. Middleton
Assistant Attorney General

APPENDIX

N.C.G.S. § 14-202.5.

§ 14-202.5. Ban use of commercial social networking Web sites by sex offenders

(a) Offense. -- It is 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 Web site 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 Web site.

(b) 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.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. -- The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) Punishment. -- A violation of this section is a Class I felony.