No. 16-6026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN DOES #1-5,

Plaintiffs-Appellees,

v.

ROY A. COOPER, III et al.,

***Defendants-Appellants*.**

On Appeal from the United States District Court
for the Eastern District of North Carolina
at Winston-Salem

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

On August 28, 2013, Appellees filed their action against Governor Pat McCrory, Attorney General Roy Cooper, and all elected district attorneys in the United States District Court for the Middle District of North Carolina, assigned as Case No. 1:13-cv-711. Plaintiffs filed their action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, challenging constitutionality of N.C. Gen. Stat. § 14-208.18.

The district court ruled on the parties' cross-motions for summary judgment in a written Memorandum Opinion And Order filed December 7, 2015. (J.A.). In the Order, the district court held that N.C. Gen. Stat. § 14-208.18(a)(3) was unconstitutionally vague as a matter of law. Pursuant to the district court's final order declaring section (a)(3) unconstitutional, the court permanently enjoined enforcement of this section. (J.A.). Appellants filed a Notice of Appeal on January 6, 2016. (J.A.).

The district court's December 7, 2015 Order declaring N.C. Gen. Stat. § 14-208.18(a)(3) unconstitutional and permanently enjoining enforcement of this statute throughout the State is immediately appealable as a final decision pursuant to 28 U.S.C. § 1291 in that the district court ruled in the Appellees' favor as a matter of law and permanently enjoined enforcement of section (a)(3). To the extent that the Order does not constitute a final decision, Appellants contend in the alternative that the Order and the rulings contained therein are still immediately

appealable pursuant to the collateral order doctrine. That doctrine applies when a ruling conclusively determines a disputed question or resolves an issue completely separate from the merits of the action, and said order or ruling would not be subject to a meaningful review on appeal after a final judgment is entered. See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 142 (1993). Here, the district court's ruling that N.C. Gen Stat. § 14-208.18(a)(3) is unconstitutional as a matter of law, and therefore unenforceable, resolved a vigorously disputed question of law in this State. A delay in hearing the appeal of this issue could result in the inability to prosecute numerous violations of § 14-208.18(a)(3).

In addition, the district court's December 7, 2015 Order is immediately appealable pursuant to 28 U.S.C. §1292(a)(1). Section § 1292(a)(1) allows an immediate appeal of interlocutory orders which grant, continue, or modify injunctive relief. 28 U.S.C. § 1291(a)(1). In this case, the district court's December 7, 2015 Order on the parties cross motions for summary judgment left for trial the issue of whether N.C. Gen. Stat. § 14-208.18(a)(2) is overbroad insofar as it may apply to sex offenders that have not been convicted of sex crimes against minors. (JA at). However, the district court also determined in its December 7, 2015 Order that § 14-208.18(a)(3) was vague as a matter of law and the court

thereby granted Appellees prayer for injunctive relief and permanently enjoined enforcement of section (a)(3) with respect to Appellees and all other sex offenders in the State of North Carolina. (JA).

To the extent that any portion of the Order is not immediately appealable, which Appellants dispute, this Court also has authority to review said rulings pursuant to the doctrine of pendent appellate jurisdiction which allows appellate courts to review rulings in non-appealable claims where the claims are inextricably intertwined and overlap with rulings involving immediately appealable claims. O'Bar v. J.C. Pinion, 953 F.2d 74, 80 (4th Cir. 1991).

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT N.C. GEN. STAT. § 14-208.18(a)(3) IS UNCONSTITUTIONALLY VAGUE, AND ORDERED THE STATE PERMANENTLY ENJOINED FORM ENFORCING § 14-208.18(a)(3).

STATEMENT OF THE CASE

Appellees are subject to the sex offender registration requirements set out in Article 27A of Chapter 14 of the North Carolina General Statutes. Appellees brought their action pursuant to 42 U.S.C. § 1983, alleging N.C. Gen. Stat. § 14-208.18 is overbroad and vague, and that enforcement of this statute would violate Appellees' First, Fifth, and Fourteenth Amendment rights under the United States

Constitution. Appellees also claim enforcement of N.C. Gen. Stat. § 14-208.18 deprives them of procedural due process. (JA).

Appellants filed a Motion to Dismiss on October 25, 2013 and an Amended Motion to Dismiss on January 24, 2104, pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. The District Court denied Appellants' Motion to Dismiss with respect to Rules 12(b)(1) and 12(b)(2). However, Appellants' Motion to Dismiss was granted in part with respect to Rule 12(b)(6). The only claims surviving Appellants' Amended Motion to Dismiss were: 1) whether N.C. Gen. Stat. §14-208.18(a)(2) and N.C. Gen. Stat. § 14-208.18(a)(3) are overbroad with respect to Appellees' rights to free speech and expression; and 2) whether N.C. Gen. Stat. § 14-108.18 is vague. (JA).

In June 2015, the parties filed cross motions for summary judgment. Pursuant to the district court's Memorandum Opinion and Order dated December 7, 2015, the district court held that N.C. Gen. Stat. §14-208.18(a)(1) and section (a)(2) are not unconstitutionally vague. (JA). The District Court left for trial the sole issue of whether N.C. Gen. Stat. § 14-208.18(a)(2) is overbroad with respect to Appellees' right to free speech insofar as N.C. Gen. Stat. § 14-208.18(a)(2) may apply to certain sex offenders who have not been convicted of a sex crime against a minor. (JA). Finally, the District Court held that N.C. Gen. Stat. § 14-

208.18(a)(3) is unconstitutionally vague as a matter of law and ordered that the State shall be permanently enjoined from enforcing section (a)(3). (JA). It is from this final Order declaring N.C. Gen. Stat. § 14-208.18(a)(3) unconstitutional and preventing enforcement thereof that the Appellant appeals.

STATEMENT OF THE FACTS

Appellees John Does 1, 3 and 4 were convicted of sex crimes involving minors. (JA ; Complaint ¶¶ 36, 66, 75) Appellees John Does 2 and 5 were convicted of violent sex crimes under Article 7A of Chapter 14 of the North Carolina General Statues. (JA ;Complaint ¶¶ 54, 81) All Appellees are registered sex offenders and are subject to North Carolina's sex offender registration provisions set forth in Article 27A, Chapter 14 of the North Carolina General Statutes, and to the restrictions contained in N.C. Gen. Stat. § 14-208.18. (JA ; Complaint ¶¶ 5-9)

N.C. Gen. Stat. § 14-208.18 was codified in Article 27A of Chapter 14, which is entitled "Sex Offender and Public Protection Registration Programs." N.C. Gen. Stat. § 14-208.18 was enacted as part of the "Jessica Lunsford Act" along with numerous changes involving sexual offenses, including the addition of the new criminal offenses of Rape of a Child and Sexual Offense with a Child, increases in penalties for sexual exploitation of a minor and promoting prostitution

of a minor, and amendments to the sex offender registration requirements "to be more stringent." 2008 N.C. Sess. Law 432. The legislative intent of the Jessica Lunsford Act, and specifically N.C. Gen. Stat. § 14-208.18, is clearly to place more stringent restrictions on certain convicted sex offenders in order to promote public safety and to protect the welfare of children in this State.

Appellants appeal from the District Court's final Order wherein N.C. Gen. Stat. § 14-208.18(a)(3) was declared unconstitutional as a matter of law. This section prohibits certain registered sex offenders from knowingly being:

> (3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

STANDARD OF REVIEW

For purposes of this appeal, the Court should conduct a *de novo* review of the record. Iko v. Shreve, 535 F.3d 225, 237 (4th Cir. 2008). Summary judgment in such cases should be granted when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact and judgment for the moving party is warranted as a matter of law. Id. at 230; Fed. R. Civ. P. 56(c) (2015). While this Court generally accepts the facts as the district court viewed them, the Court may also consider any undisputed facts that the district court did not use in its analysis. Winfield v. Bass, 106 F.3d 525, 530 (4th Cir. 1997).

ARGUMENT

I. THE DISTRICT COURT ERRED BY HOLDING THAT N.C. GEN. STAT. § 14-208.18(a)(3) IS UNCONSTITUTIONALLY VAGUE AS A MATTER OF LAW.

First, the district court determined that N.C. Gen. Stat. § 14-208.18(a)(3) is vague as a matter of law because the statute does not define or provide examples of what constitutes "regularly scheduled." (JA) See Opinion and Order at 26-27.

Void for vagueness challenges are rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. Parker v. Levy, 417 U.S. 733, 755 (1974). The question presented by such facial challenges is whether a criminal provision "is vague, 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, *but rather in the sense that no standard of conduct is specified at all*.'" Id. (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

For a statute to be void for vagueness, it must "simply ha[ve] *no* core." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982) (citing Smith v. Goguen, 415 U.S. 566, 578 (1974)). See also Parker, 417 U.S. at 755 (noting that invalidated statutes "contained no standard whatever by which criminality could be ascertained" (citations omitted)). There is a "core" application of a statute where "'by [its] terms or as authoritatively construed [it]

appl[ies] without question to certain activities," even if, outside of this unambiguous scope, "application to other behavior is uncertain." See Parker, 417 U.S. at 755, 94 S. Ct. at 2561, 41 L. Ed. 2d at 457 (quoting Smith, 415 U.S. at 578). See also United States v. Nat'l Dairy Products Corp., 372 U.S. 29, 32 (1963) (stating that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." (citations omitted))

Here, Section (a)(3) prohibits a registered sex offender from being at a place where minors gather for "regularly scheduled educational, recreational, or social programs." The district court noted that the term "regular" means "[h]appening at fixed intervals: PERIODIC." (JA ; Opinion Order at 26) The district court then attempts to distinguish section (a)(3) and its use of the term "regularly scheduled" from other sex offender cases where courts have held the term "regularly congregate" or "frequently congregate" to not be vague. However, there is no distinction from the cases cited by the district court. For example, in Britt v. State, 775 So. 2d 415, 416-17 (Fla. Dist. Ct. App. 2001), a sex offender, by virtue of his conviction, was prohibited from being near a "school, day care center, park, playground, or other place where children regularly congregate." Britt challenged this restriction based on grounds of vagueness, claiming that the terms "other place

where children regularly congregate" was unconstitutionally vague. The Florida Court of Appeals held the restriction to not be vague because the restriction was sufficiently precise to give fair notice of what constituted forbidden conduct. Id. at 417. The court held that the restriction, taken as a whole, gave a person of ordinary intelligence notice of the conduct that was proscribed.

Similarly, in United States v. Taylor, 338 F. 3d 1280, 1286 (11th Cir. 2003), the defendant was convicted of use of interstate facilities in order to transmit information about a minor for the purpose of enticing, encouraging, or soliciting any person to engage in criminal sexual activity with the minor. As a registered sex offender, Taylor was prohibited from being at places where "children frequently congregate, including schools, day care centers, theme parks, play grounds, etc." Id. at 1286. The Eleventh Circuit held the restriction was not vague because there is a common sense understanding of the conduct that is proscribed.

In the case at bar, the district court held N.C. Gen. Stat. § 14-208.18(a)(3) is vague because it fails to provide examples of restricted locations (such as schools and day care centers) in section (a)(3), which would presumably assist a sex offender in understanding the types of locations that children go to in order to attend "regularly scheduled" programs, or to assist in understanding what constitutes "regularly." The district court erred in holding § 14-208.18(a)(3)

vague, as Section (a)(3) must be considered in context with sections (a)(1) and (a)(2) of N.C. Gen. Stat. § 14-208.18. Indeed, N.C. Gen. Stat. § 14-208.18(a) contains all of the location restrictions at issue for certain sex offenders. Any reasonable person who falls under these restrictions would read § 14-208.18(a) in its entirety to understand what conduct is proscribed. Section § 14-208.18(a) provides:

> (a) It shall be unlawful for any person required to register under this Article, If the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) 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.
>
> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
>
> (3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

Although the statutory provisions contained in N.C. Gen. Stat. § 14-208.18(a) constitute separate offenses, State v. Daniels, 741 S.E.2d 354, 361 (N.C. Ct. App. 2012), they are nevertheless interrelated and must therefore be construed

in pari materia. See Carver v. Carver, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) (citations omitted). Considering § 14-208.18(a) as a whole, the statute places a sex offender on notice of locations where children might frequently or "regularly" gather, such as "schools, children's museums, child care centers, nurseries, and playgrounds." N.C. Gen. Stat. § 14-208.18(a)(2) (2015).

This statute, read as a whole, is indistinguishable from the restrictions contained in Taylor and Britt, which also advised sex offenders that they were prohibited from schools, playgrounds, day care centers, and other places where children "frequently" or "regularly" congregate. N.C. Gen. Stat. § 14-208.18(a)(3) provides fair notice regarding what conduct is prohibited, and it is therefore not vague. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015). Clearly, no ordinary person would read § 14-208.18(a) in its entirety and believe that section (a)(3) allows a registered sex offender to be at the place where high school students attend regularly scheduled college preparatory classes or college advanced placement classes at the local community college. No ordinary person would read § 14-208.18(a) in its entirety and be unclear as to whether section (a)(3) would allow a covered sex offender to be at a community center where children regularly gather during the year for scheduled recreational programs such as basketball practices and tournaments and swimming practices and swim meets. For the

reasons set forth above, the district court erred when it concluded that section (a)(3) was vague because of the use of the terms "regularly scheduled." Section (a)(3) cannot reasonable be expected to be read to the exclusion of sections (a)(1) and (a)(2) of N.C. Gen. Stat. § 14-208.18.

Finally, for the reasons stated above, the district court erred when it concluded that N.C. Gen. Stat. § 14-208.18(a)(3) was vague because of the use of the term "where minors gather." The district court again attempted to distinguish Taylor and Britt from the language contained in § 14-208.18(a)(3), because, according to the district court, those cases "involved general language that was accompanied by examples rather than general language standing alone." (JA ; Memo Opinion Order at 29) However, as argued above, section (a)(3) is interrelated with the other sections of N.C. Gen. Stat. § 14-208.18(a) and must therefore be construed *in pari materia*. See Carver v. Carver, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) (citations omitted).

Considering N.C. Gen. Stat. § 14-208.18(a) in its entirety, there are in fact examples of locations where minors gather, such as "schools, children's museums, child care centers, nurseries, and playgrounds." See N.C. Gen. Stat. § 14-208.18(a)(1) (2015). These examples are indistinguishable from the provisions held not to be vague in Taylor and Britt, among others. See also, United States v.

Zobel, 696 F.3d 558, 575 (6th Cir. 2012) (restriction prohibiting an offender from "loitering where minors congregate, such as playgrounds, arcades, amusement parks, recreation parks, sporting events, shopping malls, swimming pools, etc." was held to be not vague); United States v. Ristine, 335 F. 3d 692, 696-97 (8th Cir. 2003) (language prohibiting a sex offender from being at "places where minor children under the age of 18 congregate, such as residences, parks, beaches, pools, day care centers, playgrounds, and schools" was held to be not vague); State v. Simonetto, 606 N.W. 2d 275, 276 (Wis. Ct. App. 1999) (language prohibiting a sex offender from being at "any area frequented by persons under age 18, including but not limited to, schools, day care centers, playgrounds, parks, beaches, pools, shopping malls, theaters, or festivals" was held not to be vague.) Accordingly, the district court's conclusion that § 14-208.18(a)(3) is vague should be reversed.

CONCLUSION

For the reasons set forth above, this Court should reverse the December 7, 2015 Order of the district court finding N.C. Gen. Stat. § 14-208.18(a)(3) is unconstitutionally vague as a matter of law.

REQUEST FOR ORAL ARGUMENT

In that the issues in this appeal are matters of great significance to the citizens of the State of North Carolina, defendants-appellants respectfully request that oral argument be granted in this matter.

Respectfully submitted this the 7h day of March, 2016.

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I, the undersigned, do hereby certify that on 4 March, 2016, filed the foregoing **BRIEF OF APPELLANT** utilizing the ECF/CM System, providing notice to Plaintiff-Appellees' counsel of record as follows:

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