Docket No. 16-6026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN DOES #1 - 5,

Plaintiffs-Appellees,

v.

ROY A. COOPER, III, ET AL.,

Defendants-Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-6026 Caption: John Does #1-5 v. Roy A. Cooper, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

John Does # 1-5
(name of party/amicus)

who is Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: 06/04/16

Counsel for: Appellees

CERTIFICATE OF SERVICE

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I certify that on 7 April 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature) (date)

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STATEMENT OF THE CASE

The impermissible vagueness of North Carolina General Statute §14-208.18(a)(3) is apparent not only in the language of the statute, but in the practical difficulty it has caused citizens, law enforcement officials, and courts. Plaintiffs here have described in detail their inability to discern whether the statute covers a broad range of places they encounter in their daily lives. Joint App. at 139; Doc # 19 at 5 (Aff. of John Doe 1); Doc. # 19-1 at 4 (Aff. of John Doe 2); Doc. # 19-2 at 3 (Aff. of John Doe 3); Doc. # 19-3 at 3 (Aff. of John Doe 4). They have repeatedly asked law enforcement officials for guidance, but those officials have been unable to consistently interpret the statute – telling Plaintiffs to forego constitutionally protected activity "to be on the safe side" or that, while some activity may be "okay," they "wouldn't advise " participation. Joint App. at 139; Doc. #19-1 at 4 (Aff. of John Doe 2); Doc. # 19-2 at 3(Aff. of John Doe 3).

North Carolina's district attorneys, Defendants in this case, are themselves unable to provide clarity; *see* Doc. # 53-14 at 40, 72 (Williams Dep.); Doc. # 53-8 at 50, 60 (Freeman Dep.); and are inconsistent in their own interpretations. *Compare, e.g.*, Doc. # 53-8 at 60-61(Freeman Dep.) (interpreting subsection (a)(3) to prohibit presence "on the grounds" of the state legislature building) *with* Doc. # 53-10 at 50 (Welch Dep.) (interpreting subsection (a)(3) as incorporating a "300-foot rule"). Defendants acknowledge the statute lacks guidance for law

enforcement nor is there any statewide (or even local) policy to which they can turn for clarification or guidance. Doc. #53-14, at 39-40 (Williams Dep.).

Three separate elected state trial court judges have voided at least parts of § 14-208.18(a), noting its breadth and vagueness. Joint App. at 29, 39, and 45; Doc. # 20-4 (*State v. Herman*). Two of those specifically found (a)(3) unconstitutionally vague on its face. Joint App. at 38; 44h. As Judge Baddour said, "It is [] unreasonable to expect these defendants, or the average registered sex offender, or the average law enforcement officer, or the average citizen, to predict what kind of activity is unlawful pursuant to N.C.G.S. § 14-208.18(a)(2) or (3)[.]" *Id.* at ¶21.

Failure to predict correctly carries heavy penalties. Violation of § 14-208.18(a) is a Class H felony punishable by 4–39 months in jail or prison plus additional penalties. N.C.G.S. §14-208.18(h); N.C.G.S. § 15A-1340.17. So too, the cost of caution is high. To avoid potentially violating the statute, covered persons cannot attend church, go to a library, take classes at a college, or substantially participate in cultural and communal life. To do so is to risk arrest and prosecution. Joint App. at 139; 170; *see also* Doc. # 53-41 (N.C. Comm. College Policy); *see generally* Docs. ## 50-7–50-11 (Plaintiffs' Interrogatories). These effects are largely independent of what particular subsection of N.C.G.S. § 14-208.18(a) is at

issue precisely because subsection (a)(3) is vague and could be interpreted to cover any area also covered by subsections (a)(1) or (a)(2).

Defendants do not offer evidence refuting these facts, but respond instead by repeatedly stating that Plaintiffs are registered sex offenders who have committed either "violent" sexual offenses or a crime against a minor. Appellant's Br. at 2-3; *see* Doc. # 27 at 2-3 (State's Opp. to Mot. for Preliminary Injunction); Doc. # 31 at 8-9 (Mem. Supp. Defs' Am. Mot. to Dismiss). As such, say Defendants, Plaintiffs represent an ongoing threat to children generally. *Id.*

The facts, though, do little to support this claim. John Does 2 and 5, the "violent" offenders, were each convicted of misdemeanor sexual battery. John Doe 2 was a high school athletic coach who had a consensual sexual relationship with a student. Doc. # 19-1 (Aff. of John Doe 2). While such misuse of authority is properly illegal, the student was otherwise capable of consent. *See* N.C.G.S. §§ 14-27.25, 14-27.32. At the time of his plea agreement, the State did not believe that John Doe 2 represented an ongoing threat to minors and specifically agreed that he would be allowed to attend his minor son's educational and recreational programs. Joint App. At 137. However, he was subsequently informed that § 14-208.18(a) overrides this express agreement. Joint App. at 137.

John Doe 5's offense was committed against a thirty (30) year old woman. Doc. # 19-4 (Aff. of John Doe 5). The judge in his case specifically found that it

was not necessary for John Doe 5 to undergo standard sex offender counseling and treatment; *id.*; and John Doe 5 was later awarded custody of his two minor children. Joint App. at 139. "There have never been any allegations that John Doe 5 has ever engaged in, or has any interest in engaging in, any inappropriate contact with a minor." *Id.*

John Does 1, 3, and 4 committed offenses involving minors. John Doe 1 was convicted in 1995 of one count of receiving child pornography through the mail in violation of 18 U.S.C. § 2252(a)(2). Joint App. at 136. While incarcerated, he specifically asked to be transferred to a federal correctional facility where he could participate in the Federal Sex Offender Treatment Program – a highly selective program admitting only those with a demonstrated motivation to avoid reoffending. Doc. # 19 (Aff. of John Doe 1). He completed twenty-eight (28) months of intensive therapy to successfully graduate from the program. *Id.* And for ten years after his release from prison, John Doe 1 attended church twice weekly – singing in the choir, acting as an usher, and serving on various church committees. *Id.* Church leaders were fully aware of his past. *Id.*

In 2011, he was arrested for violating § 14-208.18(a) after police received an anonymous complaint that his presence at church was in violation of the statute. *Id.* Eventually, Gaston County law enforcement officials agreed that he could attend the main church service, but only on condition that he not "assist in the worship" in

any way. *Id.*; Doc. # 20-1 (List of Restrictions on Attending Service). There has never been any allegation that John Doe 1 acted inappropriately during his decade-long active participation in his church.

John Doe 3 was convicted in 2002 of causing his minor daughter to touch him inappropriately. Doc. # 19-2 (Aff. of John Doe 3). When confronted, he immediately acknowledged his guilt and sought treatment to ensure he did not re-offend. *Id.* He began counseling prior to his conviction and, while incarcerated, he volunteered for and completed the 600-hour North Carolina Sex Offender Accountability and Responsibility (SOAR) Program. *Id.*; Joint App. at 138. He then became a peer counselor to others going through the program. Doc. # 19-2 (Aff. of John Doe 3). After his release from prison, John Doe 3 voluntarily attended weekly counseling sessions for the next six years and still returns to the SOAR program regularly to act as a peer counselor. *Id.*

John Doe 4 was convicted in 2007 of soliciting a teenager via the Internet. Doc. # 19-3 (Aff. of John Doe 4). He was ineligible for the SOAR program as he received minimal jail time, but attended weekly treatment sessions for thirty (30) months. *Id.* John Doe 4 was also an active member of a church prior to enactment of § 14-208.18(a), but cannot now attend without fear of arrest and prosecution. *Id.*

None of the Plaintiffs have been accused of, much less arrested for, any further offenses in the 9 – 21 years since their offenses.

These facts are not meant to elicit sympathy for the Plaintiffs nor to suggest there is any excuse for their crimes, but to show that the labels "sexually violent offender" and "offense involving a minor" do not, of themselves, support Defendants' argument that Plaintiffs represent a danger to children generally. With regard to Does 2 and 5, the "violent" offenders, in each case the trial judge specifically found they did not represent such a danger. With regard to Does 1, 3, and 4, each has sought out and completed extensive treatment to prevent re-offense, each has gone years without any indication of further wrongdoing, and, if anything, § 14-208.18(a) is currently preventing them from meaningful participation in religious and social activities that seem certainly more likely to prevent re-offense than to cause it.

At no point in this litigation have Defendants presented expert testimony, reports, studies or other evidence to demonstrate either the dangerousness of persons covered under § 14-208.18(a) or that § 14-208.18(a) serves to meaningfully mitigate any such danger. Instead, they have relied solely on statements in previous cases that have since been called into substantial question or which were never factually supported at all. Joint App. at 176; *see United States v. Kebodeaux*, ___ U.S. ___, 133 S.Ct. 2496, 2503-04 (2013); *see generally* Ira Mark Ellman & Tera Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake about Sex Crime Statistics*, 30 Constitutional Commentary 495 (2015).

While Defendants are correct that §14-208.18(a) is limited to offenders whose crime involved a minor under age 16 or a "violent" offense now codified under N.C.G.S. Art. 7B, these "violent" offenses include crimes of constructive force and misdemeanors. *See* Joint App. at 133-35, n.1 and n.2; Joint App. at 174, n.19. Section 14-208.18(a) applies to persons not convicted of any offense against a minor, misdemeants, and persons convicted of offenses involving consensual contact with individuals above the age of consent. *See id.*; N.C.G.S. § 14-27.5A (misdemeanor sexual battery). Of those convicted of an offense involving a minor, the statute makes no allowance for subsequent rehabilitation. While Plaintiffs all committed crimes worthy of criminal punishment, it is incorrect to suggest that N.C.G.S. § 14-208.18(a) is narrowly limited to "violent" offenders and incurable pedophiles or that persons covered by the statute pose a *per se* danger to minor's generally.

SUMMARY OF THE ARGUMENT

N.C.G.S. § 14-208.18(a) is unconstitutionally vague on its face. As a matter of fact, law enforcement personnel have been unable to consistently apply the statute and citizens are unsure of its meaning, foregoing constitutionally protected liberties in an effort to "steer far wide" of the ill-defined prohibited zones. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). As the District Court correctly found, the text of (a)(3) lacks necessary guideposts that might address

some of these practical difficulties; and even were such signals present, the statute would still strain to get over the vagueness bar – particularly the heightened standard appropriate to criminal statutes that impose significant constitutional burdens. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

Contrary to Defendants' argument, reading subsection (a)(3) *in pari materia* with subsections (a)(1) and (a)(2) merely highlights the statute's inherent lack of clarity. The text of § 14-208.18(a) does not support Defendants' suggestion that the Court import the exemplars in subsection (a)(1) and (a)(2) into (a)(3) – and even were the Court to do so, this act of judicial construction would not aid the statute. Nor does inclusion of the word "knowingly" cure the statute's ills. It does not matter that the criminal defendant must "know" the attendant facts and circumstances when it is left unclear what facts and circumstances constitute the crime.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment protects citizens from state laws that fail to give "ordinary people fair notice of the conduct it punishes, or [that are] so standardless [they] invite arbitrary enforcement." *Johnson v. United States*, __ U.S. __, 135 S.Ct. 2551, 2556, 192 L. Ed. 2d 569, 574 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see also Grayned*, 408

U.S. at 109 (a statute is void for vagueness when it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or to "provide explicit standards for those who apply [it]"). Laws are not sufficient because there is some conduct that might "clearly fall within the provision's grasp." *Johnson*, 135 S.Ct. at 2560-61 ("[O]ur holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that [is clearly proscribed]."") (emphasis omitted). At issue in a facial vagueness challenge is the practical difficulty citizens, law enforcement officials, and courts face in determining the scope of the statute and applying it fairly and consistently. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-91 (1921).[1]

The acceptable degree of difficulty so experienced – the "degree of vagueness the Constitution tolerates" – is related to the type of statute at issue. *Hoffman Estates*, 455 U.S. at 498. Criminal statutes require greater precision;

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[1] Defendants cite language from *Hoffman Estates* and *Parker v. Levy* to suggest that "for a statute to be void for vagueness it must simply have no core." Appellant's Br. at 10 (quotation omitted). The theory that this language stands for the proposition that the ability to define clearly proscribed activity defeats a vagueness challenge was specifically rejected in *Johnson*. 135 S.Ct. at 2560-61. Nor do the cited cases themselves suggest such a proposition. In both *Hoffman* and *Levy*, the Court was discussing the applicable standards for "as-applied" challenges to statutes that did not burden fundamental liberties or which were permissible under a deferential standard applicable to military regulations. *See Hoffman*, 455 U.S. at 495 n.7; *Parker v. Levy*, 417 U.S. 733, 755-56 (1974).

Kolender, 461 U.S. at 358 n.8; as do laws that threaten to inhibit the exercise of constitutionally protected rights such as free speech and association. *Hoffman Estates*, 455 U.S. at 499 (noting this is "perhaps the most important factor affecting the clarity the Constitution demands). A criminal statute which broadly limits the exercise of fundamental liberties, such as 14-208.18(a), is subject to the strictest scrutiny. *See id.* at 498-99. And while a scienter requirement "may mitigate" a law's vagueness, *see id.* at 499, the word "knowingly" in § 14-208.18(a) does not do so.

A. N.C.G.S. § 14-208.18(a)(3) is vague on its face.

North Carolina General Statute §14-208.18(a) states:

> It shall be unlawful for any person required to register under this Article . . . 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.

This Court considers the constitutionality of subsection (a)(3) *de novo*, but it need not consider it in a vacuum. Two different, elected North Carolina state

judges have found subsection (a)(3) vague on its face precisely because it fails to give adequate notice to citizens or guidance to law enforcement within their local community. *See* Joint App. at 39 (*State of North Carolina v. Frances Louis Demaio* and *James David Nichols*, File Nos. 09 CRS 50647 and 50686 (Chatham County) (Baddour, J.)); Joint App. at 29 (*State of North Carolina v. William P. Daniels*, File Nos. 09 CRS 50792 and 50796 (Dare County) (Sermons, J.)).[2] Though some of the precise questions raised in these cases are addressed by the District Court, they effectively document both the practical confusion generated by the statute and the actual failure in consistent enforcement. *See also* Joint App. at 45 (*State v. Elder*, File No. 14 CRS 53509 at II.3 (Orange County) (Baddour, J.) ("Local law enforcement agencies, with no ill will or malice whatsoever, have been unable to consistently apply this statute to registered sex offenders[.]") (referring specifically to (a)(2)).

In this case, Plaintiffs have testified without contradiction that they are fundamentally unsure what "places" are encompassed by § 14-208.18(a)(3) and that law enforcement officials have been unable to give them clarifying guidance. *See, e.g.*, Doc. #19-1 (Aff. of John Doe 2); Doc. #19-2 (Aff. of John Doe 3). Such

[2] The third North Carolina state judge to consider a facial vagueness challenge to (a)(3) did not reach the issue after finding subsection (a)(2) independently void for vagueness. Doc. # 20-4 (*State of North Carolina v. Tracy Scott Herman*, File No. 11 CRS 1008 (Catawba County) (Sumner, J.)).

officials have gone so far as to advise Plaintiffs that they should avoid constitutionally protected activity "to be on the safe side." Doc. #19-1 (Aff. of John Doe 2); *see Hoffman Estates*, 455 U.S. at 499 (noting importance of clarity in statutes that "threaten[] to inhibit the exercise of constitutionally protected rights"). As the District Court noted, Defendants themselves acknowledge that the statute lacks needed guidance. Joint App. at 159.

The District Court undertook an extensive analysis of cases considering conditions of supervised release using phrases similar to "regularly scheduled" and "where minors gather." Joint App. at 157-61. Collectively, these cases lay out a clear, easily administered rule – such phrases are constitutionally permissible *so long as* they are accompanied by a list of exemplars sufficient to assist in understanding and provide meaningful guidance to law enforcement. *See, e.g.*, *Britt v. State*, 775 So.2d 415, 416-17 (Fla. Dist. Ct. App. 2001) (collecting cases).

Of course, a general criminal statute such as (a)(3) may not be constitutional *even with* such exemplars. As noted, the cases relied upon by the District Court uniformly concern conditions of supervised release rather than a general criminal statute. Unlike general statutes, conditions of supervised release are not necessarily subject to heightened scrutiny when they implicate fundamental rights. *Compare Hoffman Estates*, 485 U.S. at 499 (more clarity required for laws interfering with fundamental rights) *with United States v. Schave*, 186 F.3d 839, 843 (7th Cir. 1999)

(applying "reasonable relation" test to conditions of supervised release implicating fundamental rights). Nor do such conditions raise the same due process concerns, including notice and the potential for arbitrary enforcement. By definition, such conditions are (1) specifically tailored, (2) to an individual, (3) who is overseen by a probation officer to whom he can turn for guidance and frequently permission. *See State v. Simonetto*, 606 N.W.2d 275, 276 (Wis. Ct. App. 1999). That courts have generally required guiding exemplars for conditions of supervised release strongly suggests that such guidance is a constitutional floor below which a general criminal statute cannot fall. And with regard to (a)(3) in particular, there are additional vagueness problems that become clear upon reading the statute *in pari materia* as Defendants suggest.

B. Reading subsection (a)(3) *in pari materia* with subsections (a)(1) and (a)(2) highlights rather than relieves its inherent vagueness.

Defendants do not challenge the District Court's conclusion that, at a minimum, a list of exemplars is necessary to save § 14-208.18(a)(3). Instead, they suggest that the needed exemplars can be divined by taking those found in (a)(1) and (a)(2) and reading them into (a)(3) under the doctrine *in pari materia*. Doing so, however, either renders subsections (a)(1) and (a)(2) superfluous or causes the language now imported into (a)(3) to become completely unmoored from any ordinary meaning.

As written, and as the District Court noted, § 14-208.18(a) appears to create a legislative framework divided into two parts – subsections (a)(1) and (a)(2), covering places "intended primarily for the use" of minors; and subsection (a)(3), covering other locations not so intended. Subsection (a)(1) lists "schools, children's museums, child care centers, and playgrounds" as exemplars of covered locations and this list is then specifically incorporated into (a)(2). Subsection (a)(3) contains no such incorporation clause, itself suggesting that the legislature did not intend these examples to "carry over" to (a)(3).

Since the (a)(1)/(a)(2) exemplars ("schools, children's museums, child care centers, and playgrounds") are, under any reasonable interpretation, *always* locations "intended primarily for the use, care, or supervision of minors," reading this list into (a)(3) creates the result either that subsections (a)(1) and (a)(2) become largely superfluous, serving only to define the limits of the proscribed "place" depending on whether such "place" is within a "mixed use" or "single use" facility[3] (*see* Joint App. at 146) *or* subsection (a)(3) refers to a list of places *like* "schools, children's museums, child care centers, and playgrounds" but only those that are *not* "intended primarily" for minors. The first result, contrary to any signal of legislative intent, violates a basic canon of statutory construction. *See, e.g.*,

[3] Alternatively, (a)(3) now becomes largely superfluous as it effectively defines "place where minors gather for regularly scheduled . . . programs" as a "place intended for the use, care, or supervision of minors."

Penn. Dep't of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). The second not only violates basic canons of statutory construction but renders the list of exemplars essentially useless – they become divorced from their commonly understood meanings and subsection (a)(3) then refers to some hard to imagine list of "places" that are both "not intended primarily for the use of minors" and yet are substantially the same as schools and playgrounds. *See Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4, 8-9 (1st Cir. 1991) (discussing doctrine of *ejusdem generis*).

Reading the statute *in pari materia* also highlights the ambiguity of the word "place" as used in (a)(3). As the subsections are presumed under the doctrine to be part of a "single legislative framework," we assume that they refer to separate and distinct "places." *See* Joint App. at 146. Subsection (a)(3) then refers only to those places where minors "gather" for "regular" activities in enough numbers and with enough frequency to trigger the statute but not enough to cause the "place" to be "primarily" for that purpose. Again, this suggests that (a)(3) is intended to refer to places that are specifically *not* like schools, playgrounds, children's museums, etc., but then fails to offer any guidance as to what "places" would and would not fall under the statute.

Without such guidance, it is difficult to discern what definition of "place" is intended for (a)(3). As the District Court noted, the most appropriate definition of "place" within the statute as a whole is "an area occupied or set aside for a specific person or purpose." Joint App. at 147. When a place is "primarily" for the use of minors, it may be relatively easy in the ordinary case to determine the boundaries of this "set aside," especially as the word "place" is conjoined with "premises" in (a)(1) and the examples in (a)(2) suggest a reference to discrete locations with relatively clear boundaries. But "places" covered by (a)(3) are not "set aside" for the use of minors nor need they be "occupied" by minors; nor are they defined by "premises" or discretely bound within a larger location. Instead they are the now undefined "areas" where minors gather. It is simply unclear whether this would include the entirety of a beach, mall, park, or other area some portion of which might be used at some time by or for minors (*see* Doc. #53-9, at 94-95 (Dep. of David Learner) (interpreting (a)(3) to render all of a park or community center off-limits)); or whether, as in (a)(2), the legislature intended some sort of 300-foot buffer (*see* Doc. # 50-13 at 50 (Dep. of Ashley Welch) (interpreting (a)(3) to incorporate the "300-foot" rule of (a)(2))) or whether it would apply only to some undefined portion of such "place" minors would physically "gather" and never mind how close one was (*see* Doc. #53-14 at 74 (Dep. of Todd Williams) (stating that he is unsure how to define the limits of a "place" under (a)(3))). *See also* Doc.

53-8 at 61 (Freeman Dep.) (giving conflicting interpretations of the "place" described by (a)(3) as alternatively the "building" and the "premises").

The examples provided by Defendants in their Brief demonstrate the difficulty. A local community center might host youth recreational basketball leagues two nights a week – a circumstance Defendants argue would clearly bring the "place" under (a)(3). Appellant's Br. at 15. But if the community center is a mixed-use facility offering programs for both adults and minors (offering educational programs, meeting space for political and other organizations, etc.), how is the proscribed "place" determined? Is the "place" only the gym or classroom where minors are actually gathered? The building? The "premises"? Defendants themselves would disagree.

The same problem arises in the similar context of college campuses – since minors "gather" on college campuses is the entirety of the campus off-limits to any covered offender? The general counsel for the community colleges of North Carolina wasn't sure – telling college officials that the "place" *could be* the entire campus and that they should try to avoid the problem. Doc. #53-41 (N.C. Comm. College Policy).

C. The word "knowingly" in N.C.G.S. §14-208.18(a) does not ameliorate the vagueness of subsection (a)(3).

Defendants also argue, for the first time on appeal, that the word "knowingly" in the opening sentence of section (a) ameliorates the vagueness of (a)(3).

Raised for the first time here, the issue is properly considered waived. *See United States v. One 1971 Mercedes Benz*, 542 F.2d 912, 915 (4th Cir. 1976). Though this Court does have the authority to consider new arguments when failure to do so will result in plain error or a fundamental miscarriage of justice; s*ee Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993); *see also Stewart v. Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985); such exception is inappropriate in this case. The effect of § 14-208.18(a)'s "knowledge" requirement was properly briefed by Plaintiffs below and Defendants chose not to respond to the point. Defendants were aware the argument they raise here had been previously considered and rejected in state court (Joint App. at 44f-g) and Defendants, district attorneys themselves, acknowledged in deposition testimony that the word "knowingly" would not prevent prosecution of an individual who was unaware that his conduct violated the statute. *See e.g.*, Doc. # 53-8 at 42,61 (Freeman Dep.); Doc. # 53-14 at 31 (Williams Dep).

Regardless of waiver, however, the word "knowingly" in § 14-208.18(a) does not cure the vagueness of subsection (a)(3). In general, "[t]o act 'knowingly' is to act with 'knowledge *of the facts* that constitute the offense,'" not knowledge

that those facts constitute a violation of the law. *United States v. Fuller*, 162 F.3d 256, 260 (4th Cir. 1998) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). Whether a particular set of facts and circumstances falls within the purview of a particular statute is a question of law, not of fact. *See, e.g.*, *United States v. Buculei*, 262 F.3d 322, 331 (4th Cir. 2001) ("Our analysis of the scope [of a statute] presents a question of law[.]"). Thus, what must be proven under (a)(3) is that the defendant *knew* the facts and circumstances that make a particular location subject to (a)(3), not that he *knew* the location was proscribed by the statute. For instance, it is unclear under (a)(3) whether the fact that a group of scouts meets in a church basement but only during inclement weather or whether the fact that kids play pick-up soccer in a local park make the church and the park prohibited places under (a)(3). But if they *are*, then all the State would be required to show is that the defendant *knew* that the scouts so met or that the soccer games occurred. *See, e.g.*, *United States v. Wilson*, 133 F.3d 251, 261, 264 (4th Cir. 1997) (noting that proof of a "knowing" discharge into a "wetland" requires proof that the defendant knew the facts that made it a wetland). The ultimate "fact" at issue, whether, for example, such meetings are "regularly scheduled" or whether pick-up soccer games constitute "programs," is a question of law.

The text of § 14-208.18(a) offers no reason to think the North Carolina legislature intended here to create an exception to this rule. Since at least the

Supreme Court's decision in *Bryan*, it has been clear that the term "willfully," as opposed to the term "knowingly," should be used to signal the legislature's intent that the State must prove a defendant was aware the conduct at issue was illegal. *See Bryan*, 524 U.S. at 191-93. This Court has consistently recognized that distinction. *See, e.g.*, *Wilson*, 133 F.3d at 261-62 (discussing use of the terms "willfully" and "knowingly" in a statute). Nor does the grammatical structure of the statute suggest a departure. Unlike those rare instances in which a court has read the term "knowingly" to refer to knowledge of the illegality of an act, the statute makes no express reference to a legal standard. *Compare Liparota v. United States*, 471 U.S. 419, 420 (1985) (interpreting statutory language "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards *in any manner not authorized by* [*statute or regulations*]") (emphasis added) *and United States v. Gilliam*, 975 F.2d 1050, 1056 (4th Cir. 1992) (interpreting 18 U.S.C. §§ 1956(a)(1)(B)(i) and (ii)) *with Wilson*, 133 F.3d at 262 (holding that "knowingly" as used in a statute making it a crime to "knowingly violate" enumerated provisions of the Clean Water Act obligated the Government to prove the defendant's knowledge of the facts meeting each element of the offense, but not of the conduct's illegality); *see also id.* at 262-63 (discussing *Liparota*).

The word "knowingly" in (a)(3) does serve an important purpose. It makes clear that persons cannot be convicted due to accident or ignorance of the relevant

facts. *See* Joint App. at 144-45; *United States v. Tobin*, 676 F.3d 1264, 1279 n.6 (11th Cir. 2012) ("The term 'knowingly' means that 'the act was performed voluntarily and intentionally, and not because of mistake or accident.'") (quoting *United States v. Woodruff* 296 F.3d 1041, 1047 (11th Cir. 2002)). But that subsection (a)(3) is not *also* subject to the objection that it imposes strict liability does not relieve its vagueness. It simply means that the constitutional infirmity of the statute is not further compounded by the due process concerns attendant to strict liability crimes. *See Colautti v. Franklin*, 439 U.S. 379, 395 and n.13 (noting that the constitutional infirmity of a statute is "compounded by the fact that [the statute] subjects [a citizen] to potential criminal liability without fault").

In short, §14-208.18(a) is a garden variety criminal statute in which the defendant is required to *know* certain facts and circumstances, not that those facts constitute a violation of the statute. When it remains unclear what facts and circumstances constitute an offense, it does not matter that a defendant must be aware of them. There is still no adequate notice to citizens, guidance to law enforcement, or pattern for jury instructions and the statute remains impermissibly vague.

Defendants would avoid this result by pointing to this Court's decision in *United States v. Jaensch*, 665 F.3d 83 (4th Cir. 2011). *Jaensch* though does not stand for the proposition that any scienter requirement "tends to defeat [*a*]

vagueness challenge." Appellant's Br. at 8 (emphasis added). It outlines a circumstance in which a scienter requirement may do so – *Jaensch* actually says "*this* scienter requirement tends to defeat *Jaensch's* vagueness challenge." 665 F.3d at 90 (emphasis added).

In *Jaensch*, the Court considered 18 U.S.C. § 1028(a)(1), which makes it a crime to "knowingly" produce a false identification document that "appears to be issued by or under the authority of the United States." *Id.* at 89. Since the Court found that the statute did not implicate any fundamental liberties, review was necessarily limited to consideration of the facts of the case at hand. *Id.* at 89 and n.4. The Court quickly dispatched the Jaensch's claim that he lacked adequate notice of whether his documents "appeared to be" government issued after noting that the statute required the Government to prove that he "knew" the documents so appeared and it was clear from the record that he did *in fact* know that they so appeared.

The Court recognized in *Jaensch* that a scienter requirement may tend to require the government to introduce evidence of facts and circumstances regarding what the defendant "knew." From those facts and circumstances, it will often be relatively easy to evaluate an as applied challenge as they may well show that the defendant's conduct was clearly within the statute. *Id.* at 89, *quoting Holder v. Humanitarian Law Project*, 561 U.S. 1, 3 (2010) ("[A] plaintiff who engages in

some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). You can't say you didn't know when it's clear that you did. But *Jaensch* does not, as Defendants would have it, create a mistake of law defense predicated on the mere presence of a scienter requirement. *Jaensch* instead makes the common-sense point that when those facts and circumstances clearly constitute a violation, you can't then complain that the law may be vague "as applied to the conduct of others." *Id.*

Of course, in one sense, the essence of any as applied vagueness challenge is that the Defendant did not "know" his conduct was illegal (in that the statute did not give fair notice regarding the particular facts and circumstances at hand), and in that sense there is a constitutional requirement that a defendant know whether (or at least be reasonably capable of discerning that) his conduct falls within the statute's purview. But in this context the "knowledge" requirement is independent of the statutory language and stems from the separate constitutional requirement of notice generally. *See generally Hoffman Estates*, 455 U.S. at 501 (considering "issue of fair warning" in as applied challenge). That a Defendant may ultimately prevail on an as applied challenge by arguing that he did not "know" his conduct would constitute a violation does not insulate the statute from a facial challenge. Facial challenges are concerned with the *a priori* effects of insufficiently precise

language, effects not lessened by the possibility that a particular criminal defendant might ultimately obtain relief. *See, e.g*, *Kolender*, 461 U.S. at 357-58.

The other case relied upon by Defendants, *United States v. Klecker*, 348 F.3d 69 (4th Cir. 2003), is also not on point here. In *Klecker*, this Court considered an as-applied challenge to the federal Analogue Act, which prohibits the production of chemical compounds "substantially similar" to controlled substances, but only when such production is "intended for human consumption."[4] The Court found that the additional evidentiary showing required to prove the substance was "intended for human consumption" tended to limit the potential for arbitrary enforcement because law enforcement officials would not prosecute possession of such substances for non-drug related purposes. *Id.* at 71.

These cases recognize there are circumstances under which a scienter requirement will inform, though not dictate, vagueness analysis. First, in the rare instance where the statute actually does require knowledge of the illegality of the act, that requirement provides some protection from conviction based on otherwise seemingly innocent conduct. *See Liparota*, 471 U.S. at 420; *Gilliam*, 975 F.2d at

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[4] The Act defines "controlled substance analogue" as " a substance . . . (i) the chemical structure of which is substantially similar to [and has an 'effect . . . substantially similar to or greater than . . .'] a controlled substance in schedule I or II." *See* 21 U.S.C. § 802(32)(i-iii). The Act further provides that a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. § 813; *Klecker*, 348 F.3d at 71.

1056. Second, as in *Jaensch*, a scienter requirement may require the government to introduce evidence of facts and circumstances that will tend to defeat an as applied challenge. And finally, where an "intent" element serves to distinguish between innocent conduct and conduct threatening harm, that requirement provides some protection from the threat of arbitrary enforcement. *See Klecker*, 348 F.3d at 71; *see also City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (noting that anti-loitering statutes coupled with intent requirement not held vague when intent requirement serves to adequately differentiate harmful from harmless behavior). But such circumstances are not present here. This is not an as applied challenge nor is the constitutional deficiency of § 14-208.18(a)(3) that it seeks to impose strict liability or fails to differentiate between harmful and harmless activity. This statute fails the more basic test of providing sufficient guidance as to what the proscribed activity is in the first place – a deficiency particularly glaring in light of the statute's severe impact on the exercise of fundamental freedoms.

Finally, even were it the case that under § 14-208.18(a) a citizen was required to "know" that his conduct was illegal (in that it fell within the ambit of the statute), this would neither address the concerns underlying facial challenges – lack of notice, the potential for arbitrary enforcement, and the chilling effect on fundamental liberties – nor cure the constitutional infirmity. A criminal defendant's "knowledge" may be inferred from the attendant facts and

circumstances. Thus, where the language of the statute is vague, a defendant is always subject to the reality that whatever his *subjective* belief, that belief will ultimately be judged by an "objective" though necessarily vague standard. *See, e.g*, *Jaensch*, 665 F.3d at 91 (approving "reasonable person" standard for determining whether a document "appeared to be" government issued). Citizens are then still left to "necessarily guess" what facts and circumstances a jury might consider sufficient to infer the requisite "knowledge." *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning"). And any person subject to the statute might be expected to steer well clear of any "gray areas." *See Grayned*, 408 U.S. at 109. Finally, the statute would still lack the necessary guidance to law enforcement to prevent arbitrary and discriminatory enforcement for the same reason – precisely what it is the defendant must "know" remains insufficiently defined. *See Kolender*, 461 U.S. at 358 (noting importance of "the requirement that a legislature establish minimal guidelines to govern law enforcement") (internal quotation omitted).

Conclusion

As a practical matter, N.C.G.S. § 14-208.18(a)(3) creates genuine confusion among those subject to its proscriptions and has failed to provide law enforcement with sufficient guidance to ensure reasonably consistent application and

enforcements. Plaintiffs have specifically foregone participation in constitutionally protected activity not because their participation is clearly unlawful but because they are not sure (and have been unable to find out) what the statute does and does not cover.

As a legal matter, N.C.G.S. § 14-208.18(a)(3) lacks guideposts essential to addressing this confusion. It contains multiple vague provisions and reaches a broad range of constitutionally protect conduct – actually preventing people from attending church, school, going to the library, and substantially participating in other fundamental freedoms. Without, at the very minimum, exemplars to guide understanding and discretion, the statute fails to meet constitutional requirements of notice and guidance.

Whatever its intent, the North Carolina state legislature has drafted a statute that simply does not meet constitutional standards nor has the State demonstrated that it is unable to meet whatever actual threat is posed by those subject to § 14-208.18(a) in a constitutionally permissible manner. In this case, the state legislature could clarify the language of (a)(3) to remove the vagueness or it could adopt other measures to address its concerns. What it cannot do, however, is continue to require citizens and law enforcement officials to "necessarily guess" as to the statute's application to a broad range of real life, frequently encountered situations.

For the foregoing reasons the decision of the District Court finding N.C.G.S. § 14-208.18(a)(3) unconstitutionally vague on its face should be AFFIRMED.

Respectfully submitted this 6 day of April, 2016.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-6026 **Caption:** John Does #1-5 v. Roy A. Cooper, et al.

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Attorney for Appellees

Dated: 06/04/16

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I do hereby certify that on this 6th day of April, 2016, I filed a copy of the attached Brief for Appellees utilizing the ECF/CM System, providing notice to Appellants-Defendants counsel of record as follows:

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