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

SUPPLEMENTAL BRIEF FOR APPELLEES

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ISSUE PRESENTED FOR REVIEW

It is the State's burden to show that North Carolina General Statute (N.C.G.S.) § 14-208.18(a)(2) is "narrowly tailored to serve a significant government interest." However, even after repeated inquiries from the trial court, the State specifically declined to produce substantial evidence in support of this burden. Should the appellate court now overturn the district court's grant of summary judgment against the State?

STATEMENT OF THE CASE

North Carolina General Statute (N.C.G.S.) § 14-208.18(a)(2) effectively bans covered persons from churches, libraries, community centers, many public parks, some governmental buildings and other locations intimately tied to First Amendment activity. *See* Addendum; *see generally* Suppl. J.A. at 00158 (discussing reach of subsection (a)(2)); Suppl. J.A. at 00170. Unlike a standard criminal statute, it does not proscribe activity that is harmful *in itself*, but imposes a ban on the premise that doing so will prevent *future* harm.

Subsection (a)(2) applies to two discrete and numerous classes of offenders – those offenders who have committed crimes against a minor and those offenders who have only committed crimes against an adult. Suppl. J.A. at 00151; J.A. at 00134 at n.2 (describing qualifying offenses). On summary judgment, the district

court accepted the State's argument that subsection (a)(2)'s infringement of constitutional liberties was justified in so far as the statue covered offenders who had previously been convicted of an offense against a child, but noted that the State had failed to produce any evidence that offenders who committed a crime against an adult ("adult victim offenders") represented a material threat to minors sufficient to justify the statute's ban on quintessentially First Amendment locations. J.A. at 00174 – 00177. The court directed the Parties to gather and present evidence regarding the dangerousness of adult-victim offenders to minors. J.A. at 00177. Only through such evidence is the court in a position to judge whether subsection (a)(2) is "narrowly tailored to apply to the appropriate individuals." J.A. at 00176.

On December 22nd, 2015, the Parties jointly appeared before the district court to request a continuance of trial specifically for the purpose of obtaining additional time to gather evidence related to the dangerousness of adult-victim offenders. *See* D.E. # 73 (Order). Pursuant to this request, the district court granted the State until January 29th, 2016 to gather and disclose any additional evidence to support its contention that adult-victim offenders, as a class, are sufficiently dangerous to minors to justify subsection (a)(2)'s ban on First Amendment locations. Between December 22nd and January 29th, the State produced portions of the criminal records now provided to this Court and contained in the Supplemental

Joint Appendix at 00037 – 00148. The State then filed a Renewed Motion for Summary Judgment arguing that these criminal records, along with a list of cited cases, was sufficient to meet its burden of showing that the statute appropriately targeted adult-victim offenders. Suppl. J.A. at 00033.

At a status conference held March 24th, 2016, the trial court shared with the State its belief that this evidentiary showing was inadequate to carry the State's burden. Suppl. J.A. at 00168. As the trial court noted, many, if not most, of the cases cited by the State are simply not relevant to the question whether adult-victim offenders as a class are dangerous to children; and the criminal records indicate that, at best, there are *some* adult-victim offenders who may reoffend against them. Suppl. J.A. at 00166. The district court repeatedly asked the State whether it wished to gather more, non-anecdotal evidence to support its burden of showing "narrow tailoring." Suppl. J.A. at 00166. But the State refused, and requested a ruling on the existing record. *Id.* Upon consideration of that record as a whole, the trial court issued a Judgment declaring N.C.G.S. § 14-208.18(a)(2) unconstitutionally overbroad. Suppl. J.A. at 00177.

The State now appeals.

SUMMARY OF THE ARGUMENT

The State acknowledges it has the burden of demonstrating that N.C.G.S. § 14028.18(a)(2) is "narrowly tailored," but has specifically declined to produce

meaningful evidence to meet that burden. Instead, it argues first that "logic and common sense" tell us that an adult-victim offender is a substantial threat to children. Alternatively, the State argues that the limited anecdotal evidence presented demonstrates that adult-victim offenders, as a class, are substantially likely to commit new offenses against children.

Neither proposition is correct. As explained below, it is simply not "self-evident" that an adult-victim offender represents a meaningful threat to children nor does the existence of *some* adult-victim offenders who go on to commit an offense against a child demonstrate that adult-victim offenders *as a class* are meaningfully dangerous to children. It is the State's duty to show that application of subsection (a)(2) to adult-victim offenders advances the State's interest in a direct and material way without burdening substantially more speech than necessary to achieve its legitimate ends. Neither "logic" alone nor the limited anecdotal evidence provided by the State satisfy this requirement. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1133-34 (10th Cir. 2012) (striking down ban on sex offenders in public libraries because City failed to produce evidence to show "narrow tailoring").

Alternatively, the State argues that even if (a)(2) is not "narrowly tailored," facial invalidation for overbreadth is not the appropriate remedy. The State, though, cannot explain how a statue that is not constitutionally applied to a discrete

and "substantial number of individuals" is not "substantially overbroad." Suppl. J.A. at 00168 – 00169. The State has the ability to draft constitutional statutes to address any real danger posed by sex offenders and has, in fact, already enacted legislation that addresses the constitutional infirmities of subsection (a)(2) identified by the district court. *See* N.C. Sess. Law 2016-102 (2015) (effective Sept. 1st, 2016).

ARGUMENT

Subsection (a)(2) is "sweepingly broad." Suppl. J.A. at 00167. As a practical matter, it effectively bans covered offenders from church services, libraries, community centers, many parks, and even some governmental buildings. Suppl. J.A. at 00170; *see also* D.E. # 20 (Affidavit of Jerry Bron) (nearly every church is made inaccessible by subsection (a)(2)); *see also* D.E. # 53 at *15 – *19 (describing effect of subsection (a)(2)). It is though,"content-neutral," and, accordingly, all Parties acknowledge that the statute is subject to "intermediate scrutiny." *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (a statute that "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep," is invalid). Under this standard, the State must show that the statute is "narrowly tailored to serve a significant government interest." *Ross v. Early*, 746 F.3d 546, 555 (4th Cir. 2014) (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

A. The State Is Required to Make an Evidentiary Showing

The State suggests that it can meet this burden by simply showing that, "because minors would be more exposed to harm without this prohibition than with it, the statute is therefore facially valid." App. D.E. #30 at *10 (Suppl. Br. for Applts.) (*quoting Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297 (1984). However, this misstates the State's burden.

To show that a statute is "narrowly tailored," the State must show *both* (1) that the statute "promotes a substantial government interest that would be achieved less effectively absent the regulation" and (2) that the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ross*, 746 F.3d at 555 (*quoting Ward*, 491 U.S. at 799). To satisfy the first prong, it is not enough (as the State suggests) that the statute has a rational relation to the purported end. Rather, the State must make "some evidentiary showing that the recited harms are 'real, not merely conjectural,' and that the [statute] 'alleviates those harms in a direct and material way.'" *Ross*, 746 F.3d at 556 (internal quotation and citation omitted). "Heavier burdens on speech must, in general, be justified by more cogent evidentiary predicates." *Id.* (*quoting Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004)). Should it clear this hurdle, the State must *also* show that the statute does not burden substantially more speech than necessary to achieve the statute's legitimate ends.

In this case, the State must demonstrate that subsection (a)(2) appropriately "targets those offenders who pose a factually based risk to children through their presence in the restricted zones." *See Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1111 (D. Neb. 2012). Otherwise, a discrete and numerous class of persons (here "adult-victim offenders") is subject to significant curtailment of constitutional liberties without any showing they are reasonably likely to cause the harm sought to be prevented. Without evidence that adult-victim offenders, as a class, pose a material threat to children, subsection (a)(2) cannot be said to be "narrowly tailored," – as it would then clearly burden substantially more speech than necessary to achieve the government's interest. *See McCullen v. Coakley*, 134 S.Ct. 2518, 2540 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests.").

As a predicate to "narrow tailoring," the State must identify the "substantial interest" to be served. *See Ross*, 746 F.3d at 555. Here, the State simply asserts that "North Carolina has a substantial interest in the protection of minors from the threat of sexual assault." App. D.E. # 30 at *9. While this is undoubtedly true, as far as it goes, it is instructive that the State then offers no evidence that in passing N.C.G.S. § 14-208.18(a) the North Carolina state legislature ever actually considered whether this statute was reasonably necessary to achieve that end, much

less that it considered relevant studies, findings, or other evidence in making such determination. The stated purpose of the statute, contained in N.C.G.S. § 14-208.5, is to ensure law enforcement agencies have information about sex offenders, suggesting that what started out as a simple registry statute has grown exponentially without new consideration of its underlying premises. *See id.* While in this case it may be reasonable to infer the purpose of the statute from its text, *see* Suppl. J.A. at 00159, the State offers no basis to conclude that the judgment of the legislature is here entitled to deference as to the facts at issue. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("[W]e have stressed in First Amendment cases that the deference afforded legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.") (internal citation and quotation omitted).

As to its specific burden to show "narrow tailoring," the State first argues that no actual evidentiary showing is needed as it is simply a matter of "logic and common sense" that "an offender previously convicted of *any* offense described in N.C. Gen. Stat. § 14-208.18(c) (2015) poses a real and substantial threat to the physical security of . . . minor[s], regardless of the age of the assailant's previous victims." App. D.E. #30 at *12 (emphasis in original). The problem, of course, is that this argument assumes precisely what is to be proved. Instead of making the evidentiary showing required by *Ross*, the State is asking the Court to simply

assume that sufficient evidence exists. *See Ross*, 746 F.3d at 556 (noting requirement that the State make an evidentiary showing that the "risk is substantial and real").

Such assumption is not warranted. As the Supreme Court has recently recognized, it is far from clear that "sex offenders," even as a general class, represent a significant danger of recidivism. *See United States v. Kebodeaux*, 133 S.Ct. 2496, 2503 (2013) (discussing conflicting evidence regarding recidivism rates of sex offenders); *see also* Ira Mark Ellman & Tera Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake about Sex Crime Statistics*, 30 Constitutional Commentary 495 (2015). The State's reliance on passing statements in *McKune v. Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion) is misplaced as these statements are not independently supported, are themselves of questionable validity, and have been specifically called into question by later Supreme Court jurisprudence. *See Kebodeaux*, 133 S. Ct. at 2503; Ellman & Ellman, 30 Constitutional Commentary at 500-504.

Nor have courts accepted the argument that because *some* statutes regarding sex offenders have been upheld, the court can safely forego an evidentiary showing on the statute at issue. In *Doe v. City of Albuquerque*, the 10th Circuit invalidated a municipal ordinance banning sex offenders from public libraries precisely because the City failed to make an evidentiary showing that the statute was narrowly

tailored. 667 F.3d at 1133-34 (10th Cir. 2012). Instead, the City pointed to other cases in which various restrictions on sex offenders were upheld. *Id.* The *Doe* Court rejected this argument because "[g]eneral reference to other cases involving other cities, other restrictions, other interests to be served, and other constitutional challenges do not relieve the City's burden in this case." *Id.* at 1134.

The State has also failed to cite any authority in support of the specific proposition it must prove – that adult-victim offenders represent a meaningful threat to children. In fact, those courts considering the argument appear to roundly reject it. *See, e.g., Doe v. Prosecutor, Marion County*, 705 F.3d 694, 701 n.6 (7th Cir. 2013) (noting that statute aimed at protecting children by banning internet use "inexplicably applies to sex offenders whose crimes did not involve the Internet or children."); *City of Albuquerque*, 667 F.3d at 1132-33 (noting incongruity of applying ban intended for the protection of minors to adult-victim offenders); *cf. State v. Packingham*, 368 N.C. 380, 393-94 (2015) (suggesting that the Internet restriction in that case could not be constitutionally applied to an adult-victim offender). It is simply not a matter of "common sense" to assume that an individual convicted of a misdemeanor sexual assault on an adult is a meaningful threat to children and must not be within 300 feet of "schools, children's museums, child care centers, nurseries, and playgrounds." N.C.G.S. § 14-208.18(a)(1) (incorporated by reference into N.C.G.S. § 14-208.18(a)(2)).

The State does not attempt to explain more fully *why* this proposition is "common sense." Instead it urges this Court to look at *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011) – presumably because in that case the court found a connection between domestic violence and an increased risk of gun violence sufficient to justify a ban on gun ownership. *Staten* though, is entirely unlike the case at hand. First, *Staten* does not involve a First Amendment challenge, but is instead a Second Amendment case analyzed under a different formulation of "intermediate scrutiny." *Id.* at 159. Second, in *Staten*, the Government introduced substantial empirical evidence in support of its claims linking a previous conviction for serious violence against a domestic partner, gun ownership, and substantial increase in the likelihood of homicide. *Id.* at 164-167. Third, in *Staten*, the Court was specifically considering a statute in which each offender was convicted of violence against exactly the same *type of victim* – their domestic partner. Given this record, it was reasonable for the *Staten* Court to conclude that the State had met its burden of showing "reasonable fit" under the appropriate Second Amendment analysis. With regard to potential "over-inclusiveness," the *Staten* Court noted that the statute did not fail because there might be *some* covered offenders who would not misuse a firearm against a domestic partner. *Id.* at 167. However, the State's argument here precisely inverts that logic – suggesting that

subsection (a)(2) is narrowly tailored because there might be *some* covered individuals who represent a threat to children.

This is also the problem with the State's reliance on *People v. Escudero*, 183 Cal. App. 4th 302, 306, 107 Cal Rptr. 3d 758, 760 (2010) (stating that "persons with deviant sexual urges do not always limit their sex crimes to victims of the same age group"). Even setting aside the problem of accepting as "evidence" in this case testimony regarding uncharged alleged misconduct in another case (the source of the factual recitation in *Escudero*), that there exist *some* adult-victim offenders who *may* be a risk to children is simply insufficient to justify significantly curtailing the constitutional liberties of *all* adult-victim offenders. As earlier, the State's argument leaves out the "materiality" requirement of the first prong of the *Ward/Ross* test and reads out the second-prong entirely – effectively conflating "rational basis" analysis and "intermediate scrutiny."

On a different tack, the State then looks to *State v. Packingham*, 368 N.C. 380, 396, 777 S.E. 2d 738, 751 (2015), a case involving North Carolina's ban on sex offenders accessing certain websites. While the State acknowledges that this case involves a different type of statute and has limited relevance here,[1] it

[1] As the district court noted, other courts that have specifically looked at internet restrictions which lump minor-victim and adult-victim offenders have concluded uniformly that such restrictions are invalid. *See Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1108 (D. Neb. 2012); *Doe v. Prosecutor, Marion Cty., Ind.*, 705 F.3d 694, 701 n.6 (7th Cir. 2013) (noting "inexplicable" [application of Internet use

nonetheless suggests that N.C.G.S. § 14-208.18(a)(2) should be upheld because it "protect[s] minors from strangers with a demonstrated willingness to use force and violence to effectuate sexually deviant acts upon their targets." App. Doc. # 30 at *14. Indeed, throughout this litigation and in its briefing before this Court, the State has suggested that N.C.G.S. § 14-208.18(a) is less constitutionally suspect because it applies only to minor-victim and "violent" offenders.

This argument, though, is severely flawed. Even accepting the State's assertion that the law applies only to "violent" adult-victim offenders, it has still not produced evidence of a link between such "violence" and molestation of children. And the assertion itself papers over both the actual reach of the statute and the underlying facts of this case. North Carolina law defines "violent" offense so broadly as to make it a legal term of art – including crimes based on the relationship between otherwise consenting adults (*see, e.g.*, N.C.G.S. § 14-27.32 (Sexual Activity with a Student)), crimes not involving actual force but against a mentally incapacitated person (*see, e.g.*, N.C.G.S. § 14-27.22 (Second Degree Forcible Rape)), and crimes involving non-consensual touching not serious enough to warrant a felony charge (*see* N.C.G.S. § 14-27.33 (Sexual Battery)). This is not

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restrictions] to sex offenders whose crimes did not involve the Internet or children"); *see also State v. Packingham*, 229 N.C. App. 293, 301, 748 S.E.2d 146, 152 (2013), *rev'd*, 368 N.C. 380, 777 S.E.2d 738 (2015); *cf. Doe v. Jindal*, 853 F. Supp. 2d 596, 599 (M.D. La. 2012) (striking down Internet use restriction that applied *only* to minor-victim sex offenders).

to suggest that these are not rightly criminal acts. But nor are they "violent" in the ordinary sense of the word as demonstrated by the plaintiffs in this case. John Doe 2 was convicted of misdemeanor sexual battery and his terms of probation specifically allowed him to attend his minor son's educational and recreational activities. J.A. at 00137. John Doe 5 was also convicted of misdemeanor sexual battery and was subsequently granted joint custody of his two minor sons. J.A. at 00139.

Finally, the State argues that Federal Rule of Evidence 413 demonstrates that "Congress has clearly drawn the connection between past sexually assaultive conduct and the likelihood of future sexually assaultive conduct regardless of the victim's age." App. Doc. # 30 at *15 (noting that FRE 413 allows evidence of *any* past sexual assault). But Rule 413 demonstrates no such thing. The State cites no legislative history for this assertion nor is it manifest in the language of the Rule. That the Rule *allows* evidence of any prior sexual assault does not even suggest that Congress considered the relationship between adult-victim offenders and a future threat to children. Moreover, the Judicial Conference of the United States Advisory Committee on Criminal and Civil Rules specifically urged Congress not to pass Rule 413 (and 414 and 415) in large part because it is "not supported by empirical evidence." *See* Report of the Judicial Conference of the United States on

Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 52 (J.P.M.L. 1995).

In sum, the State concedes that it bears the burden of showing that adult-victim offenders pose a material threat to children, but then asks the court to simply accept this proposition as self-evident. The State does not explain how it can make the required "evidentiary showing" without actually showing evidence; nor is it "common sense" that an adult-victim offender should be kept away from "schools, children's museums, child care centers, nurseries, and playgrounds." *See Ross*, 746 F.3d at 5556 (noting requirement of "evidentiary showing"). Without a substantive evidentiary showing, the State cannot justify subsection (a)(2)'s significant curtailment of constitutional liberties.[2]

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[2] The State's attack on the 2003 Department of Justice Study referenced by the district court is, of course, irrelevant to whether the State has carried its burden here. This study though does further belie the State's claim that adult-victim offenders are a self-evident danger to children. Though the study acknowledges that its numbers might not be exact, researchers found that one year after release from prison, the chance of an adult-offender recidivating against a minor is well under one percent – approximately the same odds that a person convicted of *any* crime would commit a sex offense against a minor. *See* Patrick A. Langan, Ph.D *et al.*, Bureau of Justice Statistics, U.S. Dep't of Justice, Recidivism of Sex Offenders Released from Prison in 1994 (2003) (noting that almost half of all recidivism occurs within one year of release). So too, this recidivism rate presumably reflects rates for offenders who have *not* completed rehabilitative programs. *See* J.A. at 00138 n.3.

B. The State's Evidentiary Showing Is Insufficient

Alternatively, the State argues that it did, in fact, make a sufficient factual showing to meet its burden of demonstrating that adult-victim offenders represent a material threat to children.

The State first cites to a list of "over 50" cases it provided to the district court. However, until now the State has specifically disavowed that it was relying on the truth of those cases in support of its evidentiary burden. Suppl. J.A. at 00048 n.2 ("The recited adjudicated facts underlying criminal convictions throughout Defendant's Brief are submitted, not so much to prove the truth of those circumstances, but to show real case scenarios known to the public which can tend to serve as a rational basis for legislative action."). Even accepting the factual recitations of those cases as "evidence," the district court was correct that "most of the cases cited by Defendants are irrelevant to the question of whether adult-victim offenders are dangerous to minors." Suppl. J.A. at 00165. Instead, they involve defendants who "committed an offense against a minor before committing an offense against an adult, offenders who were in a romantic relationship with an adult before committing an offense against a minor, offenders who committed a crime both before and after a victim reached the age of 16, and offenders' use of pornographic material in conjunction with sexual crimes." *Id.* Even in its Brief to

this Court, the State cites only two cases in which an adult-victim offender goes on to commit an offense against a minor. *See* App. Doc. #30 at *18-*19.

The State also misstates its evidence regarding "recidivists pulled from North Carolina records." *See* App. Doc. # 30 at *19 (noting "examples of five recidivists). Of the four records provided, one at least, *Alldred*, simply does not support the State's contention that adult-victim offenders are collectively dangerous to minors. In the *Alldred* case, the defendant was convicted for statutory rape of his 13-year old girlfriend when he as 17 and then, 18 years later, convicted of misdemeanor sexual assault against his adult wife. Of the others, in only one instance, *Peele*, is it clear on the record submitted by the State that the defendant committed a sexual offense against an adult (attempted rape, 2001) then later went on to commit an offense against a minor (statutory rape, 2009).

At best, the State has presented anecdotal evidence showing that there are *some* adult-victim offenders that may represent a threat to minors. At the same time, the paucity of relevant evidence produced suggests that this subset is actually quite small. In a search of more than fifty states and territories spanning at least forty years, the State has produced roughly 5-10 cases in which it is even alleged that an adult victim offender went on to commit an offense against a minor. *See* Suppl. J.A. 0050 – 0060. Out of roughly 20,000 persons who have been on the North Carolina Sex Offender Registry, the State has produced one (at best three)

examples in which an adult-victim offender went on to commit an offense against a minor. In none of these cases do the fact patterns presented suggest that a statute such as subsection (a)(2) would be reasonably likely to prevent the offense.

Even assuming that the State *could* find additional anecdotal evidence, such evidence would still fail to address the crucial question – what is the *prevalence* of adult-victim offenders recidivating against minor victims? The existence of an adult-victim offender that goes on to commit an offense against a child shows that there is a non-zero chance of such recidivism. A non-zero chance could well be enough to satisfy "rational basis" analysis. But when a statute creates significant First Amendment burdens, the State must do more than demonstrate a rational relationship between the statute and a legitimate state end. It must demonstrate that the statute's application to adult-victim offenders acts to "materially" diminish the risk of harm. It can meet this burden only with evidence showing the *rate* of recidivism, expert testimony as to the psychology of adult-victim offenders generally, or some other evidence tending to show the threat posed by adult-victim offenders *as a class*. Without any such evidence, the court is unable to draw conclusions about the collective danger of adult-victim offenders. It lacks sufficient information to evaluate whether such dangerousness justifies subsection (a)(2)'s curtailment of constitutional liberties. As the district court noted, here the

State "has made no evidentiary showing at all regarding the rate at which sex offenders recidivate." Suppl. J.A. at 00165.

The State suggests in passing that it was somehow limited to the scant, anecdotal evidence provided because it was unaware of the need for such evidence until after discovery had closed. This argument is, frankly, disingenuous. After hearing on the cross-motions for summary judgment the district court specifically provided additional time to gather evidence pertinent to the question whether adult-victim offenders represent a material threat to children. D.E. #73 (Order). At the status conference of March 24th, 2016, the district court specifically asked the State, repeatedly, whether it wished to produce additional evidence on that point. Suppl. J.A. at 00168. The State responded that it would not proffer additional evidence despite the district court's indication that the State's existing proffer was insufficient. *See* Suppl. J.A. at 00168 ("Defendants chose not to seek out an expert even after repeated inquiries form the Court regarding whether they desired to do so and after the Court expressly stated that it believed that Defendants' evidentiary showing was inadequate to carry their burden in this case."). In this case, the State was fully aware of its burden, was even aware *prior to judgment* that it had not met its burden, and yet specifically chose not to produce additional evidence.

The State produced the evidentiary record, and that record is insufficient. *See City of Albuquerque*, 667 F.3d at 1134. Moreover, the record itself suggests

that, contrary to the State's assertion, it would not be at all easy to produce substantive evidence supporting the State's proposition that a single conviction for a sex offense against an adult is a sufficient indicium of dangerousness to effectively banish a person from churches, libraries, schools, playgrounds, nurseries, daycares, etc. on the grounds that they *might* then come into contact with children. Common sense suggests the opposite.

C. The District Court Was Correct that N.C.G.S. § 14-208.18(a)(2) Is Substantially Overbroad

The State's final argument is that, even assuming the statute is not "narrowly tailored," the district court nevertheless should have upheld it on the grounds that any such overbreadth is not "substantial" with regard to the its "plainly legitimate sweep."

As an initial matter, the State raises this argument for the first time on appeal. In its Renewed Motion for Summary Judgment, the State argued only that N.C.G.S. § 14-208.18(a)(2) was "narrowly tailored" – appearing to concede that if the statute could not be constitutionally applied to adult-victim offenders then it would be properly considered substantially overbroad. Suppl. J.A. at 00073 – 00063. 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 may consider new arguments raised on appeal when failure to do so will result in plain error or a

fundamental miscarriage of justice; *see 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. It is not coherent to maintain that the constitutionality of a statute should be determined on a "case by case" basis when the issue before the Court is whether the statute may be constitutionally applied to a discrete and numerous *class* of persons.

On its merits, the State's argument is deficient. First, the State suggests that the "plainly legitimate sweep" of the statute is its full application to minor-victim offenders and to any "non-expressive" activities of adult-victim offenders. But absent a meaningful showing of dangerousness, the statute's application to adult-victim offenders is not "plainly legitimate" whether such offenders are engaged in expressive activity or not. The statute effectively bans covered persons from churches, libraries, community centers, malls, many parks, large swaths of the public streets, and even some governmental buildings among other places. Such a ban implicates fundamental rights of association, religious freedom, assembly, intrastate travel, and equal protection. *See generally Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing the Court has applied heightened scrutiny to laws burdening fundamental liberties); *see also Employment Division v. Smith*, 494 U.S. 872, 891 (1990) ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise

Clause concerns."). At best (for the State), as the district court noted, the "plainly legitimate sweep" of subsection (a)(2) is its application to minor-victim offenders. *See* Supp. J.A. at 00170.

N.C.G.S. § 14-208.18(a)(2) applies to two discrete populations – adult-victim offenders and minor-victim offenders. J.A. 00174. Both populations are "substantial." Suppl. J.A. at 00169. If the statute's application to one of those populations is constitutionally impermissible, then, near tautologically, the statute suffers from "substantial" overbreadth.

The State's argument also misses a broader point. The concept of "substantial overbreadth" is not a balancing test wherein a law is "substantially" overbroad if it is invalid in 10% of its applications, or 20%, or 50%. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("The concept of 'substantial overbreadth' is not readily reduced to an exact definition."). At issue in this, and all overbreadth cases, is whether the statute places a meaningful burden on constitutional liberty not justified by a legitimate state objective. *Ross*, 746 F.3d at 552-53 (*quoting Ward*, 491 U.S. at 799) (a statute may not "burden substantially more speech than is necessary to further the government's legitimate interests"). A statute which greatly burdens the First Amendment liberties of a discrete and substantial population without adequate justification does exactly that. Such a statute is not appropriately targeted at those persons who pose a fact-based

risk, *see Doe v. Nebraska*, 898 F. Supp. 2d at 1108, and thus the "strong medicine" of facial invalidation is proper. *Id.* Especially when, as here, the State has not even attempted to argue that the district court was incorrect in finding that the statute is not "readily susceptible to a limiting construction" that would cure the substantial overbreadth. Suppl. J.A. at 00173, *citing Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011).

It is also not the case, as Defendants suggest, that it will be difficult for North Carolina to craft a more narrowly tailored statute targeted at minor-victim offenders. In fact, it has already done so. North Carolina House Bill 1021 will go into effect on September 21st, 2016. That law will replace N.C.G.S. § 14-208.18(a)(2) with a similar provision that specifically applies only to minor-victim offenders. *See* N.C. Sess. Law 2016-102 (2015). The text of subsection (a)(2) remains the same, but is now only applicable to adult-victim offenders if "a finding has been made in any criminal or civil proceeding that the person presents, or may present, a danger to minors under the age of 18." *Id.* Also contrary to Defendants' suggestion, there are generally accepted evaluation techniques to determine the likely dangerousness of individual offenders. *See generally* R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, Vol. 21, No. 1, 1-21 Psychological Assessment (2009). Using these techniques, the State is able to

identify dangerous individuals and fashion appropriate terms of supervised release to address any legitimate concern. *See* Suppl. J.A. at 00169 n.5.

Conclusion

The State is essentially asking the Court to make a factual determination – that adult-victim sex offenders represent a material threat to children – while at the same time refusing to provide meaningful evidence to support that contention. As a matter of law, it asks the Court to simply assume the State has met the first prong of the *Ross/Ward* test and then entirely disregard the second. Failing that, it asks the Court to simply declare that a significant burden on the constitutional liberties of a discrete and numerous class of persons is not "substantial" and therefore does not warrant judicial protection.

The State does not meaningfully argue that the statute does not create such constitutional burdens. Instead, it continually implies that such burdens are acceptable because, without subsection (a)(2), sexual predators will be free to hunt North Carolina's children. Setting aside the alarmist rhetoric, this is clearly not the case. The State has already passed new legislation aimed at preventing any such harm while addressing the constitutional issues identified by the district court and, to the extent there are *some* adult-victim offenders who may be a threat to minors, the State has at its disposal the means to identify such persons and subject them to appropriate restrictions.

The "dangerousness" of sex offenders generally, much less the danger of adult-victim offenders recidivating against minors, is far from established fact. If the State wishes to impose significant constitutional burdens on that class of persons, it is incumbent on the State to resolve this question of fact in its favor. As it has failed to do so here, this Court should AFFIRM the district court's ruling that N.C.G.S. § 14-208.18(a)(2) is unconstitutionally overbroad.

Respectfully submitted this 28th day of July, 2016.

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Addendum

North Carolina General Statute § 14-208.18 (2015) (Sex Offender Unlawfully on Premises):

(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:

> (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.

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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Dated: July 28th, 2016

Certificate of Service

I do hereby certify that on this 28th day of July, 2016, I filed a copy of the attached Supplemental Brief for Appellees utilizing the ECF/CM System, providing notice to Appellants-Defendants counsel of record as follows:

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