RECORD NO. 11-1841

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JANE DOE,

Plaintiff-Appellant,

v.

VIRGINIA DEPARTMENT OF STATE POLICE;
W. STEVEN FLAHERTY, Colonel in his official capacity
as Superintendent of the Virginia Department of State Police;
SPOTSYLVANIA COUNTY SCHOOL BOARD;
J. GILBERT SEAUX, in his official capacity as the Chairman
of the School Board of the Spotsylvania County Schools,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1841 Caption: Jane Doe v. Virginia Department of State Police, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jane Doe (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

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   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
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I certify that on 12 August 2011 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:

/s/ Marvin D. Miller
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12 August 2011
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202**,** and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DOES A MOTHER HAVE A FUNDAMENTAL CONSTITUTIONAL RIGHT TO BE INVOLVED IN BRINGING UP AND EDUCATING HER CHILDREN?

II. DOES THE FUNDAMENTAL RIGHT TO BE INVOLVED IN BRINGING UP AND EDUCATING ONE'S CHILDREN INCLUDE THE RIGHT TO PARENT-TEACHER CONFERENCES AT SCHOOL WITH THEIR CHILDREN'S TEACHERS AND TO ASSOCIATE AT SCHOOL WITH PARENTS OF THEIR CHILDREN'S CLASSMATES?

III. DOES THE FUNDAMENTAL RIGHT TO BE INVOLVED IN BRINGING UP AND EDUCATING ONE'S CHILDREN INCLUDE THE RIGHT TO ATTEND THEIR CHILDREN'S SCHOOL EVENTS?

IV. DOES THE FUNDAMENTAL RIGHT TO BE INVOLVED IN BRINGING UP AND EDUCATING ONE'S CHILDREN INCLUDE THE RIGHT TO PROTECT THEM FROM THE HARM OF BEING LABELED THE

CHILDREN OF A SEX OFFENDER?

V. DOES THE FUNDAMENTAL RIGHT TO BE INVOLVED IN BRINGING UP AND EDUCATING ONE'S CHILDREN INCLUDE THE RIGHT TO ATTEND SERVICES AT A CHURCH OF ONE'S FAITH?

VI. MAY A DISTRICT COURT DISMISS A CIVIL RIGHTS COMPLAINT *SUA SPONTE* FOR LACK OF RIPENESS?

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X. ARE COURTS REQUIRED TO APPLY STRICT SCRUTINY ANALYSIS TO A CLAIMED VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS, AS THE FUNDAMENTAL RIGHT TO BRING UP AND EDUCATE ONE'S CHILDREN AND ATTEND CHURCH?

XI. FOR CLAIMED VIOLATION OF PROCEDURAL DUE PROCESS RIGHTS REGARDING DEPRIVATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, IS A COURT REQUIRED TO BALANCE THE IMPORTANCE OF PRIVATE INTEREST WITH THE RISK OF AN ERRONEOUS DEPRIVATION SHOULD SUCH PROCEDURES NOT BE USED AND THE VALUE OF ADDITIONAL SAFEGUARDS AGAINST GOVERNMENT INTERESTS, INCLUDING ADMINISTRATIVE BURDENS?

XII. ARE A COMPLAINT'S FACTS TAKEN AS TRUE IN A LIGHT MOST FAVORABLE TO PLAINTIFF UNDER RULE 12(b)(6)?

XIII. SHOULD LEAVE TO AMEND BE LIBERALLY GRANTED?

STATEMENT OF THE CASE

This case involves a civil suit by Jane Doe against the School Board of Spotsylvania County, Virginia (School Board), the Virginia State Police, and its Superintendent Col. W. Steven Flaherty (collectively State Police), under 42 U.S.C. § 1983. She, her husband, and three (3) children live in Spotsylvania County where her stepson from her husband's previous marriage, John Doe, is an elementary school student and her children from her marriage, James Doe and Judy Doe, are about school age. The suit seeks declaratory and injunctive relief under

28 U.S.C. §§ 2201 and 2202 because a 2008 change in Virginia law violates her rights to be involved in the education and upbringing of her children, to associate with those who teach her children, and their classmates' parents, as well as her right to practice her religion by going to church with her children.

In 2008, the Virginia General Assembly amended Va. Code § 9.1-902.E., thereby declaring Jane Doe to be a sexually violent offender because of a conviction in 1993 of an age-inappropriate sexual liaison with a teenaged boy she was coaching, who was a little over five (5) years her junior. *See* Va. Code § 18.2-63. She was in her early 20's. There were no threats, violence, or coercion in that case. The sentence she received was two (2) years suspended but for 30 days. Jane Doe completed her probation successfully. She had no offenses prior to and has had no offenses subsequent to that unfortunate situation in the early 1990's.

Because this change in the Code of Virginia redefined her offense from non-violent to violent, infringed on her fundamental constitutional rights by preventing her from entering public or private school property to participate in the up-bringing and education of her children, prevented her from attending church with her children because the churches of her faith have Sunday School, and, because of other restrictions, she filed a complaint on 25 June 2010, seeking to declare the statutory scheme and related School Board policy unconstitutional as applied to

her. This suit also sought to enjoin the Virginia State Police and its Superintendent from placing her on the registry because of the unconstitutionality of the statutory scheme of which the registry is a part. Implementation of this statutory scheme, by placing her on the registry, caused her to lose fundamental constitutional rights. She is entitled to a due process hearing before losing such rights.

She sought to enjoin the School Board from prohibiting her from entering school property because their policy regarding an application for permission to enter school property is unconstitutional. It requires her to cause harm to her children by publically labeling them as the children of a violent sex offender. Their policy provides no means to apply anonymously, under a pseudonym, like one may do in a court case and, thereby, shield her young children from being labeled as the children of a violent sex offender.[1] If granted permission, then the information that her children's mother is a sexual offender is disseminated within the school. It was to avoid that harm that she sought and was granted permission to proceed anonymously under a pseudonym for herself and her children in this case.

The School Board sought to change venue via an agreed motion on 16 July 2010. That motion was granted and the case was transferred from Alexandria to

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[1]Prior to the Virginia Supreme Court decision in *Commonwealth v. Doe*, 278 223, 682 S.E.2d 905 (2009), a registrant could proceed under Va. Code § 18.2-370.5.C in a circuit court under a pseudonym but, after *Doe*, one also had to seek separate approval form the school board.

Richmond. The School Board also filed a motion to dismiss for failure to state a claim and lack of standing. Because the Chairman of the School Board does nothing more than preside at their meetings, Jane Doe agreed to dismiss him as a party defendant. That motion was granted on 28 July 2010. Jane Doe opposed the motion to dismiss in a pleading filed on 27 July 2010. On 24 August 2010, the State Police defendants filed their motion to dismiss. Jane Doe opposed it in a pleading filed on 3 September 2010. The School Board filed its Reply to the plaintiff's opposition on 2 August 2010. Jane Doe asked that the Motions to Dismiss be denied or, in the alternative, that she be granted leave to amend the complaint, depending on the court's ruling. On 6 October 2010, Jane Doe requested a motions hearing. The hearing was held on 12 May 2011. Plaintiff reiterated her request at the hearing that, if the motions to dismiss were to be granted, then she be granted leave to amend.

A defense claim for dismissal based on the Eleventh Amendment to the Constitution was denied, however, the Motions to Dismiss under Rules 12(b)(1) and 12(b)(6) Fed.R.Civ.P. were granted, while Jane Doe's request for leave to amend was not. In its Memorandum Opinion of 27 June 2011, the district court made findings based on facts that were not in the complaint, failed to treat the factual allegations in the complaint as true, did not give plaintiff every reasonable

inference to be drawn from the allegations, relied on issues not raised by any party, and misapplied the law.

The lower court should not have granted the motions to dismiss and, in any event, it should have allowed plaintiff leave to amend. This appeal is timely filed.

STATEMENT OF FACTS

Jane Doe, the mother of three, her husband, and the children (two born of the marriage and a step-son from her husband's previous marriage), reside in Spotsylvania County, Virginia. The oldest child is in elementary school and the two youngest children are just about school age. Jane Doe, under Virginia's sex offender registry statutory scheme, may not enter any public or private school property during school hours or during any related or school-sponsored activities, such as Cub Scouts. Since the scouts meet at a church, which has a school, the grandparents, who live in Alexandria, Virginia, have to take John Doe to scout meetings because Jane's husband usually works six (6) days a week from 7:00 a.m. to 8:00 p.m. and, sometimes, 10:00 p.m., except for every other Friday. (JA-11) If John Doe misses the school bus, or becomes ill at school, Jane Doe cannot take him to or pick him up from school because of Virginia's statutory scheme in Va. Code §§ 9.1-900, *et seq*., and 18.2-370.5. (JA-12)

Because she may not go on school property, she cannot attend parent-teacher

conferences, meet and associate with the parents of other children at school functions, or attend Episcopal church services with her children. (JA-11-14) She is an Episcopalian. The Episcopal churches where she lives all have Sunday schools, which are "private schools", placing them within the purview of Virginia's statutory scheme. (JA-11-14) Va. Code § 9.1-900, *et seq*.

When her youngest children, James Doe and Judy Doe, want to matriculate in the Spotsylvania County school system, she is going to have to home school them because she cannot have three (3) different children in school in a circumstance where there is no one available to take them to school if they are late or pick them up from school if they become sick, nor if she is unable to meet the teachers who teach her children, or the other parents of children in the same class as they.

Under Virginia's statutory scheme, she may apply anonymously under a pseudonym to the circuit court of Spotsylvania County for permission to enter school property. If that is granted, then she must next apply for permission to the School Board, which is vested with supervisory authority over the public schools pursuant to Article VIII, Section 7 of the Virginia Constitution. (JA-13) School Board policy for application for leave to enter school property does not permit application anonymously under a pseudonym for herself and the children and, if the

petition is granted, then that policy requires dissemination, within the school, that a violent sex offender is the children's mother. (JA-10, 11) She can protect her children from the opobrium and denigration attendant upon such a label in the courts, the same as in this case, but not in the school system, nor in the churches. These limits on her fundamental right to participate in the education and upbringing of her children, to associate with their teachers and other parents of children in their school classes and her desire to take her children to church, generated this suit seeking declaratory and injunctive relief.

The lower court, in dismissing the complaint, misunderstood that Jane Doe was addressing a school board policy, even though it is clearly addressed in the complaint. (JA-10, 13, 146, 147, 158, 195n.2) Unaware that the complaint addressed an existing School Board policy, the court erroneously claimed that the School Board might allow an anonymous application. (JA-195n.2, 201) The court also found that the school's faculty would meet with Jane Doe off school property after hours or visit with her via telephone, on their own time, despite the absence of such a policy, practice, or procedure. (JA-206) The court made up possible scenarios of its own rather than accept the complaint's allegation as true.

Virginia's statutory scheme for its sex offender registry does not merely publish historic fact - the existence of a prior conviction. It imposes many

requirements and restrictions resulting in the deprivation of fundamental constitutional rights, such as the right to participate in the education and upbringing by a mother of her children, associational rights with teachers and parents of other children in her children's class, and her right to attend church services.

On 1 July 2008, the law in Virginia re-defined Jane Doe's 1993 conviction for an offense not involving violence to an offense involving "violence." The result was that Jane Doe's 15-year old age-inappropriate liaison placed her under the State's statutory registration scheme for life. Va. Code §§ 9.1-902.E, 9.1-908. The registration scheme is contained in Va. Code §§ 9.1-900, *et seq*., and 18.2-370.5. It is implemented by the State Police and provides in pertinent part as follows:

> §9.1-903
>
> A. Provision of physical residence information, as determined by the State Police, for inclusion in the registry.
>
> B. Appear to register within three (3) days of release from custody or sentencing, and provide finger and palm prints, photographs, DNA samples, information regarding place of employment, motor vehicles, water or air craft registered or owned, email addresses, instant

message or chat room names or identifying information used, or intended to be used, whether for business or personal use, and whether owned or controlled by an employer or individual privately.

C. Proof of residence in Virginia by an identification card issued by the Commonwealth providing complete name, gender, date of birth, and complete physical address.

D. A change of name, for instance by marriage, or a change of residence, if within the Commonwealth, requires appearance and re-registration within three (3) days, and, if without the Commonwealth, then within ten (10) days prior to the change. The State Police must also notify local police in a jurisdiction to which a registrant is moving.

E. If changing their place of employment, whether within or without the Commonwealth, then one must appear to provide that information.

F. One has only three (3) days to appear and provide notice of a change of motor vehicles, water or air craft, whether within or without the Commonwealth.

G. Any change in a registrant's email address, or instant message, chat or other internet communication name or identification used or intended, whether within or without the Commonwealth, and whether or not

proprietary to an employer or themselves, must be provided to law enforcement within 30 minutes. It may be sent electronically. Employer's secure corporate or government communication system and user names or identifications are not exempt.

H. Registry information includes date and locality of the conviction, fingerprints and photographs as determine at the sole discretion of the State Police, the individuals' age, birth date, social security number, current physical mailing address and a description of the offense. The "description" is determined by the State Police, without any restriction on content.

I. Local law enforcement, where the individual resides, receive the registration information.

J. The homeless, shall designate an area they frequent for purposes of registration.

Registrants enrolled in an institution of higher learning, post-graduate study, or a trade school, community college, or the like, shall inform the State Police, who notify the institutions' chief law enforcement officer or the local law enforcement agency. Additionally, the State Police must physically verify, or cause to be physically verified, the registration information within 30 days of the initial

registration and semi-annually each year thereafter. This means visiting the place of employment, educational institutions, and the home, etc., as required by Va. Code § 9.1-907.C. All registration information, including social security number, date of birth, computer access information, etc., shall be disseminated by the State Police, without restriction to anyone who wants it, gives any reason, and identifies themselves. *See* Va. Code § 9.1-912. The statutory scheme does not require the State Police to disseminate the identification of a registrant's children, although the School Board policy does. (JA-10, 11)

The statutory scheme also provides, in Va. Code § 18.2-370.5, that it is a felony for a registrant to be present during school hours or during school-related or school-sponsored activities upon any property, public or private, having an elementary or secondary school or any type of daycare center, or which is being used by a public or private elementary or secondary school for a school-related or a school-sponsored activity, such as an athletic field.

Sub-section C of Va. Code § 18.2-370.5 permits application to a circuit court for permission to enter school property and, the courts permit proceeding anonymously, *i.e.*, by a pseudonym to avoid unnecessary embarrassment, or opprobrium to a petitioner's children. One provision of Va. Code § 18.2-370.5 provides notification to the schools of a court application, in an anonymous

proceeding, and the school comes under the protective order allowing anonymous proceeding by a pseudonym.

The Supreme Court of Virginia decided in *Commonwealth v. Doe*, 278 223, 682 S.E.2d 906 (2009), that registrants must seek separate school board permission because they control school property under Article VIII, Section 7 of the Constitution of Virginia. After that decision, the School Board did not change its policy to permit anonymous, *i.e.*, pseudonym, proceedings. (JA-10, 11) If the permission is granted, then the parents' and their children's identity is disseminated to personnel in the individual school. (JA-10, 11)

The lower court's grant of the Motions to Dismiss was erroneous as was its refusal to grant the request for leave to amend. This appeal is timely filed.

SUMMARY OF ARGUMENT

This is a civil rights suits under 42 U.S.C. § 1983, seeking to declare Virginia's statutory scheme for sex offender registration and the Spotsylvania County, Virginia, School Board policy implementing a part of that scheme to be unconstitutional and to enjoin the State Police and the School Board from implementing these unconstitutional provisions. Jane Doe's complaint alleged that she had a fundamental right to bring up and educate her children and to go to church with her children. She further alleged that the statutory scheme and policy at issue

violated these fundamental constitutional rights.

The lower court erroneously found that her complaint was not ripe, an issue raised by no party, and she lacked standing despite the fact that she faced actual and imminent harm to fundamental constitutional rights traceable to the defendants and remediable by a favorable court decision.

The lower court also erroneously failed to apply the proper legal standards in its analysis, failed to accept the factual allegations in the complaint as true, and failed to view those facts in a light most favorable to Jane Doe. The court even went so far as to find that the restrictions placed on her were an appropriate consequence of her criminal conviction that could be imposed 15 years after her case was over.

Not only did the court misapply the law and facts in deciding motions to dismiss under Rules 12(b)(1) and (6), but it also failed to grant leave to amend under Rule 15 F.R.Civ.P.

ARGUMENT

I. STANDARD OF REVIEW

This is a case 42 U.S.C. § 1983 case seeking declaratory judgment and related injunctive relief under 28 U.S.C. §§ 2201 and 2202. Declaratory judgments challenge illegal or unconstitutional procedures. *See MedImmune, Inc. v. Genetech,*

Inc., 549 U.S. 118, 128-129 (2007). Declaratory judgments exist so a plaintiff is not forced to choose between abandoning her constitutional rights and risking harm. *See Id.*

The district court erroneously granted the motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(1); 12(b)(6). Courts review dismissals under Fed. R. Civ. P. 12(b)(1) and (6) *de novo*. *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 261 (4th Cir. 2011); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir. 2004).

When a court considers a Rule 12(b)(6) motion, it must accept as true all factual allegations in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). The facts must be viewed in a light most favorable to the plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 591 F.3d 250, 255 (4th Cir. 2009). A complaint must give defendants only fair notice of what the claim is about and its grounds. *See Id.* at 93. According to *Ashcroft v. Iqbal*, a complaint must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct." 556 U.S. ___, 129 S. Ct. 1937, 1950 (2009). A plaintiff is not required to plead facts constituting a prima facie case. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007).

Courts review de novo dismissal for lack of ripeness or standing. *Miller v. Brown*, 462 F.3d 312, 315 (4th Cir. 2006).

II. JANE DOE'S CLAIM IS RIPE

The district court erroneously found Jane Doe's claim was not ripe. (JA-199-201) The doctrines of ripeness and standing are interrelated. Cases are ripe when, as here, the contested issues are a matter of law.[2] *See Miller*, 462 F.3d at 319.

In *Miller v. Brown*, this Court determined that Virginia's open primary law violated the Republican Party's right to associate freely. *Id.* at 316. The issues were legal questions, which meant the case was "ripe." *Id.* at 318. According to the district court in *Miller*, the case was not ripe until a Democrat voted in a Republican primary. *Id.* at 320. The problem with that analysis was that, while it would be true that waiting would "remove any doubt about the existence of concrete injury," the harm to the plaintiffs would already have occurred. *Id.* at 320 (quoting *Babbitt v. UFW Nat'l Union*, 442, U.S. 289, 301 n.12 (1979)). This Court overruled the district court because the Republicans need not hold a primary before seeking declaratory judgment. *Id.* at 320. The lower court in Jane Doe's case committed the same error as the lower court in *Miller*.

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[2] *Greenlaw v. United States,* 554 US 237 (2008) - principle of party presentation i.e. courts only address what the parties raise.

Jane Doe's case, like the plaintiffs in *Miller*, presents legal questions. *Miller*, 462 F.3d at 319. Whether the statutory scheme barring her from public or private schools and School Board policy, which labels her children as those of a sex offender, are narrowly tailored to support a legitimate government interest given Jane Doe's fundamental rights to raise and educate her children, associate with other parents, and practice her religion presents questions of law. Moreover, whether Jane Doe's fundamental rights, as a parent, to participate in the education and upbringing of her children encompasses activities such as attending parent-teacher conferences and going to school events is likewise a question of law. Whether she can be denied those fundamental rights as a consequence of redefining her offense fifteen (15) years after her conviction is also a question of law. The legal issues in Jane Doe's case meets the standard for ripeness.[3]

III. JANE DOE HAS STANDING

The district court erroneously found Jane Doe lacked standing. She has suffered actual or threatened harms traceable to the defendants that are concrete and imminent and can be addressed by a favorable court ruling. She has standing.

In declaratory judgment cases, plaintiffs do not have to subject themselves to every harm before bringing a constitutional challenge to a statutory scheme or

[3]Ripeness was not an issue raised by any party. The court addressed it *sua sponte*.

policy. *See MedImmune,* 549 U.S. at 128-129. The Supreme Court has found "[t]he plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id. See Babbitt*, 442, U.S. at 298 (when a constitutional interest is affected by a statute, plaintiff does not have to wait to be harmed before seeking relief). *Babbit* applies to this case.

Jane Doe need not subject herself to a felony conviction under Virginia's statutory scheme before bringing this suit. *See* Va. Code § 18.2-370.5. The scheme denies her entry on school grounds and the right to attend church because her offense was redefined fifteen years after her case was over. (JA-9, 13, 14) *See also* Va. Code §§ 9.1-902.E, 9.1-903, 18.2-63 and 18.2-370.5. The fact that Jane Doe has not applied to the School Board for permission to enter school grounds and churches for permission to attend services does not excuse the statutory scheme's, and School Board policy's unconstitutionality. She need not face a felony conviction, subject her children to the harm of being labeled the young children of a sex offender to seek a declaratory judgment.[4] *See* § 9.1-902.E.; *MedImmune, Inc.*, 549 U.S. at 128-129. The lower court's finding, to the contrary, was erroneous.

[4] Application to the courts is not at issue. Courts protect Jane Doe and her children by allowing anonymous, pseudonym proceedings. The lower court's focus on whether she applied to a court is not the basis of her complaint. (JA-200, 201)

To establish standing, the plaintiff must have suffered an actual or threatened harm that is concrete and imminent, i.e. an injury-in-fact, and it must be traceable to the defendant's conduct in circumstances where the harm is likely to be redressed by a favorable court ruling. *See Saladin v. Milledgeville*, 812 F.2d 687, 690 (11th Cir.1987); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 621 (W.D. 2010). *See also Babbitt*, 442 U.S. at 298(citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). Jane Doe's complaint meets this standard.

A. JANE DOE HAS SUFFERED AN INJURY-IN-FACT

Jane Does has an imminent actual and threatened harm. The unconstitutional School Board policy and statutory scheme under Va. Code § 9.1-900 *et seq*., and §18.2-370.5 ban Jane Doe from school grounds, parent-teacher conferences, dropping off or picking up her children from school, and school-sponsored activities or associating at school with parents of her children's classmates unless the School Board authorizes it. (JA-10-12) She is denied participation, and may not attend church since churches of her faith have Sunday school. (JA-13, 14)

The lower court erred by ignoring the unconstitutional School Board policy[5]

[5] Despite multiple references to the School Board policy in the complaint, the district court should have, at the least, granted plaintiff leave to amend her complaint to quote, if necessary, the policy, which the court erroneously thought did not exist. (JA-10, 11, 49, 57, 146, 147, 158, 195n.2) Moreover, any doubt about the policy's existence should have to been viewed in a light most favorable to Jane Doe. (JA-195n.2) *See Nemet Chevrolet, Ltd.,* 591 F.3d at 255. Doubting the policy's existence is not viewing this fact in a light most favorable to Jane Doe.

that did not allow Jane Doe to apply for a waiver of the school ban anonymously under a pseudonym, as is allowed in the courts. (JA-195n.2) *See e.g.*, *Commonwealth v. Doe*[6], 278 223, 682 S.E.2d 906 (2009). The lack of such a procedure has harmed Jane Doe because it interferes with her ability to direct the education and upbringing of her children and causes her to subject her children to harm when they are inevitably labeled the children of a sex offender if she applies to the School Board or a church. (JA-10-14) A mother has a duty, when raising her children, to protect them, especially when so young, from the harm such a label brings. Even the lower court recognized that harm. (JA-187, 195n.2)

Moreover, the statutory scheme has no constitutional procedure whereby Jane Doe could challenge her reclassification as "dangerous", which is the basis for the State Police placing her on the registry with all of its restrictions. (JA-203, 204) (protecting schoolchildren and their parents from dangerous sex-offenders is a material reason for the statutory scheme's restrictions and School Board policy). *See* Va. Code § 9.1-900 (purpose of the registry is to protect persons from dangerous sex-offenders).

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[6] In this case, the court, recognizing the harm of publishing the plaintiff's relationship to his children, allowed him to proceed under a pseudonym. In the same way, Jane Doe ought to be allowed to proceed under a pseudonym with the School Board so as not to subject her small children to ridicule, debasement, and embarrassment, which they would suffer, if labeled the children of a sex offender by their peers and in the school community.

The district court failed to follow Supreme Court precedent holding that prospective future injury meets standing requirements. (JA-200, 201) *See Babbitt,* 442, U.S. at 298.

The Supreme Court has found standing when a plaintiff has not tried all existing remedies before seeking declaratory judgment. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the plaintiff objected to the use of affirmative action in undergraduate admissions. He intended to but had not yet applied to transfer universities before challenging a university's admissions policies as unconstitutional. *Id.* at 260-61. The existence of the unconstitutional policy coupled with his desire to apply, but for the unconstitutional policy, was a real, imminent, and non-hypothetical injury conferring standing. *See Id.*

Likewise, Jane Doe has standing to challenge the unconstitutional School Board policy and the State Police implementation of Virginia's statutory scheme because her harm is real, imminent, and non-hypothetical. Jane Doe is "able and ready" to participate in the education and upbringing of her children which is denied to her due to the unconstitutional, not narrowly-tailored statutory scheme and School Board policy.[7] (JA-10-14) *See id.*

According to the Supreme Court, Jane Doe does not have to apply to the

[7] See "narrowly tailored" addressed *infra* at 31-33.

circuit court, then the School Board, and then the church she wishes to attend to have standing because she is "able and ready" to do so and is, therefore, entitled to challenge the unconstitutional statutory scheme and School Board policy. *Gratz*, 539 U.S at 262. She, like the plaintiff in *Gratz*, is seeking declaratory and injunctive relief from the unconstitutional statutory scheme and School Board policy which infringes on her fundamental constitutional rights. *Id.* She has standing, and has stated a cause of action.

The district court followed the dissent in *Gratz* rather than the majority by dismissing her complaint because she had not applied to a court, the School Board, or a church. (JA-200, 201) *See* 539 U.S at 262; 285-86. The district court is trying to revisit a settled matter of law.

As with the inevitable harm that would occur by allowing Democrats to vote in a Republican primary, Jane Doe has actual and imminent harm because she is currently banned from her children's school and church. She will be forced to harm her children by subjecting them to the inevitable ridicule and embarrassment when labeled the children of a sex-offender because of the statutory scheme and School Board's policy and the lack of such a policy in the churches she seeks to attend. (JA-10-14) *See Miller*, 462 F.3d at 315, 317. Jane Doe, as a mother and parent of three young children, has a fundamental right to protect her children from such

harm. The right to educate and raise children encompasses bringing the children up in a safe, healthy environment, which becomes impossible when the children are thus labeled.

The lower court's Memorandum Opinion ignored the existence of the School Board policy, speculated that the School Board might allow a "Jane Doe" proceeding, even though that is contrary to the policy, and also speculated about the existence of alternatives to attending parent-teacher conferences at school. (JA-10, 13, 146, 147, 158, 195n.2, 201, 206) It is error to grant a Rule 12(b)(6) motion on factual speculations made up by the court, as occurred here.

Additionally, Jane Doe's fear that she will be prosecuted if she fails to comply with the Commonwealth's statutory scheme is sufficient to establish an imminent injury-in-fact for standing and ripeness purposes. *See* Va. Code §§ 9.1-900 *et seq*., and 18.2-370.5. When a plaintiff would fall under a criminal statute, its statutory language provides the basis for such a suit as this because "the fear of prosecution[] reasonably founded in fact." *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987). Jane Doe cannot be forced to choose between risking criminal prosecution and compliance with an unconstitutional statute. *See v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-393 (1988).

B. THE DEFENDANT'S CONDUCT IS CAUSING JANE DOE HARM

The harm Jane Doe suffers can be traced to the defendants. The Commonwealth's statutory scheme and School Board policy deny her the opportunity to participate in her children's upbringing and education, require her to subject them to inevitable harm once they are labeled children of a sex-offender, bans association with other parents in her children's class engaged in mutual child-rearing, and prevent the practice of her religion.

These injuries meet the standing requirement's second element because, but for the unconstitutional statutory scheme implemented by the State Police and their Superintendent and but for the School Board policy, Jane Doe would not be harmed. *See Miller*, *supra*, at 318.

C. A FAVORABLE COURT DECISION WILL REDRESS JANE DOE'S HARM

Jane Doe's injuries can be redressed by a favorable court decision. *Miller,* 462 F.3d. at 318. Jane Doe seeks declaratory judgment that Va. Code §§ 9.1-900 *et seq*., 18.2-370.5, and the School Board policy violate her fundamental rights. Injunctive relief would prevent the School Board from exercising its unconstitutional policy and the State Police from implementing this unconstitutional statutory scheme.

Jane Doe has standing and her case is ripe. *See Miller*, 462 F.3d at 319; 321.

This Court should direct that she be allowed to proceed; and, if necessary, to amend her complaint. *See, e.g., Franks v. Ross,* 313 F.3d 184, 193 (4th Cir. 2011)(holding that leave to amend should be liberally granted).

IV. THE DISTRICT COURT FAILED TO ACCEPT AS TRUE FACTS ALLEGED IN APPELLANT'S COMPLAINT, RELIED ON FACTS NOT IN EVIDENCE

Under Rule 12(b)(6), district courts must take the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff. *See Erickson*, 551 U.S. at 94; *Nemet Chevrolet, Ltd.,* 591 F.3d at 255. The district court failed to meet this Rule 12(b)(6) requirement by relying on facts not submitted by the parties, failing to accept the complaint's facts as true, and not viewing them in a light most favorable to the plaintiff.

The School Board's policy is, in fact, in existence, as is the statutory scheme. (JA-10, 11, 49, 57, 146, 147, 158, 195n.2) This policy and the Virginia Code bars Jane Doe from coming onto school grounds, attending parent-teacher conferences, dropping off or picking up her children from school, and school-sponsored activities like sporting event unless the School Board authorizes it. (JA-10-12) Va. Code § 9.1-900 et. seq.; § 18.2-370.5. To dismiss the case the district court found there was no School Board policy and that Jane Doe might be able to appear anonymously under a pseudonym, as is allowed in the court system. (JA-195n.2,

201) *See e.g., Commonwealth v. Doe*, 278 at 231. There is a policy which requires revelation of the identity of petitioner and her children and dissemination in the school community. (JA-10, 11)

The district court also mistakenly assumed, based on facts it made up, that a procedure to apply to the School Board under a pseudonym was not necessary because Jane Doe could "call teachers and administrators" and "meet school faculty off-site." (JA-205-206) Nowhere is this suggested, except, inappropriately, by the district court. *Id.* This is the opposite of taking the facts in the light most favorable to Jane Doe. *See Nemet Chevrolet, Ltd.* 591 F.3d at 255.

Because the lower court based its determination that a statute that bars plaintiff from school property and a School Board policy allowing applications under pseudonyms was unnecessary on facts not submitted by any party while ignoring the facts in the complaint, the district court's decision to grant the motions to dismiss should be reversed. *See Nemet Chevrolet, Ltd.* 591 F.3d at 255.

V. THE DISTRICT COURT MISAPPLIED THE APPLICABLE LAW

A. SUBSTANTIVE DUE PROCESS

When a fundamental right is involved, courts employ a strict scrutiny analysis. *See Palmer v. City Nat'l Bank*, 498 F.3d 236, 246 (4th Cir. 2007). For a claim under substantive due process involving a fundamental right, the strict scrutiny test

is that the government is entirely forbidden to infringe on fundamental rights unless the infringement is narrowly tailored to serve a compelling state purpose. *Reno v. Flores*, 507 U.S. 292, 301-302 (U.S. 1993).

To find a right is fundamental under substantive due process involves two-steps. First, fundamental rights are those which are objectively "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Second, a "careful description of the asserted liberty interest is required." *Id*. at 721. The fundamental right to raise and educate children meets both of these requirements.

The Supreme Court has found "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This right is not limited to biological children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). More recently, the Supreme Court found that liberty interests of "parents in the case, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65-66 (citing *Yoder*, 406 U.S. at 232).

In *Meyer v. Nebraska*, the Supreme Court found that liberty under the Fourteenth Amendment exists in a number of contexts having to do with one's private life, including the right to bring up children and practice religion by "worship[ing] God." 262 U.S. 390, 399 (1923). A parent's choices about the upbringing of children is "'of basic importance to our society'" and protected by the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519, U.S. 102, 116 (1996) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer*, 262 U.S. 390 (raising children). A parent's right to protect the "care, custody, and management" of their children can be limited only when there is "a powerful countervailing interest." *M.L.B.*, 519 U.S. at 117-118 (internal quotations and citations omitted).

Jane Doe's suit sought to challenge the constitutional validity of the limits placed on her parenting by the statutory scheme and School Board policy. The district court failed to analyze both the statutory scheme and the School Board policy under the correct strict scrutiny test and did not decide whether the statute and the policy were narrowly tailored. (JA-202-206) At this stage, the complaint made a sufficient claim. (JA-10-14) If it had not then leave to amend, not dismissal, was the proper course. *See Franks*, 313 F.3d at 193.

1. The Statutory Scheme and State Police.

In 2008, fifteen years after the fact, Jane Doe's offense was redefined as violent. *See* Va. Code §§ 9.1.902E; 18.2-63. (JA-9) The State Police collect, maintain, and make publically available Jane Doe's personal registry information as well as her conviction. Va. Code §§ 9.1-903, 9.1-912. (JA-56) Therefore, Jane Doe's due process rights have been violated by the State Police by virtue of their compiling and maintaining the unconstitutional registry under this statutory scheme and its restrictions. (JA-7-8) However, the lower court failed to find a parent's right to raise and educate her children was fundamental under the constitution, and failed to analyze the statutory scheme under strict scrutiny as required. (JA-202-208) *See Reno v. Flores, supra.*

Plaintiff claims the protected right at issue in this case is her fundamental right, as a parent, to ensure the education and upbringing of her children, not a right to privacy on which the district court based its opinion. (JA-204, 205, 207) Because the district court based its opinion on a right not at issue, this Court cannot rely on the district court's findings under substantive due process.

Not only did the district court fail to address the fundamental right to a parent's upbringing of her children, but the court also found the state can impose curtailments of such right in this case because they may do so as part of a criminal

sentence. (JA-205, 206) To the district court, denying Jane Doe the right to participate in the education and upbringing of her children is a proper sentencing consequence of her prior conviction, even if it comes fifteen years after her sentencing. (JA-203-205) While Jane Doe did not raise an *ex post facto* claim in her complaint, this finding by the district court that *ex post facto* sentencing occurred is proper should have resulted in Jane Doe being allowed to amend her complaint to address this issue.

The Supreme Court has recognizes parents have a fundamental right to the education and upbringing of their children. *See M.L.B.,* 519 U.S. at 116 (citing *Skinner*, 316 U.S. 535); *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390. The lower court failed to recognize this.

The district court also never addressed whether the statutory scheme was narrowly tailored, which is part of Jane Doe's claim. (JA-10-16, 59) *See Palmer*, 498 F.3d at 246 (denial of fundamental rights are viewed under strict scrutiny). The language in Va. Code § 18.2-370.5 makes sweeping pronouncements as to when someone falling under the statute can enter property used for educating children. Because of these restrictions, Jane Doe is denied the opportunity to participate in her children's upbringing and education, which is a fundamental right. *See M.L.B.,* 519 U.S. at 116 (citing *Skinner*, 316 U.S. 535); *Pierce*, 268 U.S. 510;

Meyer, 262 U.S. 390. This infringement must be narrowly tailored to pass strict scrutiny. *See Palmer*, 498 F.3d at 246.

Because the district court incorrectly failed to find Plaintiff's claimed parental rights to be fundamental and failed to conduct a proper strict scrutiny analysis, its decision should be reversed.

2. The School Board Policy and The School Board.

The district court erroneously failed to find a parent's right to bring up and educate her children is fundamental and failed to use the correct strict scrutiny test in evaluating the School Board policy.

Like the statutory scheme, School Board policy is not narrowly tailored despite its infringement on Jane Doe's fundamental right to the upbringing and education of her children. In particular, the School Board decided not to change its policy to allow anonymous petitions under pseudonyms in the wake of *Commonwealth v. Doe*, 278 223, 682 S.E.2d 906 (2009).

In *Commonwealth v. Doe*, the Supreme Court of Virginia held that school boards have the final say in whether, and under what conditions, to permit registrants on their school grounds. *Id.* at 231. Previously, only the circuit courts decided whether and under what conditions sex-offenders could be on school campuses. *See* Va. Code § 18.2-370.5. (JA-50) Importantly, circuit courts allow

anonymous petitions. *See, e.g., James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). Thus, before *Commonwealth v. Doe*, Jane Doe's fundamental right to raise and educate her children could be addressed in a manner protecting her and her children from harm by petitioning a court to be on school grounds under a pseudonym. This mechanism was narrowly tailored in light of Jane Doe's fundamental rights. However, after *Commonwealth v. Doe*, this right was taken away. Circuit courts still allow anonymous petitions; the School Board does not. (JA-10-11) That is one of the bases for this suit.

B. PROCEDURAL DUE PROCESS.

Under procedural due process, the right to some kind of prior hearing is necessary when life, liberty, or property are implicated by government action. *See Board of Regents* v. *Roth*, 408 U.S. 564, 569-570 (1972). *See also Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

However, the district court failed to use the appropriate test to determine Jane Doe's procedural due process rights. The correct test in procedural due process is a balancing between the importance of the private interest involved, the risk of an erroneous deprivation should such procedures not be used and the probable value of additional safeguards, and the Government's interests, including administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976). The district court did not

use the *Mathews v. Eldridge* test in deciding that Jane Doe's claim does not warrant procedural due process. The court under substantive due process seemingly ruled on the merits rather than the complaint's statement of a cause of action.

As stated *supra*, Jane Doe has a fundamental right to raise and bring up her children. *See, e.g., M.L.B.,* 519 U.S. at 116 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer*, 262 U.S. 390. The opportunity to exercise this fundamental right is being denied to her without an adequate, constitutional hearing because the statutory scheme and the School Board policy, which does not allow petitions under pseudonyms. *See James*, *supra.*, at 238.

1. The Statutory Scheme and State Police.

Jane Doe's Procedural Due Process Rights are being violated by the State Police because they continue to enforce an unconstitutional statutory scheme that, procedurally, provides no mechanism to challenge her re-classification under Va. Code § 9.1-900 as "dangerous." (JA-15-16) She was not offered a procedure where should could contest her reclassification as a violent sex-offender before being placed on the registry. (JA-9)

Under the *Mathews v. Eldridge* test, Jane Doe's interests are her fundamental right to raise and education her children, freely associate, and exercise her religion.

Mathews, 424 U.S. at 321. Moreover, because Jane Doe was not afforded a procedure, before her reclassification, to challenge her new status, she is marked as a dangerous person for the rest of her life. *See Id.* and Va. Code §§ 9.1-900, 9.1-908. The government invites a high risk of erroneously categorizing those who are not dangerous as dangerous because there is no opportunity to challenge this reclassification. *See Id.* Virginia's courts are well equipped to handle such individual determinations. *See Id* § 18.2-370.5.C; *see also Commonwealth v. Doe, supra.*, where the court addressed "dangerousness" and protected petitioner's identity by a pseudonym proceeding.

Furthermore, Jane Doe's claim here and the Commonwealth's statutory scheme are materially distinct from those at issue in *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003). The district court misread the Supreme Court's decision in *Conn. Dep't of Pub. Safety v. Doe* and its application to Jane Doe. The Connecticut statute at issue in that case merely disclosed publically available information. *See Id.* at 4-8. Second, unlike the Connecticut statute, the Commonwealth's statutory scheme makes an offender's dangerousness a material part of the statute. *Id.* at 4. Va. Code § 9.1-900. Third, unlike the plaintiffs in *Conn. Dep't of Pub*. *Safety* who alleged harm to reputation only, Jane Doe is asserting harm to her fundamental rights which are being infringed by the Commonwealth's unconstitutional statutory

scheme. *Conn. Dep't of Pub. Safety*, 538 U.S. at 6-7.

In Virginia, a person who has been a convicted sex-offender fifteen years ago is now forced to submit a wide range of information for public availability. Va. Code §§ 9.1-903; 9.1-912. If a sex-offender changes her email address, instant message screen name, or other internet communication name because of identity theft, she has only thirty minutes to notify law enforcement, no matter when nor where she is. *Id.* § 9.1-903(G).

The registry itself includes personal information such as a person's name, birth date, social security number, and physical home and work address. *Id.* § 9.1-903.H. This information will be given to anyone upon request. *Id.* § 9.1-912. In terms of what is publically accessible on the internet, the State Police have total discretion to include any information about an offender that they "determine is necessary to preserve public safety." *Id.* § 9.1-913. Jane Doe is also on the registry for life. *Id.* § 9.1-908. The State Police physically check to see if the information provided is accurate. *Id.* § 9.1-907(C).

Moreover, the Commonwealth's statutory scheme makes an offender's dangerousness a material part of the statute. *See* Va. Code § 9.1-900. The Supreme Court, in finding the statute in Connecticut did not violate procedural due process, held that "due process does not entitle [a plaintiff] to a hearing to establish

a fact (the existence of conviction) that is not material under the Connecticut statute." *Conn. Dep't of Pub. Safety*, 538 U.S. at 7. Connecticut took great care to explain how those on their registry were not dangerous and that the registry was only providing publically available information. *Id.* at 5. *See also* Conn. Gen. Stat. § 54-258(a).

In the Commonwealth, the express purpose of the statutory scheme is to protect society from people declared to be dangerous. *See* Va. Code §§ 9.1-900, 9.1-902.E., 18.2-63. Therefore, because dangerousness is a material part of the Commonwealth's statute, Jane Doe is entitle to a hearing before she is redefined as a dangerous violent sex offender.

Additionally, the plaintiff in *Conn. Dep't of Pub. Safety* did not make a substantive due process argument and sought only protection of his reputation. 538 U.S. at 6, 8. The lower court's reliance on the Connecticut case was misplaced because the Supreme Court did not address a substantive due process claim. For instance:

> Unless respondent can show that the substantive rule of law is defective (by conflicting with a provision of the Constitution,) any hearing on the current dangerousness is a bootless exercise. It may be that the respondent's claim is actually a substantive challenge to Connecticut's statutes 'recast in procedural due process terms.' Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections,

> and maintains, as he did below, that his challenge is strictly a procedural one . . . . Because the question is not properly before us, we express no opinion as to whether Connecticut's [statute] violates principles of substantive due process. (internal citations omitted). *Id.* at 7-8.

Here, Jane Doe's right is a fundamental one – the right to educate and bring up her children. This is a much different interest than the mere reputational interest at stake in *Conn. Dep't of Pub. Safety*. *Id.* at 6. The Supreme Court has never decided whether a sex-offender statute meets constitutional scrutiny on both substantive and procedural due process grounds, but this is precisely the argument Jane Doe raises.

Thus, the district court erroneously found that "[t]he Supreme Court definitely closed the door on this [due process] argument in *Conn. Dep't of Pub. Safety*, 538 U.S. 1 (2004)." (JA-207) To say "[Jane Doe] has no due process right to prove she is not dangerous because dangerous is not the criteria that causes a person to be listed on the Registry" is not correct. Jane Doe is challenging the statutory scheme on substantive as well as due process grounds, and on the basis of fundamental right, not mere reputation and. The district court's reliance of *Conn. Dep't of Pub. Safety* requires reversal.

2. The School Board Policy and School Board

Jane Doe not only has a substantive due process right to raise and educate her

children free from state interference unless the statutory scheme and corresponding School Board policy's intrusion into this fundamental right are narrowly tailored, which they are not, but she has a procedural due process right as well.

Under the *Mathews v. Eldridge* test, as stated *supra*, Jane Doe's private interests are fundamental – the right to raise and educate her children, which entails the right to keep them from the harm of being labeled as children of a sex-offender. *Mathews*, 424 U.S. at 321. *See, e.g., M.L.B.,* 519 U.S. at 116 (citing *Skinner*, 316 U.S. 535); *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

Courts recognize the necessity for anonymous procedures under procedural due process. This Circuit has found such proceedings are necessary to ensure the well-being, health, and even safety of those affected by bringing suits. *See James*, 6 F.3d at 238. When granting the right to an anonymous procedure under a pseudonym, this Circuit looks at whether the matter involves highly personal information, whether there is a risk of mental or physical retaliation or harm to the one seeking anonymity and "even more critically, to innocent non-parties." *Id.*

Jane Doe is not the only party affected if she is not allowed to petition the School Board anonymously under a pseudonym. Her small, innocent children will be faced with ridicule, debasement, and embarrassment when they are labeled as the children of a sex-offender. (JA-10-11) The facts of Jane Doe's previous conviction

are highly sensitive and the nature of the activity involved creates the risk to both Jane Doe and her children of mental or physical harm or retaliation. *See James*, 6 F.3d at 238.

The reason the circuit court requirement was not included in this suit is because it has a means to proceed anonymously under a pseudonym. Jane Doe's fundamental constitutional interests in raising and educating her children in an environment free from harm are no less important before the School Board than they are in court.

Additionally, the administrative burden on the School Board would be light. *See Mathews*, 424 U.S. at 321. School boards have previously had procedures to protect the identify of youngsters in juvenile court contexts. (JA-178, 180-181) Schools also received notice of Jane Doe proceedings in court petitions. Va. Code § 18.2-370.5.C. Thus, the School Board's ability to conduct anonymous petitions is not unknown to them.

If it had applied the right test, the district court would have found Jane Doe entitled to challenge the denial of procedural due process in her law suit.

C. THE FREEDOM OF ASSOCIATION

The statutory scheme denies Jane Doe the right to be on school property, and, therefore, she cannot associate with other parents whose children are in class with

her children or their teachers. *See* Va. Code § 18.2-370.5. (JA-13, 16, 17, 65-66) It prevents Jane Doe's association with a small, exclusive group of parents of her children's classmates engaged in child-rearing in that limited context, and, as such, the lower court erroneously denied her constitutional right to the freedom of association.

The Supreme Court has found relationships, such as the one at issue here, that go to the "sustenance of a family" are at the heart of this nation's concept of liberty, and these relationships deserve the greatest constitutional protection under the principle of freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). Among the relationships are those concerning the raising and upbringing of children. *Id.* Groups tending to deserve the greatest protection under the freedom of association are

> distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain affiliation, and seclusion from others in critical aspects of the relationship. . . . Conversely, an association lacking these qualities – such as a large business enterprise – seems remote from the concerns giving rise to this constitutional protection. . . . Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. *Id.* at 620.

The district court erroneously failed to find the group of classmate parents

was sufficiently small to entail constitutional protection. (JA-209) The district court wrongly considered the group of parents and teachers mutually engaged in child-rearing to be akin to a large business corporation not deserving of associational protection under the constitution. (JA-209) *See Roberts*, 468 U.S. at 620.

A group of classmates' parents and their teachers is a small, selective group, not a large business-like enterprise. *See Roberts*, 468 U.S. at 620. A public elementary school class is not equal to a business corporation. Additionally, the number of parents of the children in the same class is small and limited. *See Roberts*, 468 U.S. at 620. Moreover, the number of teachers involved in teaching Jane Doe's children is also similarly small, such as one for each child. Because the group is small and centers on raising and educating children, any infringement on Jane Doe's right of association imposed by the Commonwealth's statutory scheme warrants constitutional protection. *Id.* at 619.

The group at issue here falls on the higher end of the spectrum of associational groups protected by the constitution, not the lower end of business corporations. *Id.* at 620. Accordingly, Jane Doe's fundamental interest in associating with other parents in the same classroom and their teacher for the purpose of educating and raising children falls at the higher-end of this spectrum because it is a small, select group important to the fundamental right to raise and

educate children. *Id.*

Lastly, the lower court's viewing the group at issue here as a large, unselective body is not viewing the facts as true and in a light most favorable to Jane Doe, as required for a motion to dismiss under Rule 12(b)(6). *Nemet Chevrolet, Ltd.*, 591 F.3d at 255; *Erickson*, 551 U.S. at 94. The court made a merits decision for the end of a trial not a Rule 12(b)(6) decision on the sufficiency of the complaint.

D. THE FREE EXERCISE OF RELIGION.

Jane Doe cannot attend local churches of her faith with her children because they have Sunday schools, which means she is prohibited from entering their grounds. *See* Va. Code § 18.2-370.5. Moreover, like the School Board policy, her local churches have no procedure whereby Jane Doe can apply anonymously under a pseudonym. This is a violation of her due process rights. (JA-13-14) Jane Doe's fundamental right to the free exercise of her religion is infringed.

The district court misapplied the law involving the Free Exercise Clause under the First Amendment. (JA-210-211) When the government infringes on the fundamental right to the free exercise of religion, it must "justify any substantial burden on the religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Employment Div., Dept. of*

Human Resources of Ore. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., Brennan, J., Marshall, J., Blackmun, J., concurring). *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)(". . . penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.").[8]

Further, the Supreme Court has explicitly found the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions when it is a hybrid action involving Free Exercise violations in conjunction with other constitutional protections, such as the right of parents to raise and educate their children. *See Employment Div., Dept. of Human Resources*, 494 U.S. at 881-882; *see also Pierce*, 268 U.S. 510. Moreover, when statutes are generally applicable and facially neutral that does not end the inquiry because "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. . . . ." *See Employment Div., Dept. of Human Resources*, 494 U.S. at 894 (O'Connor, J., Brennan, J., Marshall, J., Blackmun, J., concurring). It is error to assume that just because a law has criminal sanctions and is generally applicable that a state may not be required to carve out an exception for religiously motivated

[8]In the *Smith* case, the Supreme Court also looked to see whether the prohibited act which impacted the free practice of religion was also undertaken by others for non-religious purpose. *Id.* at 889. In that case, it was taken by vote. Here, it is attending Sunday church services with Jane Doe's children.

conduct. *See Employment Div., Dept. of Human Resources*, 494 U.S. at 899-900 (O'Connor, J., Brennan, J., Marshall, J., Blackmun, J., concurring). After all, this is not the merits stage; it is whether the complaint states a cause of auction. It does.

First, the district court erroneously found the law was generally applicable and neutral on its face. (JA-210-211) The Commonwealth's statutory scheme specifically targets only sex-offenders on the registry, which is the opposite of being generally applicable. *See* Va. Code § 18.2-370.5.

Additionally, Jane Doe's inability to attend the churches of her faith is a substantial infringement on her right to the free exercise of her religion, and, as such, triggers strict scrutiny. *Employment Div., Dept. of Human Resources*, 494 U.S. at 894 (O'Connor, J., Brennan, J., Marshall, J., Blackmun, J., concurring). Here, the lower court failed to apply the correct strict scrutiny test and never decided whether the Commonwealth's statutory scheme was narrowly tailored in light of Jane Doe's fundamental right to the free exercise of her religion. (JA-210-211)

Moreover, even if the statutory scheme is generally applicable, Jane Doe's claim is a hybrid Free-Exercise claim coupled with another fundamental right – the right to raise and educate her children. In hybrid cases like this, the First Amendment bars application of a facially neutral law when it infringes on other

constitutional protections, like Jane Doe's other fundamental rights here at issue. *See Employment Div., Dept. of Human Resources*, 494 U.S. at 881-882. The district court simply found the Commonwealth's statutory scheme was generally applicable, and thus Jane Doe was not entitled to any constitutional protection, but the lower court failed to account for her hybrid claim and the other fundamental rights at stake. (JA-210-211) *See Id.* Despite the Supreme Court's warning, the district court erroneously assumed that a facially neutral law that infringes on Jane Doe's free exercise of religion is not required to carve out an exception for her religiously motivated conduct. *See Employment Div., Dept. of Human Resources*, 494 U.S. at 899-900 (O'Connor, J., Brennan, J., Marshall, J., Blackmun, J., concurring).

The district court failed to apply the correct strict scrutiny test, failed to account for Jane Doe's hybrid claim, failed to find the law targets a narrow, specific category of people and is not generally applicable, and erroneously assumed the statutory scheme does not require an exception in light of its infringement on religion. (JA-210-211) The court also failed to accept her factual allegation as true and failed to give her every favorable inference to be drawn from them. Thus, the lower court should be reversed.

VI. JANE DOE SHOULD HAVE BEEN GRANTED LEAVE TO AMEND COMPLAINT

In *Iqbal*, cited by the district court, the Supreme Court specifically remanded

that case to the Circuit Court to consider whether the plaintiff should be granted leave to amend his complaint to cure its deficiencies. (JA-196) 129 S. Ct. at 1950. Such is consistent with this Circuit's precedence in which leave to amend is freely granted unless such amendment is clearly futile, in bad faith, or inequitable. Fed. R. Civ. P. 15(a); *Franks*, 313 F.3d at 193; *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999). It is also this Circuit's policy to resolve cases on the merits instead of disposing of them based on technicalities. *Sciolino v. City of Newport News*, 480 F.3d 642, 651 (4th Cir. 2007).

Given the importance of this case in recognizing the fundamental rights of parents to educate and bring up their children and practice her religion, the lower court, at the least, should have granted Plaintiff's request for leave to amend her complaint. Moreover, as shown throughout this Brief, Jane Doe's claims are not futile. Among other things, the lower court failed to conduct a proper legal analysis, improperly introduced its own speculative facts in making its decision, and mis-categorized the fundamental rights at stake. It cannot be said Jane Doe's claims are clearly futile. (JA-10, 11, 49, 57, 146, 147, 158, 195n.2, 199-211) Additionally, there is no bad faith and granting Jane Doe leave to amend would not be inequitable. *See* Fed. R. Civ. P. 15(a); *Franks*, 313 F.3d at 193; *Edwards*, 178 F.3d

at 244; *Ostrzenski*, 177 F.3d at 252-53. The district court should have granted Jane Doe leave to amend her complaint, and this Court should reverse and remand.

CONCLUSION

The lower court's decision was factually erroneous and legally incorrect. Its decision should be reversed and the case remanded so that Jane Doe's case can be determined on the merits. If appropriate, then the district court should also be directed to grant leave to amend so that the important issues presented in this case can be heard and decided.

Respectfully submitted,

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/S/

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument on the issues presented in this appeal.

CERTIFICATE OF COMPLIANCE

1. This Brief of the Appellant has been prepared using Microsoft Word software, Times New Roman font, 14 point proportional type size.

2. Exclusive of the corporate disclosure statement; table of contents; table of authorities; statement with respect to oral argument, any addendum containing statutes, rules, or regulations; and the certificate of service, this brief contains 10,708 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief and/or a copy of the word of line print-out.

/S/_____
Marvin D. Miller

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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