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,

Defendants – Appellees.

APPELLANT'S REPLY BRIEF

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Appellant adopts the Statement of Jurisdiction in her Opening Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant adopts the Statement of Issues Presented for Review in her Opening Brief.

STATEMENT OF THE CASE

Jane Doe's 42 U.S.C § 1983 suit seeks to declare the Virginia Sex Offender Registry unconstitutional because it invades fundamental, constitutionally protected rights. The Registry is not a mere recitation of historic fact such as the identity of an individual convicted of a sex offense addressed in *Conn. Dept. of Pub. Safety vs. Doe,* 538 US 1 (2003). Virginia's Registry is, and is alleged to be, part of a greater statutory scheme that limits the liberty and fundamental constitutional rights of Jane Doe, as applied. (JA-9-17) Both the lower court (JA-203-204, 211) and appellees (Br 16-17) consider the deprivation of her constitutional rights necessary to protect children, i.e. Jane Doe is deemed to be a present danger to children; however, as alleged, she has not been afforded a pre-declaration proceeding to address that she is not "dangerous." [1] Jane Doe was not

[1] References to "(JA)" is to the Joint Appendix and to "(Br)" is to appellees' brief.

declared “dangerous” and deprived of her rights for life until 15 years after she was in court for an age inappropriate liaison.

The registration scheme in Va. Code §§ 9.1-900, *et seq.*, and §18.2-370.5, as alleged, bans her from school property where her children would be elementary school students, and from church with her children because the churches operate Sunday schools. (JA-10-17) She may not attend school events, parent/teacher conferences, nor associate with other parents at school. While she can apply anonymously, under a pseudonym, to court for leave to go on school property, such as in *Commonwealth v. Doe* 378 Va. 223, 682 S.E.2d 905 (2009), the Spotsylvania School Board application policy, as alleged, has no provision allowing anonymous application under a pseudonym. (JA-10, 13, 146, 147, 158) When an application is granted, the policy requires broad dissemination of the identity of the parent and their children within the school. (JA-10, 158) To participate in her children’s education, she must label them as those of a violent sex offender.

The parties and the lower court do not dispute that labeling elementary school children as the children of someone declared a violent sex offender is harmful to the children, which is, perforce, harmful to Jane Doe. Plaintiff Doe does not want to harm her children. She requests that the School Board’s policy be declared unconstitutional. It prevents her involvement in the rearing and upbringing of her children. That is, and is alleged to be, a denial of a fundamental constitutional right. (JA-14, 15, 57-63). The lower court ducked that issue by claiming that she could meet with teachers off school property and by other means although there is no evidence that such is available in the Spotsylvania system. (JA-205-206) That was a failure to accept the complaint in a light most favorable to the Plaintiff.

The complaint seeks to enjoin Colonel Flaherty from placing her on the Registry because of the its unconstitutionality. (JA-8-10, 14-17) Placement on it is a determination, as the lower court found, that she presents a danger to children. (JA-203-204, 211) Jane Doe was not allowed to address the validity of that factual conclusion before it was made. (JA-9) There is no post-designation proceeding after placement on the registry. It prevents her from entering school property in a jurisdiction where she would have to harm her children to apply and, if the application was granted, harm them even more by the dissemination in the school system of their relationship to her, someone required to register as a violent sex-offender.[2]

[2] As noted, Jane Doe became a violent sex offender 15 years after her court case was over.

The registration scheme is also alleged to be, and is, unconstitutional and is sought to be so declared because it prevents her from attending church. (JA-13-14, 17) She is an Episcopalian and the Episcopal Churches in her area operate Sunday schools, which place those Sunday services off limits for Jane Doe. (JA-13-14) The Sunday schools have no policy allowing applications. Churches are not mentioned in the pertinent Code provisions. Va Code § 9.01-900 *et seq*., § 18.2-370.5. There is the additional problem that the churches, non-government congregations, have no requirements under the Registry provisions whereby she can ask for permission to attend church nor protect her children from the recognized harm of the opprobrium and disdain that would befall them by being associated with her as a registrant. That issue was not addressed by the lower court. (JA-210-211)

The Registry exposes her personal information such as social security number, e-mail address, and date of birth. In these times, that exposure presents an unnecessary risk. Both state and federal courts recognize the danger and protect public disclosure of social security numbers and dates of birth.

The lower court erroneously failed to address her request for leave to amend so that she could re-draft her complaint consistent with the court's determinations. She could, for example, if the allegations regarding the lack of a school board policy are inadequate, incorporate the policy verbatim in an amended complaint, but that was not allowed. Regarding the lack of an appropriate means for her to attend church, she could amend to be more clear so that she can raise her children in her faith. She could, for example, list the churches with Sunday schools and detail the lack of a means to apply to attend and quote the Va. Code's lack of any provision regarding churches. It is not as though denial of the right to pray in church is meaningless under the constitution.

The district court also held that the deprivation of her right to attend school events to participate in her children's education and upbringing was an appropriate punishment for her conviction. (JA-16) The court equated barring Jane Doe from participating in her children's education and upbringing to other criminal sentences, revoking her driver's license or sending her to prison. (JA-16) That, of itself, should have resulted in leave to amend so as to address *ex post facto* sentences. Although not raised in the initial complaint, *ex post facto* sentencing could be added to an amended complaint to address the court's finding that *ex post facto* punishment is permissible. The complain should not have been dismissed and, if not, then leave to amend should have been granted.

STATEMENT OF FACTS

Appellees do not dispute that there are no facts showing that Jane Doe, herself, presents a danger to children. They do not dispute that the fact that she is considered to be a danger was not addressed in any proceeding or litigation in her 1993 case and that this declaration was not made until well after her criminal case was over. There is no showing that the School Board has a policy or procedure whereby she may apply for leave to go on school premises etc., anonymously under a pseudonym, nor do they deny that, if her application was granted, then her relationship to her children would be disseminated in various ways in the school, nor that there is a great potential for harm to her children once she is a publicly associated with them as a registered violent sex offender. That is a harm to Jane Doe.

Likewise there is no dispute that individuals such as Jane Doe in state and federal court can proceed anonymously under a pseudonym to protect the innocent children, that such protection is necessary and important, and that the School Board can, even though it chooses not to, operate with an anonymous procedure allowing a pseudonym since they are notified when pseudonym cases are brought in the circuit courts of Virginia pursuant to Va. Code §18.2-370.5(C).

Finally, there is no dispute that Virginia's registration statutory scheme goes beyond merely reporting the identity of an individual whose conviction is a matter of public record, because it makes available the individual's email address, date of birth, social security number, and other personal information, to the public online and upon request. This needless exposure is dangerous and contrary to procedures in force in state and federal courts protecting social security numbers and dates of birth in litigation, civil or criminal.

ARGUMENT

I. THE LOWER COURT HAD JURISDICTION (THE CASE WAS RIPE AND JANE DOE HAS STANDING).

The lower court, *sua sponte*, determined that the case was not ripe and that Jane Doe had no standing to bring it. (JA-199-201) That is not correct because the fundamental right to be involved in the upbringing and rearing of one's children includes the right to attend parent-teacher conferences, to associate with parents of the children in one's child's class, to take them to church, and to attend their athletic, artistic, and other performances.[3] The lower court did not address those issues. It concluded, from sources unknown, that the Spotsylvania system's teachers are required to meet with parents after school hours, off school property and otherwise so that banishment from school property does not prevent

[3] If not properly pled then leave to amend should have been granted.

parent/teacher interaction. Where the court got that idea is unknown. Defendant School Board does not claim any such policy exists.

Colonel Flaherty, by implementing Virginia's unconstitutional registry scheme, deprives Jane Doe of her of fundamental constitutional rights, including the right to be involved in the rearing, upbringing, and education of her children and the right to practice her religion. She need not go on school or church property and risk a criminal prosecution in order to exercise the right to declaratory relief.[4] The lower court and Appellees claim that she has to apply, subject her children to the undisputed harm of the opprobrium associated with a public link between them and a registered violent sex offender before a suit can be brought, but that misconstrues the concept of declaratory judgment. *See MedImmune, Inc. v. Genetech*, 549 U.S. 118, 128-129 (2007). If the statutes are declared, as they are, unconstitutional, then the right to injunctive relief to prevent their application to her is an available remedy.

It follows, therefore, that the statutes and the School Board policy constitute

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[4]Appellees' and the lower court's focus on Jane Doe's failure to apply to a court for leave to enter school property is not the issue. Courts have anonymous procedure by pseudonym. *See Commonwealth v. Doe, infra.* The lack of a School Board policy or procedure to permit anonymous application under a pseudonym is at issue here, as is their policy requiring dissemination of her relationship to her children throughout the school if access is granted. (JA-10, 13, 146, 147, 158)

an unlawful invasion of constitutionally protected rights, which is particularlized and currently existing; that her harm is directly connected to the defendants because the School Board will not change its policy and Colonel Flaherty enforces registration, its consequential deprivation of fundament rights, and the public availability of her otherwise protected information. Her injury would be redressed by a favorable decision declaring the unconstitutionality of the provisions and policies and resulting in protective injunctions. She satisfies the requirements of *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

The issues presented in this case are questions of law. For instance, the right to raise and bring-up children, which includes the right to control the religious upbringing of children and to attend school-related activities such as parent-teacher conferences, is a constitutional question of law under the First and Fourteenth Amendments. *See, e.g.*, Argument II, *infra*. Because questions of law are automatically ripe, Jane Doe's complaint is ripe. *See Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

II. THE COMPLAINT PROPERLY ALLEGES EXISTING VIOLATIONS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS AND, IF IT DOES NOT, BECAUSE THE RIGHTS ASSERTED ARE FUNDAMENTAL, DOE SHOULD HAVE BEEN GIVEN LEAVE TO AMEND.

A. THE STATUTORY SCHEME IS UNCONSTITUTIONAL AS APPLIED.

In finding Jane Doe could not challenge the Commonwealth's statutory scheme on constitutional grounds, the Appellees and the lower court relied on what it thought was the controlling case – *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003). That case does not control. Jane Doe does not claim harm to reputation nor is the statute at issue here the same as the one in *Conn. Dep't of Pub. Safety v. Doe*.

In *Conn. Dep't of Pub. Safety*, the petitioner challenged Connecticut's statute that reclassified him as a sex-offender under the theory that this reclassification harmed his reputation. *Id.* at 6, 8. This challenge was brought only under procedural due process grounds regarding reputation and not in conjunction with other fundamental, substantive constitutional rights. The Supreme Court expressly made no decision on whether any sex-offender registration statute would pass constitutional scrutiny on substantive due process grounds involving fundamental rights. *Id.* at 7-8. That issue has never been decided. *Id.* Jane Doe seeks relief because her fundamental rights have been denied on both substantive due process and procedural due process grounds, and is not concerned about her "reputation," but focuses on fundamental, constitutional rights about raising children, practicing religion, and free association. *Conn. Dep't of Pub. Safety* does not control.

The registration statute at issue in *Conn. Dep't of Pub. Safety* is also materially distinct from the Commonwealth's statute here. In the Commonwealth, the purpose of its statutory scheme is to protect society from "dangerous" people. Va. Code §§ 9.1-900, 9.1-902E, 18.2-63. In other words, the Commonwealth makes "dangerousness" a material part of its statute. Va. Code § 9.1-900; *Conn. Dep't of Pub. Safety,* 538 U.S. at 4. In Connecticut, the statute took great care to show that it was publishing mere historic fact of already publically-available information involving convictions and was not meant to adjudge someone to be presently "dangerous." Conn. Gen. Stat. § 54-258(a). *See Conn. Dep't of Pub. Safety,* 538 U.S. at 4-8.

The Commonwealth's statutory scheme goes much further than the one in Connecticut. For example, the Commonwealth's statutory scheme publishes social security numbers, email addresses, birth dates, and has other requirements. Va. Code. § 9.1-903; 9.1-912. This information is not generally available, even in court proceedings, but is made available to anyone upon request under the registry scheme. Va. Code. § 9.1-912. The Commonwealth certainly creates a great deal of risk to registrants by allowing this kind of information to be accessible to anyone who asks for it.

Thanks to the 2008 amendment to the Commonwealth's statutory scheme, Jane Doe has been declared "dangerous" now and for all time. Va. Code. §§ 9.1-900, 9.1-908. This finding about Jane Doe is quite different than the situation addressed under the Connecticut law. By finding Jane Doe "dangerous," the Commonwealth deprives her of liberty, including her fundamental right to raise her children, associate with other parents in her children's class, and practice her religion. This deprivation requires a procedure where Jane Doe can contest her reclassification as "dangerous" – a procedure not afforded to her. This violates due process. *See Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

It is worth noting that the School Board allows Jane Doe a procedure whereby she may contest her "dangerousness" in an individualized determination when she applies to be admitted on school grounds. However, as stated *supra*, this process does not pass constitutional scrutiny because it is not narrowly tailored, not because it does not exist. There is no procedure under Virginia's law to seek an exemption from a church that has a Sunday school.

B. RAISING AND EDUCATING CHILDREN.

The rights at issue in this appeal are fundamental. Jane Doe has a fundamental right to raise and educate her children. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-118 (1996), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This includes the right to direct the religious upbringing of children, to participate with teachers and parents in a class, and to be on public school grounds to attend parent-teacher conferences, sporting events, performances, and other forms of educational and child-development activities that parents attend. (JA-10-16, 57-61) *See M.L.B.*, 519 U.S. at 116-118, *Skinner*, 316 U.S. 535, *Pierce*, 268 U.S. 510. Jane Doe also has the fundamental right to the Free Exercise of her religion and to the Freedom of Association. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (finding the Free Exercise of religion to be a fundamental right); *N.A.A.C.P v. Alabama*, 357 U.S. 449 (1958) (holding that Freedom of Association is a fundamental right). Defendants Flaherty and the School Board impermissibly infringe on these fundamental rights.

When fundamental rights are involved, regulations limiting these rights are only justified by a compelling state interest. *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618, 634

(1969), *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). The regulations must be narrowly tailored to limit them to the compelling state interests that are implicated while respecting the individual's liberty interest. *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308 (1940); *see Eisenstadt* v. *Baird*, 405 U.S. 438, 460, 463-464 (1972)(White, J., concurring). Such regulations are viewed by courts under the strict scrutiny test – the most heightened form of judicial scrutiny.[5] *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

So, to succeed, the School Board and Colonel Flaherty must prove that the statutory scheme and school board policy are narrowly drawn, meaning they are drawn in the least restrictive way possible, and they have a compelling state interest for the statute and school board policy. The defendants have not done this, so this Court must reverse, remand, and allow the case to proceed.

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[5] It is often said that it is strict in scrutiny, fatal in fact.

1. PARTICIPATING IN PARENT-TEACHER CONFERENCES, ATTENDING SCHOOL EVENTS, ASSOCIATING WITH OTHER PARENTS, AND DIRECTING THE RELIGIOUS UPBRINGING OF CHILDREN.

The lower court failed to resolve the central issue raised in this case: that the fundamental right to raise and bring-up children includes participation in child-raising activities like attending parent-teacher conferences and other school events, associating in school with the parents of her child's classmates, and attending church with her children to bring them up her faith. The test the lower court was required to use was strict scrutiny, but it did not. *See Yoder,* 406 U.S. at 214, 233; *M.L.B.*, 519 U.S. at 116-118; *Skinner*, 316 U.S. 535; *Pierce*, 268 U.S. 510.

Appellees would have this Court use the incorrect rational basis test. (Br 19) The rational basis test justifies governmental action infringing on rights when the government has a legitimate state interest. *See United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Rational basis, the lowest level of judicial review, is not the correct standard for this case because fundamental rights, such as the right to raise children and go to church, are analyzed using strict scrutiny, not rational basis. *Eisenstadt*, 405 U.S. at 460, 463-464 (White, J., concurring), *Kramer*, 395 U.S. at 627; *Shapiro*, 394 U.S. at 634, *Griswold*, 381 U.S. at 485, *Aptheker*, 378 U.S. at 508, *Sherbert*, 374 U.S. at 406; *Cantwell*, 310 U.S. at 307-308. *See also Palmer v. City Nat'l Bank,* 498 F.3d 236, 246 (4th Cir. 2011)(regulations impinging on fundamental rights get the strict scrutiny test).

In this case, Virginia has explicitly acknowledged that parents have a fundamental right to raise and bring up their children. The statutory scheme at issue recognizes it infringes on parental rights, so it balances its interest in protecting children from dangerous people with a parent's right to participate in their children's upbringing by being on school grounds. Parents are not completely banned from being on school grounds with children and may seek permission to be on their campuses. Va. Code § 18.2-370.5 (C). This is an explicit recognition that the statutory scheme infringes on the fundamental rights of parents. It also means the School Board's policy is unconstitutional.

The problem with the Spotsylvania School Board's policy is that it is not narrowly drawn. It fails strict scrutiny. The school boards in the Commonwealth have the ultimate say in who can be on their school grounds by holding quasi-judicial proceedings to determine whether a particular registrant is dangerous. *Commonwealth v. Doe, supra*. School boards are required, when making those determinations, to meet constitutional scrutiny by narrowly tailoring their policies because parents have fundamental rights at stake. To be narrowly tailored, meaning it is drawn in the least restrictive way possible, this policy must allow for anonymous petitions under pseudonyms, as do courts, to protect the children's well-being and to protect the parent from being forced to harm their children if they assert their rights. *See also James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). The Spotsylvania School Board has not done this, and its policy fails under strict scrutiny.

The Appellees would have this Court find the fundamental right to raise and bring up children is limited to decisions involving school-enrollment.[6] (Br 19). However, this is contrary to Supreme Court precedent. For example, in *Wisconsin v. Yoder*, the Court found the right to raise children included the right to direct their religious upbringing. 406 U.S. 205, 233 (1972). In *M.L.B.*, the Court held that the right to raise children includes the "companionship, care, custody, and management" of them. *M.L.B.*, 519 U.S. at 117-118.

Moreover, the sole case cited by the Appellees to support their argument that the right to raise children is limited to school enrollment decisions is a trail court's decision that is context-specific. In *Myers v. Loudon Cnty School Board*, 251 F. Supp. 2d 1262, 1276 (E.D. Va. 2003), cited by Appellees, the plaintiff challenged the pledge of allegiance and tried to have the court design the entire school's

[6] Jane Doe also faces an enrollment decision. She is forced to choose between home schooling or enrolling her children in school, thereby subjecting them to ridicule when they are labeled as children of a sex-offender after she applies for permission to be on school grounds through an unconstitutional procedure.

curriculum around his own personal religious beliefs. There, the trial court addressed the issue of raising children in the context of a state's duty to provide education. Read in context, this language was not a general limit on all of the fundamental rights' of parents in every case. If it were it would not comport with precedent in superior courts.

2. ANONYMOUS PETITIONS ARE NECESSARY TO PASS CONSTITUTIONAL SCRUTINY.

The Spotsylvania School Board has no policy allowing an anonymous application under a pseudonym to protect children from the undisputed harm of being branded as the children of a violent sex offender. Spotsylvania County has a policy requiring applicants who are granted permission to attend school events to have their name and that of their children published in various ways throughout the school, which causes the innocent children, and accordingly the parent, harm. This harm is undisputed. Jane Doe should not be required to harm her children and subject them to the undisputed ridicule caused by publicly connecting herself to them to apply to the School Board and later attend events at their schools. (JA-10-13, 184, 187)

This Court has enumerated reasons why anonymous petitions under pseudonyms are necessary. *See James*, 6 F.3d at 238. The most important reason anonymous petitions are allowed is because they protect innocent third-parties, such as children, from harm. *Id.* This harm can be physical or psychological. The interest in protecting innocent children from harm is no less important in a quasi-judicial proceeding before a school board than it is in the court system.

The School Board chooses not to allow anonymous petitions, although it certainly could. School's have used anonymous procedures in other contexts, such as in identifying youngsters in juvenile courts. (JA-178, 180-181) Because the School Board has the ability to allow for anonymous petitions, but refuses to do it, the School Board's policy is not narrowly tailored. Therefore, the policy fails strict scrutiny. It is unconstitutional.

C. JANE DOE'S RIGHT TO THE FREEDOM OF ASSOCIATION.

Although the fundamental right of parents to raise and bring-up their children includes the right to associate with other parents involved in their children's class, the Freedom of Association is also an individual right under the First Amendment.

Appellees argue that Jane Doe does not have a right to the Freedom of Association because a group of parents in her children's classes is, evidently, so large and unselective that First Amendment's protections do not apply. (Br 25) To the contrary, the Supreme Court finds relationships involving the "sustenance of a family," such as the raising and upbringing of children, deserve the greatest constitutional protection, i.e., strict scrutiny. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). Groups deserving the greatest constitutional protection, or strict scrutiny,

> [have] attributes [such] as relative smallness, a high degree of selectivity . . . , 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 lower court erroneously found that a small group of parents involved in Jane Doe's children's class is no different than a large business enterprise. (JA-209) This is a finding of fact that does not accept the complaint in the light most favorable to the Plaintiff. It also has no factual basis. This Freedom of Association analysis is more akin to a final determination on the merits than a analysis on Rules 12(b)(1) or 12(b)(6).

Because the group of parents involved in her children's class is small, selective, secluded, and, most importantly, involves the "sustenance of a family," limits placed on this group's right to associate must pass the strict scrutiny test. *Id.*

at 619-620. Here, there is no state interest, compelling or otherwise, in preventing parents from associating with each other. *See N.A.A.C.P v. Alabama*, 357 U.S. 449 (1958); *see also Eisenstadt*, 405 U.S. at 460, 463-464 (White, J., concurring), *Kramer*, 395 U.S. at 627; *Shapiro*, 394 U.S. at 634, *Griswold*, 381 U.S. at 485, *Aptheker*, 378 U.S. at 508, *Sherbert*, 374 U.S. at 406; *Cantwell*, 310 U.S. at 307-308. The state interest in both the statutory scheme and school board policy claim that it goes to protecting children from dangerous people, not to protecting parents from other parents. *See* Va. Code § 9.1-900, *et seq*. This limit on Jane Doe's associational rights is not, therefore, narrowly tailored, nor is it in any way linked with a compelling state interest. This case should be reversed and remanded with instructions to use the appropriate test when deciding this issue.

D. JANE DOE'S RIGHT TO THE FREE EXERCISE OF HER RELIGION.

The right of parents to direct the religious upbringing of their children is part of the right of parents to raise their children. *Yoder*, 406 U.S. at 233. Jane Doe also has an individual right to the Free Exercise of her religion, which is prohibited by the state statutory scheme.

It is undisputed that Jane Doe cannot attend church with her children because all nearby Episcopalian Churches have Sunday Schools attached to them. (JA-13-14, 211) Jane Doe's right to the Free Exercise of her religion warrants strict scrutiny because it is a fundamental right. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 894 (1990)(O'Connor, J., et al. concurring) (burdens on religious conduct must be motivated by a compelling state interest and be effectuated by narrowly tailored means); *Yoder*, 406 U.S. at 214. Moreover, Jane Doe is not alleging a violation of the Free Exercise Clause alone; there are also other fundamental rights involved here, such as the fundamental right of parents to raise and bring up their children. These fundamental rights are being infringed by the state statutory scheme. She is entitled to have this issue address, but the lower court did not do so. She is also entitled to have it addressed by the proper legal analysis. If the compliant is not adequate, Jane Doe is entitled to leave to amend.

The lower court and Appellees urge this Court to find the statutory scheme is neutral and generally applicable, and so there is no Free Exercise Clause violation. (JA-210-211) (Br 26) The lower court, to the extent it addressed this issue at all, used the rational basis test. (JA 210-211)(generally applicable laws "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.")(citing *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995)). Assuming, *arguendo*, that the statutory scheme is generally applicable[7], rational basis is still the incorrect legal standard to apply in this case.

Even when a statute is generally applicable or neutral, when more than one fundamental right is coupled with a claim under the Free Exercise of religion, courts must determine whether the state's infringement on these rights passes the strict scrutiny test. *See Employment Div., Dept. of Human Resources*, 494 U.S. at 881-882, 894. This is what courts call a "hybrid claim." *Id.* The Appellees would have this Court believe we "cloud" the issue by pointing this out, but this is not clouding the issue; it is illuminating it. (Br 26)

This case presents the rights of parents intertwined with the right to the Free Exercise of religion. In such cases, the Supreme Court has found that " where the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the state' is required to sustain the validity of the State's requirements under the First Amendment." *Id.* at 882 n.1. The Supreme Court has also repeatedly acknowledged that parents have a fundamental right to direct the religious upbringing of their children. *See, e.g., id; Yoder*, 406 U.S. at 233.

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[7] We do not agree that the statutory scheme is "generally applicable." *See* Opening Brief at 45.

To pass strict scrutiny, the Commonwealth is required to carve out an exception to its statutory scheme, even if the statute is generally applicable, to allow for religious conduct. *See Employment Div., Dept. of Human Resources*, 494 U.S. at 899-900. There is no mechanism under which Jane Doe can even apply for permission, let alone apply anonymously under a pseudonym, to the churches to attend religious services because these churches also have Sunday Schools on their grounds. She is not asking to attend a public or private school. She wants to attend church services. The law is silent on church services. This means the statutes forbids Jane Doe from going to church with her children. Va. Code § 18.2-370.5.

The Commonwealth here has made no attempt to balance the competing interests of protecting children from dangerous people and a parent's fundamental right to attend church and direct her children's religious upbringing. This statutory scheme is not narrowly tailored, and, therefore, fails strict scrutiny. These mistakes of law by the lower court require reversal.

This case should be reversed and remanded with instructions to the lower court to apply the correct test under the First Amendment.

III. THE LOWER COURT SHOULD HAVE GRANTED JANE DOE LEAVE TO AMEND HER COMPLAINT.

Jane Doe asked for leave to amend her complaint. (JA-189) The lower court denied her leave to amend without giving any reason. Even Appellees agree that leave to amend should be freely granted. (Br 27) According to this Court, leave to amend should always be granted unless an amendment would be in bad faith, inequitable, or clearly futile. *See Edell & Associates, P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 446 (4th Cir. 2011) (holding the district court abused its discretion by denying leave to amend). *See also* Fed. R. Civ. P. 15(a); *Franks v. Ross*, 313 F.3d 184,193 (4th Cir. 2002); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Ostrzenski v. Seigel*, 177 F.3d 245, 252-253 (4th Cir. 1999). Appellees do not dispute that granting Jane Doe leave to amend would not be in bad faith or prejudicial against them. (Br 27-28)

By not granting Jane Doe leave to amend, Appellees argue her claims are implausible, but this is not be correct. (Br 28) For example, the lower court, to deny leave to amend, must have determined it is not plausible that the right of parents to raise their children includes a parent's right to direct the religious upbringing of her children. That finding cannot be correct because it is directly contrary to nearly a century's worth of Supreme Court precedent. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As such, this was an abuse of discretion requiring reversal. *See Edell & Associates, P.C.*, 264 F.3d at 446.

Furthermore, the lower court found the Commonwealth's statutory scheme and School Board policy denying Jane Doe her fundamental rights as a parent were appropriate *ex post facto* punishments. (JA-16) This issue, which was not raised by Jane Doe or by the Appellees, also flies in the face of long-established Supreme Court precedents prohibiting *ex post facto* punishment. *See, e.g., Smith v. Doe*, 538 U.S. 84 (2003). Jane Doe should have been granted leave to amend her complaint to address the lower court's mistaken beliefs about the current legal status of *ex post-facto* punishments.

CONCLUSION

The lower court's decision was riddled with mistakes of law and mistakes of fact. The district court uniformly applied the wrong legal tests to the fundamental rights involved in this case. Strict scrutiny should have been applied, and, as such, the lower court should have found the statutory scheme and school board policy were properly claimed to be unconstitutional as applied. The lower court added its own facts as a basis of decision and did not view the facts in the light most favorable to Plaintiff Jane Doe, as is required on a motion to dismiss under 12(b)(1) and (6). In effect, it decided the case on the merits and did wo using wrong legal standard and facts not in the record.

The lower court should have granted Jane Doe leave to amend her complaint if there were deficiencies because an amendment would not be prejudicial to Appellees, it would not be bad faith, and her claims are certainly plausible because the fundamental rights of parents adheres with long-established Supreme Court precedent. As such, the lower court abused its discretion. This Court should reverse and remand with instructions to apply the appropriate legal standards and, if then the complaint is deficient, leave to amend should be granted.

Respectfully submitted,
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By Counsel

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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 5,859 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 true and correct copies of the Reply Brief of Appellant was sent, first-class mail, postage prepaid, on this 28th day of November 2011, to:

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