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, COLONEL W. STEVEN FLAHERTY, SPOTSYLVANIA COUNTY SCHOOL BOARD, AND J. GILBERT SEAUX

Defendants-Appellees

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

BRIEF OF APPELLEES

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

CHARLES A. QUAGLIATO
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071 phone
(804) 371-0151 fax
cquagliato@oag.state.va.us
Counsel for Defendants/Appellees Department of State Police and Colonel W. Steven Flaherty

JENNIFER LEE PARRISH
PARRISH, HOUCK & SNEAD, PLC
701 Kenmore Ave., Suite 100
P.O. Box 7166
Fredericksburg, Virginia 22401-7166
(540) 373-3500
Fax: (540) 899-6394
E-mail: parrish@phslawfirm.com
Counsel for Defendants/Appellees Spotsylvania County School Board and J. Gilbert Seaux

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-841 Caption: Jane Doe v. Virginia Department of State Police, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

J. Gilbert Seaux (name of party/amicus) who is appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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

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

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

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

CERTIFICATE OF SERVICE

****

I certify that on August 9, 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:

Charles Quagliato, VSB #45774
Assistant Attorney General of Virginia
900 East Main St., 6th Floor
Richmond, VA 23219

/s/ Jennifer Lee Parrish
(signature)

August 9, 2011
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-841 Caption: Jane Doe v. Virginia Department of State Police, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Spotsylvania County School Board (name of party/amicus) who is appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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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,

W. Steven Flaherty (name of party/amicus) who is appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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Charles A. Quagliato
(signature)

August 11, 2011
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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,

Virginia Dept. of State Police (name of party/amicus) who is appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Charles A. Quagliato
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court properly granted the Virginia Department of State Police's ("Department") Motion to Dismiss based upon Eleventh Amendment grounds.[1]

II. Whether the district court properly dismissed the Appellant's Complaint on jurisdictional grounds.

III. Whether the district court properly granted Appellees' Motions to Dismiss for failure to state a claim upon which relief may be granted.

IV. Whether the district court properly dismissed the Appellant's Complaint with prejudice without leave to amend.

STATEMENT OF THE CASE

This case arises from Doe's statutory obligation to register as a sex offender, pursuant to Virginia Code § 9.1-902 and her desire to be relieved judicially of this obligation.

On June 25, 2010, Doe filed a four-count Complaint against the Appellees alleging a substantive due process violation of her right to raise and educate her children, a procedural due process violation of her right to raise and educate her children, a violation of her associational rights, and a violation of her right to

[1] Appellant failed to address the Department's dismissal on Eleventh Amendment grounds on the merits in her brief. (JA-198, 202). Appellant mistakenly stated the District Court denied the Department's claim. Brief of the Appellant at 6.

exercise religion. (JA-6-13) The last count, a violation of Doe's right to exercise religion, was alleged solely against the Virginia Department of State Police ("Department") and Colonel W. Steven Flaherty ("Flaherty"). (JA-17)

In her prayer for relief, Doe sought a declaration that Virginia's sex offender registry scheme was unconstitutional as applied to her; an injunction against the Department and Flaherty enjoining them from collecting, maintaining and making Doe's information available on Virginia's sex offender registry; an injunction against the Spotsylvania County School Board ("School Board") and J. Gilbert Seaux ("Seaux") enjoining them from exercising their authority in preventing Doe from entering school property in Spotsylvania County; and requested the District Court to order the School Board and Seaux to implement a procedure by which Doe could anonymously petition the School Board to enter and remain on school property.

On July 16, 2010, the School Board and Seaux filed a motion to dismiss and a memorandum in support. On August 24, 2010, the Department and Flaherty filed a motion to dismiss and a memorandum in support. Doe filed a responsive brief for each motion to dismiss. On October 6, 2010, Doe filed a request for hearing.

On May 12, 2011, a hearing was held on the Defendants' motions to dismiss before the Honorable John A. Gibney, Jr., Judge for the United States District

Court, Eastern District of Virginia, Richmond Division. At the hearing Doe agreed to dismiss Seaux as a defendant. (JA-54, 142, 202).

On June 27, 2011, the district court issued a memorandum opinion and final order granting the Defendants' motions to dismiss with prejudice. The district court dismissed Doe's claims against the Department for want of subject matter jurisdiction based on the Eleventh Amendment. (JA-198, 202). The district court dismissed Doe's remaining claims against Flaherty and the School Board based on ripeness and standing, as well as for her failure to state a claim.

On July 22, 2011, Doe filed her notice of appeal. Doe contends that the district court improperly dismissed her claims against Flaherty and the School Board for want of ripeness and standing and for failure to state a claim.[2] Doe further contends that the trial court improperly failed to permit Doe to amend her Complaint.

STATEMENT OF FACTS

Doe's obligation to register as a sex offender stems from a 1993 conviction of carnal knowledge of a minor, in violation of Virginia Code § 18.2-63. At the time of her conviction, Doe was not required to register as a sex offender. In 1994, the Virginia General Assembly enacted the Virginia Sex Offender and Crimes Against Minors Registry ("Registry") creating Doe's obligation to register. In

[2] Although the district court found one claim against Flaherty to be justiciable it dismissed that claim for Doe's failure to state a claim. (JA-201)

1994, a conviction of carnal knowledge of a minor was an offense for which registration was required, but it was not deemed a "sexually violent offense." In 2006, however, the federal government enacted the Adam Walsh Child Protection and Safety Act. Title I of the Act, known as the Sex Offender Registration and Notification Act ("SORNA"), required Virginia to implement a comprehensive set of sex offender registry standards. Failure to implement such standards would result in a partial loss of federal funding for state and local law enforcement programs. In 2008, the Virginia General Assembly amended Virginia Code § 9.1-902 to comply with SORNA. One of the consequences of this amendment was that Doe's 1993 conviction was reclassified as a "sexually violent offense."

Anyone convicted of a "sexually violent offense" is prohibited from entering or being present on a school's property during school hours, and during school-related or school-sponsored activities, or on any school bus, or on any property during hours when such property is solely being used by a public or private elementary or secondary school for a school-related or school-sponsored activity. Va. Code § 18.2-370.5(A). Virginia Code § 18.2-370.5(B) creates certain exceptions to this prohibition if the individual is a lawfully registered and qualified voter, and is coming upon such property solely for purposes of casting his vote, or the individual is a student enrolled at the school. Additionally, Virginia Code § 18.2-370.5(C) provides a petition process for an individual convicted of a

sexually violent offense to seek access to school property. After the petition is granted in whole or in part, the individual must seek permission from a local school board or the owner of the private school or child day center to enter the school's property. Doe has never availed herself of the petition process contained in Virginia Code § 18.2-370.5(C) and has failed to seek permission from School Board to access to school property in Spotsylvania County.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) *de novo. Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 261 (4th Cir. 2011) (with regard to 12(b)(1) motions); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir. 2004) (with regard to 12(b)(6) motions). Similarly, a district court's dismissal for lack of ripeness or standing is reviewed *de novo. Andrew v. Lohr*, 2011 U.S. App. Lexis 18416 (4th Cir. 2011) (with regard to ripeness); *McBurney v. Cuccinelli*, 616 F.3d 393, 398 (4th Cir. 2010) (with regard to standing). Likewise, a district court's legal determination of whether *Ex parte Young* relief is available is reviewed *de novo*. *McBurney* at 398. This Court reviews a district court's refusal to grant leave to amend a complaint for abuse of discretion. *Edell & Associates, P.C. v. Law Offices of Angelos*, 264 F.3d 424, 446 (4th Cir. 2001).

SUMMARY OF ARGUMENT

The district court committed no error in dismissing Doe's action with prejudice. The Department is immune from Doe's claims, and dismissal for ripeness and standing and failure to state a claim was proper with respect to the School Board and Flaherty. The district court committed no error in denying Doe's request to amend her Complaint as any amendment would have been futile. This Court should affirm the trial court's judgment.

ARGUMENT

I. The District Court Applied the Correct Standard of Review.

A. A Motion under Rule 12(b)(1) Federal Rules of Civil Procedure

A motion made pursuant to Fed. R. Civ. P. 12(b)(1) challenge's the courts jurisdiction over the subject matter of the complaint. If a defendant alleges that the complaint fails to state facts upon which subject matter jurisdiction exists, the facts in the complaint are presumed true. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). If, however, the jurisdictional facts are contested as untrue, "A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Id.* Consideration of evidence outside of the pleadings does not necessarily convert the motion to dismiss to a motion for summary judgment. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citation omitted). Ultimately, the plaintiff bears

the burden of establishing subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). In determining the issue of subject matter jurisdiction, the district court considered the appropriate evidence, applied the proper standard and committed no error. (JA-195-96).

B. A Motion under Rule 12(b)(6) Federal Rules of Civil Procedure

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The function of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

Considering the complaint and its allegations in the light most favorable to the non-moving party, a court must grant a motion to dismiss if the plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555.

The district court must accept, solely for the purpose of deciding a 12(b)(6)

motion, the truth of all well-pled factual allegations and fair inferences arising therefrom. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The court, however, is under no obligation to accept conclusory allegations regarding the legal effect of the facts alleged. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). Furthermore, the court need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937, 1949 (2009). In considering the Appellees' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the district court applied the proper standard and committed no error. (JA-196).

II. The District Court Properly Dismissed the Department on Eleventh Amendment Grounds.

Doe mistakenly asserts that the district court denied the Department's Eleventh Amendment claim. Brief of the Appellant at 6. Although Doe has procedurally defraulted any Eleventh Amendment issue on appeal, a brief discussion suffices to demonstrate the lack of any possible error on this point.

"[T]he essence of the [Eleventh Amendment] immunity is that the State cannot be sued in federal court at all, even where the claim has merit, and the importance of immunity as an attribute of the States' sovereignty is such that a court should address that issue promptly once the State asserts its immunity." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 n.4 (4th Cir. 2005). Although *Ex parte Young*, 209 U.S. 123 (1908), provides an exception to the Eleventh Amendment's bar on suit, the exception only "allows private citizens . . . to enjoin *state officials* in their official capacities . . ." *Franks v. Ross*, 313 F.3d 184, 197 (4th Cir. 2002). The *Ex parte Young* exception does not extend to state agencies and the Department, as a state agency, is immune to suit under the Eleventh Amendment. *See Constantine*, 411 F.3d at 479. Accordingly, the district court properly dismissed the Department on Eleventh Amendment grounds. (JA-197-99, 202)

III. The District Court Properly Dismissed Claims Against the School Board and Flaherty on Jurisdictional Grounds.

The district court dismissed most of Doe's claims for lack of ripeness and standing.[3] (JA-199-201). The ripeness and standing doctrines stem from the case and controversy clause of Article III of the Constitution. U.S. Const., art. III, § 2,

[3] As mentioned above, the district court did find one claim to be justiciable. Doe's claim against Flaherty "that she should not be listed on the sex offender registry" survived the court's ripeness and standing evaluation. (JA-201).

cl. 1. The doctrines ensure both that a dispute exists between parties and that the dispute can be remedied by judicial action.

The questions of ripeness and standing may be considered *sua sponte*. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (ripeness may be considered on a court's own motion); *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1223 (4th Cir. 1980) (jurisdictional standing is an issue to be considered *sua sponte* by the court); Fed. R. Civ. P. 12(h)(3). Any claim by the Doe that the district court could not consider these issues on its own motion is erroneous.

A. Ripeness

The doctrine of ripeness addresses the timing of a suit, if the dispute has ripened into matter that can be resolved through litigation. "Ripeness is peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements ….'" *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807-08 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). "Dismissal for lack of ripeness is appropriate where nothing in the record shows that the appellants have suffered any injury thus far and the future effect of the law relied upon remains wholly speculative." *Gasner v. Bd. of Supervisors of Cnty. of Dinwiddie, Va.*, 103 F.3d

351, 361 (4th Cir. 1996). A case is not ripe when it is "dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

Doe failed to meet the ripeness requirement to bring this action for a variety of reasons. Although Doe asserts numerous school-related activities in which she cannot partake on School Board property, Doe did not plead facts showing an actual injury that the School Board or Flaherty caused. (JA-8-13). Likewise, Doe made various claims of religious activities in which she could not take part but failed to plead facts showing an actual injury that Flaherty caused. (JA-13-14).

More importantly, Doe failed to allege any facts indicating that she applied for a state court order allowing her to enter the statutorily prohibited areas, pursuant to Virginia Code § 18.2-370.5, or that she attempted to avail herself of any processes or procedures of the School Board, anonymously or otherwise, and was denied. (JA-176-77). As the petition process contained Virginia Code § 18.2-370.5(C) may relieve Doe of her hypothetical injury, the harms she asserted are speculative. (JA-200-01). Therefore, as Doe's claims are dependent on future uncertainties, they are not ripe and the district court properly dismissed them on this ground. (JA-201).

B. Standing

The doctrine of standing ensures that the litigants are the proper parties to the action. Standing contains a minimum of three elements. First, "plaintiff must

have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Secondly, "[t]here must be a causal connection between the injury and the conduct complained of . . ." and third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61. "When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

Doe did not meet the standing requirements established in *Lujan*. First, as discussed above, there has been no "injury in fact." (JA-201). As Doe has alleged a "hypothetical" injury, she lacks standing under the law. (JA-201). *Lujan*, 504 U.S. at 560.

Second, no connection between the alleged injury and the conduct complained of exists; therefore, the second prong of the test for standing has not been met. *Lujan*, 504 U.S. at 560-61. Doe did not allege any facts identifying or describing the alleged School Board "policy" giving rise to her claims for violations of constitutional rights. She only generally refers to "a policy" in ¶ 19 of the Complaint, but never provided specific facts pertaining to the policy or how

it has caused her alleged injury. (JA-10-11). Doe merely asserted that "[s]ince her reclassification, [she] has not entered school property." (JA-11). Additionally, as stated previously, Doe did not plead facts indicating she has suffered an injury in fact since she failed to plead facts showing she ever attempted (either openly or anonymously) to avail herself of a procedure through court order or the School Board by which she could petition to come onto school property or a church attached to school property. (JA-176-77).

Finally, for Doe to have standing to bring this lawsuit, it must be likely that a favorable decision will redress her injury. Even supposing that she suffered an actual injury, Doe has not filed suit against the proper parties so that a favorable decision would redress her grievances. The School Board has the authority "to decide whether a registrant classified as a sexually violent offender may enter public school property in Spotsylvania County and under what conditions." (JA-8). Doe clearly acknowledges this authority. (JA-8, 177). The authority is bestowed upon the School Board through Virginia Code § 18.2-370.5 and *Commonwealth v. Doe*, 682 S.E.2d 906 (Va. 2009). Through Doe's lawsuit, she is attempting to assert that the laws related to violent sex offenders as applied to her are unconstitutional. Appellees cannot make or change the laws enacted by the Virginia General Assembly, and an action against the Appellees will not result in the laws being modified. Further, Doe cannot be granted the relief she is

requesting in this regard. "A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *Baker v. Carr*, 369 U.S. 186, 204 (1962) (quoting *Liverpool Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). Therefore, a favorable decision in this case will not redress her injury, and Doe fails to meet the third requisite prong to have standing to bring the lawsuit.

C. The District Court Properly Considered the Evidence

The standard for determining whether Doe's claims were ripe or if Doe had standing is the same standard for a motion made pursuant to Fed. R. Civ. P. 12(b)(1). Thus, if the jurisdictional facts are challenged as untrue, the district court may go beyond the allegations of the complaint to determine if there are facts to support the jurisdictional allegations. *Adams*, 697 F.2d at 1219. Doe argues that the district court improperly considered her failure to avail herself to the petition process afforded by Virginia Code § 18.2-370.5(C) or the School Board's procedure as facts not in evidence. Brief of Appellant at 26-27. However, this is not the case. By questioning Doe at the hearing, the district court properly considered this evidence in determining if subject matter jurisdiction existed. (JA-171-75). Accordingly, the district court properly dismissed most of the claims against the School Board and Flaherty as non-justiciable issues. (JA-199-201).

IV. Whether District Court Properly Granted Appellees' Motions to Dismiss for Failure to State a Claim Upon Which Relief Could Be Granted.[4]

A. Count I: Substantive Due Process

1. Appellees' Conduct Does Not Shock the Conscience

Substantive due process guarantees an individual protection from government action so arbitrary that no procedural protection can render it fair. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-47 (1998); *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 720 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992). "The protection of substantive due process is indeed narrow and covers only state action which is 'so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'" *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995) (quoting *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991)). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for reasonable decision making in this uncharted area are scarce and open-ended." *Albright v.*

[4] On May 12, 2011, Doe agreed to dismiss Seaux as a party defendant at Appellees' motions to dismiss hearing. (JA-54, 142, 202). It was redundant to name Seaux as a defendant since Doe already named the School Board as a defendant. *See Kentucky v. Graham*, 473 U.S. 159 (1985). Therefore, to the extent any argument is necessary, Seaux was properly dismissed from Doe's action.

Oliver, 510 U.S. 266, 271-72 (1994). As a result, "the determination 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience'" is characterized by the Supreme Court "as a 'threshold question,' 'antecedent to' any 'possibility of recognizing a substantive due process right to be free of such executive action.'" *Hawkins v. Freeman*, 166 F.3d 267, 271 (4th Cir. 1999) (quoting *Lewis*, 523 U.S. at 847 n. 8 (1998)).

Doe alleged that Flaherty's collection and the publication of information about convicted sex offenders on the Registry violated her substantive due process rights. This statutorily mandated conduct, however, does not shock the conscience. In *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court explained the rationale for sex offender registries, noting that registration laws warn citizens about sex offenders, protect against repeat offenders, and help in the arrest of those repeat offenders. *Id.* The district court also noted that nearly every state has a sex offender registry. Accordingly, Flaherty has not violated any substantive due process right Doe has. (JA-203).

Doe also takes issue with the enactment of Virginia Code § 18.2-370.5, which requires sex offenders to seek permission before entering schools or daycares. (JA-14-15). Nothing is shocking about a statute that provides special protection to children. (JA-203).

Lastly, Doe complains that the School Board should have an anonymous procedure by which she can obtain the Board's permission to enter school property without revealing her identity. (JA-10, 18). As the district court observed, "This argument is nonsense." (JA-203). The Board must know the identity of Virginia Code § 18.2-370.5(C) petitioners to ensure the safety of school children and to make informed decisions about who can have access to school property. As the district court correctly concluded, "nothing any of the defendants in this case have done shocks the conscience." (JA-203).

2. Doe's Protected Interests Are Not Implicated

Doe's substantive due process claim also fails to implicate a fundamental right. "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Legislation implicating a fundamental right or fundamental liberty interest will survive constitutional scrutiny only if the legislation is narrowly tailored to serve a compelling state interest. *Id.* at 721. If the asserted right is not a fundamental right or a protected liberty interest, the legislation will survive constitutional scrutiny if the legislation is rationally related to a legitimate government interest. *Id.* at 728. The Supreme Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Id*. at 721.

Doe has not established that her asserted liberty interest is a fundamental right protected by the Due Process Clause. As stated by the district court, "The true gravamen of her Complaint is that she must reveal her identity." (JA-204). Anonymity, however, is not a fundamental liberty interest. Courts have found that individuals have a right to privacy for specific "zones" of life. These zones of privacy include "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976) (holding that there was no right to privacy when a state publicized a record of an arrest). However, an individual has no right to privacy in her identity. *Jones v. Murray*, 763 F. Supp. 842, 848 (W.D. Va. 1991) (holding that it is constitutional "to develop a DNA data bank [to] … enable the state to detect and deter violent crimes). *See also Cutshall v. Sundquist*, 193 F.3d 466, 480-81 (6th Cir. 1999) (holding that "the Constitution does not encompass a general right to nondisclosure of private information" and that a sex offender registry act "does not impose any restrictions on [a petitioner's] personal rights that are fundamental or implicit in the concept of ordered liberty.")

The district court noted that Doe attempted to "cloud the issue by arguing that the registration laws affect her fundamental rights to direct the upbringing and education of her children." (JA-205). Although case law indicates that "child rearing and education" is a fundamental right, *Paul*, 424 U.S. at 713, the

fundamental rights involving the upbringing and education of children are generally "limited to the coarse decision of whether to enroll a child in a public school, private school, or if the child is sufficiently mature, to dis-enroll a child from school altogether." *Myers v. Loudoun Cnty. Sch. Bd.*, 251 F. Supp. 2d 1262, 1275-76 (E.D. Va. 2003). "The state legitimately can impose restraints and requirements that touch the lives of children in direct conflict with the wishes of their parents." *Id*. at 1275 (citing *Bellotti v. Baird*, 443 U.S. 622, 639 n. 18 (1979) (asserting that the "constitutional parental right" to direct the upbringing of one's child protects only against undue or adverse interference by the state). Here, the statute in question has only a tangential effect on the upbringing of Doe's children. (JA-206). Doe's children still receive their mother's care and Doe has many ways to participate in her children's education. Therefore, Doe failed to demonstrate a fundamental right under her claim that Flaherty and School Board have interfered with the upbringing and education of her children. As Doe does not have any constitutional right to privacy in her identity and her rights to assist in the upbringing and education of her children have not been directly infringed, Flaherty and School Board need only prove a rational basis for their actions to survive constitutional scrutiny. (JA-205).

As the Superintendent of the Virginia State Police, Flaherty has been tasked with "assist[ing] the efforts of law-enforcement agencies and others to

protect their communities and families from repeat sex offenders and to protect children from becoming victims of criminal offenders by helping to prevent such individuals from being allowed to work directly with children." Va. Code § 9.1-900 *et seq*. Likewise, School Board has been granted the authority under Virginia Code § 18.2-370.5 and *Commonwealth v. Doe*, 682 S.E.2d 906 (Va. 2009), to require that convicted sex offenders seek and obtain permission to go onto school property. Such laws, policies, and protections are rationally related to a legitimate state interest in protecting school children and others from convicted sex offenders. Both Flaherty and School Board's actions satisfy the rational basis analysis. (JA-205). Therefore, the district court properly dismissed Doe's substantive due process claim for failure to state a claim against Flaherty and School Board. (JA-206).

An additional argument appellant raises regarding substantive due process is the idea that courts often allow for anonymous petitions. *See* Brief of the Appellant, p. 33. Appellant cites *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), in support of her argument. Brief of Appellant, p. 33. *Jacobson*, however, addressed anonymity at trial in the court setting, and is inapposite to the School Board. *Id*. at 234. Additionally, while the court in *Jacobson* stated that "under appropriate circumstances anonymity may, as a matter of discretion, be permitted," such anonymity is not appropriate for a petition by a convicted sex offender to the

School Board for permission to enter onto school property. *Id.* at 238. The School Board is entrusted with making informed decisions as to the safety and welfare of the children in its schools. Accordingly, as discussed above, the School Board must know the identity of those sex offenders requesting to go onto school property to ensure the safety of school children.

B. Count II: Procedural Due Process

In the second count of her Complaint, Doe alleged that Flaherty and the School Board violated her procedural due process rights. (JA-15-16). The Due Process Clause requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *see also Etheridge v. Medical Ctr. Hospitals*, 376 S.E.2d 525, 530 (Va. 1989). Thus, to state a claim for a procedural due process violation, Doe was required to demonstrate (1) a liberty or property interest (2) of which the government deprived her (3) without due process. *See Sylvia Dev. Corp*, 48 F.3d at 826.

1. Claim Against Flaherty

Doe alleged that "Flaherty … violated Jane Doe's procedural due process right . . . without first affording her any procedure by which she could contest her reclassification." (JA-9, 15-16, 206-07). She specifically demanded a hearing to contest her reclassification "based on the facts of her offense and her specific

characteristics, including that she is not a dangerous individual." (JA-9, 206-07). As the district court properly noted, "The Supreme Court definitively closed the door on this argument in *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003)."[5] (JA-207).

In *Doe*, the United States Supreme Court held that an offender's inclusion in a registry did not trigger a procedural due process violation because inclusion was based upon the offender's conviction alone – "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.* at 7. A threshold requirement for bringing a procedural due process challenge is a showing that additional procedures would produce the possibility of a different result under the applicable statutory scheme. *Id.* at 7. As the district court correctly concluded, in Virginia the *only* relevant fact for registration is Doe's conviction; thus, a post-conviction hearing would have no bearing on Doe's registration obligations. Additionally, as noted by the district court, "before her conviction, Doe has the highest form of due process, a trial by jury in which her guilt had to be proved beyond a reasonable doubt." (JA-207). Accordingly, the district court properly dismissed Doe's procedural due process claim for failure to state a claim against Flaherty. (JA-207).

[5] Likewise, the Supreme Court of Virginia closed the door on this argument for those procedural due process claims brought under a state procedural due process violation. *See McCabe v. Commonwealth*, 650 S.E.2d 508 (Va. 2007).

2. Claim Against School Board

Doe asserted that the School Board violated her procedural due process rights by not affording her a procedure by which she could anonymously petition to enter school property. (JA-16). As set forth above, there is no constitutional right to privacy in one's identity, and therefore, anonymity is not a fundamental right. Doe has no valid constitutional justification for demanding an anonymous procedure to petition the School Board, and she has not suffered a violation of procedural due process rights from the School Board's alleged failure to provide such a procedure. Virginia Code § 18.2-370.5(C) permits Doe to seek permission from the School Board to gain access to school property. Doe certainly has the right to seek permission to gain the access she desires; however, she has no right to demand an anonymous procedure.[6]

Furthermore, as discussed above, and contrary to her assertions, Doe's fundamental rights to direct the upbringing and education of her children have not been violated. Therefore, no fundamental right is implicated under Doe's plea for protecting her children. (JA-205-06). Further, Doe already has access to a procedure through the statute by which she can request entry onto school property.

[6] Doe's argument that "her small, innocent children will be faced with ridicule, debasement, and embarrassment when they are labeled children of a sex-offender" (Brief of Appellant, p. 39) is not applicable here. Doe is a convicted sex offender, and no anonymous procedure will ameliorate that fact or the possible effects of Doe's prior conviction on her children.

(JA-207). Her request for an anonymous proceeding should not be granted as it poses a dangerous and highly ineffective burden on the statutory protections of school children. An anonymous petition to the circuit court followed by an anonymous petition to the School Board would require the School Board to render a decision allowing an unidentified sex offender on school property. Such a procedure would allow a convicted sex offender to mingle anonymously among young school children without the explicit knowledge of those children or the administrators and the parents of the children whose primary desire is to keep those children safe. (JA-208). Such a procedure is not appropriate for the school setting, as undoubtedly this procedure would adversely affect the safety of the other children at the school.

As Doe does not have a constitutional right to privacy in her identity and her fundamental rights to the education and upbringing of her children have not been infringed upon, the School Board has not violated her constitutional right to procedural due process by failing to provide her with the ability to anonymously petition for permission to enter onto school property. (JA-207-08). Therefore, the district court properly dismissed Doe's procedural due process claim for failure to state a claim against the School Board upon which relief could be granted. (JA-208).

C. Count III: Associational Rights under 1st and 14th Amendments

Doe alleged that Flaherty and the School Board had violated her associational rights under the First and Fourteenth Amendments. (JA-16-17). "Determining the limits of state authority over an individual's freedom to enter into a particular association unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). "Factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* Only those relationships that exhibit smallness, selectivity, and seclusion would be "likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Id.*

Doe's allegations did not establish a violation of her associational rights. Doe's general claims simply do not reflect the smallness, a high degree of selectivity, and seclusion from others that *Roberts* required. As stated by the district court, Doe's "claim in Count III articulates a general right of association that is, undoubtedly, large and inclusive." (JA-209). The district court notes that schools often limit the rights of parents to associate on school property and that certain classes of people, those incarcerated or who lose their driver's licenses, generally cannot travel to schools. (JA-209) Accordingly, the district court

properly dismissed Doe's associational rights claim for failure to state a claim against Flaherty and the School Board. (JA-208-09).

D. Count IV: Right to the Free Exercise of Religion

The Free Exercise Clause prohibits the government from passing laws that disfavor religious practice or belief; however, a law that is religion-neutral and generally applicable does not violate the Free Exercise Clause even if it incidentally affects religious practice. *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 170 (4th Cir. 1995); *see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). In her Complaint, Doe alleged that Flaherty violated her freedom to exercise religion. On brief, Doe attempts to cloud the issue by claiming her free exercise claim is a hybrid claim, intertwined with her claim that the sex offender registry laws affect her fundamental right to raise and educate her children. Brief of Appellant 44-46. Either way, the conclusion of the district court, that "the plaintiff's claim that her fundamental right to the free exercise of religion has been violated by Flaherty is meritless" is correct. (JA-17, 210). Virginia's sex offender registration laws are neutral, of general applicability, and only incidentally affect Doe's ability to practice her religion. (JA-210). Doe has failed to show otherwise.

Doe claims that Virginia's sex offender laws are not generally applicable in the free exercise context because the laws discriminate against a certain group of people, namely sex offenders. (JA-182-83). Brief of Appellant 45-46. However, this is not the proper test for determining general applicability. As stated in *Lukumi*, "The Free Exercise Clause 'protect[s] religious observers against unequal treatment,' and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542, 543. As correctly stated by the district court, "The registration laws are facially neutral since they lack any reference to religion . . . and the Virginia General Assembly enacted them for reasons totally unconnected to any religion-based discriminatory purpose." (JA-210). Accordingly, the district court properly dismissed Doe's free exercise claim for failure to state a claim against Flaherty. (JA-209-11).

V. The District Court Properly Dismissed the Complaint with Prejudice and Without Leave to Amend.

Doe's last claim of error is that the district court improperly dismissed her complaint with prejudice and without leave to amend. There is little doubt that leave to amend should be freely granted; however, if such amendment is clearly futile the district court may deny such relief. *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999). The district court denied Doe's request to amend

because Doe's Complaint was rife with jurisdictional problems and its basic premises fail to state a plausible claim. No amount of amending could have cured these problems. Accordingly, the district court did not abuse its discretion in denying Doe's request to amend her Complaint.

CONCLUSION

For the reasons stated herein, the judgment of the trial court must be **AFFIRMED.**

STATEMENT CONCERNING ORAL ARGUMENT

Appellees do not believe that this case raises issues requiring oral argument.

Respectfully submitted,

APPELLEES,

By: _____/s/_____
Charles A. Quagliato, VSB # 45774
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-0083
Fax: (804) 225-3064
E-mail: cquagliato@oag.state.va.us
Counsel for Defendants/Appellees
Department of State Police and
Colonel W. Steven Flaherty

Jennifer Lee Parrish, VSB #31996
PARRISH, HOUCK & SNEAD, PLC
701 Kenmore Ave., Suite 100
P.O. Box 7166
Fredericksburg, Virginia 22401-7166
Telephone: (540) 373-3500
Fax: (540) 899-6394
E-mail: parrish@phslawfirm.com
Counsel for Defendants/Appellees
Spotsylvania County School Board and
J. Gilbert Seaux

CERTIFICATE OF COMPLIANCE

1. Exclusive of the Corporate Disclosure Statements, Table of Contents, Table of Authorities, Request for Oral Argument, Certificate of Compliance and Certificate of Service, the Appellees' Response Brief contains 6,209 words.

2. The Appellees' Response Brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point, serif typeface.

_____s/_____
Charles A. Quagliato
Counsel for Defendants/Appellees
Department of State Police and
Colonel W. Steven Flaherty

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2011, I will electronically file the Appellees' Response Brief with the Clerk of the Court using the CM/ECF system. In addition, I hereby certify that eight (8) copies of the Appellees' Response Brief were filed in the Clerk's Office of the United States Court of Appeals for the Fourth Circuit and two (2) copies of the Appellees' Response Brief were sent by first class mail, postage prepaid, to Marvin D. Miller, Esq., Law Offices of Marvin D. Miller, 1203 Duke Street, Alexandria, Virginia 22314, Counsel for Appellant.

_____s/_____
Charles A. Quagliato
Counsel for Defendants/Appellees
Department of State Police and
Colonel W. Steven Flaherty