NO. COA12-417 FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Dare
	)	
WILLIAM PERCY DANIELS	)	

****

BRIEF FOR THE STATE
(Appellant)

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 2

STATEMENT OF THE FACTS 2

STANDARD OF REVIEW 4

ARGUMENT 5

I. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(2) IS UNCONSTITUTIONAL WHEN THE COURT LACKED JURISDICTION TO REVIEW N.C.G.S. § 14-208.18(a)(2) 5

A. Applicable Statutes 5

B. The Trial Court Lacks Jurisdiction to Review N.C.G.S. § 14-208.18(a)(2) 7

II. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. §§ 14-208.18(a)(2) AND (a)(3) ARE UNCONSTITUTIONAL WHEN THE DEFENDANT LACKS STANDING TO RAISE A FACIAL CHALLENGE . . 11

A. Freedom of Religion, Speech, and Association . . . 12

B. Standing to Raise a Facial Challenge 14

III. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(3) IS UNCONSTITUTIONAL 17

A. N.C.G.S. § 14-208.18(a)(3) is Presumed to be Constitutional 18

B. N.C.G.S. § 14-208.18(a)(3) Is Not Unconstitutionally Overbroad 23

C. N.C.G.S. § 14-208.18(a)(3) Is Not Unconstitutionally Vague 29

D. N.C.G.S. § 14-208.18(a)(3) Survives Strict Scrutiny 33

IV. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(2) IS UNCONSTITUTIONAL 34

CONCLUSION 35

CERTIFICATE OF SERVICE 36

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

Abington School Dist. v. Schempp, 374 U.S. 203,
10 L. Ed. 2d 844 (1963) 12,27

Alexander v. United States, 509 U.S. 544,
125 L. Ed. 2d 441 (1993) 15

Ashcroft v. American Civil Liberties Union,
535 U.S. 564, 152 L. Ed. 2d 771 (2002) 12

Bolger v. Youngs Drug Products Corp., 463 U.S. 60,
77 L. Ed. 2d 469 (1983) 12

Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed. 2d 830
(1973) 14,15,24,29

Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659 (1976) 34

Clark v. City of Los Angeles, 650 F.2d 1033
(9th Cir. 1981), cert. denied, 456 U.S. 927,
72 L. Ed. 2d 443 (1982) 24,26

Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1,
155 L. Ed. 2d 98 (2003) 21

Erznoznik v. City of Jacksonville, 422 U.S. 205,
45 L. Ed. 2d 125 (1975) 13,17

Hernandez v. Commissioner, 490 U.S. 680,
104 L. Ed. 2d 766 (1989) 12,26,27

Houston v. Hill, 482 U.S. 451, 96 L. Ed. 2d 398
(1987) 25

N.Y. State Club Ass'n v. City of New York,
487 U.S. 1, 101 L. Ed. 2d 1 (1988) 24,25

New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113
(1982) 23,25,29

County Court of Ulster v. Allen, 442 U.S. 140,
60 L. Ed. 2d 777 (1979) 15

Roberts v. United States Jaycees, 468 U.S. 609,
82 L. Ed. 2d 462 (1984) 13,14,22

United States v. Cotton, 535 U.S. 625,
152 L. Ed. 2d 860 (2002) 8

United States v. Mazurie, 419 U.S. 544,
42 L. Ed. 2d 706 (1975), 372 U.S. 29, 32-33,
9 L. Ed. 2d 561, 565 (1963)) 29

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464,
70 L. Ed. 2d 700 (1982) 15

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442, 170 L. Ed. 2d 151 (2008) 18,19

Young v. American Mini Theatres, Inc., 427 U.S. 50,
49 L. Ed. 2d 310 (1976) 16

Zablocki v. Redhail, , 434 U.S. 374, 54 L. Ed. 2d 618
(1972) 13

STATE CASES

Caswell County v. Hanks, 120 N.C. App. 489,
462 S.E.2d 841 (1995) 30

Cinema I Video, Inc. v. Thornburg, 320 N.C. 485,
358 S.E.2d 383 (1987) 24

High v. Pearce, 220 N.C. 266, 17 S.E.2d 108 (1941) 7

Hobbs v. Moore County, 267 N.C. 665, 149 S.E.2d 1
(1966) 19,31

Standley v. Town of Woodfin, 362 N.C. 328,
661 S.E.2d 728 (2008) . . . . . passim

State v. Bryant, 359 N.C. 554, 614 S.E.2d 479 (2005) . 18,19,22

State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981) 29

State v. Golphin, 353 N.C. 364, 533 S.E.2d 168
(2000), cert. denied, 532 U.S. 931,
149 L. Ed. 2d 305 (2001) 5

State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1997) 18,19

State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979) 9

State v. Harris, No. COA11-1031
(N.C. Ct. App., April 3, 2012) 9

State v. Herman, No. COA11-1291
(N.C. Ct. App., June 5, 2012) 9

State v. Hightower, 187 N.C. 300, 121 S.E.616 (1924) 21

State v. Ross, 173 N.C. App. 569, 620 S.E.2d 33 (2005) 5

State v. Tickle, 238 N.C. 206, 77 S.E.2d 632 (1953), cert. denied, 346 U.S. 938, 98 L. Ed. 2d 426 (1954) 8

State v. Willis, 285 N.C. 195, 204 S.E.2d 33 (1974) 8

Treants Enterprises, Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986) 33,34

CONSTITUTIONAL PROVISIONS

N.C. Const. Art. IV, § 12(3) 8

STATUTES

N.C.G.S. § 7A-271 8

N.C.G.S. § 14-22 3

N.C.G.S. § 14-27.2A 20

N.C.G.S. § 14-27.3 2

N.C.G.S. § 14-208.5 20

N.C.G.S. § 14-208.18 . . . . . passim

N.C.G.S. § 14-208.18(a)(2) . . . . . passim

N.C.G.S. § 14-208.18(a)(3) . . . . . passim

N.C.G.S. § 14-208.18(d) 6

N.C.G.S. § 14-208.18(e) 7

N.C.G.S. § 14-208.18(g) 7

N.C.G.S. § 14-208.18(h) 5

N.C.G.S. § 15A-642 8

N.C.G.S. § 15A-923(a) 8

N.C.G.S. § 15A-1445(a)(1) 2

N.C.G.S. § 115C-378 7

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BRIEF FOR THE STATE
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ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(2) IS UNCONSTITUTIONAL WHEN THE COURT LACKED JURISDICTION TO REVIEW N.C.G.S. § 14-208.18(a)(2)?

II. DID THE TRIAL COURT ERR IN DETERMINING THAT N.C.G.S. §§ 14-208.18(a)(2) AND (a)(3) ARE UNCONSTITUTIONAL WHEN THE DEFENDANT LACKS STANDING TO RAISE A FACIAL CHALLENGE?

III. DID THE TRIAL COURT ERR IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(3) IS UNCONSTITUTIONAL?

III. DID THE TRIAL COURT ERR IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(2) IS UNCONSTITUTIONAL?

STATEMENT OF THE CASE

The defendant was indicted on 8 June 2009 for two counts of Sex Offender on Unlawful Premises under N.C.G.S. § 14-208.18(a)(3) for offenses that occurred on or about 6 May 2009 and 7 May 2009. (R pp. 7, 9) On 15 March 2010, the State obtained a superseding indictment for the offense that occurred on 6 May 2009. (R p. 10) The defendant filed a Motion to Declare N.C.G.S. § 14-208.18

Unconstitutional on 20 October 2010. (R pp. 16-30) On 6 December 2010, the State obtained superseding indictments on both counts. (R pp. 8, 11) On 13 April 2011, defendant filed a Superseding Motion to Declare N.C.G.S. § 14-208.18 Unconstitutional and a brief in support of his motion. (R pp. 30-50) The motion was heard at a pretrial hearing on 2 June 2011 during the Criminal Session of Superior Court in Dare County before the Honorable Wayland J. Sermons, Jr., Superior Court Judge Presiding. (T pp. 1-2; R p. 68) On 5 December 2011, Judge Sermons entered a written order declaring N.C.G.S. §§ 14-208.18(a)(2) and (3) unconstitutional and dismissing the pending charges against the defendant. (R pp. 68-77) The State filed written notice of appeal on 7 December 2011. (R p. 78)

The Record on Appeal was settled by stipulation on 3 April 2012. (R pp. 114-115) The Record was filed with this Court on 5 April 2012, docketed on 9 April 2012, and mailed to the parties on 10 April 2012. (R p. 1)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The State appeals pursuant to N.C.G.S. § 15A-1445(a)(1) from the trial court's order declaring N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) unconstitutional and dismissing the pending charges against the defendant.

STATEMENT OF THE FACTS

The defendant is a registered sex offender subject to the registration provisions of Article 7A, Chapter 14 of the North Carolina General Statutes in that he was convicted of Second Degree Rape found in N.C.G.S. § 14-27.3 on 10 October 1996. (R pp. 8, 11,

70; T p. 115) The offense involved a victim who was 20 years old. (R p. 70; T p. 116) The defendant served nine years and seven months in the Department of Correction. (R p. 70) In addition, defendant pled guilty to Assault with Intent to Commit Rape in violation of N.C.G.S. § 14-22 (repealed) on 12 September 1973. (R p. 111; T pp. 157-170) This offense involved a victim of the age of 12 and was reduced from indictments for rape and kidnapping. (R pp. 105-111; T pp. 157-170)

On 6 May 2009, defendant, along with his wife and son, went to Westcott Park in Manteo, NC to deliver onion bulbs to his daughter to plant in her yard. (R pp. 68-69) His daughter was there watching her grandson play tee ball. (R p. 68) As he arrived, the tee ball game had ended and parents were leaving with their children. (R pp. 68-69; T p. 11) Kevin Duprey, an investigator for the Dare County Sheriff's Office, was there watching the tee ball game and recognized the defendant. (R p. 69; T p. 12) The defendant, his wife, son, and daughter met on the east side of the tee ball field and talked for about an hour. (R p. 69; T p. 12) At that time, a boy's baseball game and a girl's softball game were being played on the other fields. (T p. 27) The defendant left that night on a scooter. (T p. 13)

Westcott Park is operated by the Dare County Parks and Recreation Department. It has three small fields used for tee ball or Little League baseball games and a public facility called the Lion's Club Center that is used for community events, dance, and gymnastic classes. (R p. 69) Westcott Park and the Lion's Club

Center are open 6-7 days per week and serve youth from ages 3 to 18. (R p. 69) Tee ball, Cal Ripkin's and Babe Ruth league games are played there, as well as baseball, soccer and other sports camps during the summer. (R p. 69) Westcott Park does not post any signs indicating that registered sex offenders are prohibited from entering or being present. (R p. 69)

On 7 May 2009, defendant, his daughter, and his son-in-law were practicing softball at Walker Park in Wanchese, NC as members of a coed softball league. (R p. 69) The defendant's wife sat in the car and watched them practice. (R p. 69) They practiced for about an hour and a half and then left. (T p. 17) Deputy Alan Moran with the Dare County Sheriff's Office was there umpiring a tee ball game. (R p. 69) He noticed the defendant playing softball in the adjacent field, recognized him, and knew he was a registered sex offender. (R p. 69) He contacted Deputy Shawn Barrera, who rode by Walker Park and confirmed that the defendant was there playing softball. (R pp. 69-70)

Walker Park is also maintained by the Dare County Parks and Recreation Department. It contains an adult baseball field, a youth baseball field, soccer fields, a playground and picnic area. (R p. 69) Walker Park does not post any signs indicating that registered sex offenders are prohibited from entering or being present. (R p. 70)

STANDARD OF REVIEW

On appeal, a trial court's findings of fact are reviewed to determine if the findings are supported by competent evidence in

the record. State v. Ross, 173 N.C. App. 569, 573, 620 S.E.2d 33, 36 (2005). Conclusions of law, however, are reviewed de novo. Id. Conclusions must be legally correct, reflecting correct application of applicable legal principles to the facts found. State v. Golphin, 353 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), cert. denied, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(2) IS UNCONSTITUTIONAL WHEN THE COURT LACKED JURISDICTION TO REVIEW N.C.G.S. § 14-208.18(a)(2).

The trial court erred in determining the constitutionality of N.C.G.S. § 14-208.18(a)(2) when the trial court lacked jurisdiction to review N.C.G.S. § 14-208.18(a)(2). Defendant was indicted pursuant to N.C.G.S. § 14-208.18(a)(3), not (a)(2), and therefore the trial court did not have jurisdiction to review (a)(2). As such, this Court should vacate the trial court's order as it pertains to N.C.G.S. § 14-208.18(a)(2).

A. Applicable Statutes.

N.C.G.S. § 14-208.18, entitled "Sex offender unlawfully on premises", governs restrictions of sex offenders from "knowingly be[ing]" at certain locations. Violation of the section is a Class H felony. N.C.G.S. § 14-208.18(h)(2011). Defendant was indicted pursuant to N.C.G.S. § 14-208.18(a)(3), which states in pertinent part:

> It shall be unlawful for any person required to register under this Article, if the offense is described in subsection (c) of this section, to knowingly be . . . [a]t any place where minors gather for regularly scheduled educational, recreational, or social programs.

N.C.G.S. § 14-208.18(a)(3)(2011). Defendant also challenged, and the trial court found to be unconstitutional, N.C.G.S. § 14-208.18(a)(2), which states in pertinent part:

> It shall be unlawful for any person required to register under this Article, if the offense is described in subsection (c) of this section, to knowingly be . . . [w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

N.C.G.S. § 14-208.18(a)(2)(2011). The places described in subdivision (1) include "schools, children's museums, child care centers, nurseries, and playgrounds." N.C.G.S. § 14-208.18(a)(1)(2011).

N.C.G.S. § 14-208.18(c) limits application of the section to persons required to register under Article 27A that have committed: "(1) [a]ny offense in Article 7A of this Chapter[]" or "(2) [a]ny offense where the victim of the offense was under the age of 16 years at the time of the offense." N.C.G.S. § 14-208.18(c)(2011).

N.C.G.S. § 14-208.18 also provides for certain exemptions from the restriction including that: (1) parents or guardians of minors may take the minor to any location providing emergency medical care if the minor is in need of medical care (N.C.G.S. § 14-208.18(b)(2011)); (2) parents or guardians of students enrolled in a school may be present on school property with certain conditions (N.C.G.S. § 14-208.18(d)(2011)); (3) persons who are eligible to vote may be present at a location subject to restriction if the location is used as a voting place with certain conditions

(N.C.G.S. § 14-208.18(e)(2011)); (4) persons eligible to attend public school under N.C.G.S. § 115C-378 may be present on school property if permitted by the local board of education (N.C.G.S. § 14-208.18(f)(2011)); and (5) juveniles may be present at a restricted location to receive medical treatment or mental health services with certain conditions (N.C.G.S. § 14-208.18(g)(2011)).

The State will incorporate this section explaining the applicable statutes throughout this brief.

B. The Trial Court Lacks Jurisdiction to Review N.C.G.S. § 14-208.18(a)(2).

The trial court noted that the defendant stands indicted for violations of N.C.G.S. § 14-208.18(a)(3). (R p. 71) However, finding that "the facts of this case apply to N.C.G.S. § 14-208.18(a)(2) as well," the trial court went on to determine the constitutionality of both N.C.G.S. §§ 14-208.18(a)(2) and (3). (R pp. 71-77). The trial court did not, however, distinguish which facts of this case apply to N.C.G.S. § 14-208.18(a)(2). Regardless, this is an erroneous expansion of the trial court's jurisdiction.

Our Supreme Court has defined jurisdiction as "the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment[;] [and] the right to adjudicate concerning the subject matter in a given case." High v. Pearce, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941)(internal quotation marks and citations omitted). The United States Supreme Court has defined jurisdiction simply as "the courts' statutory or constitutional power to adjudicate the case."

United States v. Cotton, 535 U.S. 625, 630, 152 L. Ed. 2d 860, 867 (2002).

Subject matter jurisdiction "is derived from the law." State v. Tickle, 238 N.C. 206, 208, 77 S.E.2d 632, 634 (1953), cert. denied, 346 U.S. 938, 98 L. Ed. 2d 426 (1954). In North Carolina, the power of the state superior courts originates in the Constitution of North Carolina. Our Constitution provides that "[e]xcept as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. Art. IV, § 12(3).

The North Carolina General Assembly established the rules for subject matter jurisdiction in criminal actions in Chapter 7A, Article 22 of the North Carolina General Statutes. The superior court has exclusive, original jurisdiction over felonies and in certain instances over misdemeanors. See N.C.G.S. § 7A-271 (2011). N.C.G.S. § 15A-642 provides that "[p]rosecutions originating in the superior court must be upon pleadings as provided in Article 49 of this Chapter." N.C.G.S. § 15A-923(a), found in Article 49 provides:

> The pleading in felony cases and misdemeanor cases initiated in the superior court division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. 15A-642. If there is a waiver, the pleading must be an information."

N.C.G.S. § 15A-923(a)(2011).

Our Supreme Court has determined that a criminal court acquires subject matter jurisdiction over a defendant by "valid information, warrant, or indictment[,]" State v. Willis, 285 N.C.

195, 201, 204 S.E.2d 33, 37 (1974), and that "[a] valid warrant or indictment encompassing the offense for which the defendant is convicted is essential to the jurisdiction of the court." State v. Hardy, 298 N.C. 191, 199, 257 S.E.2d 426, 431 (1979).

This Court has recently found a lack of jurisdiction in two cases involving N.C.G.S. § 14-208.18 because of defective indictments. In State v. Harris, No. COA11-1031 (N.C. Ct. App., April 3, 2012), the defendant was indicted pursuant to N.C.G.S. § 14-208.18(a)(1). The indictment, however, failed to allege that the defendant had been convicted of an offense enumerated in Article 7A of Chapter 14 or an offense involving a victim who was under 16 years of age at the time of the offense as required by N.C.G.S. § 14-208.18(a). As a result, this Court vacated the judgment against the defendant without prejudice, finding the indictment insufficient to confer jurisdiction upon the trial court. Harris, No. COA11-1031, slip op. at 16 (N.C. Ct. App., April 3, 2012).

In State v. Herman, No. COA11-1291 (N.C. Ct. App., June 5, 2012), the defendant was indicted pursuant to N.C.G.S. § 14-208.18(a)(2). The State appealed from a pretrial determination that the statute was unconstitutional. Although not raised by either party on appeal, this Court dismissed the appeal based upon a lack of jurisdiction. The indictment, as in Harris, failed to allege that the defendant had been convicted of an offense enumerated in Article 7A of Chapter 14 or an offense involving a victim who was under 16 years of age at the time of the offense as

required by N.C.G.S. § 14-208.18(a). Herman, No. COA11-1291, slip op. at 12 (N.C. Ct. App., June 5, 2012). In making its determination, the Court stated:

> "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." . . . "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity[,]" and "in its absence a court has no power to act[.]"

Herman, No. COA11-1291, slip op. at 8-9 (N.C. Ct. App., June 5, 2012)(citations and internal quotations omitted)(alterations in original).

The defendant presented evidence, and the trial court found as fact, that his daughter lives within 300 feet of two family child care facilities. (R p. 70) Similarly defendant presented evidence and the trial court found that the church he has attended since he was a small child holds children's Sunday school in rooms adjacent to the sanctuary. (R p. 70) Finally, the trial court acknowledged that the defendant's oldest daughter changed the location of a birthday party because of concerns that her father would not be able to attend. (R p. 71) The defendant was not charged with any conduct related to these facts.

The defendant stands indicted for violations of N.C.G.S. § 14-208.18(a)(3) for incidents that took place at Walker Park and Westcott Park, places "where minors gather for regular scheduled educational, recreational, or social programs." (R pp. 8, 11, 71) However the trial court found that "the facts of this case apply to N.C.G.S. § 14-208.18(a)(2) as well[.]" (R p. 71) While the court does not distinguish which facts of this case apply to N.C.G.S. §

14-208.18(a)(2), it would not matter whether the court meant the incidents at the parks, the defendant's church, or the defendant's daughter's house. This statement by the trial court is irrelevant. As defendant is not charged for a violation of N.C.G.S. § 14-208.18(a)(2), the trial court had no power to determine the constitutionality of N.C.G.S. § 14-208.18(a)(2).

II. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. §§ 14-208.18(a)(2) AND (a)(3) ARE UNCONSTITUTIONAL WHEN THE DEFENDANT LACKS STANDING TO RAISE A FACIAL CHALLENGE.

Even if this Court should find that the trial court had jurisdiction to review N.C.G.S. § 14-208.18(a)(2), the trial court erred in determining the constitutionality of N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) when the defendant lacks standing to raise a facial challenge to the statute. Defendant was not charged with a violation of N.C.G.S. § 14-208.18(a)(2). Defendant presented no evidence at the hearing nor circumstances in his motion that any of his own constitutional rights were violated. Defendant was charged as a result of delivering onion bulbs to his daughter at Westcott Park and practicing softball at Walker Park. Although he argues that his freedom of association was violated, delivering bulbs and practicing softball are not fundamental rights. Nor did delivering bulbs and practicing softball encompass freedom of religion or speech. As defendant was not charged with N.C.G.S. § 14-208.18(a)(2) and N.C.G.S. § 14-208.18(a)(3) is constitutional as applied to the defendant, he does not have standing to raise a facial challenge to either section of the statute.

A. Freedom of Religion, Speech, and Association.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble[.]" U.S. Const. amend. I.

The Supreme Court has explained that:

> The Free Exercise Clause . . . "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates *against him* in the practice of his religion."

Abington School Dist. v. Schempp, 374 U.S. 203, 222-223, 10 L. Ed. 2d 844, 858 (1963)(emphasis added). "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Hernandez v. Commissioner, 490 U.S. 680, 699, 104 L. Ed. 2d 766, 786 (1989).

Regarding freedom of speech, the Supreme Court has explained that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65, 77 L. Ed. 2d 469, 476 (1983). "[T]his principle, like other First Amendment principles, is not absolute." Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573, 152 L. Ed. 2d 771, 780 (2002). "A State or municipality may protect individual

privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content." Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 45 L. Ed. 2d 125, 130 (1975).

While "association" is not specifically named in the First Amendment, the Court has recognized two different categories of constitutionally protected "freedom of association":

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 82 L. Ed. 2d 462, 471 (1984). "Precious few rights have been found by the Supreme Court of the United States to be fundamental in nature. Such rights include the right to marry, the right to have children, and the right to marital privacy." Standley v. Town of Woodfin, 362 N.C. 328, 332, 661 S.E.2d 728, 730-731 (2008)(citations omitted). A statute that "significantly interferes with the exercise of a fundamental right" of this nature will be upheld if it "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Zablocki v. Redhail, 434 U.S. 374, 388, 54 L. Ed. 2d 618, 641 (1972). Infringements on

the right to associate for expressive purposes "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Roberts, 468 U.S. at 623, 82 L. Ed. 2d at 475. Government actions that have been held to unconstitutionally infringe on this right include penalties or withholding benefits from individuals because of their membership in a certain group, required disclosure of the fact of membership in a group seeking anonymity, and interference with the internal organization or affairs of a group. Id. at 622, 82 L. Ed. 2d at 474.

The State will incorporate this section discussing these fundamental rights throughout this brief.

B. Standing to Raise a Facial Challenge.

It is embedded in the traditional rules governing constitutional adjudication that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610, 37 L. Ed. 2d 830, 839 (1973). Constitutional rights "are personal and may not be asserted vicariously." Id. A party who invokes the court's authority must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable

decision." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 709 (1982)(citations omitted)(internal quotations omitted).

In his motion and at the hearing, defendant cited Broadrick for the proposition that "[w]hen challenging a statute as an infringement upon fundamental, First Amendment rights, the petitioner not only has the right to contest the statute as it applies to himself, but also as it applies to others." (R p. 25; T p. 173) This is an erroneous expansion of the exception to traditional rules of standing. The Supreme Court recognizes the exception to be more limited:

> As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Broadrick v. Oklahoma, 413 U.S. 601, 610 (and cases cited). A limited exception has been recognized for statutes that broadly *prohibit speech* protected by the First Amendment. Id., at 611-616. This exception has been justified by the overriding interest in removing illegal deterrents to the *exercise of the right of free speech*.

County Court of Ulster v. Allen, 442 U.S. 140, 155, 60 L. Ed. 2d 777, 790 (1979) (emphasis added). See also Alexander v. United States, 509 U.S. 544, 555, 125 L. Ed. 2d 441, 453 (1993)("The 'overbreadth' doctrine, which is a departure from traditional rules of standing, permits a defendant to make a facial challenge to an overly broad statute *restricting speech*, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute.")(emphasis added). Furthermore, if a "statute's deterrent effect on *legitimate expression* is not 'both real and

substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' the litigant is not permitted to assert the rights of third parties." Young v. American Mini Theatres, Inc., 427 U.S. 50, 60, 49 L. Ed. 2d 310, 320 (1976)(quoting Erznoznik, 422 U.S. at 216, 45 L. Ed. 2d 135)(emphasis added).

The defendant has not shown appropriate circumstances for the application of this narrow exception to traditional rules of standing. Defendant was not charged with an offense under N.C.G.S. § 14-208.18(a)(2) and thus has shown no injury of his own that would permit him to raise any facial challenge to this section. Nor did defendant show that N.C.G.S. § 14-208.18(a)(2) restricts speech or expression. Defendant similarly made no argument or showing as to how N.C.G.S. § 14-208.18(a)(3) restricts freedom of speech or expression, nor does N.C.G.S. § 14-208.18(a)(3) restrict speech or expression. Defendant focused instead on the general right to freedom of association and freedom of religion.

Furthermore, the trial court made no findings that N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) specifically interfere with freedom of speech or expression, instead finding that "N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) are not closely drawn to avoid unnecessary abridgment of associational freedoms . . . [and] religious freedom in achieving its objectives." (R p. 74) There is simply no evidence that N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) have a real and substantial deterrent effect on legitimate expression. N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) do not restrict any speech

or expression because of its message, ideas, subject matter, or content, they only restrict a sex offender from knowingly being (1) within 300 feet of any location intended primarily for the use, care, or supervision of minors and (2) at any place where minors gather for regularly scheduled educational, recreational, or social programs. As such, if there is any restriction on speech, it would be a "reasonable" restriction on "place" of expression only, not message, idea, subject matter, or content. See Erznoznik, 422 U.S. at 216, 45 L. Ed. 2d at 130.

Defendant is not charged with a violation of N.C.G.S. § 14-208.18(a)(2) and thus has no standing to challenge this statute. Neither has defendant established that N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) infringe upon the protected right of speech or expression, let alone that they have a real and substantial deterrent effect on legitimate expression. As such, the limited exception to traditional rules of standing does not apply for him to raise a facial challenge to either section of the statute. Thus the trial court's order is in error and should be vacated.

III. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(3) IS UNCONSTITUTIONAL.

Should the Court find that defendant has standing to bring forward his facial challenge, the trial court's determination that N.C.G.S. § 14-208.18(a)(3) is unconstitutional is still in error. N.C.G.S. § 14-208.18(a)(3) is not unconstitutionally overbroad or vague, nor is it unconstitutional as applied to defendant.

A. N.C.G.S. § 14-208.18(a)(3) is Presumed to be Constitutional.

This Court's inquiry is guided by the principles that "[f]acial challenges are disfavored[,]" Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450, 170 L. Ed. 2d 151, 161 (2008), and that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (quoting United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987)). This is because "the presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." Id. (quoting Ramsey v. N.C. Veterans Comm'n, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964)). Indeed, it is well-established in this State that "where a statute is susceptible to two interpretations – one constitutional and one unconstitutional – the Court should adopt the interpretation resulting in a finding of constitutionality." State v. Green, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1997)(quoting In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978), cert. denied, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999).

To challenge the facial constitutionality of a legislative act, an individual "must establish that no set of circumstances exists under which the act would be valid." Bryant, 359 N.C. at 564, 614 S.E.2d at 486. "The fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" Id. In determining

whether a law is facially invalid, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Wash. State Grange, 552 U.S. at 449-450, 170 L. Ed. 2d at 160. Furthermore, where possible, "the language of a statute will be interpreted so as to avoid an absurd consequence." Hobbs v. Moore County, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966). A statute should never be construed "so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms." Id.

1. N.C.G.S. § 14-208.18(a)(3) Has a Fair and Reasonable Construction.

While a criminal statute is to be strictly construed, courts "must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation of a statute." Green, 348 N.C. at 596, 502 S.E.2d at 824. A statute that is clear and unambiguous must be given its "plain and definite meaning," but when a statute is ambiguous or unclear, "resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." Id. Legislative intent may be ascertained "by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means." Id. (quoting State v. Partlow, 91 N.C. 550, 552 (1884)). The Court may also consider

legislative history, circumstances surrounding the statute's adoption, earlier statutes on the same subject, common law, and previous interpretations of the same or similar statutes. Id.

N.C.G.S. § 14-208.18 was codified in Article 27A of Chapter 14, which is entitled "Sex Offender and Public Protection Registration Programs." The "Purpose" of the Sex Offender and Public Protection Registration Programs, as explained in N.C.G.S. § 14-208.5, provides that:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest.

N.C.G.S. § 14-208.18 was enacted as part of the "Jessica Lunsford Act for NC" along with numerous changes involving sexual offenses, including the addition of the new criminal offenses of Rape of a Child and Sexual Offense with a Child (N.C.G.S. §§ 14-27.2A and 4A), increases in penalties for sexual exploitation of a minor and promoting prostitution of a minor, and amendments of the sex offender registration requirements "to be more stringent." Act of July 28, 2008, ch. 117, 2008 N.C. Sess. Laws 432. The legislative intent of the Jessica Lunsford Act and specifically N.C.G.S. § 14-208.18 is clearly to place more stringent restrictions on sex offenders in order to protect the public safety and welfare of children in our State.

The United States Supreme Court also recognizes the inherent danger of reintegrating sex offenders into society. The Court has stated that "[s]ex offenders are a serious threat in this Nation. The victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 155 L. Ed. 2d 98, 103 (2003). Our Supreme Court has more specifically recognized that "released sex offenders are four times more likely to be rearrested for subsequent sex crimes than other released offenders." Standley, 362 N.C. at 333, 661 S.E.2d at 731.

The aim of N.C.G.S. § 14-208.18(a)(3) is to restrict sex offenders from knowingly being at any place where minors gather for regularly scheduled educational, recreational, or social programs. A fair and reasonable construction of N.C.G.S. § 14-208.18(a)(3) would require the State to prove the defendant knew that he was at a place where minors gather for regularly scheduled educational, recreational, or social programs. See State v. Hightower, 187 N.C. 300, 121 S.E.616 (1924) ("Generally speaking, when it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it.").

2. There Is No Evidence That There Is No Set of Circumstances Under Which N.C.G.S. § 14-208.18(a)(3) Would Be Valid.

The defendant has not established, nor did the trial court

find, that there is *no* set of circumstances under which N.C.G.S. § 14-208.18(a)(3) would be valid. See Bryant, 359 N.C. at 564, 614 S.E.2d at 486. The instant case is just one example of circumstances in which N.C.G.S. § 14-208.18(a)(3) is valid. There was no evidence presented nor circumstances in the defendant's motion to establish that the defendant's freedom of religion or speech have been violated by his prohibition from Walker Park or Westcott Park. Nor did the trial court find that the defendant's freedom of religion or speech were violated in any way by his prohibition from these parks. Defendant's right to play softball and hang out with his family are not the fundamental rights of association contemplated by the United States Constitution. See Roberts, 468 U.S. at 617-618, 82 L. Ed. 2d at 471; Standley, 362 N.C. 328, 661 S.E.2d 728.

Although defendant did not set forth any fundamental right of his own that was impinged by N.C.G.S. § 14-208.18(a)(3), he arguably has a non-fundamental liberty interest. See Standley, 362 N.C. 328, 661 S.E.2d 728 (holding that the liberty interest to enter and freely roam in the park is not fundamental). There is nothing fundamental about a citizen's liberty interest in visiting a county park to deliver onion bulbs for a gardening competition and practice softball. See Id. at 331-332, 661 S.E.2d at 730-731. As such, as applied to the defendant, N.C.G.S. § 14-208.18(a)(3) must only be rationally related to a legitimate government interest. See Id. (stating that where an asserted liberty interest is not fundamental, the law in question must only be rationally

related to a legitimate government purpose).

The State's interest in protecting children from sex offenders is not only legitimate, but also compelling, as conceded by the defendant. (R p. 39; T p. 174) See New York v. Ferber, 458 U.S. 747, 756, 73 L. Ed. 2d 1113, 1122 (1982)("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"); Standley, 362 N.C. at 333, 661 S.E.2d at 731 ("Protecting children and other visitors to parks . . . from sexual attacks is certainly a legitimate government interest."). N.C.G.S. § 14-208.18(a)(3) is rationally related to that interest. See Standley, 362 N.C. at 333, 661 S.E.2d at 731 (stating that a town ordinance prohibiting registered sex offenders from entering its parks is rationally related to the legitimate government interest of protecting park visitors from becoming victims of sexual crimes and is thus constitutional). Therefore, N.C.G.S. § 14-208.18(a)(3) is constitutional as applied to the defendant, whereas in visiting the park to deliver onion bulbs to his daughter and practice softball, he was at a place where minors gather for regularly scheduled tee ball, baseball, softball, basketball, dance, gymnastics, soccer, and other recreational and social programs. (R p. 69; T pp. 81-90, 98)

B. N.C.G.S. § 14-208.18(a)(3) Is Not Unconstitutionally Overbroad.

The consequence of departing from the traditional rules of standing "is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or

partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." Broadrick, 413 U.S. at 613, 37 L. Ed. 2d at 840-841. Application of the "overbreadth doctrine" is thus "manifestly, strong medicine" that should be "employed by the Court sparingly and only as a last resort." Id. at 613, 37 L. Ed. 2d at 841.

"The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right." Clark v. City of Los Angeles, 650 F.2d 1033 (9th Cir. 1981), cert. denied, 456 U.S. 927, 72 L. Ed. 2d 443 (1982). Where conduct and not merely speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615, 37 L. Ed. 2d at 842. See also Cinema I Video, Inc. v. Thornburg, 320 N.C. 485, 358 S.E.2d 383 (1987)(stating that "[m]ere potential for overbreadth is not dispositive, however; 'the overbreadth involved [must] be substantial before the statute involved will be invalidated on its face.'")(quoting Ferber, 458 U.S. at 769, 73 L. Ed. 2d at 1130). Thus, "[a] law is constitutional unless it is '*substantially overbroad*.'" N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 14, 101 L. Ed. 2d 1, 16 (1988)(quoting Broadrick at 615, 37 L. Ed. 2d at 842)(emphasis added).

To show that a statute is substantially overbroad, a challenger to the constitutionality of a statute must demonstrate

"that a *substantial number* of instances exist in which the Law cannot be applied constitutionally." Id. (emphasis added). See also Ferber, 458 U.S. at 771, 73 L. Ed. 2d at 1132 (stating that a law should not be invalidated for overbreadth unless it "reaches a *substantial number* of impermissible applications") (emphasis added). A statute should never be held to be facially invalid "'merely because it is possible to conceive of a single impermissible application[.]' Instead, 'in a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a *substantial amount* of constitutionally protected conduct.'" Houston v. Hill, 482 U.S. 451, 458, 96 L. Ed. 2d 398, 410 (1987)(citations omitted)(emphasis added).

The defendant did not demonstrate that a substantial number of instances exist in which N.C.G.S. § 14-208.18(a)(3) cannot be applied constitutionally. Defendant presented evidence, and the trial court found as fact, that his daughter lives within 300 feet of two family child care facilities. (R p. 70) Similarly defendant presented evidence and the trial court found that the church he has attended since he was a small child holds children's Sunday school in rooms adjacent to the sanctuary. (R p. 70) Finally, the trial court acknowledged that the defendant's oldest daughter changed the location of a birthday party because of concerns that her father would not be able to attend an event at the community center that is used as a Head Start center during the day. (R p. 71)

The fact that the defendant's daughter lives within 300 feet

of two family child care facilities may potentially subject the defendant to prosecution under N.C.G.S. § 14-208.18(a)(2), but do not subject the defendant to prosecution under N.C.G.S. § 14-208.18(a)(3) unless he is "at" those locations. Nor would it be unconstitutional if he were charged with a violation of N.C.G.S. § 14-208.18(a)(2) for visiting his daughter. Although his oldest daughter changed the location of a birthday party out of concern that her father would not be able to attend, this in no way violated the defendant's constitutional rights. The party was held at a different location and the defendant was ultimately able to attend. (T pp. 76-78)

The defendant also argued, and the trial court found, that N.C.G.S. § 14-208.18(a)(3) is overbroad because it infringes upon the free exercise of religion. (R pp. 25, 75) Defendant presented evidence that the church he has attended since he was a small child holds children's Sunday school in rooms adjacent to the sanctuary. (R p. 70) He suggests that he could be charged under N.C.G.S. § 14-208.18(a)(3) for attending church. Notably, "[t]he overbreadth doctrine has been applied almost exclusively in the areas of first amendment expressive or associational rights," Clark, 650 F.2d at 1036, not freedom of religion. Freedom of religion claims are reviewed to determine if the "government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Hernandez, 490 U.S. at 699, 104 L. Ed. 2d at 786. The defendant must show the coercive effect of the enactment "as it

operates against him in the practice of his religion." Abington School Dist., 374 U.S. at 223, 10 L. Ed. 2d at 858.

The defendant showed no such coercive effect on his own practice of religion nor on anyone else's practice of religion. Even if this Court were to find that Sunday school classes or Vacation Bible School met the definition of an "educational, recreational, or social" program, the defendant is not completely prohibited from practicing his religion. Defendant's minister testified that she would be willing to minister to the defendant and other sex offenders outside of the church if they were prohibited from attending the church, as she does with other people who are "homebound." (T pp. 47-49) Defendant would not be prohibited from practicing his religion, only from attending services at this specific church. Even if the Court finds this to be a "substantial burden on the observation of a central religious belief or practice," the State's compelling interest in protecting children from sex offenders justifies the burden. Hernandez, 490 U.S. at 699, 104 L. Ed. 2d at 786.

The trial court concluded that the statute "abridges . . . religious activities in a manner which in no way serves the State's compelling interest. . . . The offender who attends services in the sanctuary of a church with an adjacent nursery is hardly a danger to those children." (R p. 75) This argument is a fallacy. Prohibiting sex offenders from being near places where minors gather limits their ability to observe the minors, form opinions about which minors are more appealing to them or more vulnerable,

communicate with the minors, and establish relationships with them, breaking down barriers and building trust with the minors so that the offender may ultimately violate one or more of them.

The trial court found that N.C.G.S. § 14-208.18(a)(3) is overbroad in that it "distorts and renders meaningless any element of criminal intent. . . . In order to convict, the State would merely prove beyond a reasonable doubt that the Defendant know[s] where he was." (R p. 75) This is an erroneous interpretation of the terms of the statute. N.C.G.S. § 14-208.18(a)(3) prohibits sex offenders from "*knowingly* be[ing] . . . at any place where minors gather for regularly scheduled educational, recreational, or social programs." A fair and reasonable construction would require the State to prove the defendant knew that he was at a place where minors regularly gather for educational, recreational, and social programs, not just that he knew "where he was." A defendant who does not know that he is at a place where minors regularly gather for a prohibited purpose, does not "knowingly" violate the statute.

The trial court also discussed the possible violation that occurs when the defendant visits his daughter, however, he discusses this possible violation in the context of N.C.G.S. § 14-208.18(a)(2), not (a)(3). (R p. 75, para. 23) As the trial court had no jurisdiction to review N.C.G.S. § 14-208.18(a)(2), his consideration of the overbreadth of that section of the statute is irrelevant in an analysis of N.C.G.S. § 14-208.18(a)(3).

The United States Supreme Court has recognized that where a statute is not substantially overbroad, "whatever overbreadth may

exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Broadrick, 413 U.S. at 615-616, 37 L. Ed. 2d at 842. See also Ferber, 458 U.S. at 773-774, 73 L. Ed. 2d at 1133. As defendant has not established that N.C.G.S. § 14-208.18(a)(3) is substantially overbroad, the trial court erred in finding it to be facially unconstitutional. Whatever overbreadth exists should be analyzed on a "case-by-case" basis when fact situations arise appropriately before the courts.

C. N.C.G.S. § 14-208.18(a)(3) Is Not Unconstitutionally Vague.

When a statute is challenged based upon whether it is impermissibly vague, the test to be applied is whether the statute gives "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." State v. Elam, 302 N.C. 157, 162, 273 S.E.2d 661, 664 (1981). A statute is not impermissibly vague where it is "sufficiently precise for a man of average intelligence to 'reasonably understand that his contemplated conduct is proscribed.'" United States v. Mazurie, 419 U.S. 544, 553, 42 L. Ed. 2d 706, 714 (1975)(quoting United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 9 L. Ed. 2d 561, 565 (1963)). This Court has further explained that:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ in its application violates the first essential of due process of law. Even so, impossible standards of statutory clarity are not required by the Constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret

> and administer it uniformly, constitutional requirements are fully met.

Caswell County v. Hanks, 120 N.C. App. 489, 492, 462 S.E.2d 841, 848 (1995). "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." National Dairy Products Corp., 372 U.S. at 33, 9 L. Ed. 2d at 565-566. Furthermore, "the defendants have the burden of showing either that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration." Caswell County, 120 N.C. App. at 492-3, 462 S.E.2d at 848.

Defendant produced no evidence to establish that N.C.G.S. § 14-208.18(a)(3) was vague in light of the circumstances in this case. Defendant went to Westcott Park on 6 May 2009 to take onion bulbs to his daughter, who was watching her grandson play tee ball. (R p. 68) As he arrived, the children and their families were leaving the field as the game had ended. (R pp. 68-69; T p. 11) While the defendant, his wife, son, and daughter talked for about an hour in the parking lot, a boy's baseball game and a girl's softball game were being played on the other fields. (R p. 69; T pp. 12, 27) On 7 May 2009, defendant practiced softball at Walker Park for about an hour and a half. (R p. 69; T p. 17) While he was practicing with his coed softball team, a tee ball game was being played on an adjacent field. (R p. 69) Under the circumstances of this case, it is clear that the defendant had reasonable notice that both parks were places where minors gather for regularly scheduled recreational programs. Additionally, defendant received

notice from the North Carolina State Bureau of Investigation of N.C.G.S. § 14-208.18 when it was passed, specifically detailing that he was prohibited from being at a place where minors gather for regularly scheduled educational, recreational, or social programs. (R pp. 93-95; T pp. 114-115, 137-139, 153-154; State's Exh. 2) Thus, defendant had reasonable notice not only that the parks were places where minors gather for regularly scheduled recreational programs, but also that he was prohibited from being there.

The trial court found that N.C.G.S. § 14-208.18:

> does not define "Knowingly be at," "location," "place," or "premises." It does not describe what the offender must "know." Is it where he is? Is it that there are children present? Is it how many children have been cared for "at one time?" How is the location where the 300 feet is measured? Is the entire building housing a child care and other non child care uses where the measurements start? Does an offender violate the law when he drives by a child care facility within 300 feet of his travel lane? How does a supervisor like Tim White of the Dare County Parks and Recreation Department know the answers to these questions?

(R p. 76). The trial court also took judicial notice of cases from Chatham County and Catawba County that have no precedential value. (R pp. 76-77) The trial court has completely intertwined his concern for N.C.G.S. § 14-208.18(a)(3) with (a)(2). As discussed above, the trial court had no jurisdiction to review N.C.G.S. § 14-208.18(a)(2) and therefore his consideration of the vagueness of that section of the statute is irrelevant to an analysis of N.C.G.S. § 14-208.18(a)(3). Further, the trial court's findings fail to consider a fair and reasonable construction of the terms of the statute. Hobbs, 267 N.C. at 671, 149 S.E. 2d at 5.

First, the trial court found that N.C.G.S. § 14-208.18(a)(3) is unconstitutionally vague in that it "does not define 'Knowingly be at,' 'location,' 'place,' or 'premises.' It does not describe what the offender must 'know.'"(R p. 76) As discussed in section III.A.1 above, the aim of N.C.G.S. § 14-208.18(a)(3) is to restrict sex offenders from knowingly being at any place where minors gather for regularly scheduled educational, recreational, or social programs. A fair and reasonable construction of N.C.G.S. § 14-208.18(a)(3) would require the State to prove the defendant knew that he was at a place where minors gather for regularly scheduled educational, recreational, or social programs. Terms such as "location" and "place" can be defined using common sense. N.C.G.S. § 14-208.18(a)(3) protects wholly innocent conduct by requiring criminal intent, namely knowledge.

The trial court was also concerned with whether children have to be present at the time for an offense to occur. (R pp. 76-77) The plain meaning of the statute prohibits sex offenders from knowingly being at a place where minors gather for regularly scheduled educational, recreational, or social programs, whether or not any minors are present at the time. N.C.G.S. § 14-208.18(a)(3). In not specifying that minors must be present, the legislative intent is for this restriction to be at all times. This makes it easier for a sex offender to know that he should never be at the location, instead of having to guess whether there are any minors there at the time or whether a minor may show up while the sex offender is there. N.C.G.S. § 14-208.18(a)(3) is not vague simply

because it does not require minors to actually be present for a sex offender to violate the statute.

The trial court also notes that N.C.G.S. § 14-208.18(a)(3) is unconstitutionally vague in that:

> It is unreasonable to expect a Defendant like Mr. Daniels, or the average sex offender, or the average law enforcement officer, or the average citizen, to predict what kind of activity is unlawful, and as such runs the risk of impermissibly delegating basic policy matters to policemen, prosecutors, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

(R p. 77) In light of the circumstances of this case, it is absolutely reasonable for the defendant to know that being at a public park while children are playing tee ball, baseball and softball games violates the statute. Tim White with Dare County Parks and Recreation most certainly did know that sex offenders cannot be at the parks and had asked two prior sex offenders to leave. (T pp. 90-93) N.C.G.S. § 14-208.18(a)(3) is not unconstitutionally vague in light of the conduct with which the defendant is charged. National Dairy Products Corp., 372 U.S. at 33, 9 L. Ed. 2d at 565-566.

D. N.C.G.S. § 14-208.18(a)(3) Survives Strict Scrutiny.

"[A] law which burdens certain explicit or implied 'fundamental' rights must be strictly scrutinized." Treants Enterprises, Inc. v. Onslow County, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986). Such a law may "be justified only by a 'compelling state interest,' and must be narrowly drawn to express only the legitimate interests at stake." Id. The defendant failed

to show that N.C.G.S. § 14-208.18(a)(3) actually burdens any fundamental rights. However, N.C.G.S. § 14-208.18(a)(3) satisfies strict scrutiny if the Court decides that standard applies.

As discussed in section III.A.1 above, N.C.G.S. § 14-208.18(a)(3) serves a compelling state interest by promoting the public safety and welfare of children in this State by prohibiting sex offenders from knowingly being at a place "where minors gather for regularly scheduled educational, recreational, or social programs" and thus where minors regularly congregate. See Standley, 186 N.C. App. 134, 650 S.E.2d 618.

The Supreme Court has recognized that even "'*significant interference* with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." Buckley v. Valeo, 424 U.S. 1, 25, 46 L. Ed. 2d 659, 691 (1976)(citations omitted)(emphasis added). N.C.G.S. § 14-208.18(a)(3) is closely drawn to avoid unnecessary abridgement of associational freedoms.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT N.C.G.S. § 14-208.18(a)(2) IS UNCONSTITUTIONAL.

Even if this Court should find that the trial court had jurisdiction and that the defendant has standing to raise a facial challenge to N.C.G.S. § 14-208.18(a)(2), the trial court erred in finding N.C.G.S. § 14-208.18(a)(2) to be unconstitutional. The State respectfully incorporates the arguments in section III above to conclude that the trial court similarly erred in finding N.C.G.S. § 14-208.18(a)(2) to be overbroad and vague, and in

finding that it does not survive strict scrutiny. N.C.G.S. § 14-208.18(a)(2) would similarly be constitutional as applied to defendant.

CONCLUSION

The trial court erred in finding §§ 14-208.18(a)(2) and (a)(3) to be unconstitutional as the trial court lacked jurisdiction to review N.C.G.S. § 14-208.18(a)(2), the defendant lacked standing for a facial challenge to N.C.G.S. §§ 14-208.18(a)(2) and (a)(3), and as N.C.G.S. §§ 14-208.18(a)(2) and (a)(3) are nevertheless constitutional. Therefore, the State respectfully submits that this Court should vacate the trial court's order and reinstate the charges against the defendant.

Electronically submitted this the 11th day of June, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

G. Glenn Gerding
Attorney at Law
210 North Columbia Street
Chapel Hill North carolina 27514

This the 11th day of June, 2012.

Electronically Submitted
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