IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Kenny, et al.,

Plaintiffs,

v.

Wilson, et al.,

Defendants.

Civil Action No.: 2:16-cv-2794-MBS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

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Plaintiffs respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment.

PRELIMINARY STATEMENT

South Carolina's laws against Disorderly Conduct and Disturbing Schools[1] violate the Due Process Clause's guarantee of fundamental fairness. As applied to schoolchildren, the Disorderly Conduct law's prohibitions on acting in a "disorderly or boisterous manner," as well as against use of obscene or profane language, S.C. Code § 16-17-530, are fatally vague. Elementary and secondary school students "are in many ways disorderly or boisterous by nature." *Kenny v. Wilson*, 885 F.3d 280, 290 (4th Cir. 2018). Schools regularly manage these kinds of childhood and adolescent behaviors through school-based interventions, and there is a large body of research documenting effective means of doing so. *See infra* Section IV. Yet the Disorderly Conduct law lacks any objective guideline to distinguish such natural disorder and boisterousness from criminally prohibited conduct. As such, it fails to give students sufficient notice of the conduct it prohibits and encourages arbitrary and discriminatory enforcement in violation of the Constitution. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Thousands of South Carolina schoolchildren have entered the juvenile and criminal systems on charges[2] of Disorderly Conduct in school in recent years. They are criminalized for typical childhood behavior like refusing to follow directions, minor physical altercations, or cursing. *See infra* Section V.C. They are also chilled in their expressive activity—including

[1] Throughout this brief, Plaintiffs use "the Disturbing Schools law" to refer to the version of S.C. Code § 16-17-420 in force prior to its amendment on May 17, 2018.

[2] While the juvenile system uses the terms "taken into custody," S.C. Code § 63-19-810, and "referral," for the sake of ease, this brief will refer to "arrest" and "charges" or "prosecution" to refer to enforcement in both the juvenile and criminal systems.

engagement with education and the ability to speak out against police abuse—because they cannot know when these actions will be treated as criminally "boisterous" or "disorderly."

Although boisterousness and disorder are common features of childhood and adolescence, these behaviors are criminalized in some, but not all, children. The distinction is always arbitrary. It is often also discriminatory, falling on Black students and students with disabilities disproportionately. Statewide, Black students are charged with Disorderly Conduct in school at more than six times the rate of their white classmates. Declaration of Brooke Madubuonwu at ¶ 19. Students also face arrest for Disorderly Conduct in lieu of receiving supports to address behaviors associated with their disabilities. *See, e.g.*, Declaration of S.P at ¶¶ 4–24. In all of these ways, the Disorderly Conduct law violates the due process rights of South Carolina students.

The Disturbing Schools law is similarly unconstitutional. Although it has been amended over the course of this litigation to remove its fatally flawed prohibitions, young people against who the law has been enforced, including Plaintiffs, continue to be harmed through the existence of the charge on their juvenile and criminal records. *See infra* Section VI; Declaration of D.D. at ¶ 26 & Ex. A. The Disturbing Schools law has prohibited children from being "disturb[ing]," "interfere[ing]," or "obnoxious," and from loitering at school. S.C. Code Ann. § 16-17-420 (2017). As with the Disorderly Conduct law, these vague terms have led to the criminalization of students for behaviors that cannot be distinguished from common childhood and adolescent conduct, *see infra* Section V.B, as well as for engaging in protected expression. Declaration of Niya Kenny at ¶¶ 3–10, 24; Declaration of Taurean Nesmith at ¶¶ 5–15, 24. Black students have been nearly four times as likely as their white classmates to be charged with Disturbing Schools.

Declaration of Megan French Marcelin ¶ 19. The Disturbing Schools law has failed to provide notice and has been enforced in an arbitrary and discriminatory manner.

The challenged laws criminalize Plaintiffs for nothing more than being children. These laws interfere with their ability to obtain an education, and are a substantial driver of young people's involvement with the juvenile and criminal systems in South Carolina. The Disorderly Conduct and Disturbing Schools laws undermine their most basic due process rights to be free from arbitrary and discriminatory arrest and prosecution, *see Morales*, 527 U.S. at 56, and this Court should find them unconstitutional.

STATEMENT OF FACTS

I. Procedural History

1. Plaintiffs filed this action in August of 2016, challenging South Carolina's Disturbing Schools and Disorderly Conduct laws as unconstitutionally vague, subjecting South Carolina students to criminalization on an arbitrary and discriminatory basis. ECF 1. Because "[e]ach year, thousands of adolescents enter into the juvenile and criminal justice systems on charges of Disturbing Schools and Disorderly Conduct," Plaintiffs also sought a preliminary injunction. ECF 5. In March of 2017, the Court granted a motion to dismiss on standing grounds. ECF 91. Plaintiffs appealed and the Fourth Circuit vacated the district court decision and remanded for further proceedings, finding that Plaintiffs S.P., D.S., and Nesmith had demonstrated standing. ECF 102.

2. Subsequently, the South Carolina legislature amended the Disturbing Schools statute to remove the provisions challenged by Plaintiffs. *See* ECF 132-1. The amendment resolved Plaintiffs' requests that the Court enjoin enforcement of the Disturbing Schools law, but did not

resolve Plaintiffs' request for an order preventing the retention of records related to the law.[3] *See* ECF 185 at 7; 181. Plaintiffs amended the complaint to add Plaintiff D.D, ECF 157, and Defendant filed a motion to dismiss. ECF 165. The Court denied the motion, finding Plaintiffs' claims seeking expungement of records under the Disturbing Schools law remained viable, ECF 185 at 7, that D.S.'s claims were not moot, *id.* at 8, and that Girls Rock—now Carolina Youth Action Project—possesses representational and organizational standing. *Id.* at 10, 11.

3. Thereafter, the Court certified the following classes in this action. For the purposes of seeking injunctive relief against the enforcement of S.C. Code § 16-17-530 against elementary and secondary school students:

> All elementary and secondary school students in South Carolina, each of whom faces a risk of [ ] arrest or juvenile referral under the broad and overly vague terms of S.C. Code § 16-17-530 while attending school.

Additionally, for purposes of obtaining an injunction against retention of records under both the prior version of S.C. Code § 16-17-420 and S.C. Code §16-17-530:

> All elementary and secondary school students in South Carolina for whom a record exists relating to being taken into custody, charges filed, adjudication, or disposition under S.C. Code § 16-17-530; and
> All elementary and secondary school students in South Carolina for whom a record exists relating to being taken into custody, charges filed, adjudication, or disposition under S.C. Code § 16-17-420 prior to May 17, 2018.

ECF 201; ECF 198.

II. Parties

4. Plaintiff D.D. is African American and has attended South Carolina Public Schools. D.D. Decl. at ¶¶ 1–2, attached as Exhibit 1. As an eighth-grade student, D.D. was charged under the Disturbing Schools law. *Id.* at ¶¶ 8–10. Although the charges were dismissed, D.D. received

[3] The individual claims of Plaintiffs Niya Kenny and Taurean Nesmith were also resolved. ECF 185 at 5.

a letter from the Solicitor General's Office indicating that the charges would remain on his record. *Id.* at ¶ 26 & Ex. A.

5. Plaintiff D.S. is African American and has attended South Carolina Public Schools. Declaration of D.S. at ¶¶ 1–2, attached as Exhibit 2. D.S. was diagnosed with lead poisoning as a child and faced developmental and learning challenges as a result. *Id.* at ¶ 3. At the age of 17, D.S. was charged as an adult under the Disturbing Schools law. *Id.* at ¶ 5.

6. Plaintiff S.P. is Caucasian and has attended South Carolina Public Schools. S.P. Decl. at ¶¶ 1–2, attached as Exhibit 3. S.P. has been diagnosed with multiple mood and conduct disabilities that cause her to become irritable when she faces threats or confrontation. *Id.* at ¶ 3. To address her disability, S.P. requested and received a behavior intervention plan through her school. *Id.* at ¶¶ 4–5. As a first-year high school student, S.P. was charged with Disorderly Conduct at school. *Id.* at ¶ 2, 6.

7. Plaintiff Carolina Action Youth Project ("CYAP"), formerly "Girls Rock," *see* ECF 133, is a Charleston-based nonprofit that works "directly with young people to develop leaders dedicated to making positive change within their communities," Declaration of Micah Blaise Carpenter at ¶ 6, attached as Exhibit 4, and is "guided by core principles that include challenging criminalization and promoting collective accountability for behavior." *Id.* at ¶ 7. CYAP has expended resources advocating against the Disturbing Schools law and providing support to students charged under the challenged laws. *Id.* at ¶¶ 17–23. CYAP youth members have been charged with Disturbing Schools. *Id.* at ¶ 19.

8. Defendant Alan Wilson is sued in his official capacity as the Attorney General of South Carolina. The Attorney General of South Carolina has the duty to assist and represent the Governor in the faithful execution of the laws. S.C. Const. art. IV § 15.

III. Statutory Language

9. South Carolina's Public Disorderly Conduct law provides:

> Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

S.C. Code § 16-17-530. The Attorney General has interpreted the law to apply even when the only individuals present are the defendant and the arresting officer, 1991 S.C. Op. Att'y Gen. 89 (1991), and to prohibit "[u]se of foul or offensive language toward a principal, teacher, or police officer," 1994 S.C. Op. Att'y Gen. 62 (1994), No. 25, 1994 WL 199757.

10. Merriam Webster defines "disorderly" as "characterized by disorder,"[4] and further defines disorder as "a lack of order," or in the verb form, "to disturb the regular or normal functions of."[5] "Boisterous" is defined as "noisily turbulent" as well as "marked by or expressive of exuberance and high spirits."[6]

11. As enforced prior to the May 17, 2018 amendments, South Carolina Code section 16-17-420, the Disturbing Schools law, provides:

> (A) It shall be unlawful:
>
> (1) for any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon; or

[4] Merriam-Webster.com, Disorderly, https://www.merriam-webster.com/dictionary/disorderly. Last visited July 19, 2021.
[5] Merriam-Webster.com, Disorder, https://www.merriam-webster.com/dictionary/disorder. Last visited July 19, 2021.
[6] Merriam-Webster.com, Boisterous, http://www.merriam-webster.com/dictionary/boisterous. Last visited July 19, 2021.

> (2) for any person to (a) enter upon any such school or college premises or (b) loiter around the premises, except on business, without the permission of the principal or president in charge.
>
> (B) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, on conviction thereof, shall pay a fine of not more than one thousand dollars or be imprisoned in the county jail for not more than ninety days.

S.C. Code § 16-17-420 (2017). As provided by South Carolina Attorney General's Opinions, the law prohibits "[u]se of foul or offensive language toward a principal, teacher, or police officer," as well as "fighting," 1994 S.C. Op. Att'y Gen. 62 (1994), No. 25, 1994 WL 199757, and becoming "uncooperative and disruptive." Letter from Robert D. Cook, S.C. Assistant Att'y Gen., to Hon. John W. Holcombe, Sheriff, Chester Cty., 1999 WL 626642 (July 12, 1999). Attorney General's Opinions observe that "[n]o express limitations on the time of applicability of [§16-17-420's] prohibition are set forth," 1990 S.C. Op. Att'y Gen. 175 (1990), No. 90, 1990 WL 482448, and reason that the law can "apply to any part of the campus regardless of whether students or other students [sic] or faculty were present." 1994 S.C. Op. Att'y Gen. 62.

12. "Obnoxious" is defined as "unpleasant in a way that makes people feel offended, annoyed, or disgusted."[7]

13. The Disturbing Schools law was amended pursuant to Act 183, 2018 S.C. Acts, which took effect on May 17, 2018. Criminal and juvenile records generated under the Disturbing Schools law prior to the amendment remain in effect. Act 182, Section 3 provides:

> After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act 182, 2018 S.C. Acts.

[7] Merriam-Webster.com, Obnoxious, http://www.merriam-webster.com/dictionary/obnoxious. Accessed July 19, 2021.

IV. Addressing Child and Adolescent Behavior in Schools

14. The Disturbing Schools and Disorderly Conduct laws criminalize conduct common to children and developing adolescents and where more effective school-based approaches exist. According to undisputed testimony from Plaintiffs' expert, Joseph B. Ryan, Distinguished Professor of special Education at Clemson University, "[b]ehavioral and social skills are learned through the process of adolescent development." 2016 Declaration of Joseph B. Ryan at 4, attached as Exhibit 5. "[E]ducators can . . . change or shape a child's behavior," *id.* at 5; and researchers have identified a number of evidence-based practices for managing challenging student behaviors. *Id.* at 3; 9–17. Evidence-based practices exist at several levels of intervention. Some "are preventative in nature, and address the entire school, including students, teachers, and support staff." *Id.* at 11. These can include techniques like assessing "classroom layout, agenda, procedures, and routines," *id.*, and "positively reinforcing prosocial behaviors." *Id.* at 12. A small number of students—approximately 1%–5%—require the most intensive levels of intervention. *Id.* at 15. These interventions can include functional behavioral assessments, "a common practice in special education," and providing wraparound services. *Id.*; *see also id.* at 16–17. Functional behavioral assessments have been shown to "reduce[] problem behaviors by an average of 70.5%." *Id.* at 16.

15. While effective, evidence-based classroom management practices exist, "[n]early half (41%) of classroom teachers . . . reported receiving insufficient training in behavior management." *Id.* at 4. A 2014 study found that "most teacher preparation programs failed to provide sufficient training on even the most basic concepts," such as "establishing class routines" and "praising positive student behavior," or "how to handle misbehavior," and "only a third . . . required teacher candidates to practice behavior management skills." *Id.* at 18. Although "special

[education teachers] are responsible for teaching those students who display many of the most challenging . . . behaviors," a similar study of these training programs "found that only a quarter . . . had an entire course devoted to behavior management." *Id.* at 19.

16. Where training and support for the use of evidence-based behavior management strategies is lacking, "schools have increased their use of punitive [and] exclusionary disciplinary approaches . . . ranging from suspension . . . [to] criminal charges." *Id.* at 5; *see also id.* at 7. Punitive and exclusionary approaches "are often ineffective at addressing problem behaviors," including because they "fail to teach appropriate alternative behaviors," and "may inadvertently reinforce a problem behavior." *Id.* at 6. Punitive strategies that remove students from the classroom have led to "[i]ncreased levels of misbehavior" because they allow the student to temporarily escape the classroom or assignment. *Id.* "Researchers have also found that students react negatively to harsh and aggressive teacher behaviors," and may "respond with higher rates of student misbehavior," or "develop feelings of inadequacy, including guilt, shame, or embarrassment." *Id.* at 6–7. Ineffective classroom management likewise weighs heavily on teachers, "given [that student] behavioral challenges are frequently cited as a primary factor influencing teacher attrition rates." *Id.* at 5; *see also id.* at 6–7.

17. In addition to being generally ineffective, punitive disciplinary strategies are disproportionately applied to students of color, students from low socioeconomic status families, and students with disabilities. *Id.* at 7–8. For example, "Black students are suspended three times more frequently than [white] peers," and "students with disabilities are" suspended at twice the rate of students without disabilities. *Id.* at 8. Researchers have found that "significant racial disparities exist[ ] in school discipline even after accounting for [socioeconomic status]." *Id.* There is also a racial disparity in the types of offenses which lead to suspension: "African-

American students were more likely to be suspended for subjective types of offenses (e.g., disrespect, excessive noise),” while white students were more often suspended for “more objective types of offenses (e.g., smoking, vandalism).” *Id.* at 8–9.

18. In addition, “[p]olice have become increasingly commonplace in schools across the nation.” 2020 Supplemental Declaration of Joseph Ryan at 2, attached as Exhibit 6; *see also id.* at 4 (observing that “police are increasingly being called upon to deal with behavioral issues in schools”). This has resulted in “a significant increase in the number of nonviolent arrests on school grounds.” *Id.* at 3. “For example, research has shown that schools with police have five times as many arrests for disorderly conduct as schools without police.” *Id.* at 3. This has disproportionately impacted students of color and students with disabilities. Recently, data reported to the U.S. Department of Education showed that “while Black students represented only 15% of the school population, they accounted for 31% of students referred to law enforcement or school related arrests.” *Id.* at 3. Additionally, students with disabilities accounted for 82,800 of 291,100 students referred or subject to school-related arrest nationwide. *Id.*

19. “[I]ncreased numbers of police in schools has resulted in . . . negative impacts for schools and students.” *Id.* at 4. A review of multiple studies found that “police presence did not have a positive influence on schools, and may have a negative one by increasing referrals of students into the juvenile justice system.” *Id.* at 4–5. Contact with the juvenile justice system increases the risk that a young person will drop out of school and that they may be incarcerated later on. *Id.* at 5; 2016 Ryan Decl. at 7.

V. South Carolina's Disorderly Conduct and Disturbing Schools Laws Encourage Arbitrary and Discriminatory Enforcement

A. Enforcement of the challenged laws against youth occurs primarily in schools.

20. The Disorderly Conduct law is among the most common reasons for juvenile referral to law enforcement. Declaration of Crystal Kayiza Ex. A, attached as Exhibit 7. Plaintiffs' undisputed analysis shows that between August 3, 2015 and July 30, 2020, 5,120 young people were referred to law enforcement on Disorderly Conduct charges. Madubuonwu Decl. at ¶ 17, attached as Exhibit 8. Of these referrals, almost three quarters (72.9%) were school related. *Id.* at ¶ 20. Further, Disorderly Conduct was the only or most serious charge in 84.8% of school related cases. *Id.* at ¶ 22. Students as young as eight have been charged. *Id.* at ¶ 35.

21. The Disturbing Schools law has operated in a similar fashion. Plaintiffs' undisputed analysis shows that between August 2010 and March 2016, over 9,500 adolescents entered the juvenile justice system on charges of Disturbing Schools. Marcelin Decl. at ¶ 15, attached as Exhibit 9. In 2014–2015, in Charleston and several other South Carolina counties, more young people entered the juvenile justice system because of school disruption charges than for any other reason. Kayiza Decl. at ¶¶ 11–12, Ex. A. Students as young as seven have been charged. Marcelin Decl. at ¶ 16.

B. The challenged laws require subjective distinctions between criminal conduct and behaviors addressed at the lowest levels of school codes of conduct.

22. Behaviors criminalized by the Disorderly Conduct and Disturbing Schools laws cannot be distinguished from behaviors assigned minimal penalties under school codes of conduct. For example, in Greenville schools, "disorderly acts" are included among the lowest level offenses in violation of the school code of conduct, which may lead to discipline as minor as a verbal reprimand. Declaration of Sierra Mohamed, Ex A, Greenville County Schools

Behavior Code at 4, attached as Exhibit 10;[8] *see also* Kayiza Decl. Ex. C.3 at 4; Mohamed Decl. Ex. B, Richland County School District One 2018-2019 Student Handbook[9] at 14 (defining "Disruption of Class/Activity" as a Level I offense); Kayiza Decl. Ex. C.2 at 18 (same); Mohamed Decl. Ex. C, Richland School District Two Code of Conduct[10] at 1 (defining activities "which tend to impede orderly classroom procedures or instructional activities, orderly operation of the school, or the frequency or seriousness of which may disturb the classroom or school" at the lowest level of behavioral misconduct subject to consequences including a verbal reprimand).

23. Similarly, Charleston includes among the lowest level offenses to be managed in the classroom "conducting oneself in a disruptive or disrespectful manner," including making "[a]ny loud sound that is unnecessary or interferes with the learning environment," Mohamed Decl. Ex. D, Charleston County School District Student Handbook[11] at 28, as well as "[r]ough or boisterous play or pranks." *Id.* at 35; *see also* Kayiza Decl. Ex. C.1 at 14, 47.

24. School codes treat "disruptive" and "disorderly" behavior as low-level misbehaviors addressed through school-based interventions. However, the same terms appear in the Disorderly Conduct and Disturbing Schools laws and encourage criminalization of the same behavior.

25. Without objective, specific guidance through the statutes, subjective judgment must guide the determination of whether a child's behavior constitutes a matter for school-based intervention or an act of criminal Disorderly Conduct or Disturbing Schools. As the head of the

[8] The Greenville County Schools Behavior Code is also available publicly at https://go.boarddocs.com/sc/greenville/Board.nsf/goto?open&id=9ZRQ8H660580.
[9] The Richland County School District One 2018-2019 Student Handbook is also available publicly at https://www.richlandone.org/cms/lib/SC02209149/Centricity/Domain/132/2018-2019%20Richland%20One%20Student%20Code%20of%20Conduct%20Handbooka.pdf.
[10] The Richland County School District Two Code of Conduct is also available publicly at https://boardpolicyonline.com/?b=richland2&s=268392.
[11] The Charleston County School District Student Handbook is also available publicly at https://www.ccsdschools.com/cms/lib/SC50000504/Centricity/Domain/117/StudentCodeofConduct_2020-2021_ENGLISH_Feb23.pdf.

Greenville County Sheriff's Department School Enforcement Unit admitted, in determining whether someone has engaged in disorderly conduct by being "loud or boisterous," there are "a lot of factors" an officer will consider, and "the individual circumstance and the discretion of the officer . . . play a role." Mohamed Decl., Ex. L, Deposition of Michael Rinehart at 49:1–6; *see also id.* at 48:6–18 (Q: "[H]ow would you determine whether someone had engaged in disorderly conduct [by being loud or boisterous]?" A: . . . "Without having a specific incident or being in a specific situation, it's a little difficult for me to answer that question."). He further admitted that different officers may have a different judgment of whether conduct violates the statute. *Id.* at 65:22–66:1 ("[I]s it possible that a different officer would have a different judgment of when the use of curse words or profanity violate the disorderly conduct statute? A: I would say yes.").

26. The Office of the Solicitor for the Eleventh Judicial Circuit has also recognized that many of the student behaviors criminalized under the Disturbing Schools and Disorderly Conduct laws "are behavioral issues rather than criminal acts." Kayiza Decl. Ex. H, Letter from Donald V. Meyers, Solicitor, Eleventh Judicial Circuit, to Dr. Karen Woodward, Superintendent, Lexington County School District One (Jun. 3, 2010). The Office pointed out that "when various individuals . . . come together and initiate programs, [such as School-wide Positive Behavior Interventions and Supports, School-based Mental Health, and Family Involvement Programs], many schools have seen a reduction in the number of Disturbing Schools and Disorderly Conduct charges." *Id.*

C. Enforcement of the Disorderly Conduct and Disturbing Schools laws is discriminatory.

27. The lack of objective guidelines in the challenged laws leads to arbitrary and discriminatory enforcement. The undisputed data show that officers charge Black students with being criminally "disorderly" at higher rates than their white peers. Black youth comprise 29.9% of the youth population aged 5–17, but comprised 75.3% of school-based referrals to law

enforcement for Disorderly Conduct between August 3, 2015 and July 30, 2020. Madubuonwu Decl. at ¶ 21. White youth make up 54.74% of this population, but only 21.0% of school-based referrals under the law. *Id.* Across the state, Black youth are charged in school under the Disorderly Conduct law at over six times (6.36) the rate of white youth. *Id.* at ¶ 19. In Greenville, which had both the highest number of total school-related referrals and the highest number of school-related referrals of Black youth, Black students were charged with Disorderly Conduct at fourteen times the rate of white students. *Id.* at ¶ 33. There were five cases statewide in which a child under the age of 10 was charged; all five cases were referrals of Black students. *Id.* at ¶ 36.

28. Similarly, the Disturbing Schools law has been subjectively and disproportionately enforced against students of color. Statewide, Black students have been nearly four times as likely to be referred for Disturbing Schools. Marcelin Decl. at ¶ 19. In the 2014–2015 school year in Charleston, Black students were approximately six-and-a-half times more likely to be referred for Disturbing Schools than were their white classmates. *Id.* at ¶ 23, Ex. A at 4.

29. Students face charges under the Disorderly Conduct law for a range of school infractions, such as refusing to follow instructions or cursing in the presence of others. For example, in Greenville, a police officer reported that a Black eighth grader "became loud and boisterous with his words and his physical gestures" in the school cafeteria. The police officer intervened and after the student reportedly refused to get in the lunch line, he was forcibly handcuffed and placed under arrest. Mohamed Decl. Ex. E, Greenville County Sheriff's Office Incident Report No. 19000016960. In another incident, a 16-year-old Black student was arrested for Disorderly Conduct after the police officer "could clearly hear [the student] using obscene language while in the presence of adults and other students," and after the student was advised "to refrain from the language or he would be charged," the student allegedly used a curse word.

Kayiza Decl. Ex. B.3.[12] K.B., a Latina student, was arrested as a 14-year-old middle schooler. Declaration of K.B. at ¶ 1–3, attached as Exhibit 11. K.B. had arrived to gym class "just as the bell rang," and argued when her teacher told her she needed to report to the "Tardy Sweep" room. *Id.* at ¶¶ 4–9. A police officer was called to escort her, and when she continued to protest, she was arrested. *Id.* at ¶¶ 10–13. The incident was recorded as "Disorderly Conduct" and she was later charged with Disturbing School. Kayiza Decl. Ex. B-4.[13]

30. Plaintiff S.P., a student with disabilities, was charged with Disorderly Conduct at school. S.P. Decl. at ¶ 6. S.P. had a Behavior Intervention Plan designed to address behavior associated with her disabilities, which impact her mood and conduct; the Plan designated "safety people" who S.P. could talk to if she got upset. *Id.* at ¶¶ 3–5, Ex. A. S.P.'s arrest stemmed from an incident that began when S.P. entered the library and encountered a girl who had been making fun of her throughout the morning. *Id.* at ¶¶ 7–9. S.P. told the girl to stop talking about her before sitting down at another table. *Id.* S.P. was soon approached by the principal and then a school resource officer who asked her to leave the library. *Id.* at ¶¶ at 10–12. S.P. initially protested because she did not understand why she, but not the student who teased her and continued to laugh at her, was being asked to leave. *Id.* at ¶¶ 13–17. Students in the library laughed at S.P. and

[12] *See also* Mohamed Decl., Ex. F, Greenville County Sheriff's Office Incident Report No. 20000168583 (12-year old charged with Disorderly Conduct after "still being disruptive" after being sent to the counselors office, cursing, and attempting to leave when the police officer arrived); *Id.* Ex. H, Richland County Sheriff's Office Incident Report No. 1904016109 (Black 7th grader who was "taken into custody, cuffed," and charged with Disorderly Conduct for cursing "in front of students and guest employees" and remaining "belligerent and non-compl[iant]" after being sent to in-school suspension.); Kayiza Decl. Ex. B.1 (twelve-year-old Black female arrested for Disorderly Conduct after a physical altercation with another student where "[n]o injury [was] noted;" it was reported that the students "did disturb the normal operation of school"); Rinehart Dep. at 49:23–25 (describing as a factor in determining whether someone has violated the Disorderly Conduct Law, "if the individual . . . is using profanity, is it something where it's in close proximity of smaller children . . .").

[13] In a similar incident, a 16-year-old Black student was "demanding to be let into the office to see his sister because . . . school admin hurt her"and was "yelling at school staff and being profane." Mohamed Decl., Ex. J, North Charleston Police Department Incident Report No. 2018036499. After the school principal and police reportedly "asked him to calm down several times," the student was placed in handcuffs and told he was being charged with disturbing schools. *Id.* The incident report identified the incident type as "Disorderly Conduct." *Id.*

clapped as she was escorted from the library and S.P. cursed at them in response. *Id.* at ¶¶ 18–22. Following the incident, S.P. was charged with Disorderly Conduct. *Id.* at ¶¶ 23–26.[14]

31. As with the Disorderly Conduct law, the Disturbing Schools law has been applied to typical childhood and adolescent conduct that could be managed through school-based interventions. For example, D.D. was charged with Disturbing Schools after she was sent out of the classroom for talking. Carpenter Decl. at ¶ 19. While seated outside of the classroom, another student approached her and began speaking to her. *Id.* After a school police officer observed her talking to the student, she was detained, handcuffed, and charged with Disturbing Schools. *Id.* In another incident, a Black student was charged with Disturbing Schools after another student complained about several students using their phones to take photographs of themselves and other students in a school bathroom. *Id.* Plaintiff D.S. was charged under the statute following a minor physical altercation in which she was not the aggressor. While standing in a school hallway, D.S. and her friend were approached by two other students, one of whom hit D.S., starting a fight between the two. D.S. Decl. at ¶ 6. Other than D.S., who left the altercation with a small lump on her head, no students were injured and teachers broke up the conflict shortly after it started. *Id.* at ¶¶ 6–7. D.S. was charged with Disturbing Schools. *Id.* at ¶ 10.

32. Students have also been charged with Disturbing Schools and Disorderly Conduct when expressing concerns over police misconduct. At age 18, Niya Kenny was charged under the Disturbing Schools statute after attempting to document the violent arrest of a classmate, and calling out in protest. Declaration of Niya Kenny at ¶¶ 1–9, attached as Exhibit 12. In response,

[14] In another incident, a middle school student identified in the police report as "a special needs student who receives service in an emotionally disturbed setting" was arrested for disorderly conduct two days after enrolling in a new school. Mohamed Decl. Ex. K, Richland County Sheriff's Office Incident Report No. 1812024307. The student was upset and refusing to go to In-School-Suspension, and reportedly "became extremely belligerent, cursing and threaten[ing]" school staff and police. *Id.* The student was also in foster care. *Id.*

Ms. Kenny was handcuffed in front of her teacher and classmates and removed from the classroom. *Id.* at ¶¶ 12–15. She was eventually taken to a detention center where she was charged with Disturbing Schools. *Id.* at ¶¶ 21–24. The initial police report listed the incident type as "Disorderly Conduct*." Id*. at. ¶ 24, Ex. A. Niya Kenny is not the only student charged with a crime under the challenged laws upon criticizing police. For example, a Black student cursed at a police officer in a school parking lot and was charged with Disorderly Conduct after the officer stated that "cursing in public was not allowed under state law." Mohamed Decl. Ex. G, Greenville County Sheriff's Office Incident Report No. 19000039178; *see also* Kayiza Decl. Ex. B.2 (Black student arrested for Disorderly Conduct and Disturbing Schools after stating "in a loud and boisterous manner toward the SRO 'fuck you'"); Mohamed Decl, Ex. I (Black student responding with profanity to police order to go to class arrested for Disorderly Conduct.); Declaration of Taurean Nesmith at ¶¶ 9–12, 24, attached as Exhibit 13 (Black student charged with Disturbing Schools after criticizing police treatment of classmate at college apartment complex).

VI. Students charged under the Disorderly Conduct and Disturbing Schools laws experience significant harms

33. Students charged under the Disorderly Conduct and Disturbing Schools laws face a number of harms, including the trauma of arrest, detention, and involvement with the criminal and juvenile systems, financial burdens, and educational disruptions, Nesmith Decl. at ¶ 22; S.P. Decl. at ¶¶ 23–27; K. B.at ¶¶ 12–14; D.S. Decl. at ¶¶ 10–18; Kenny Decl. at ¶¶ 12–27; Carpenter Decl. at ¶ 19; *see also* ECF 5 at 10–15, and chilling of their expressive activity. *Kenny v. Wilson*, 885 F.3d 280, 289 (4th Cir. 2018); Kenny Decl. at ¶¶ 5, 8–9. Students also experience physical injury. For example, in the course of K.B,'s arrest at age fourteen, the police officer "slammed [her] to the ground, leaving bruises," before placing her in handcuffs. K.B. Decl. at ¶¶ 12–13; *see*

also Kayiza Decl. Ex. B.3 (student arrested for Disorderly Conduct was subjected to a "tactical takedown").

34. A record of a prior criminal charge also harms Plaintiffs, even if they were not ultimately convicted or adjudicated delinquent. A prior charge can bar a young person from participating in diversion in the future and the violation of the unconstitutional statute would appear on a young person's record. For example, although the charges against D.D. were dismissed, he received a letter from the Solicitor General's office explaining that the charges would remain on D.D.'s record and that the state may re-initiate prosecution of the charges at any time. D.D. Decl. Ex. A. A juvenile record may only be expunged after a person turns seventeen, has completed any sentence, and only if there are no subsequent charges on their record. S.C. Code § 63-19-2050(A).[15] Clearing one's record of a Disorderly Conduct or Disturbing Schools charge brings additional costs and burdens. To have a record expunged, students must make an application to the local solicitor's office and pay up to $310 in fees. Kayiza Decl. Ex. F (South Carolina Judicial Department, Frequently Asked Questions About Expungement and Pardons in South Carolina Courts).

STANDARD OF REVIEW

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Harley v. Wilkinson*, 988 F.3d 766, 768 (4th Cir. 2021) (quoting Fed. R. Civ. P. 56(a)). "Whether a challenged statutory enactment is unconstitutionally vague is a legal question . . . ." *Henry v. Jefferson Cty. Planning Comm'n*, No.

[15] Consistent with the amendment to define seventeen-year-olds as juveniles, effective July 1, 2019, a juvenile record cannot be expunged until the person is at least eighteen. 2016 South Carolina Laws Act 268 (S.916) (effective July 1, 2019).

99-2122, 215 F.3d 1318, 2000 WL 742188, at *4 (4th Cir. 2000); *see also United States v. Smith*, 165 F.3d 913 (4th Cir. 1998).

ARGUMENT

I. Vagueness Standard

"It is axiomatic that a law fails to meet the dictates of the Due Process Clause 'if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'" *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). A law violates the Due Process Clause if it is impermissibly vague for either of two independent reasons. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In assessing criminal laws, "perhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Lanning* at 482 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

"The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Where—as here—speech and expression are implicated, "[t]he general test of vagueness applies with particular force." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *see also Goguen*, 415 U.S. at 573 (1974); *Hoffman Estates*, 455 U.S. at 499. This is because a vague law presents "those same chilling concerns that attend an overbreadth challenge." *Bell v. Keating*, 697 F.3d 445, 455 (7th Cir. 2012).

Additionally, a criminal law is subject to a heightened standard of certainty and "can be invalidated on its face 'even where it could conceivably have . . . some valid application.'" *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (quoting *Wright v. New Jersey*, 469 U.S. 1146, 1152 (1985)). As the Supreme Court has stated, "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

The need for a high degree of certainty is all the more critical where criminal laws apply to schoolchildren. The Supreme Court has repeatedly recognized that children and adolescents are in the process of cognitive development, and cited their "lack of maturity and an underdeveloped sense of responsibility" as indicators of diminished culpability. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (acknowledging that minors "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them") (citation omitted); *Graham v. Florida*, 560 U.S. 48, 68 (2010), *as modified* (July 6, 2010); *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245 (citation omitted). The Court's assessment of vagueness in the context of criminal laws enforced against children must therefore differ markedly from laws reviewed in other contexts, such as economic regulations applied to business professionals. *See Hoffman Estates*, 455 U.S. at 499. Because of their age and overall lack of education and experience in comparison to adults, it is particularly imperative that the law present schoolchildren with clear notice as to what actions will be treated as criminal.

In assessing a law for vagueness, this Court "must extrapolate its allowable meaning," in which it is "relegated[] to the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Grayned v. City of Rockford*, 408 U.S. 104,109–110 (1972) (internal quotations omitted). Interpretations by the South Carolina Attorney General's Office affirm a broad reading of the challenged laws,[16] and these opinions are given persuasive weight in South Carolina courts. *See, e.g.*, *Cahaly v. LaRosa*, 25 F. Supp. 3d 817, 826 (D.S.C. 2014), *vacated in part on other grounds*, 796 F.3d 399, 402 (4th Cir. 2015) ("[Attorney General's opinions] are afforded great weight in South Carolina, particularly in matters of statutory construction.").

II. The Disorderly Conduct Law Is Void for Vagueness as Applied to Elementary and Secondary School Students

Section 16-17-530, the Disorderly Conduct law, is unconstitutionally vague, as a matter of law, when applied to elementary and secondary students because it fails to provide students with notice of when their behavior will be considered criminal and encourages arbitrary and discriminatory enforcement. *Morales*, 527 U.S. at 56; *Kolender*, 461 U.S. at 357.

A. The prohibition on "conducting oneself in a disorderly or boisterous manner" is overly vague, inviting arbitrary and discriminatory enforcement.

First, the Disorderly Conduct law broadly prohibits "conducting [oneself] in a disorderly or boisterous manner." S.C. Code § 16-17-530. Merriam Webster defines "disorderly" as "characterized by disorder,"[17] and further defines disorder as "a lack of order," or in the verb form, "to disturb the regular or normal functions of."[18] In this way, the prohibitions are

[16] *See supra* ¶¶ 9, 11.
[17] Merriam-Webster.com, Disorderly.
[18] Merriam-Webster.com, Disorder.

synonymous with those of the Disturbing Schools law. "Boisterous" is defined as "noisily turbulent" as well as "marked by or expressive of exuberance and high spirits."[19]

Any effort to distinguish normal childhood and adolescent behavior and misbehavior from criminally "disorderly" or "boisterous" conduct necessarily and impermissibly turns on subjective judgment. As the Fourth Circuit observed, elementary and secondary school students "are in many ways disorderly or boisterous by nature." *Kenny* 885 F.3d at 290; *see also* 2016 Ryan Decl. at 4 ("Behavioral and social skills are learned through the process of adolescent development."). Indeed, the Record shows that such subjective judgments play a determinative role in enforcing the law against students. *See* Rinehart Dep. at 63:10–11 ("each individual officer has discretion"); *id.* at 65:22–66:1 ("[I]s it possible that a different officer would have a different judgment of when the use of curse words or profanity violate the disorderly conduct statute? A: I would say yes."); *id.* at 49:7–14.

If disorderly is read to mean "disturb[ing] the regular or normal functions"[20] of a school, the Disorderly Conduct law provides no criteria to determine which behaviors meet this definition. It is undisputed that managing sometimes challenging childhood and adolescent behavior is a regular part of school functions. *See supra* Section IV ¶ 14; 2016 Ryan Decl. at 5–17. Thus, it would make little sense to call such challenging behaviors incompatible with normal school activity. As the Maryland Court of Appeals observed:

> A typical public school deals on a daily basis with hundreds—perhaps thousands—of pupils in varying age ranges and with a variety of needs, problems, and abilities . . . . Disruptions of one kind or another no doubt occur every day in the schools, most of which, we assume, are routinely dealt with in the school setting by principals, assistant principals, pupil personnel workers, guidance counselors, school psychologists, and others, as part of their jobs and as an aspect of school administration.

[19] Merriam-Webster.com, Boisterous.
[20] Merriam-Webster.com, Disorder.

In re Jason W., 837 A.2d 168, 174 (Md. 2003). Indeed, educators who implement evidence-based practices can reduce and deescalate challenging student behaviors, including for students with disabilities who require more support. *See supra* Section IV ¶ 14; 2016 Ryan Decl. at 9–17.

Reflecting this reality, school codes of conduct use the same terms used in the criminal law to describe behaviors addressed through the lowest level school-based interventions. *See supra* Section V.B ¶¶ 22–23. For example, in Greenville schools, "disorderly acts" are included among the lowest level offenses in violation of the school code of conduct, which may lead to discipline as minor as a verbal reprimand. Mohamed Decl. Ex. A at 4; *see also* Mohamed Decl. Ex. B at 14 (defining "Disruption of Class/Activity" as a Level I offense); *id.* Ex. C at 2. So too, the Charleston School District includes among the lowest level offenses to be managed in the classroom "conducting oneself in a disruptive or disrespectful manner," including through making "any loud sound that is unnecessary or interferes with the learning environment," *id.* Ex. D at 28, as well as "rough or boisterous play or pranks." *Id.* at 35.

School codes of conduct recommend school-based interventions for managing generally disruptive or noncompliant behavior. Nonetheless, students routinely are criminally charged for these same behaviors. *See, e.g.*, *id.* Ex. F, Greenville County Sheriff's Office Incident Report No. 20000168583 (12-year-old charged with Disorderly Conduct after "still being disruptive" after being sent to the counselor's office, cursing, and attempting to leave when the police officer arrived); *id.* Ex. H, Richland County Sheriff's Office Incident Report No. 1904016109 (Black seventh grader charged with Disorderly Conduct for cursing "in front of student and guest employees" and remaining "belligerent and non-compl[iant]" after being sent to in-school suspension); Kayiza Decl. Ex. B.1 (twelve-year-old Black girl arrested for Disorderly Conduct after a physical altercation with another student where "no injury [was] noted").

In some contexts, such as a school pep rally or recess, "boisterousness"—the display of "exuberance and high spirits"[21]—may be not only expected but accepted, encouraged, and constitutionally protected. *Cf. Baribeau v. City of Minneapolis*, 596 F.3d 465, 476–77 (8th Cir. 2010) (concluding that a prohibition of "'boisterous' and/or noisy conduct" infringed expressive conduct, including as example, "a basketball coach shouting and throwing her clipboard across the locker room at halftime"). For example, students in the school cafeteria may communicate with one another as "an important part of the educational process," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969), where this expression could be characterized as "exuberant" and "high spirited." Yet in South Carolina, a Black eighth grader was charged with Disorderly conduct solely for being "loud and boisterous with his words and his physical gestures." Mohamed Decl. Ex. E. These statutory terms provide no basis to distinguish constitutionally protected expression from criminal conduct.

Because the Disorderly Conduct law relies entirely on subjective determinations of whether a child's "disorderly" or "boisterous" behavior should be dealt with through school interventions or treated as criminal, it also "encourage[s] arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56; *see also Goguen*, 415 U.S. at 573; *Grayned*, 408 U.S. at 108–09 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). Members of law enforcement admit that behaviors characterized as criminal by one individual under the law could be viewed as matters of school discipline by another. *See* Kayiza Decl. Ex. H (Letter from Donald V. Meyers, Solicitor, Eleventh Judicial Circuit, to Dr. Karen Woodward, Superintendent, Lexington County School District One (Jun. 3, 2010)) (noting that "many [Disorderly Conduct and Disturbing

[21] Merriam-Webster.com, Boisterous.

Schools] charges are behavioral issues rather than criminal acts"); Rinehart Dep. 49:1–6 (explaining that there are "a lot of factors" an officer will consider, and "the individual circumstance and the discretion of the officer . . . play a role" in determining whether someone has engaged in disorderly conduct by being "loud or boisterous"); *id.* at 48:6–18 (Q: "[H]ow would you determine whether someone had engaged in disorderly conduct [by being loud or boisterous]?" A: . . . "Without having a specific incident or being in a specific situation, it's a little difficult for me to answer that question."); *id.* at 65:22–66:1 ("[I]s it possible that a different officer would have a different judgment of when the use of curse words or profanity violate the disorderly conduct statute? A: I would say yes."). Because the law turns on subjective judgment in each instance, the decision of whether to treat an individual student as criminally "disorderly" or "boisterous" is always arbitrary. *See Morales*, 527 U.S. at 71 (Breyer, J., concurring in part and concurring in the result) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.").

The lack of objective guidance in the law leads to arbitrary and discriminatory enforcement in several forms. First, the vague terms of the Disorderly Conduct law chill free speech and expressive conduct which "attending school inevitably involves." *Kenny*, 885 F.3d at 288; *see also Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021) ("[T]he school itself has an interest in protecting a student's unpopular expression . . . . America's public schools are the nurseries of democracy."); *Grayned*, 408 U.S. at 109 ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (internal citation omitted). The law's

prohibition against "boisterous" conduct that is not also disorderly, S.C. Code §14-17-530 (prohibiting "disorderly *or* boisterous" conduct) (emphasis added), further encourages the criminalization of disfavored viewpoints. *See Baribeau v. City of Minneapolis*, 596 F.3d 465, 476–77 (8th Cir. 2010); *Original Fayette Cty. Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89, 92 (W.D. Tenn. 1970) (holding that prohibitions on "the use of rude, boisterous, offensive, obscene or blasphemous language in any public place" and "conduct[ing] oneself in a disorderly manner" violates due process and "sweeps too broadly" in limiting First Amendment rights). The speech and expression of schoolchildren may sometimes be considered "disorderly," "disruptive," or "boisterous" by adults. However, it is firmly settled that "mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms." *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (internal alteration omitted). Despite this, the Disorderly Conduct law has been enforced against students exercising their right to criticize police. *See, e.g.*, Mohamed Decl. Ex. G, (student charged after cursing at a police officer in a school parking lot); Kenny Decl. at ¶¶ 8–15; *id.* at ¶ 10 ("As Officer Fields was handcuffing the girl, I exclaimed something like, 'What the fuck? What did she do wrong?' Officer Fields turned to me and told me that I was going to jail, too."); Kayiza Decl. Ex. B.2–3, 5; Mohamed Decl. Ex. I.

The statute can also criminalize students with disabilities where the law elsewhere requires accommodations. For example, S.P. had a Behavior Intervention Plan designating "safety people" who S.P. could talk to if she got upset, an expected behavior associated with her disabilities. S.P. Decl. at ¶¶ 3–5, Ex. A. However, the same behaviors could be characterized as criminal under the Disorderly Conduct law's vague prohibition on "disorderly" conduct. The broad language of the law enabled school administers to ignore S.P.'s Behavior Intervention Plan

and for police to arrest her instead. *Id.* at ¶¶ 23–26; *see also* Mohamed Decl. Ex. K (student identified by police as "a special needs student who receives services in an emotionally disturbed setting" charged with Disorderly Conduct after becoming emotionally upset at school).

The vague terms of the law also encourage discriminatory enforcement against students of color. Research shows that discipline rules requiring a greater degree of subjective interpretation are more likely to be applied against students of color. 2016 Ryan Decl. at 8–9. The vague terms of the Disorderly Conduct law similarly turn on subjective interpretation and are likewise disproportionately applied against Black students. From the 2015–2016 school year through the 2019–2020 school year, over 5,000 South Carolina youth were charged with Disorderly Conduct. Madubuonwu Decl. ¶ 17; *see also* Kayiza Decl. Ex. A (listing Disorderly Conduct as one of the ten most frequent juvenile charges between 2010–2015). Over 70% of those charges were school-related. Madubuonwu Decl.at ¶ 20. Across South Carolina, Black youth are roughly six-and-a-half (6.55) times more likely than their white peers to be charged with disorderly conduct in schools. *Id.* at ¶ 25. In many counties, the disparity between the treatment of Black and white students is more severe. *Id.* at ¶ 32. In Greenville County, for example, Black youth were charged with Disorderly Conduct in school at fourteen times the rate of their white peers. *Id.* at ¶ 33. Five children younger than ten were charged with disorderly conduct in school; all of them were Black. *Id.* at ¶ 36. These stark disparities in enforcement are undisputed. While school codes of conduct indicate that behaviors like cursing, disobeying adults, and fighting are expected from students and managed through school-based responses, Black students are criminalized for these behaviors where others are not. *See supra* at ¶ 27–28; Madubuonwu Decl. at ¶¶ 19, 21, 33; *see also* 2020 Ryan Decl. at 3.

B. The prohibition on the use of "obscene or profane language" is overly vague.

Further, the Disorderly Conduct law's prohibition on the use of "obscene or profane language," S.C. Code §16-17-530, fails to provide "minimal guidelines to govern law enforcement" against schoolchildren. *Goguen*, 415 U.S. at 574. While the use of profanity may be addressed through school rules, standing alone, it cannot constitute a crime. [22] However, the Attorney General has affirmed that the Disorderly Conduct law does indeed permit such sanctions, interpreting the law to prohibit "[u]se of foul or offensive language toward a principal, teacher, or police officer." 1994 S.C. Op. Att'y Gen. 62 (1994), No. 25, 1994 WL 199757.

Despite settled law establishing that even vulgar or profane speech may not be subject to criminal penalty, the use of curse words or profanity is frequently cited in arresting students for Disorderly Conduct. *See, e.g.*, Mohamed Decl. Ex. G (student charged after cursing at a police officer in a school parking lot on grounds that "cursing in public was not allowed under state law"); Rinehart Dep. at 49:23–25 (describing as a factor in determining whether someone has violated the Disorderly Conduct Law, "if the individual . . . is using profanity, is it something where it's in close proximity of smaller children . . ."); Kenny Decl. at ¶ 24, Ex. A; S.P. Decl. at ¶ 6, 21–26; Kayiza Decl. Ex. B.2–3, 5; Mohamed Decl. Ex. I. As the Fourth Circuit recognized, the Disorderly Conduct statute does not provide an objective standard to determine what, if any, student conduct accompanying these utterances would rise to the level of fighting words. *See*

[22] Under well-established First Amendment principles, the use of profanity may not constitute a criminal offense except where such language constitutes fighting words. *See, e.g.*, *City of Landrum v. Sarratt*, 572 S.E.2d 476, 478 (S.C. Ct. App. 2002); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"). Further, the "'fighting words' exception may require narrow application in cases involving words addressed to a police officer." *State v. Perkins*, 412 S.E.2d 385, 386 (S.C. 1991); *see also Sarratt*, 572 S.E.2d at 478 (holding that a student's use of the word "fuck" in argument with principal and another student over whether student had cheated her out of money, although offensive and unacceptable, did not constitute fighting words) (citing *In re Louise C.*, 3 P.3d 1004, 1005–07 (A.Z. Ct.App.1999)). Similarly, use of the word "fuck," does not in itself constitute obscenity. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 20 (1971).; *Hess v. Indiana*, 414 U.S. 105, 107 (1973). Nor does the raising of the middle finger. *Freeman v. State*, 805 S.E.2d 845, 850 (2017).

Kenny, 885 F.3d at 290 (distinguishing *Sarratt*). As set forth above, the prohibition on "disorderly" or "boisterous" conduct cannot provide such an objective standard. No standard of conduct is additionally incorporated in the prohibition on "obscene or profane language." The failure of the South Carolina Supreme Court's narrowing interpretation to prevent arbitrary enforcement of this provision in schools is evidence of the law's vagueness when applied to students. *See Johnson*, 576 U.S. at 598 ("The failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness.") (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)) (internal quotations omitted).

C. Lack of a scienter requirement exacerbates the law's vagueness.

Finally, the Disorderly Conduct law does not incorporate a scienter requirement that might "mitigate a law's vagueness" regarding notice. *Hoffman Estates*, 455 U.S. at 499; *see also Morales*, 527 U.S. at 55. Nor does it require actual disruption of another person. *See* 1991 S.C. Op. Att'y Gen. 89 (1991) ("The physical presence of individuals other than a defendant and the law enforcement officer who makes an arrest is not necessary for a disorderly conduct violation."). *Contrast Grayned*, 408 U.S. at 114 (ordinance required willful action, causation, and "demonstrated interference"). Lack of notice in this context raises heightened concerns because a young person could violate the law without any intent to do so. In the circumstances of a young person who also lacks intent, the Supreme Court has found that moral culpability is "twice diminished." *Graham*, 560 U.S. at 69.

. . . . .

The Disorderly Conduct law is unconstitutionally vague as applied to elementary and secondary school students. The law's prohibition on the use of "obscene or profane language," prohibitions on conducting oneself in a "disorderly or boisterous manner," and lack of a scienter

requirement fail to provide any objective basis to distinguish common childish behavior from criminal conduct. The lack of guidance encourages discriminatory enforcement against students engaged in speech and expression, against Black students, and against students with disabilities.

III. The Disturbing Schools Law is Void for Vagueness on its Face

To "interfere or disturb . . . in any way," to "loiter," and "to act in an obnoxious manner" are all prohibited by the terms of the Disturbing Schools law. These terms, too, are unconstitutionally vague, as a matter of law. Although the law has now been amended, it continues to injure young people for whom a criminal charge under an unconstitutional law remains on their record. *See supra* Section VI; ECF 185 at 7; Decl. of D.D. at ¶ 26 & Ex. A.

A. The prohibitions against "disturb[ing] or interfering in any way" and "acting in an obnoxious manner" provide no objective standard and are unconstitutionally vague.

The Disturbing Schools law's prohibitions against "disturb[ing] or interfering in any way" with a school and against "acting in an obnoxious manner" do not permit easy measurement of the behavior of schoolchildren. As discussed above, young people regularly behave in ways that adults may consider to be "disturbing," or "obnoxious" and educators regularly manage these behaviors without resort to criminal law. *See supra* Section IV. The Disturbing Schools law provides no objective standard to determine when such conduct is criminally sanctioned.

The Disturbing Schools law also lacks critical limits identified in existing Supreme Court precedent necessary to save the law from unconstitutionality. In *Grayned*, the Supreme Court found that an anti-noise ordinance only closely avoided unconstitutional vagueness where—in addition to requiring intentional action and demonstrated causation—application was limited to those on "grounds adjacent to any building in which a school or any class thereof is in session," 408 U.S. at 107–08, and required "the 'noise or diversion' be actually incompatible with normal

school activity." *Id.* at 113–14. In this context, the Supreme Court found that disturbances could be "measured by their impact on the normal activities of the school." *Id*. at 112. In stark contrast, the Disturbing Schools law does not require intent, demonstrated causation, or actual disruption of classes. *See*, *e.g.*, 1994 S.C. Op. Att'y Gen. 62 (concluding that the law could "apply to any part of the campus regardless of whether students or other students [sic] or faculty were present."); 1990 S.C. Op. Att'y Gen. 175 (1990), No. 90, 1990 WL 482448 (observing that "no express limitations on the time of applicability of [§16-17-420's] prohibition are set forth"). Moreover, the law applies to schoolchildren within the school itself. *Kenny*, 885 F.3d at 291 ("Unlike the school regulation in *Tinker* or the city ordinance in *Grayned*, the Disturbing Schools law is a criminal law that applies to all people who in 'any way or in any place' willfully or unnecessarily disturb students or teachers. . . .").

Further, the law's prohibitions against "disturb[ing]," "interfer[ing] . . . in any way . . ." and act[ing] in an obnoxious manner" infringe on First Amendment protected expression. S.C. Code § 16-17-420. The South Carolina Supreme Court has previously interpreted the phrase "'interference' . . . 'in any manner'" and found that the term failed to provide clear notice and infringed upon protected First Amendment rights. *Town of Honea Path v. Flynn*, 176 S.E.2d 564, 567 (S.C. 1970). Likewise, whether a person is acting in "an obnoxious manner" depends upon subjective viewpoint. "Obnoxious" is defined as "unpleasant in a way that makes people feel offended, annoyed, or disgusted."[23] As with the term "abuse," considered by the South Carolina Supreme Court in *Flynn*, 176 S.E.2d at 566–67, "obnoxiousness" is not defined in the statute and "[o]ne's view as to what the term was intended to mean or connote would likely vary considerably." *Id.* at 567. It is firmly settled that "mere public intolerance or animosity cannot be

[23] Merriam-Webster.com, Obnoxious.

the basis for abridgment of these constitutional freedoms." *Coates*, 402 U.S. at 615 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (internal alteration omitted). Yet by its terms, the Disturbing Schools law invites criminalization of an insult uttered, expression of an idea that some find offensive, as well as interactions between individuals "whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented . . . ." *Coates*, 402 U.S. at 616; *see also* Flynn, 176 S.E.2d at 567–68 (conviction "may well have rested upon nothing more than mere words uttered . . . which were not pleasing to the local police officers who obviously did not like anyone questioning or challenging their authority").

Individual experiences demonstrate the troubling results of this vagueness in the law. For example, Ms. Kenny was arrested for Disturbing Schools when she spoke out against use of force by a police officer against a classmate. Kenny Decl. at ¶¶ 3–14, 24; *see also* Nesmith Decl. at ¶¶ 9–12, 24. The application of the Disturbing Schools statute to individuals like Ms. Kenny clearly infringes First Amendment rights. *See, e.g.*, *Perkins*, 412 S.E.2d at 386 ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.") (quoting *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987)).

B. The prohibitions against "loitering" are unconstitutionally vague.

Likewise, the Disturbing Schools law's prohibitions against loitering provide no notice and are open to arbitrary enforcement. The statute makes it unlawful for a person to "loiter about such school or college premises," S.C. Code § 16-17-42(A)(1)(b), as well as to "enter upon any such school or college premises or . . . loiter around the premises, except on business, without the permission of the principal or president in charge. *Id.* at § 16-17-420(A)(2).

"The freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Morales*, 527 U.S. at 53. For this reason, "[s]tate

courts have uniformly invalidated laws that do not join the term 'loitering' with a second specific element of the crime." *Id.* at 57–58 (citations omitted). The Disturbing Schools law contains no second specific element of the crime. It is not limited by its terms to loitering that impairs school functions and applies when school is not in session and when no students or faculty are present. *See* 1990 S.C. Op. Att'y. Gen. 175, 1990 WL 482448; 1994 S.C. Op. Att'y. Gen. 62, 1994 WL 199757. Further, the law makes no distinction between students, employees, or others. For example, it could be applied to a child who lingers in walking home from school or to a college student "loitering" on the grounds of the campus. Additionally, school and college "premises" and the area "around the premises," S.C. Code §16-17-420(A)(1)(b), (2), can encompass a large area that cannot be ascertained with precision. Indeed, the law has been applied to include an apartment complex owned by a college. Nesmith Decl. at ¶¶ 2, 7, 24.

As the South Carolina Attorney General recognized, the Disturbing Schools statute is closely analogous to a Colorado school loitering statute declared unconstitutionally vague for this reason. 1990 S.C. Op. Att'y. Gen. 175, 1990 WL 482448 (citing *People in Interest of C. M.*, 630 P.2d 593 (Colo. 1981)).[24] The Supreme Court has also repeatedly found similar statutory language to be vague. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) ("restriction" of the law to wandering or strolling "without any lawful purpose or object" did not cure vagueness and instead created "a trap for innocent acts") (internal citation omitted); *Palmer v. City of Euclid*, 402 U.S. 544, 546 (1971) (finding statute that penalized loitering "without any visible or lawful business" impermissibly vague).

[24] The Colorado statute provided "that a person commits a class 1 petty offense if he: 'Loiters in or about a school building or grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific, legitimate reason for being there, and not having written permission from a school administrator.'" *Interest of C. M.*, 630 P.2d at 594. (Colo. 1981) (quoting Co. C.R.S. Section 18-9-112(2)(d)).

C. The terms of the Disturbing Schools law invite arbitrary and discriminatory enforcement.

The terms of the Disturbing Schools law provide no objective standards for enforcement and instead, "authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56; *see also Coates*, 402 U.S. at 614 ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."). As with the Disorderly Conduct law, the uncontroverted evidence shows that Black students are more likely to be subject to criminal penalties for typical adolescent behavior. In 2015 Black students were nearly four times more likely than their white peers to be referred for Disturbing Schools. Marcelin Decl. at ¶ 19. Students' experiences reflect the arbitrary nature of decisions to arrest or refer students rather than rely on school-based responses. *See, e.g.*, Carpenter Decl. at ¶ 19; K.B. Decl. at ¶¶ 3–15; Kayiza Decl. Ex. B.1–5; Mohamed Decl., Ex. J.

D. The vagueness of the Disturbing Schools law is compounded by the lack of a scienter or actual disruption.

The Disturbing Schools law contains no scienter requirement that, if present, "may mitigate a law's vagueness" regarding notice. *Hoffman Estates*, 455 U.S. at 499. Rather, the law prohibits conduct engaged in "willfully *or unnecessarily*." S.C. Code §16-17-420 (emphasis added). As is the case with the Disorderly Conduct law, the absence of a scienter requirement coupled with the law's application to schoolchildren as young as seven makes certain that the law's imprecise terms fail to provide adequate notice. *See Graham*, 560 U.S. at 69 (concluding that, as compared to an adult, the culpability of a minor who lacks intent is "twice diminished").

The Disturbing Schools law also is not limited to actual disruption and instead applies "regardless of whether students or other students or faculty are present," 1994 S.C. Op. Att'y.

Gen. 62, 1994 WL 199757, and without limitation to the times of day or year when school is in session. 1990 S.C. Op. Att'y. Gen. 175, 1990 WL 482448. *Contrast Grayned*, 408 U.S. at 114 (ordinance required willful action, causation, and "demonstrated interference with school activities"). The Disturbing Schools law requires neither intent nor disruption and fails to provide notice to those charged.

. . . . .

The Disturbing Schools law incorporates prohibitions on "disruption," "interference," "obnoxiousness," and "loitering," each of which is substantially vague, and further contains no requirements of scienter or actual disruption. The law's imprecise terms have led to arbitrary and discriminatory enforcement against Black students and students with disabilities, and against students engaged in constitutionally protected expression. Those students against whom it was enforced continue to be injured, as criminal charges under this facially unconstitutional law remain on their criminal records.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Plaintiffs and award the relief requested in Plaintiffs' First Amended Complaint.

[*signatures on the following page*]

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Respectfully submitted,

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