CASE NO. 21-2166

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAROLINA YOUTH ACTION PROJECT, *et al.*,

Plaintiffs - Appellees

v.

ALAN WILSON,

Defendant - Appellant

On Appeal from the United States District Court for the District of South Carolina, Charleston Division
Civil Action No. 2:16-cv-2794-MBS

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

Sarah Hinger
Galen Sherwin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
shinger@aclu.org

Allen Chaney
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA
Post Office Box 1668
Columbia, SC 29202
achaney@aclusc.org

Counsel for Plaintiffs-Appellees

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1, Plaintiff-Appellee Carolina Youth Action Project states that it has no parent corporation and no corporation or publicly held company owns 10% or more of its stock.

Plaintiffs-Appellees D.S., S.P., and D.D. are individuals and do not have a parent corporation or any stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Plaintiffs-Appellees, elementary and secondary school students throughout South Carolina, challenge the state's Disturbing Schools law[1] and, as applied to them, its Disorderly Conduct law as unconstitutionally vague. Under these statutes, students attend school at risk of arrest[2] for behavior deemed "disorderly," "boisterous," "disturbing," or "obnoxious," vague terms that encompass a range of conduct typical of schoolchildren. The challenged statutes have served as the principal drivers channeling young people into the state's criminal and juvenile systems. Thousands of South Carolina's students—disproportionately Black students and students with disabilities—have faced charges of Disorderly Conduct and Disturbing Schools for conduct like: refusing to follow directions, engaging in minor physical altercations, cursing, and talking back to school authorities. Criminalizing students for being "disorderly," "boisterous," "disturbing," and "obnoxious" has also chilled students' expressive activity—including engagement with education and speaking out about police

[1] "The Disturbing Schools statute" or "Disturbing Schools law" is used 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 "referred," for the sake of ease, this brief will refer to "arrest" and "charges" to refer to enforcement in both the juvenile and criminal systems.

conduct—because they cannot know when their expression will lead to arrest. The district court correctly found these statutes unconstitutionally vague. The court properly certified a class under Rule 23(b)(2) and, to remedy these constitutional violations, entered class-wide injunctive relief against the use and retention of enforcement records. This Court should affirm.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). To avoid vagueness, a law must provide "adequate notice of what conduct is prohibited and must include sufficient standards to prevent arbitrary and discriminatory enforcement." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019) (citation omitted). As the district court correctly held, South Carolina's Disorderly Conduct and Disturbing Schools laws fail this basic constitutional test. They provide no objective criteria by which to determine whether conduct deemed "disorder[ly]," "boisterous," "disturb[ing]," or "obnoxious" will be handled through the application of routine educational techniques and school rules, or will instead be subject to criminal penalties. Because they lack definiteness, the statutes are enforced "on an ad hoc and subjective basis," *Grayned*, 408 U.S. at 108–09, thereby "encourag[ing] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Here, undisputed evidence shows that the risk of discriminatory enforcement is far more than an abstract concern. The challenged laws have been applied to Black students at vastly higher rates than to white classmates. Evidence from Greenville schools, for example, shows that Black students are *fourteen times* as likely as their white classmates to be charged as criminally "disorderly" or "boisterous." Likewise, students with disabilities are subject to criminalization under the vague laws for behavior associated with their disability. Further, students have faced arrest when engaged in expressive conduct. For example, Niya Kenny, the original lead Plaintiff in this case, was charged with Disturbing Schools after protesting the violent arrest of a classmate.

On appeal, Defendant-Appellant urges this Court to ignore these vagueness concerns and defer entirely to the "policy decisions of the legislative branch of State government." Defendant-Appellant's Br. 1. But in arguing that affirming the district court would "tie the hand of prosecutors," he spells his own defeat. *Id.* Under the Due Process Clause, criminal laws *must* limit law enforcement. Without clearly defined standards, the criminal code would "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972). Rightfully, the Constitution does not countenance such a system.

For nearly a century, the Supreme Court has been resolute—a vague statute "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Johnson v. United States*, 576 U.S. 591, 595 (2015). Here, the vagueness concerns that spring from the text of the statutes are confirmed by clear evidence of discriminatory enforcement. Because the constitutional violations are clear and the injury to students is real and substantial, the district court properly granted summary judgment for Plaintiffs. And after correctly finding a common class-wide constitutional injury, the district court was well within its discretion to certify the class under Rule 23(b)(2) and to fashion comprehensive equitable relief to eliminate the discriminatory effects of the violation. For these reasons, this Court should affirm.

STATEMENT OF THE CASE

A. Statutory Provisions

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 (2012).

The Attorney General's Office 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), No. 91-33, 1991 WL 474763, 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.

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

> (A) It shall be unlawful:
>
> > (1) for any person wilfully [sic] 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
> >
> > (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 (2012).

The law has been understood to prohibit "[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), 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. 90-61, 1990 WL 482448, and that the law can "apply to any part of the campus regardless of whether students or other students [sic] or faculty were present." 1991 S.C. Op. Att'y Gen. 89 (1991).

The Disturbing Schools law was amended by Act 182, 2018 S.C. Acts, effective May 17, 2018. However, juvenile records generated under the Disturbing Schools law before 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, JA 140.

B. Enforcement in the Schools Context

1. *Enforcement of the challenged laws against elementary and secondary school students is arbitrary and discriminatory.*

Undisputed evidence shows that almost three quarters (72.9%) of Disorderly Conduct juvenile referrals in recent years originated in schools. JA 656 ¶¶ 17, 20 (between August 3, 2015 and July 30, 2020, 5,120 young people were referred for Disorderly Conduct). Further, Disorderly Conduct was the only or most serious charge in 84.8% of school related cases. JA 657 ¶ 22. The Disturbing Schools law has operated in a similar fashion. Undisputed evidence shows that between August 2010 and March 2016, over 9,500 adolescents entered the juvenile justice system on charges of Disturbing Schools. JA 673 ¶ 15. 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. JA 513 ¶¶ 11–12. Defendant suggests that only a small number of youth—1,057—were referred for Disorderly Conduct in the 2019–2020 fiscal year. Def.'s Br. 10, JA 329. However, schools were not operating in person for a significant part of this time. Moreover, this does not diminish the constitutional injury to students who were arrested and to all students who attended school under the threat of arrest.

South Carolina students have faced charges under the Disorderly Conduct and Disturbing Schools laws for common school infractions,

such as refusing to follow instructions or cursing in the presence of others, for behaviors recognized to be associated with their disabilities, and for exercising their First Amendment rights.

For example, CYAP member K.B., a Latina student, was arrested as a 14-year-old middle schooler. JA 836 ¶¶ 1–3. K.B. had arrived to gym class "just as the bell rang," and argued when her teacher told her to report to the "Tardy Sweep" room. JA 837 ¶¶ 4–9. A police officer was called to escort her. *Id.* ¶ 10. K.B. attempted to cool down her increasing frustration, but when she asked to see a mentor who had been assigned to her for this purpose, she was not allowed. *Id.* ¶ 11. When she continued to protest, the police officer "grabbed [her] and slammed [her] to the ground, leaving bruises," and handcuffed her. *Id.* ¶¶ 10–13. The incident was recorded as "Disorderly Conduct" and she was later charged with Disturbing School. JA 822–23.[3] K.B. had been an honors student; when she returned to school from suspension, she was placed in a program called Twilight offering only three hours of computer-

[3] In a similar incident, a 16-year-old Black student was allegedly "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." JA 819–20. 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.*

based instruction a day and requiring her to find independent transportation to and from the program. JA 838 ¶¶ 17–22.

Another CYAP member, D.D., was charged with Disturbing Schools after she was sent out of the classroom for talking. JA 393–94 ¶ 19.C. 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.* A third CYAP member, a Black student, was charged after a student complained about several students photographing themselves and other students in a school bathroom. JA 392–93 ¶ 19.A.

Plaintiff D.S. was charged following a minor physical altercation. 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. JA 359–60 ¶ 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. JA 360 ¶ 7. D.S. was charged with Disturbing Schools. JA 360 ¶ 10.

Cursing and non-compliance with school rules are repeatedly cited as instances of criminal Disorderly Conduct or Disturbing Schools. For example:

- A Black eighth grader was arrested when he reportedly "became loud and boisterous with his words and his physical gestures" in the school cafeteria. JA 802.
- A 16-year-old Black student was arrested when "using obscene language while in the presence of adults and other students." JA 521.
- A 12-year-old was charged with Disorderly Conduct after "still being disruptive" after being sent to the school counselor's office, cursing, and attempting to leave when the police officer arrived. JA 807–08.
- A seventh grader 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. JA 814.
- A twelve-year-old Black girl was 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." JA 517.

Many behaviors criminalized by the Disorderly Conduct and Disturbing Schools laws cannot be distinguished objectively from behaviors assigned the lowest level of discipline 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. JA 700–01; *see also* JA 635; JA 712 (defining "Disruption of Class/Activity" as a Level I offense); JA 607 (same); JA 727 (assigning 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" to the lowest level of misconduct subject to consequences as minimal as a verbal reprimand). Similarly, Charleston includes among the lowest level offenses—to be managed by a teacher within 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," JA 761, as well as "[r]ough or boisterous play or pranks." JA 768; *see also* JA 542 (categorically defining "Disorderly Conduct" as Level 1 offenses which "should be handled by the classroom teacher"), JA 575 (defining horseplay, a Level 1 offense, as "rough or boisterous play").

In the absence of objective statutory criteria, subjective judgment determines whether a schoolchild's behavior constitutes a matter for school-based intervention or criminal Disorderly Conduct or Disturbing Schools. As the head of the Greenville County Sheriff's Department School Enforcement Unit admitted, "[w]ithout having a specific incident

or being in a specific situation, it's a little difficult" to state how to determine when a student has violated the Disorderly Conduct law. JA 827; *see also* JA 828 (explaining that in determining whether a student has engaged in disorderly conduct by being loud or boisterous, there are "a lot of factors" an officer will consider, and "the individual circumstances and the discretion of the officer . . . play a role"). He further testified that different officers may have a different judgment of whether conduct violates the statute. JA 830–31 (Q: "[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."). The Office of the Solicitor for the Eleventh Judicial Circuit also recognized that many of the student behaviors criminalized under the challenged laws "are behavioral issues rather than criminal acts." JA 652. The Office pointed out that "when various individuals . . . come together and initiate programs [such as School-wide Positive Behavior Interventions and Supports], many schools have seen a reduction in the number of Disturbing Schools and Disorderly Conduct charges." *Id.*

The lack of objective guidelines leads to arbitrary and discriminatory enforcement. Undisputed evidence shows 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, but 75.3% of school-based referrals for Disorderly Conduct.

JA 657 ¶ 21. White youth make up 54.74% of this population, but only 21.0% of referrals. *Id.* ¶ 21. Across the state, Black students are charged with Disorderly Conduct in school at over six times (6.36) the rate of white classmates. JA 656 ¶ 19. In Greenville, Black students are charged at fourteen times the rate of white students. JA 658 ¶ 33. Similarly, Black students have been nearly four times as likely to be referred for Disturbing Schools. JA 673 ¶ 19. In the 2014–2015 school year in Charleston, Black students were more than six times as likely to be referred for Disturbing Schools than were their white classmates. JA 674 ¶ 23; JA 679.

While incident reports and Department of Juvenile Justice data do not record disability status, undisputed evidence from individual incidents reflects that students have been charged with Disorderly Conduct and Disturbing Schools for behavior associated with a disability. For example, Plaintiff 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. JA 377–78 ¶¶ 3–5; JA 382. S.P.'s arrest stemmed from an incident that began when S.P. entered the library and encountered a girl who had made fun of her throughout the morning. JA 378 ¶¶ 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, who asked her to leave the library. *Id.* ¶¶ 10–11. When

S.P. asked why she, but not the student who teased her and continued to laugh at her, was being asked to leave, the principal told her, "I could arrest you for not coming with me." JA 378–79 ¶¶ 13–14. A police officer had been called to the library, and eventually S.P. agreed to leave the library with him. JA 378–79 ¶¶ 12, 16–20. Students laughed at S.P. and clapped as she was escorted from the library and S.P. cursed at them in response. *Id.* ¶¶ 21–22. Following the incident, S.P. was charged with Disorderly Conduct. *Id.* ¶¶ 23–26. She was also suspended from school and placed on school probation. *Id.* ¶¶ 24–25.

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," and in a foster care placement, was arrested for Disorderly Conduct two days after enrolling in a new school. JA 822–23. 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.*

Students have also been charged with Disturbing Schools and Disorderly Conduct when engaged in First Amendment protected expressive activity, including when voicing concerns over police misconduct. Niya Kenny was charged with Disturbing Schools after attempting to document the violent arrest of a classmate and calling out in protest. JA 840–41 ¶¶ 1–9. In response, Ms. Kenny was handcuffed in front of her teacher and classmates and removed from the classroom.

JA 841 ¶¶ 12–15. She was eventually taken to a detention center and charged with Disturbing Schools. JA 842 ¶¶ 21–24. The initial police report listed the incident type as "Disorderly Conduct." JA 845.

Niya Kenny is not the only student charged under the challenged laws upon criticizing police. For example:

- A Latino 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." JA 811.
- A Black student was arrested for Disorderly Conduct and Disturbing Schools after stating "in a loud and boisterous manner toward the [police officer] 'fuck you.'" JA 519.
- A fourteen-year-old student responding with profanity to a police order to go to class was arrested for Disorderly Conduct. JA 816.
- Taurean Nesmith, a Black college student, was charged with Disturbing Schools and Disorderly Conduct after criticizing police treatment of a classmate he believed was being racially profiled in the parking lot of a college apartment complex. JA 849–50 ¶¶ 9–12, 24.

2. The challenged statutes harm Plaintiffs in numerous ways, including through juvenile records.

Students charged with Disorderly Conduct and Disturbing Schools face a number of harms, including not only physical injuries, JA 837 ¶¶ 12–13; JA 521 (student arrested for Disorderly Conduct subjected to a "tactical take down"), but also the less visible trauma of arrest, detention, and involvement with the criminal and juvenile systems, the attendant financial burdens, and further collateral consequences, including limits on their ability to obtain an education. *See, e.g.*, JA 850 ¶ 22 (overnight jailing); JA 379–80 ¶¶ 23–27 (suspension and school probation); JA 837 ¶¶ 12–14 (physical injuries); JA 360–61 ¶¶ 10–18 (cost of Pretrial Intervention); JA 841–43 ¶¶ 12–27 (arrested and handcuffed in front of classmates, and detained); JA 392–93 ¶ 19 (involvement with the juvenile system). Harms to students can be compounding and long lasting. Contact with the juvenile system increases the risk that a young person will drop out of school and that they may be incarcerated later on. JA 469; JA 404.

The record of charges also harms young people, even if they were not ultimately adjudicated delinquent. The threat of charges chills students' expressive activity because they cannot know when disfavored speech could subject them to arrest. *Kenny v. Wilson*, 885 F.3d 280, 289 (4th Cir. 2018); JA 840–41 ¶¶ 5, 8–9. The stigma of charges is also a substantial harm in itself. *See Manning*, 930 F.3d at 273 ("[E]ven laws

that nominally impose only civil consequences warrant a 'relatively strict test' for vagueness if the law is 'quasi-criminal' and has a stigmatizing effect.") (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–500 (1982)). Further, a prior charge continues to appear on a young person's record, which could bar them from participating in diversion in the future, lead to more significant limitations on educational opportunities, and generate other collateral consequences.

For example, although the charges against Plaintiff D.D. were dismissed, he received a letter from the Solicitor General's office explaining that the charges would remain on his record, that "the State reserves the right to bring [the] charges back to court" and that "if further charges are received, [the State] will have a record of the opportunity given by the dismissal and will likely take prosecutorial action." JA 357. D.D., a Black student, was arrested as an eighth grader for allegedly making a threat on the school bus—an allegation D.D. strenuously denies. After being charged, D.D. was so scared that he "stopped eating, stopped talking to people, and couldn't sleep." JA 352 ¶¶ 14–15. His application to early college was denied after the charges were made, JA 353 ¶ 16, and he was sent to an alternative school. *Id.* ¶ 23. Although the charges were dropped, D.D. continued to have trouble eating and sleeping, and the depression impacted his grades. JA 355 ¶ 35. D.D. reflects: "Sometimes I look at stuff on the Internet regarding

the incident[,] because I'm all over the Internet[,] and I cry about it." *Id.* Similarly, the charges against Niya Kenny were dropped, but she was so "humiliated and afraid" following her arrest that she withdrew from school and entered a G.E.D. program. JA 843 ¶¶ 26–27.

A juvenile record may only be expunged after a person turns eighteen, has completed any sentence, and has no subsequent charges on their record. S.C. Code § 63-19-2050. Clearing one's record of a Disorderly Conduct or Disturbing Schools charge brings additional costs and burdens. To have a record expunged, students must apply to the local solicitor's office and pay up to $310 in fees. JA 644.

3. Schools regularly manage student behavior.

The Disturbing Schools and Disorderly Conduct laws criminalize conduct of children and adolescents that is both expected and can be effectively addressed by educators. According to undisputed testimony from Joseph B. Ryan, Distinguished Professor of Special Education at Clemson University, "[b]ehavioral and social skills are learned through the process of adolescent development." JA 401. "[E]ducators can . . . change or shape a child's behavior," JA 402, and researchers have identified a number of evidence-based practices for managing student behaviors. JA 400, 406–14. Some "practices are preventative in nature," including techniques like assessing "classroom layout, agenda, procedures, and routines," and "positively reinforcing prosocial

behaviors." JA 408–10. A small number of students require the most intensive levels of intervention, such as functional behavioral assessments, "a common practice in special education," and wraparound services. JA 412; *see also* JA 413–14. When properly implemented, these practices are also highly effective. For example, the use of functional behavioral assessments has been shown to "reduce[] problem behaviors by an average of 70.5%." JA 413.

Although effective classroom management practices exist, where training and support for implementation is lacking, "schools have increased their use of punitive [and] exclusionary disciplinary approaches," such as "suspension" and "criminal charges." JA 402; *see also* JA 404. Punitive and exclusionary approaches "are often ineffective" in correcting challenging behaviors, including by "fail[ing] to teach appropriate alternative behaviors." JA 403. Punitive strategies that remove students from the classroom often lead to "[i]ncreased levels of misbehavior" because they allow the student to temporarily escape the classroom, reinforcing problem behavior. JA 403.

The discriminatory enforcement patterns seen in South Carolina under the challenged statutes is consistent with research on the disparate effects of punitive approaches to student discipline observed nationwide. Punitive approaches are disproportionately applied to students of color and students with disabilities. JA 404–05. Researchers have found that "significant racial disparities exist[] in school discipline

even after accounting for [socioeconomic status]." JA 405. Additionally, "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)." JA 405–06. Punitive discipline is also disproportionately applied to students with disabilities. JA 404–05. Recently reported national data show that "students with disabilities are more than twice as likely to be suspended in comparison to individuals without disabilities," and "[s]imilarly skewed outcomes were observed [in] . . . arrest rates." JA 405. "Police have [also] become increasingly commonplace in schools across the nation," resulting in "a significant increase in the number of nonviolent arrests on school grounds," and disparately impacting Black students and students with disabilities. JA 466–67.

C. Procedural History

Plaintiffs filed this action in 2016. JA 34. In 2017, the district court dismissed the case on standing grounds, and this Court vacated and remanded for further proceedings. *Kenny*, 885 F.3d 280. Thereafter, the state amended the Disturbing Schools statute to remove the challenged provisions. *See* JA 137–41. The amendment resolved Plaintiffs' requests that the Court enjoin enforcement of the Disturbing Schools law, but did not resolve their request for injunctive relief

against the reliance on records generated under the law before its amendment. *See* JA 234, 237–38. Plaintiffs filed an Amended Complaint adding D.D. as a named Plaintiff. JA 234–35.

The court certified a class of all elementary and secondary school students in South Carolina for purposes of seeking injunctive relief against the enforcement of S.C. Code § 16-17-530. JA 288. It also certified two subclasses:

1. 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 ("Disorderly Conduct Law Sub-Class"); and
2. 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 ("Former Disturbing Schools Law Sub-Class").

JA 275, 288.

Following full briefing and argument on the parties' cross motions for summary judgment, on an undisputed factual record, JA 289, JA 349, the district court granted Plaintiffs' Motion for Summary Judgment. JA 947. The court entered a declaratory judgment and enjoined "the State's enforcement of S.C. Code Ann. § 16-17-530 . . . as to elementary and secondary school students in South Carolina while

they are attending school" and enjoining the State "from retaining the records of the [two sub-classes], relating to being taken into custody, charges filed, adjudication, or disposition under S.C. Code Ann. § 16-17-420, prior to May 17, 2018, and under S.C. Code Ann. § 16-17-530, except as would be permissible following expungement under S.C. Code Ann. § 17-1-40." *Id.*

Defendant indicates that he filed a notice appealing the lower court's March 30, 2020 order, denying his motion to dismiss, and his May 10, 2020 order, granting Plaintiffs' motion to amend. Def.'s Br. 2. Defendant makes no argument related to these orders, effectively waiving them. *See, e.g.*, Fed. R. App. P. 28(a)(8)(A) (An opening brief must contain the "appellant's contentions and the reasons for them."); *Igen Int'l, Inc. v. Roche Diagnostics Gmbh,* 335 F.3d 303, 308 (4th Cir. 2003) ("Failure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues.").

STANDARD OF REVIEW

The grant of summary judgment is reviewed *de novo* and 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)).

Class certification is reviewed for "clear abuse of discretion." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). Absent "an error of

law or clear error in finding of fact . . . substantial deference [is given] to a district court's certification decision, recognizing that a district court possesses greater familiarity and expertise than a court of appeals in managing the practical problems of a class action." *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015) (internal quotations and citations omitted).

"A district court enjoys wide discretionary authority in formulating remedies for constitutional violations," and "is reversible only for an abuse of discretion." *Smith v. Bounds*, 813 F.2d 1299, 1301–02 (4th Cir. 1987).

SUMMARY OF ARGUMENT

South Carolina's Disorderly Conduct and Disturbing Schools laws violate the Due Process Clause's prohibition on vagueness. As applied to schoolchildren, the Disorderly Conduct law's prohibitions on acting in a "disorderly or boisterous manner," and against 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*, 885 F.3d at 290, and schools regularly manage these behaviors through school-based interventions and rules. The Disorderly Conduct law lacks objective guidelines by which to determine when a schoolchild's disorder or boisterousness is criminally prohibited. Accordingly, it fails to give sufficient notice of the conduct it prohibits

and encourages arbitrary and discriminatory enforcement against Black students, students with disabilities, and students exercising their First Amendment rights. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

The Disturbing Schools law is similarly unconstitutionally vague. Although it has been amended to remove its fatally flawed prohibitions, Plaintiffs continue to be harmed through the existence of the charge on their records. JA 354 ¶ 26; JA 357. The Disturbing Schools law has prohibited schoolchildren from being "disturb[ing]," "interfer[ing]," or "obnoxious," and from loitering at school. S.C. Code § 16-17-420. These vague terms fail to provide an objective standard and have encouraged arbitrary and discriminatory enforcement.

Recognizing Plaintiffs raise this common legal theory, stemming from the same unconstitutional statutes applicable statewide, and seek declaratory and injunctive relief under Rule 23(b)(2), the court below found that commonality and typicality requirements were met, and that named Plaintiffs provide adequate representation. The court was well within its discretion in certifying a class action.

Finally, upon finding an injury to Plaintiffs' constitutional rights, the district court acted within its sound discretion to order responsive relief. A record of charges under these unconstitutional laws unfairly generates stigma, escalates future penalties, and interferes with future life opportunities. The court enjoined retention of records related to

enforcement against schoolchildren. This relief was within the court's discretion and necessary to redress the ongoing harm to Plaintiffs.

For all of these reasons, the Court should affirm the district court's class certification and summary judgment orders in full.

ARGUMENT

I. The Challenged Laws Are Impermissibly Vague.

A. The Due Process Clause Prohibits Vague Laws.

"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 *Morales*, 527 U.S. at 56). A law may be impermissibly vague "[f]irst, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and "[s]econd, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* (quoting *Hill*, 530 U.S. at 732). 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*, 723 F.3d at 482 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

"The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Hoffman Ests.*, 455

U.S. at 498. 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); *accord Goguen*, 415 U.S. at 573 (1974); *Hoffman Ests.*, 455 U.S. at 499.

Additionally, "[i]f criminal penalties may be imposed for violations of a law, a stricter standard is applied in reviewing the statute for vagueness." *Manning*, 930 F.3d at 272–73 (citing *Hoffman Ests.*, 455 U.S. at 498–99). The need for a high degree of certainty is all the more critical where criminal laws apply to schoolchildren who are in the process of cognitive development and have diminished culpability. *See Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (citing juveniles' "lack of maturity and an underdeveloped sense of responsibility" as indicators of diminished culpability); *see also 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). *Contrast Hoffman Ests.*, 455 U.S. at 498 ("[An] economic regulation is subject to a less strict vagueness test . . . because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.").

In assessing a law for vagueness, a court must "extrapolate its allowable meaning from the statutory text and authoritative interpretations of similar laws by courts of the State." *Brown v. Ent.*

Merchants Ass'n, 564 U.S. 786, 813 (2011) (Alito, J., concurring) (quoting *Grayned*, 408 U.S. at 110). "[I]t is not within [the federal court's] power to construe and narrow state laws." *Id.*

Discounting these well-established standards, Defendant argues that "[t]his case is essentially a facial challenge," and thus, that the Court should tolerate a high degree of vagueness in the challenged laws. Def.'s Br. 29. This argument fails for at least two reasons. First, to the extent courts favor a particular application in assessing vagueness, *id.* at 29 (citing *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir.1998)), Plaintiffs' challenge to the Disorderly Conduct law stands in such a preferable position. It is limited to the context of enforcement against elementary and secondary school students, and the district court's injunction is tailored accordingly. Second, while declaring a law void on its face involves a greater exercise of judicial power, *see id.* at 29 (citing *Schleifer*, 159 F.3d at 853), courts apply the standards cited above to find statutes facially unconstitutional. *See, e.g.*, *Johnson*, 576 U.S. at 606 (residual clause of federal sentencing statute); *Morales*, 527 U.S. at 52 (gang loitering ordinance); *Papachristou*, 405 U.S. at 171 (vagrancy statute). Under the applicable vagueness standard, the Disturbing Schools law is facially unconstitutional.

Defendant's proposed two-prong standard improperly assumes the case involves a facial challenge to both statutes. It does it apply to either the applied challenge to the Disorderly Conduct law or the facial

challenge to the Disturbing Schools law. Defendant erroneously asserts that the Court must first consider "whether the enactment implicates a substantial amount of constitutionally protected conduct.'" Def.'s Br. 19–20 (quoting *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (quoting *Hoffman Ests.*, 455 U.S. at 494)). But as stated in *Hoffman Estates*, this is the test for overbreadth, which the Court there considered before "then examin[ing] the facial vagueness challenge." 455 U.S. at 494. This case does not involve an overbreadth claim.

Defendant's second assertion, that a law must be vague in all of its applications to be invalid on its face, Def.'s Br. 20 (citing *Hoffman Ests.*, 455 U.S. at 494–95), has been squarely rejected by the Supreme Court and this Court. A law may be facially invalid "even where it could conceivably have had some valid application." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citing *Colautti v. Franklin,* 439 U.S. 379, 394–401 (1979); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939)). *Johnson v. United States* reaffirmed this rule and clarified that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602; *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018). This Court has repeatedly recognized and applied this rule. *United States v. Hasson*, No. 20-4126, 2022 WL 518993, at *6 (4th Cir. Feb. 22, 2022) ("[T]he

Court [in *Dimaya*] reiterated that a statute need not be vague in all its applications to be unconstitutional."); *Kolbe v. Hogan*, 849 F.3d 114, 148 n.19 (4th Cir. 2017); *Doe v. Cooper*, 842 F.3d 833, 842–43 (4th Cir. 2016); *see also Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018); *United States v. Cook*, 914 F.3d 545, 553 (7th Cir. 2019), *vacated on other grounds*, 140 S.Ct. 41 (2019).

Defendant's reliance on the Second Circuit's decision in *Copeland v. Vance,* 893 F.3d 101, 113 n.3 (2nd Cir. 2018), *see* Def.'s Br. 20, is unavailing. Both *Hoffman Estates* and *Copeland* recognize a higher degree of certainty is required where a law implicates fundamental rights or imposes criminal penalties. *Hoffman Ests.*, 455 U.S. at 499 (recognizing that when a law applies criminal penalties and or "interferes with the right of free speech or of association, a more stringent vagueness test should apply"); *accord Copeland*, 893 F.3d at 111 n.2. This case involves both a criminal statute and interference with students' fundamental rights to free speech. Thus, even if this Court were to deviate from its precedent to adopt the Second Circuit's analysis, which it should not, the heightened level of scrutiny would apply here.

Finally, the Court should decline the baseless invitation to introduce new limitations to students' First Amendment rights. Defendant erroneously argues that *Tinker* governs here. Def.'s Br. 22 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503

(1969)). But *Tinker* addressed the question of when school officials may regulate student speech consistent with the First Amendment; it did not consider the vagueness of any law or rule. Most importantly, it did not consider the application of criminal laws. Rather, in considering the ability of educators to regulate student speech, the Supreme Court has explicitly distinguished criminal laws as requiring a higher degree of precision. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) ("[T]he school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."). This Court has already distinguished *Tinker* from the legal questions in this case. *Kenny*, 885 F.3d at 290–91. Defendant presents no reason for the Court to reverse its prior ruling.

B. The Disorderly Conduct Law is Unconstitutionally Vague As Applied to Elementary and Secondary School Students.

1. The prohibition on "conducting [oneself] in a disorderly or boisterous manner" is overly vague.

The Disorderly Conduct law broadly prohibits "conducting [oneself] in a disorderly or boisterous manner." S.C. Code § 16-17-530. As this Court observed, elementary and secondary school students "are in many ways disorderly or boisterous by nature." *Kenny* 885 F.3d at 290; *see also* JA 401 ("Behavioral and social skills are learned through the process of adolescent development."). Distinguishing schoolchildren's normal behavior and misbehavior from criminal

"disorderly" or "boisterous" conduct impermissibly turns on subjective judgment, as the Record confirms. *See* JA 830–31 (Q: "[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."); JA 827 (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."); JA 828; JA 652 (Letter from Solicitors office, noting that "many [Disorderly Conduct and Disturbing Schools] charges are behavioral issues rather than criminal acts").

Merriam Webster defines "disorderly" as "characterized by disorder,"[4] and disorder as "a lack of order," or in the verb form, "to disturb the regular or normal functions of."[5] In this way, the prohibitions are synonymous with those of the Disturbing Schools law

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[4] Merriam-Webster.com, Disorderly, https://www.merriam-webster.com/dictionary/disorderly (last visited March 11, 2022). Reference to dictionary definitions is a well-established method of determining the ordinary meaning of statutory terms. *See, e.g.*, *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *United States v. Whorley*, 550 F.3d 326, 334 (4th Cir. 2008) (citing Merriam-Webster's Collegiate Dictionary).

[5] Merriam-Webster.com, Disorder, https://www.merriam-webster.com/dictionary/disorder (last visited March 11, 2022).

discussed below. The law provides no objective criteria indicating which behaviors "disturb the regular or normal functions" of the school. It is undisputed that managing sometimes challenging behavior is a regular part of school functions. JA 402–14. Thus, it would make little sense to call such challenging behaviors incompatible with normal school activity. Indeed, educators who implement evidence-based practices can reduce and deescalate challenging student behaviors, including for students with disabilities who require more support. *Id.*

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* JA 700–01 (defining "disorderly acts" as among the lowest infractions, which may lead to discipline as minor as a verbal reprimand); *see also* JA 712 (defining "Disruption of Class/Activity" as a Level I offense); JA 727 (defining behavioral misconduct activities as Level I offenses); JA 761 (including among the lowest level offenses to be managed in the classroom "conducting oneself in a disruptive or disrespectful manner" and making "any loud sound that is unnecessary or interferes with the learning environment"); JA 768 (defining "rough or boisterous play or pranks" as the lowest level offense to be managed "by the classroom teacher" and not "through a formal referral for disciplinary actions").

Although school codes of conduct call for school-based interventions to manage disruptive or noncompliant behavior, under

the challenged laws, students are criminally charged for these same behaviors. *See, e.g.*, JA 806–08 (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); JA 814 (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); JA 517 (twelve-year-old Black girl arrested for Disorderly Conduct after a physical altercation with another student where "no injury [was] noted"). As incident reports demonstrate, the law does not provide objective criteria, instead relying on subjective characterization of a child's behavior as criminally "disruptive."

The law additionally criminalizes "boisterousness." "Boisterous" is defined as "noisily turbulent" as well as "marked by or expressive of exuberance and high spirits."[6] In some contexts, such as a pep rally or recess, "boisterousness" may be not only expected or accepted, but also 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 and "day to day activities," including as an example, "a basketball coach

[6] Merriam-Webster.com, Boisterous, http://www.merriam-webster.com/dictionary/boisterous (last visited March 11, 2022).

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*, 393 U.S. at 512, where this expression could be characterized as "exuberant" and "high spirited." Yet a Black eighth grader was charged with Disorderly conduct solely for being "loud and boisterous with his words and his physical gestures" in the cafeteria. JA 802. The statutory terms do not distinguish constitutionally protected expression from criminal conduct.

Because the Disorderly Conduct law relies on subjective determinations of whether a child is criminally "disorderly" or "boisterous," it also "encourage[s] arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56; *see also Grayned*, 408 U.S. at 108 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). First, the statute criminalizes students with disabilities where the law elsewhere requires accommodations. For example, S.P. had a Behavior Intervention Plan designating "safety people" to whom S.P. could talk if she got upset, an expected behavior associated with her disabilities. JA378 ¶¶ 3–5, JA 382. 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 led police to arrest her instead. JA 379–80 ¶¶ 23–26; *see also* JA 822–23 (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). As the court below found, because students with disabilities may engage in disability-related behaviors that are more challenging to deescalate, they are more likely to be perceived as "disorderly" and thus face greater risk of criminalization under the law. JA 937.

The law also encourages 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. JA 405–06. The vague terms of the Disorderly Conduct law similarly turn on subjective interpretation and are likewise disproportionately applied against Black students. 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. JA 657 ¶ 25. In many counties, the disparity between the treatment of Black and white students is even more extreme. JA 658 ¶ 32. In Greenville, for example, Black youth were charged with Disorderly Conduct in school at fourteen times the rate of their white peers. *Id.* ¶ 33. These stark disparities in enforcement are undisputed. While school codes of conduct indicate that behaviors like cursing, disobeying adults, and fighting are anticipated and managed through

school-based responses, Black students are criminalized for these behaviors where others are not. JA 656–58 ¶¶ 19, 21, 33; *see also* JA 467–68.

Defendant argues that the court below erred in considering racially disproportionate enforcement because the case does not involve an equal protection claim. Def.'s Br. 46. This argument ignores the central constitutional concern with a vague law's potential to "authorize[] or even encourage[] discriminatory enforcement." *Lanning*, 723 F.3d at 482 (quoting *Hill*, 530 U.S. at 732). While a demonstration of disparate enforcement is not required to establish a law's vagueness, certainly the Court is not required to ignore evidence where it exists.

The vague terms of the Disorderly Conduct law also 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 §15-17-530 (prohibiting "disorderly *or* boisterous" conduct) (emphasis added), further encourages the criminalization of disfavored viewpoints.

See Baribeau, 596 F.3d at 476–77; *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). Despite this, the Disorderly Conduct law has been enforced against students exercising their right to criticize police. *See, e.g.*, JA 811 (student charged after cursing at a police officer in a school parking lot); JA 840–41 ¶¶ 8–15; *id.* ¶ 10 (student charged after verbally challenging police officer's reasons for arresting a classmate); JA 519; JA 521; JA 526–27; JA 816–17.

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

Further, as applied to schoolchildren, 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." *Goguen*, 415 U.S. at 574. The use of profanity may be

addressed through school rules; but it cannot constitute a crime.[7] Nor does the "fighting words" limitation South Carolina courts have read into the Disorderly Conduct law cure the law's vagueness as applied to schoolchildren. Attorney General's Opinions, which are "afforded great weight in South Carolina, particularly in matters of statutory construction," *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) (citation omitted), instruct that as applied to students, the Disorderly Conduct law prohibits "[u]se of foul or offensive language toward a principal, teacher, or police officer." 1994 S.C. Op. Att'y Gen. 62 (1994). Consistent with this instruction, the use of curse words or profanity is

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[7] 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) (citing favorably *In re Louise C.*, 3 P.3d 1004, 1005–07 (Ariz. Ct. App.1999) (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)). Similarly, neither use of the word "fuck" nor the raising of the middle finger in itself constitutes obscenity. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 20 (1971); *Hess v. Indiana*, 414 U.S. 105, 107 (1973); *Freeman v. State*, 805 S.E.2d 845, 850 (Ga. 2017).

frequently cited in charging students with Disorderly Conduct. *See, e.g.*, JA 811 (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"); JA 828 (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"); JA 840, ¶ 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."); JA 842 ¶ 24, JA 845; JA 378–80 ¶¶ 6, 21–26; JA 519; JA 521; JA 526–27; JA 816. As this Court 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 Kenny*, 885 F.3d at 290 (distinguishing *Sarratt*).

Moreover, the statute also permits the criminalization of student speech under its malleable prohibition against "conducting [oneself] in a disorderly or boisterous manner." S.C. Code § 16-17-530. The case law cited by Defendant provides no clarity as to the scope of this language. As this Court previously found, while South Carolina courts have "clarifie[d] that profane language alone cannot constitute a violation of the law," they have said "nothing at all about how to interpret other vague phrases in the Disorderly Conduct law. . . or even what conduct

must accompany profane language for there to be a criminal conviction." *Kenny*, 885 F.3d at 290.

3. 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 Ests.*, 455 U.S. at 499; *see also Morales*, 527 U.S. at 55. Nor does it require a showing that education was in fact "disrupted," however that term is defined. Instead, the law applies even when no one other than "the defendant and the law enforcement officer" are "physical[ly] present." 1991 S.C. Op. Att'y Gen. 89 (1991). *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 intent. The Supreme Court has found that where a young person lacks intent, moral culpability is "twice diminished." *Graham v. Florida*, 560 U.S. 48, 69 (2011).

4. Defendant does not identify terms that would cure the law's vagueness.

Defendant does not point to any terms within the Disorderly Conduct law that would give notice to students or guide law enforcement. Instead, without further explication, Defendant cites to a string of facial challenges brought by adults against wholly distinct

laws and rules.[8] Def.'s Br. 30–31. Additional cases cited by the Defendant involve provisions incorporating significantly more guidance than Section 16-17-530. For example, in *United States v. Cassiagnol*, this Court considered a regulation prohibiting "'unseemly or disorderly conduct' while on government property." 420 F.2d 868, 872 (4th Cir. 1970). In addition to the greater tolerance of vagueness in a non-criminal regulation, the Court contrasted the regulation, which applied

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[8] *See Livingston v. State*, 995 A.2d 812, 814, 822 (Md. App. 2010) (upholding a prohibition on "disorderly" behavior "[w]hile an individual is in any placement for tuberculosis treatment" on the grounds that the term "disorderly" was sufficiently clear "within the context of a treatment center for people with communicable tuberculosis"); *Lowery v. Adams*, 344 F. Supp. 446, 455 (W.D. Ky. 1972) (considering a university policy, and noting that "[u]niversity regulations for students because of the very nature of the institution and its goals and purposes, should not be tested by the same requirements of specificity as are state statutes") (citation omitted); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1338 (M.D. Fla. 2011) (considering a disorderly conduct statute applied to adults); *United States v. Nordean*, No. CR 21-175 (TJK), 2021 WL 6134595, at *9 (D.D.C. Dec. 28, 2021) (rejecting argument that the statute's terms "official proceeding "otherwise obstructs, influences, or impedes," as applied to conduct other than the "impairment of evidence" and as applied to them, "corruptly," rendered the section vague); *Tigrett v. Rector & Visitors of Univ. of Virginia,* 97 F. Supp. 2d 752, 760–61 (W.D.Va. 2000) ("Plaintiff's main argument is that the savings clause is itself void for vagueness and makes the entire section void for vagueness.").

"only in conjunction with other rules and regulations pertaining to government property . . . all of which were prominently posted" against "generally worded statutes which were operating in an unlimited spectrum" and "provided no semblance of notice." *Id.* at 873; *see also Groppi v. Froehlich*, 311 F. Supp. 765, 770 (W.D. Wis. 1970) (noting that "'[d]isorderly' is indeed an unfortunately vague and broad term," but upholding the provision on the grounds that it contained additional "modifying phrases" which "rescued [it] from invalidity"); *Freeman*, 805 S.E.2d at 849 (noting that the statute at issue "ma[de] clear that the level of 'tumultuous' behavior necessary to give rise to a sustainable charge must involve acts that would place another person in reasonable fear for his or her safety"). South Carolina's Disorderly Conduct law contains no such clarifying language.

Defendant also cites cases upholding provisions containing the word "boisterous" against facial challenges. Def.'s Br. 32. But the statutes in those cases are not analogous to South Carolina's Disorderly Conduct law. In contrast, they included language defining at what point "boisterous" behavior may become criminal as well as other elements, such as a scienter requirement, and did not consider application to schoolchildren. *See United States v. Agront*, 773 F.3d 192, 197–98 (9th Cir. 2014) (considering an administrative regulation and explaining that although the challenged regulation "does not explicitly define a necessary quantum of 'loud, boisterous, and unusual noise,'" additional

terms make clear that conduct violates the rule only when it creates noise "sufficiently 'loud, boisterous, and unusual' that it would tend to disturb the normal operation of a VA facility"); *Heard v. Rizzo*, 281 F. Supp. 720, 741 (E.D. Pa. 1968) (considering a statute prohibiting "loud, boisterous and unseemly noise or disturbance" and noting that "all three elements"—loudness, boisterousness, and unseemliness—"have to be present to constitute a violation," in addition to a showing of "willfulness and disturbance of the described residents"); *City of Cincinnati v. Hoffman*, 285 N.E.2d 714, 717 (Ohio 1972) (considering a statute which "prohibits willful disorderly conduct which is performed with the intent to abuse or annoy"). By contrast, in *Coates*, 402 U.S. at 614, the Court found an analogous ordinance prohibiting conduct "annoying to persons passing by" to be unconstitutionally vague on its face, reasoning that precisely because "[c]onduct that annoys some people does not annoy others . . . the ordinance is vague . . . in the sense that no standard of conduct is specified at all."

Moreover, none of these cases considered the particular application of a law to schoolchildren. These statutes thus starkly contrast with South Carolina's Disorderly Conduct law, which, as applied in schools, criminalizes any and all "disorderly or boisterous" conduct by schoolchildren and provides no guidance to determine when their boisterousness constitutes *criminal* disorderly conduct.

Defendant also argues that the testimony of a single police officer, Captain Rinehart, shows that "charges are made carefully" without any "difficulty in understanding or applying any statutes." Def.'s Br. 12. This again does not point to an objective standard within the law. In fact, Captain Rinehart's testimony further demonstrates how the Disorderly Conduct law delegates standard-setting to ad hoc and subjective determinations. As Captain Rinehart testified "in [his] experience," a violation of the law might occur when "the teacher is asking the student to calm down, [and] the student's behavior is not calming down. So they ask for an administrator" who tries to "de-escalate the situation. And if those methods are unsuccessful, they may call the [school police officer]." JA 873. This account does not describe particular actions of the student, instead focusing on whether the teacher or administrator was successful in de-escalating a situation, and whether they chose to call a police officer. Conversely, Captain Rinehart testified that it would not constitute a violation of the law if a teacher or administrator was able to calm the student down. *Id.* ("If it's a situation where the individual is causing a disturbance in the classroom and [the teacher and the administrator are able] to calm them down, obviously, that would be something the school could handle."). As the witness further acknowledged, whether the teacher or administrator is able to calm a student down or needs to call a police

officer, is a matter of "the teacher's perspective, the administrator's perspective." *Id.*

Whether or not the individual police officer makes a careful decision in these circumstances, the decision is always subjective. Moreover, the criminal law itself, not the order of a police officer or judgment of school staff, must give sufficient notice of the conduct it prohibits. *Morales*, 527 U.S. at 58–59 ("Because an officer may issue an order only after prohibited conduct has already occurred, . . . [s]uch an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law."); *see also Wright v. State of Ga.,* 373 U.S. 284, 292 (1963) (stating that a law would violate the vagueness prohibition if individuals were found guilty of violating the statute "because they disobeyed the officers"); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90–91 (1965) (considering a law prohibiting loitering "after having been requested by any police officer to move on" and finding that the law "d[id] not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat") (internal quotation and citation omitted).

Finally, Defendant cites a number of incident reports to argue that the students involved were properly criminalized. Def.'s Br. 28–29; *see also id.* at 45. But as the district court recognized, this argument misses the mark. Individuals may disagree about whether or not a

student's conduct ought to be subject to criminal penalties. The relevant fact is that the Disorderly Conduct law contains no objective criteria to guide the determination. *See Coates*, 402 U.S. at 616 (dismissing the notion that details of an offense could validate the challenged ordinance). In this way, the law's prohibition on schoolchildren behaving in a "disorderly or boisterous manner" raises concerns similar to those this Court found in a law applied to "habitual drunkards." *Manning*, 930 F.3d at 276. As stated in that case, "Police officers, prosecutors, and even state circuit court judges likely will have differing perceptions regarding what frequency of drunkenness exceeds the necessary threshold for a person to be considered an 'habitual drunkard.'" *Id.* Therefore, the Court found, applying the phrase in an individual case "depends entirely upon the prohibition philosophy of the particular individual enforcing the scheme at that moment." *Id.* (internal quotation and citation omitted). Similarly here, whether a student is deemed criminally "disorderly or boisterous" will depend upon the differing perceptions and prohibition philosophies of individual law enforcement officers.

This is precisely what due process forbids. As the Supreme Court has expressed, "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law" by "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Goguen*, 415 U.S. at 575 (quoting *Gregory v. City of Chicago*, 394 U.S.

111, 120 (1969) (Black, J., concurring)); *see also United States v. Reese*, 92 U.S. 214, 221 (1875); *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in the result) ("[The ordinance] is unconstitutional, not because a policeman applied his discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case.").

C. The Disturbing Schools Law is Unconstitutionally Vague.

1. The prohibitions against "interfer[ing]" or "disturb[ing] in any way" and "act[ing] in an obnoxious manner" are overly vague

The Disturbing Schools law's prohibitions against "interfer[ing]" with or "disturb[ing] in any way" a school and "acting in an obnoxious manner" do not provide objective guidelines for compliance or enforcement. S.C. Code § 16-17-420 (2017). In particular, schoolchildren regularly behave in ways that adults may consider "disturbing," or "obnoxious," and educators regularly manage these behaviors. JA 400–02, 406–14. But the vague terms of the law require subjective assessments to distinguish conduct that is criminal from that which is not.

As set forth above, the term "disturbing" is not a helpful, let alone objective, criterion when school codes of conduct anticipate that behavior described in those same terms can be addressed through minimal classroom interventions. JA 542, 575, 635 (categorizing

"Disorderly Conduct" as Level I offenses), 700–701, 712, 761, 768. The added terms "interfer[ing]" or "disturb[ing] in any way" expand rather than narrow or clarify the statute's vague reach. Further, the law lacks any of the critical limits that narrowly saved a statute considered by the Court in *Grayned v. City of Rockford*. 408 U.S. at 113–14. In *Grayned*, the Supreme Court found that an anti-noise ordinance only closely avoided unconstitutional vagueness where the law "require[d] that (1) the 'noise or diversion' be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the 'noise or diversion'; and (3) the acts be 'willfully' done." *Id.* In addition, the law was limited to "fixed times—when school is in session—and at a sufficiently fixed place—adjacent to the school." *Id.* at 111. In stark contrast, the Disturbing Schools law is a criminal law which does not require intent, demonstrated causation, or actual disruption of school classes or activities. *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 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 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."). If the ordinance in *Grayned* came "close" to violating the Due Process Clause, 408 U.S. at 109, the Disturbing Schools law clearly crosses the constitutional line.

Defendant cites *In re Amir*, arguing that the statute has been limited to actions that "disturb the learning environment." Def.'s Br. 37 (citing *In re Amir X.S.*, 639 S.E.2d 144, 149 (S.C. 2006)). However, this Court has already rejected this argument, finding that *In re Amir* did not reach the question of vagueness and did not provide a limiting construction. *Kenny*, 885 F.3d at 290–91 ("The defendants say that . . . the South Carolina courts have provided limiting constructions that clarify the reach of the statutes. Again, we do not agree.") (citing *In re Amir X.S.*, 639 S.E.2d 144) (additional internal citations omitted). Defendant's argument is further belied by the authoritative interpretations expressed in Attorney Generals' Opinions. 1994 S.C. Op. Att'y Gen. 62; 1990 S.C. Op. Att'y Gen. 175.

The law's prohibitions against "interfer[ing]" or "disturb[ing] in any way" and " "act[ing] in an obnoxious manner" further 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."[9] 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 that term was intended to mean or connote would likely vary considerably." *Id.* at 567; *see also Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 388 (E.D. Ky. 1993) (adult entertainment licensing ordinance relying on standard of "obnoxious" found unconstitutionally vague); *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 814 (Iowa 1983) (civil ordinance relying on standard of "obnoxious" unconstitutionally vague); *People v. Olsonite Corp.*, 265 N.W.2d 176, 181 (Mich. Ct. App. 1978) (environmental ordinance using term "obnoxious" unconstitutionally vague).

It is firmly settled that "mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms." *Coates*, 402 U.S. at 615 (citing *Street v. New York*, 394 U.S. 576, 592 (1969)). Yet by its terms, the Disturbing Schools law invites

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[9] Britannica.com, Obnoxious, https://www.britannica.com/dictionary/obnoxious (last visited Mar. 12, 2022). This same definition appeared in Merriam-Webster at the time Plaintiffs filed their Complaint, in August 2016. *See* Wayback Machine, https://web.archive.org/web/20190110143959/https://www.merriam-webster.com/dictionary/obnoxious (showing archived version of Merriam-Webster.com, Obnoxious, http://www.merriam-webster.com/dictionary/obnoxious, that appeared as of Aug.20, 2016).

criminalization of unpopular expression, 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"); JA 840–42 ¶¶ 3–14, 24; *see also* JA 849–50 ¶¶ 9–12, 24.

Defendant points to cases involving regulation of beer advertising and horse racing licensure, respectively, to argue the term "obnoxious" is not unduly vague. Def.'s Br. 39–40 (citing *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 973 F. Supp. 280, 288 (N.D.N.Y. 1997); *aff'd in part, rev'd in part*, 134 F.3d 87 (2d Cir. 1998); *Fox v. Philadelphia Turf Club, Inc.*, No. CIV.A. 86-6346, 1987 WL 17751, at *1 (E.D. Pa. Sept. 30, 1987)). However, the economic regulations in these cases were subject to the most lenient vagueness scrutiny and are not equivalent to a law infringing fundamental rights and imposing criminal penalties on children. *See Hoffman Ests.*, 455 U.S. at 498. Moreover, the statute considered in *Bad Frog Brewery* was found to violate the First Amendment on appeal. *Bad Frog Brewery*, 134 F.3d at 101 (vagueness not raised on appeal).

2. The prohibitions against "loitering" are overly vague.

The Disturbing Schools law also makes it unlawful for a person to "loiter about such school or college premises," S.C. Code § 16-17-420(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" and "courts have uniformly invalidated laws that do not join the term 'loitering' with a second specific element of the crime." *Morales*, 527 U.S. at 53, 58 (footnote and citation omitted). The Disturbing Schools law contains no second specific element of the crime and instead applies even when school is not in session. *See* 1990 S.C. Op. Att'y Gen. 175; 1994 S.C. Op. Att'y Gen. 62. Additionally, "school or college premises" and the area "around the premises," S.C. Code §16-17-420(A)(1)(b)–(2)(b), cannot be ascertained with precision. Indeed, the law has been applied to include the parking lot of an apartment complex owned by a college. JA 848–50 ¶¶ 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 (citing *People in Int. of C. M.*, 630 P.2d 593

(Colo. 1981)).[10] The Supreme Court has also repeatedly found similar statutory language to be vague. *See, e.g.*, *Papachristou*, 405 U.S. at 164 (qualification 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") (footnote omitted); *Palmer v. City of Euclid, Ohio*, 402 U.S. 544, 545–46 (1971) (finding statute that penalized loitering "without any visible or lawful business" impermissibly vague). Defendant does not distinguish these Supreme Court cases and indeed, could not.

3. 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 Ests.*, 455 U.S. at 499. Rather, the law prohibits conduct engaged in "wilfully [sic] *or unnecessarily*." S.C. Code §16-17-420(A)(1) (emphasis added). As with the Disorderly Conduct law, the absence of a scienter requirement coupled with the law's application to schoolchildren makes certain that the law's imprecise terms fail to provide adequate notice.

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[10] The Colorado statute provided that a person committed a crime when he "'[l]oiters 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.'" *Int. of C. M.*, 630 P.2d at 594).

The additional state court cases Defendant cites are clearly distinguishable. Def.'s Br. 41–42. At a minimum, willful disruption was required through either statutory terms or a state court narrowing interpretation.[11]

Finally, Defendant suggests that past state court adjudications for Disturbing Schools indicate that the statute "is not invalid in all of its applications." Def.'s Br. 45. This argument again fails, for the reasons discussed above. *See supra* Part IA. Moreover, none of these cases addressed vagueness, and Defendant's recitation of case facts cannot substitute for an objective standard in the terms of the law itself.

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

The terms of the Disturbing Schools law provide no objective standard for enforcement and, instead, "authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (citing *Kolender*, 461 U.S. at 357). As with the Disorderly Conduct law,

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[11] *See State v. Schoner*, 591 P.2d 1305, 1306 (Ariz. Ct. App. 1979) (statute requiring "willful[]" disruption applied to protestors outside a school); *State v. Wiggins*, 158 S.E.2d 37, 39 (N.C. 1967) (statute requiring willful disruption applied to adults protesting outside a school); *Toledo v. Thompson-Bean*, 879 N.E.2d 799, 804 (Ohio Ct. App. 2007) (in case against an adult, municipal ordinance "construed to apply only to willful acts done with intent to disturb . . . and that actually cause a substantial disruption"). To the extent that the Georgia court in *In re D.H.*, 663 S.E.2d 139 (Ga. 2008), did not require at least these elements, it stands as an unpersuasive outlier.

the uncontroverted evidence shows that Black students are more likely to be subject to criminal penalties for being "disturbing" or "obnoxious." In 2015, Black students were nearly four times more likely than their white peers to be referred for Disturbing Schools. JA 673 ¶ 19. In Charleston, Black students were approximately six-and-a-half times more likely to be referred for Disturbing Schools than were their white classmates. JA 674 ¶ 23; JA 679. As the district court correctly observed, such stark racial disparities plainly demonstrate that "the absence of objective criteria has in fact led to discriminatory enforcement of the Law." JA 937.

II. The District Court Acted Within Its Discretion in Granting Class Certification.

This case is a paradigmatic class action under Rule 23(b)(2). Plaintiffs, on behalf of all South Carolina schoolchildren, sought injunctive relief against two vague criminal laws that were arbitrarily and discriminatorily enforced against schoolchildren. "A district court has broad discretion in deciding whether to certify a class." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). Exercising this authority, the district court found that certification was appropriate because the challenged law "poses a risk to each member of the [] Class, regardless of whether they have been previously charged," JA 285, and the relief sought "would clearly benefit all members of the class by eliminating the uncertainty as to what conduct is permitted and the

risk of being charged under a vague law." JA 284 (citation omitted). Because the district court's ruling is entitled to substantial deference[12] and squarely aligns with this Court's precedent, it should be affirmed.

A. Claims Advanced by Class Members Were Sufficiently Common to Support Certification under Rule 23.

The commonality requirement is satisfied where class members "have suffered the same injury" and present claims that depend "upon a common contention." *Wal-Mart Stores, Inc. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). Importantly, "[w]hat matters to class certification . . . [is] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted). Commonality is established where Defendant "engaged in a common course of conduct directed at all the plaintiffs." 7A Charles Alan Wright et al., *Fed. Prac. and Proc.* § 1763 (4th ed. 2021).

Here, Defendant argues that the Class lacked commonality because "only a minute percentage" of students have been prosecuted under the challenged statutes. But as the district court properly found, this argument misses the mark. JA 279. The harm that flows from a

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[12] Defendant's brief failed to identify the appropriate standard of review for class certification. Fed. R. App. P. 28(a)(8)(B) (requiring "*for each issue*, a concise statement of the applicable standard of review") (emphasis added). Class certification is reviewed for abuse of discretion and entitled to substantial deference. *Berry*, 807 F.3d at 608.

vague law is not limited to *actual* enforcement. Until the injunction entered, all class members faced a common threat of arbitrary and discriminatory enforcement at their schools. Put another way, all class members lacked knowledge of when, or if, they might be arrested and prosecuted. *See* JA 278. Importantly, the mere threat of enforcement chills speech and other expressive activity. It is for precisely these reasons that federal courts allow pre-enforcement vagueness challenges. *See*, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). Recognizing this, the court found that commonality is not precluded where "the precise nature of how an injury will impact an individual student may vary according to circumstance, including how law enforcement chooses to exercise its discretion in charging students." JA 279.

Each member of the class faced the possibility of arbitrary or discriminatory enforcement, and each benefited from the district court's order enjoining enforcement of the Disorderly Conduct law. No more is necessary to establish commonality.

B. Plaintiffs Advanced Claims Typical of All Class Members and Their Representation Was Adequate.

Under Rule 23, typicality is satisfied "if a plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of

other class members and is based on the same legal theory." *Moodie v. Kiawah Island Inn Co., LLC,* 309 F.R.D. 370, 378 (D.S.C. 2015) (citation omitted). To satisfy typicality, "the plaintiff's claim and the claims of class members [need not] be perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006). Adequacy of representation is similarly satisfied where a "class representative [is] part of the same class and possess the same interest and suffer[s] the same injury as the class members." *Lienhart,* 255 F.3d at 146 (alteration omitted).

"The commonality and typicality requirements of Rule 23(a) tend to merge," *Dukes*, 564 U.S. at 349 n.5, as do Rule 23's adequacy of representation requirements. *Deiter*, 436 F.3d at 466 (citing *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). As discussed above, each class member advanced an *identical* claim: that, as students, they faced the possible enforcement of two unconstitutionally vague statutes. In the district court's words: "the one legal theory at issue in this case is whether the statutes are unconstitutionally vague," which required the court to "undertake one analysis to adjudicate the claims associated with this theory." JA 282. In that sense, class members' claims could not be more "typical of the claims or defenses of the class." Fed. R. Civ. Pro. 23(a); JA 280.

On appeal, Defendant argues that because named Plaintiffs suffered actual enforcement under the challenged laws, their claims "are atypical . . . and they cannot be adequate representatives under Rule 23(a)(4)." Def.'s Br. 51. But this difference does not bear on the question of class certification.[13] Plaintiffs' arrests for Disorderly Conduct and Disturbing Schools do not alter their legal claims; they, like all other class members, sought an injunction against the statutes' ongoing enforcement. Moreover, Plaintiffs' arrests made them particularly well suited to represent the interests of the class because they are intimately aware of the laws' consequences and are highly motivated to obtain prospective relief. Interested plaintiffs representing disinterested class members is a common feature of class actions. *See, e.g.*, *J.D. v. Azar,* 925 F.3d 1291, 1314 (D.C. Cir. 2019) ("A basic object of the class action device is to permit an aggregated suit when an individual might forgo pressing a free-standing claim because she has too little at stake on her own. A lack of interest among absent class members, then, is an everyday feature of class actions.") (internal citation omitted).

[13] Defendant also asserts, without evidence, that "many other students may prefer that the laws be enforced." Def.'s Br. 50. But in order to defeat Rule 23's adequacy requirement, a conflict "must be more than merely speculative or hypothetical." *Ward v. Dixie Nat. Life Ins. Co.,* 595 F.3d 164, 180 (4th Cir. 2010) (citation omitted).

Finally, even if minor factual variations were relevant to the typicality analysis—which they are not—the cohesiveness of Plaintiffs' single legal theory outweighs any factual differences. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) ("The typicality requirement may be satisfied despite substantial factual differences. . . when there is a strong similarity of legal theories.") (citation and internal quotations omitted).

C. The Relief Ordered by the District Court Benefits the Whole Class.

Rule 23(b)(2) certification is appropriate "where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Dukes,* 564 U.S. at 360; *see also Berry,* 807 F.3d at 609. As this Court has observed, "Rule 23(b)(2) was created to facilitate civil rights class actions." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.24 (4th Cir. 2006). Applying these principles, the district court correctly found that certification was proper under Rule 23(b)(2).

In arguing that the whole class was not aided by the district court's order granting injunctive relief, Defendant again reveals his misapprehension of the harm attendant to vague criminal laws. Vague laws fail because they are standardless in their sweep and—as a result—permit arbitrary and discriminatory enforcement. For that very reason, *all* class members faced the threat of enforcement. While Black students faced a greater risk of enforcement than most, the laws'

criminalization of common schoolchildren's behavior exposed *all* students to the risk of arrest and prosecution.

Here, the enjoinment of the vague Disorderly Conduct Law and an expungement of relevant records under both statutes is the necessary relief for the group-wide injury suffered by the class. The district court acted well within its discretion in certifying the class and sub-classes under Rule 23(b)(2). This Court should affirm the ruling below.

III. The District Court Did Not Abuse Its Discretion In Fashioning A Remedy.

A. Federal Courts Are Authorized to Expunge Criminal Records to Remedy Constitutional Violations.

When the Constitution is violated, trial courts have "*virtually boundless discretion* in crafting remedies." *Missouri v. Jenkins*, 515 U.S. 70, 124–25 (1995) (Thomas, J., concurring) (emphasis added); *accord N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016). The remedy established by the district court "is reversible only for an abuse of discretion."[14] *Smith*, 813 F.2d at 1301–02.

Under these principles, it is "well established that a court may order the expungement of records, including arrest records, when that

[14] Notably, Defendant failed to cite a single case where a district court's expungement order was reversed on appeal. *United States v. Bagley*, 899 F.2d 707 (8th Cir. 1990) (affirming district court's denial of expungement petition); *United States v. Mettetal*, 714 F. App'x 230 (4th Cir. 2017) (same).

remedy is necessary and appropriate in order to preserve basic legal rights." *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973); *see also United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975) ("[R]equests to expunge are frequently made as part of the relief requested in civil rights proceedings."), *cert. denied*, 423 U.S. 836 (1975). This rule has been affirmed by this Court and by circuit courts throughout the federal system. *See, e.g.*, *Allen v. Webster*, 742 F.2d 153, 155 (4th Cir. 1984) (expungement available as remedy where a conviction "was based on a statute later declared unconstitutional"); *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1240 (9th Cir. 2019) ("This court has been clear that a determination that records were obtained and retained in violation of the Constitution supports a claim for expungement relief of existing records so obtained."); *United States v. Coloian*, 480 F.3d 47, 50 (1st Cir. 2007) (recognizing jurisdiction "to expunge records of unconstitutional convictions"); *United States v. Trzaska*, 781 F. App'x 697, 703 (10th Cir. 2019) (expungement appropriate "where the statute under which the arrestee was prosecuted was itself unconstitutional") (citation omitted).

Defendant's main argument to the contrary is that the court's equitable expungement order unlawfully bypasses the state's statutory expungement scheme. Def.'s Br. 52–53. But as many cases demonstrate, the federal court's remedial authority is not cabined by state law.

To start, the Supreme Court has routinely held that state laws cannot burden a federal right. In *Felder v. Casey*, 487 U.S. 131 (1988), for example, the Court ruled that Wisconsin's "notice of claim" statute could not bar a plaintiff's federal civil rights action. In so holding, the Court explained that burdening of a federal right "is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule." *Id.* at 144. Given this rule, it would make little sense to conclude that the unavailability of expungement under state law could limit the district court's authority to order equitable relief.

Even more to the point, the Supreme Court has repeatedly explained that when states violate the constitution, they forfeit authority over areas they ordinarily control. *See*, *e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (education); *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (redistricting). In *Swann*, for example, the Court ruled that despite the states' plenary authority over education, the judiciary possesses broad authority to end school segregation. In reconciling its broad view of the judiciary's equitable authority with conflicting principles of federalism, the Court explained that "[r]emedial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." 402 U.S. at 16.

In accordance with these principles, federal courts have uniformly rejected the argument raised by Defendant here. *See, e.g.*, *Sullivan v.*

Murphy, 478 F.2d 938, 972 (D.C. Cir. 1973) ("Where there is an infringement of constitutional rights the Federal courts must be guided by the need for an effective remedy, and are not constrained by the 'state law' of the jurisdiction where the acts took place."); *United States v. Steelwright*, 179 F. Supp. 2d 567, 572 n.9 (D. Md. 2002) ("[T]he act of expungement arises from the Court's equitable powers and is not bound by any statutory guidelines."); *Doe v. Alger*, No. 5:15-CV-00035, 2017 WL 1483577, at *5 (W.D. Va. Apr. 25, 2017) (refusing to limit expungement of college disciplinary records to the form allowed for by state law, reasoning that "this court has broad equitable power to direct a party to take an action that would otherwise be prohibited by state law"); *DeMarco v. Sadiker*, 952 F. Supp. 134, 142 (E.D.N.Y. 1996) ("That expungement may not be available in state court is irrelevant because the relief that a federal court provides in a § 1983 action is a federal rule.") (citation omitted).

As the district court properly concluded, this action "sounds in federal law because it challenges the constitutionality of state statutes as a violation of the Due Process Clause," and accordingly, state law expungement schemes did not limit the court's broad equitable powers. JA 287.

B. The District Court Was Well Within its Discretion to Order Class-Wide Expungement.

Defendant takes particular issue with the class-wide scope of the district court's remedial order, arguing that "[a]lthough the Court does have authority to order expungement in the event of an arrest based upon an unconstitutional statute," relief should not be available to the class in this case. Def.'s Br. 56.

Defendant does not, and could not, cite to any case holding that a court's remedial powers are diminished in a class action. Following Defendant's position, each individual student would have the same legal claims, and the same right to a remedy, but need to proceed under separate lawsuits. Such a standard would undermine Rule 23's purpose of "promoting judicial economy and efficiency," as well as affording a remedy where "the traditional framework of multiple individual actions" would create an economic barrier for individuals. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (citation omitted); *see also* JA 287–88 ("Defendant's contention that expungement as a class-wide remedy is not appropriate . . . [is] reminiscent of Defendant's challenge [to typicality and commonality.]"). The district court properly certified a class and was well within its discretion in ordering a remedy corresponding to the broad scope of the class-wide injury. *Cf. Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60,

69 (1992) ("[E]xistence of a statutory right implies the existence of all necessary and appropriate remedies.") (citation omitted).

Further, Defendant erroneously characterizes this relief as "unprecedented." Def.'s Br. 53. To the contrary, Defendant himself cites at least three cases—*Sullivan, McLeod,* and *Wheeler*—involving class wide expungement orders. Def.'s Br. 54–55 (citing *Sullivan*, 478 F.2d (expungement for class of wrongfully arrested protesters); *United States. v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (wrongfully arrested African Americans in Texas); *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969) (enjoining statute and expunging records of all twelve plaintiffs)). These are not the only cases recognizing the availability of class-wide expungement remedies. *See, e.g.*, *Casale v. Kelly*, 257 F.R.D. 396, 414 (S.D.N.Y. 2009) ("[E]xpungement alone would form a sufficient basis for certification of a (b)(2) class."); *Fazaga*, 916 F.3d at 1240–41 (affirming availability of expungement relief in class action alleging unconstitutional law enforcement surveillance); *Goss v. Lopez*, 419 U.S. 565 (1975) (affirming decision ordering expungement of discipline files for a class of students in § 1983 action); *Wolff v. McDonnell*, 418 U.S. 539, 544 (1974) (in class action on behalf of prison inmates, upholding order "expung[ing] from prison records any determinations of misconduct arrived at in proceedings that failed to comport with due process").

Moreover, the propriety of the court's remedy cannot be evaluated in a vacuum; it must be judged in proportion to the harm it addresses. The goal of a remedial decree is to place those harmed by an unconstitutional provision "in the position they would have occupied in the absence of discrimination." *McCrory*, 831 F.3d at 239 (alterations and citation omitted); *United States v. Virginia*, 518 U.S. 515, 547 (1996). Any remedy short of that would violate the court's "duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Here, the court found that the state's enforcement of the Disturbing Schools and Disorderly Conduct laws against schoolchildren was unconstitutional and that, because of the stigmatization and adverse housing, education, and employment consequences that flow from the continued existence of these charges in their juvenile records, the harm inflicted upon Plaintiffs would persist in the absence of an injunction against the retention and reliance on records reflecting enforcement of an unconstitutional law. JA 937–38; *see also Kowall v. United States*, 53 F.R.D. 211, 216 (W.D. Mich. 1971)[15] (explaining that

[15] Defendant further argues *Kowall* stands for the proposition that class-wide relief is not appropriate. Def.'s Br. 55. But *Kowall* did not consider a class action. Rather, that court's statement that "[i]n each case, the court must weigh the reasons advanced for and against

the collateral consequences of arrest records justify expungement). On these facts, class-wide expungement was the only way for the district court to remedy the constitutional violation—*i.e.*, to restore named Plaintiffs and absent class members to the position they would have occupied without the State's unconstitutional conduct, preventing the ongoing injury a criminal record would inflict.

Defendant leans heavily on this Court's unpublished decision in *United States v. Mettetal*, 714 F. App'x 230 (4th Cir. 2017), to argue that expungements are "rarely justified" and are inappropriate in this case. But even if *Mettetal* were binding, its holding is inapposite. Mettetal argued for expungement because he was convicted on evidence that should have been excluded, *id.* at 233, a procedural deficiency,[16] rather than the "essential" due process violation caused by an unconstitutionally vague law. *Johnson*, 576 U.S. at 595 (citation omitted). On these facts—and in its discretion—the district court denied expungement relief and this Court affirmed. *Mettetal*, 714 F. App'x at 236.

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expunging arrest records" was made in rejecting the government's argument that expungement was precluded "as a general rule." *Kowall*, 53 F.R.D. at 214.

[16] The exclusionary rule is a prudential doctrine designed to deter misconduct; there is no "right" to have evidence suppressed. *See Davis v. United States*, 564 U.S. 229, 236 (2011) ("Exclusion [of evidence] is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search.") (citation omitted).

Unlike *Mettetal's*, Plaintiffs' records stem from unconstitutional laws that are impermissibly vague. But for South Carolina's unconstitutional and discriminatory enforcement of vague criminal laws, Plaintiffs' arrests, charges, and convictions would not exist. And as this Court acknowledged in *Mettetal*, those circumstances are distinguishable and warrant expungement. *Mettetal*, 714 F. App'x at 236 (citing *Sullivan*, 478 F.2d 938 (expunging illegal arrests of antiwar demonstrators) and *McLeod*, 385 F.2d 734 (expunging illegal arrests intended to harass and intimidate Black voters)). The district court determined that expungement was an appropriate remedy in this case, and this determination was well within its discretion.

Make no mistake—this case presents an "extreme circumstance." Plaintiffs proved, and the district court found, that law enforcement in South Carolina routinely arrested and prosecuted schoolchildren under impermissibly vague statutes. This unconstitutional conduct "led to a disproportionate number of Black students and students with disabilities entering the juvenile justice system," thereby "increas[ing] the risk that [those children] will drop out of school and . . . be incarcerated later in life." JA 937–38. On the undisputed facts, the court further found that "the charge itself, even absent a conviction, carries long lasting and deleterious effects." JA 947. This extraordinary harm demanded a comprehensive class-wide remedy. Expungement was

the only remedy sufficient to cure Plaintiffs' injury, and the district court was right to grant it.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's orders granting summary judgment for Plaintiffs, certifying the class under Rule 23(b)(2), and expunging class members' records.

Respectfully submitted this 16th day of March, 2022.

s/Sarah Hinger
SARAH HINGER
GALEN SHERWIN
American Civil Liberties Union Foundation
125 Broad Street 18th Fl
New York, NY 10004
shinger@aclu.org

ALLEN CHANEY
American Civil Liberties Union Foundation of South Carolina
P.O. Box 1668
Columbia, SC 29202
Tel: (843) 282-7953
achaney@aclusc.org

Counsel for Plaintiffs-Appellees

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument pursuant to Local Rule 34(a).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits established by this Court's Order. DKT 21. Excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 16,180 words, and has been prepared in a proportionally spaced font using Microsoft Word 2010 in 14-point Century Schoolbook font.

Dated: March 16, 2022.

/s/ Sarah Hinger

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I electronically filed the foregoing Response Brief of Plaintiffs-Appellees with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Sarah Hinger

ADDENDUM TO PLAINTIFFS-APPELLEE'S OPENING BRIEF

Code of Laws of South Carolina 1976 Annotated
Title 16. Crimes and Offenses
Chapter 17. Offenses Against Public Policy
Article 7. Miscellaneous Offenses

This section has been updated. Click here for the updated version.

Code 1976 § 16-17-420

§ 16-17-420. Disturbing schools; summary court jurisdiction.

Effective: June 2, 2010 to May 16, 2018

(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

(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.

(C) The summary courts are vested with jurisdiction to hear and dispose of cases involving a violation of this section. If the person is a child as defined by Section 63-19-20, jurisdiction must remain vested in the Family Court.

Credits

HISTORY: 1962 Code § 16-551; 1952 Code § 16-551; 1942 Code § 1129; 1932 Code § 1129; Cr. C. '22 § 28; 1919 (31) 239; 1968 (55) 2308; 1972 (57) 2620; 2010 Act No. 273, § 12, eff June 2, 2010.

Code 1976 § 16-17-420, SC ST § 16-17-420
Current through 2022 Act No. 120, subject to final approval by the Legislative Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws.

End of Document

Add. 2

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Prior Version Held Unconstitutional as Applied by Kenny v. Wilson, D.S.C., Oct. 08, 2021

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Code of Laws of South Carolina 1976 Annotated
Title 16. Crimes and Offenses
Chapter 17. Offenses Against Public Policy
Article 7. Miscellaneous Offenses

Code 1976 § 16-17-530

§ 16-17-530. Public disorderly conduct; conditional discharge for first-time offenders.

Effective: June 25, 2019
Currentness

(A) A person who is: (1) found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner; (2) uses obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church; or (3) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharges any gun, pistol, or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or be imprisoned for not more than thirty days. However, conditional discharge may be granted by the court in accordance with the provisions of this section upon approval by the circuit solicitor.

(B) When a person who has not previously been convicted of an offense pursuant to this section or any similar offense under any state or federal statute relating to drunk or disorderly conduct pleads guilty to or is found guilty of a violation of this section, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires, including the requirement that the person cooperate in a treatment and rehabilitation program of a state-supported facility, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal pursuant to this section is without court adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. However, a nonpublic record must be forwarded to and retained by the South Carolina Law Enforcement Division solely for the purpose of use by the courts in determining whether or not a person has committed a subsequent offense pursuant to this section. Discharge and dismissal pursuant to this section may occur only once with respect to any person.

(C) Upon the dismissal of the person and discharge of the proceedings against him pursuant to subsection (B), the person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained as provided in subsection (B)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after a hearing, that the person was dismissed and the proceedings against him discharged, it shall enter the order. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person as to whom the order has been entered may

be held pursuant to another provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest, or indictment or information, or trial in response to an inquiry made of him for any purpose.

(D) Before a person may be discharged and the proceedings dismissed pursuant to this section, the person must pay a fee to the summary court of one hundred fifty dollars. No portion of the fee may be waived, reduced, or suspended, except in cases of indigency. If the court determines that a person is indigent, the court may partially or totally waive, reduce, or suspend the fee. The revenue collected pursuant to this subsection must be retained by the jurisdiction that heard or processed the case and paid to the State Treasurer within thirty days of receipt. The State Treasurer shall transmit these funds to the Prosecution Coordination Commission which shall then apportion these funds among the sixteen judicial circuits on a per capita basis equal to the population in that circuit compared to the population of the State as a whole based on the most recent official United States census. The funds must be used for drug treatment court programs only. The amounts generated by this subsection are in addition to any amounts presently being provided for drug treatment court programs and may not be used to supplant funding already allocated for these services. The State Treasurer may request the State Auditor to examine the financial records of a jurisdiction which he believes is not timely transmitting the funds required to be paid to the State Treasurer pursuant to this subsection. The State Auditor is further authorized to conduct these examinations and the local jurisdiction is required to participate in and cooperate fully with the examination.

Credits

HISTORY: 1962 Code § 16-558; 1952 Code § 16-558; 1949 (46) 466; 1968 (55) 2842; 1969 (56) 153; 2019 Act No. 90 (H.3601), § 1, eff June 25, 2019.

Editors' Notes

VALIDITY

<For the validity of this section, see Kenny v. Wilson, --- F. Supp.3d ---, 2021 WL 4711450 (D.S.C. Oct. 8, 2021).>

Notes of Decisions (17)

Code 1976 § 16-17-530, SC ST § 16-17-530

Current through 2022 Act No. 120, subject to final approval by the Legislative Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws.

End of Document

Add. 4

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Code of Laws of South Carolina 1976 Annotated
Title 63. South Carolina Children's Code (Refs & Annos)
Chapter 19. Juvenile Justice Code
Article 7. Custody and Detention (Refs & Annos)

Code 1976 § 63-19-810
Formerly cited as SC ST § 20-7-7205

§ 63-19-810. Taking a child into custody.

Effective: June 16, 2008
Currentness

(A) When a child found violating a criminal law or ordinance is taken into custody, the taking into custody is not an arrest. The jurisdiction of the court attaches from the time of the taking into custody. When a child is taken into custody, the officer taking the child into custody shall notify the parent, guardian, or custodian of the child as soon as possible. Unless otherwise ordered by the court, the person taking the child into custody may release the child to a parent, a responsible adult, a responsible agent of a court-approved foster home, group home, nonsecure facility, or program upon the written promise, signed by the person, to bring the child to the court at a stated time or at a time the court may direct. The written promise, accompanied by a written report by the officer, must be submitted to the South Carolina Department of Juvenile Justice as soon as possible, but not later than twenty-four hours after the child is taken into custody. If the person fails to produce the child as agreed, or upon notice from the court, a summons or a warrant may be issued for the apprehension of the person or of the child.

(B) When a child is not released pursuant to subsection (A), the officer taking the child into custody shall immediately notify the authorized representative of the Department of Juvenile Justice, who shall respond within one hour by telephone or to the location where the child is being detained. Upon responding, the authorized representative of the department shall review the facts in the officer's report or petition and any other relevant facts and advise the officer if, in his opinion, there is a need for detention of the child. The officer's written report must be furnished to the authorized representatives of the department and must state:

(1) the facts of the offense;

(2) the reason why the child was not released to the parent. Unless the child is to be detained, the child must be released by the officer to the custody of his parents or other responsible adult upon their written promise to bring the child to the court at a stated time or at a time the court may direct. However, if the offense for which the child was taken into custody is a violent crime as defined in Section 16-1-60, the child may be released only by the officer who took the child into custody. If the officer does not consent to the release of the child, the parents or other responsible adult may apply to any judge of the family court within the circuit for an ex parte order of release of the child. The officer's written report must be furnished to the family court judge. The family court judge may establish conditions for such release.

(C) When a child is charged by a law enforcement officer for an offense which would be a misdemeanor or felony if committed by an adult, not including a traffic or wildlife violation over which courts other than the family court have concurrent jurisdiction as provided in Section 63-3-520, the law enforcement officer also shall notify the principal of the school in which the child is enrolled, if any, of the nature of the offense. This information may be used by the principal for monitoring and supervisory purposes but otherwise must be kept confidential by the principal in the same manner required by Section 63-19-2220(E).

(D) Juveniles may be held in nonsecure custody within the law enforcement center for only the time necessary for purposes of identification, investigation, detention, intake screening, awaiting release to parents or other responsible adult, or awaiting transfer to a juvenile detention facility or to the court for a detention hearing.

Credits

HISTORY: 2008 Act No. 361, § 2.

Notes of Decisions (2)

Code 1976 § 63-19-810, SC ST § 63-19-810

Current through 2022 Act No. 120, subject to final approval by the Legislative Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Code of Laws of South Carolina 1976 Annotated
Title 63. South Carolina Children's Code (Refs & Annos)
Chapter 19. Juvenile Justice Code
Article 19. Juvenile Records (Refs & Annos)

Code 1976 § 63-19-2050
Formerly cited as SC ST § 20-7-8525

§ 63-19-2050. Petition for expungement of official records.

Effective: July 1, 2019
Currentness

(A)(1) A person who has been taken into custody for, charged with, or adjudicated delinquent for having committed a status offense or a nonviolent crime, as defined in Section 16-1-70, may petition the court for an order expunging all official records relating to:

(a) being taken into custody;

(b) the charges filed against the person;

(c) the adjudication; and

(d) the disposition.

(2) A person may not petition the court if the person has a prior adjudication for an offense that would carry a maximum term of imprisonment of five years or more if committed by an adult.

(B) A prosecution or law enforcement agency may file an objection to the expungement. If an objection is filed, the expungement must be heard by the court. The prosecution or law enforcement agency's reason for objecting must be that the person has other charges pending or the charges are not eligible for expungement. The prosecution or law enforcement agency shall notify the person of the objection. The notice must be given in writing at the most current address on file with the court, or through the person's counsel of record.

<Text of (C) effective July 1, 2019. See Editor’s Note for contingency.>

(C)(1) If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed a status offense, the court shall grant the expungement order. If the person has been taken into custody for, charged with, or adjudicated

delinquent for having committed multiple status offenses, the court may grant an expungement order for the multiple status offenses.

(2) If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed a nonviolent crime, as defined in Section 16-1-70, the court may grant the expungement order. For the purpose of this section, any number of offenses for which the individual received youthful offender sentences at a single sentencing proceeding for offenses that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.

(3) The court shall not grant the expungement order unless the court finds that the person is at least eighteen years of age, has successfully completed any dispositional sentence imposed, has not been subsequently adjudicated for or convicted of any criminal offense, and does not have any criminal charges pending in family court or general sessions court. If the person was found not guilty in an adjudicatory hearing in the family court, the court shall grant the expungement order regardless of the person's age and the person must not be charged a fee for the expungement. An adjudication for a violent crime, as defined in Section 16-1-60, must not be expunged.

(D) If the expungement order is granted by the court, the records must be destroyed or retained by any law enforcement agency or municipal, county, state agency, or department pursuant to the provisions of Section 17-1-40.

(E) The effect of the expungement order is to restore the person in the contemplation of the law to the status the person occupied before being taken into custody. No person to whom the expungement order has been entered may be held thereafter under any provision of law to be guilty of perjury or otherwise giving false statement by reason of failing to recite or acknowledge the charge or adjudication in response to an inquiry made of the person for any purpose.

(F) For purposes of this section, an adjudication is considered a previous adjudication only if the adjudication occurred prior to the date the subsequent offense was committed.

(G) The judge, at the time of adjudication, shall notify the person of the person's ability to have the person's record expunged, the conditions that must be met, as well as the process for receiving an expungement in the particular jurisdiction pursuant to this section.

Credits

HISTORY: 2008 Act No. 361, § 2; 2015 Act No. 22 (S.133), § 2, eff June 1, 2015; 2016 Act No. 268 (S.916), § 9, eff July 1, 2019; 2018 Act No. 254 (H.3209), § 5, eff December 27, 2018.

Code 1976 § 63-19-2050, SC ST § 63-19-2050

Current through 2022 Act No. 120, subject to final approval by the Legislative Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws.

End of Document

Add. 8

South Carolina General Assembly
122nd Session, 2017-2018

A182, R198, S131

STATUS INFORMATION

General Bill
Sponsors: Senators McLeod, Hutto, Jackson, Kimpson, M.B. Matthews, Fanning, Shealy, Senn and Malloy
Document Path: l:\council\bills\agm\18989wab17.docx
Companion/Similar bill(s): 3794

Introduced in the Senate on January 10, 2017
Introduced in the House on April 18, 2017
Last Amended on April 5, 2017
Passed by the General Assembly on May 10, 2018
Governor's Action: May 17, 2018, Signed

Summary: Disturbing schools

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
12/13/2016	Senate	Prefiled
12/13/2016	Senate	Referred to Committee on **Judiciary**
1/10/2017	Senate	Introduced and read first time (Senate Journal-page 77)
1/10/2017	Senate	Referred to Committee on **Judiciary** (Senate Journal-page 77)
2/7/2017	Senate	Referred to Subcommittee: Hutto (ch), Timmons, Rice
3/22/2017	Senate	Committee report: Favorable with amendment **Judiciary** (Senate Journal-page 6)
3/23/2017		Scrivener's error corrected
4/5/2017	Senate	Amended (Senate Journal-page 29)
4/5/2017	Senate	Read second time (Senate Journal-page 29)
4/5/2017	Senate	Roll call Ayes-33 Nays-8 (Senate Journal-page 29)
4/6/2017		Scrivener's error corrected
4/6/2017	Senate	Read third time and sent to House (Senate Journal-page 114)
4/18/2017	House	Introduced and read first time (House Journal-page 5)
4/18/2017	House	Referred to Committee on **Judiciary** (House Journal-page 5)
5/3/2018	House	Committee report: Favorable **Judiciary** (House Journal-page 44)
5/9/2018	House	Read second time (House Journal-page 80)
5/9/2018	House	Roll call Yeas-102 Nays-2 (House Journal-page 80)
5/10/2018	House	Read third time and enrolled (House Journal-page 19)
5/14/2018		Ratified R 198
5/17/2018		Signed By Governor
5/24/2018		Effective date 05/17/18
5/31/2018		Act No. 182

View the latest legislative information at the website

VERSIONS OF THIS BILL

12/13/2016

3/22/2017
3/23/2017
4/5/2017
4/6/2017
5/3/2018

(A182, R198, S131)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 16-17-425 SO AS TO PROVIDE IT IS UNLAWFUL FOR SCHOOL OR COLLEGE STUDENTS TO MAKE THREATS TO TAKE THE LIVES OF OR TO INFLICT BODILY HARM UPON OTHERS BY USING ANY FORM OF COMMUNICATION WHATSOEVER, AND TO PROVIDE THE SECTION MAY NOT BE CONSTRUED TO REPEAL, REPLACE, OR PRECLUDE APPLICATION OF ANY OTHER CRIMINAL STATUTE; AND TO AMEND SECTION 16-17-420, RELATING TO OFFENSES INVOLVING DISTURBING SCHOOLS, SO AS TO RESTRUCTURE THE OFFENSES TO PROVIDE A DELINEATED LIST OF THOSE ACTIONS WHICH CONSTITUTE A VIOLATION, TO LIMIT ITS APPLICATION TO ACTIONS BY PERSONS WHO ARE NOT STUDENTS, TO DEFINE NECESSARY TERMINOLOGY, TO REVISE THE PENALTY FOR A VIOLATION OF A DISTURBING SCHOOLS OFFENSE, AND TO ELIMINATE JURISDICTION OF SUMMARY COURTS AND FAMILY COURTS.

Whereas, recent reports indicate there has been an increase in the number of South Carolina students arrested for disturbing schools; and

Whereas, it is in the best interest of all South Carolinians that all students be given every opportunity to succeed in South Carolina's school systems. Now, therefore,

Be it resolved that educators and school administrators throughout the State are urged to exhaust all avenues of behavioral discipline in accordance with the school's code of conduct prior to requesting the involvement of law enforcement officials. Similarly, law enforcement officials are urged to seek the normal standards of proof when enforcing the criminal laws of this State on school grounds. Law enforcement officials should also maintain and apply officer discretion when enforcing the criminal laws of this State on school grounds.

Be it enacted by the General Assembly of the State of South Carolina:

School disturbances by nonstudents

SECTION 1. Section 16-17-420 of the 1976 Code is amended to read:

"Section 16-17-420. (A) It is unlawful for a person who is not a student to wilfully interfere with, disrupt, or disturb the normal operations of a school or college in this State by:

(1) entering upon school or college grounds or property without the permission of the principal or president in charge;

(2) loitering upon or about school or college grounds or property, after notice is given to vacate the grounds or property and after having reasonable opportunity to vacate;

(3) initiating a physical assault on, or fighting with, another person on school or college grounds or property;

(4) being loud or boisterous on school or college grounds or property after instruction by school or college personnel to refrain from the conduct;

(5) threatening physical harm to a student or a school or college employee while on school or college grounds or property; or

(6) threatening the use of deadly force on school or college property or involving school or college grounds or property when the person has the present ability, or is reasonably believed to have the present ability, to carry out the threat.

(B) For the purpose of this section, 'person who is not a student' means a person who is not enrolled in, or who is suspended or expelled from, the school or college that the person interferes with, disrupts, or disturbs at the time the interference, disruption, or disturbance occurs.

(C) Any person who violates a provision of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand dollars or imprisoned for not more than one year, or both."

Student threats

SECTION 2. Article 7, Chapter 17, Title 16 of the 1976 Code is amended by adding:

"Section 16-17-425. (A) It is unlawful for a student of a school or college in this State to make threats to take the life of or to inflict bodily harm upon another by using any form of communication whatsoever.

(B) Nothing contained in this section may be construed to repeal, replace, or preclude application of any other criminal statute."

Savings

SECTION 3. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending

actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. 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.

Time effective

SECTION 4. This act takes effect upon approval by the Governor.

Ratified the 14th day of May, 2018.

Approved the 17th day of May, 2018.

_____