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

REPLY BRIEF OF DEFENDANT-APPELLANT WILSON

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 4

I THE DISTRICT COURT APPLIED THE INCORRECT STANDARD FOR A FACIAL VAGUENESS CHALLENGE 4

II THE STATUTES ARE CONSTITUTIONAL 13

A Section 16-17-530 Is Not Vague 13

B The Disturbing he Schools Statute Is Not Vague 21

III THE DISTRICT COURT ERRED IN CERTIFYING THE CLASS OF STUDENTS 23

IV THE DISTRICT COURT LACKED THE AUTHORITY TO ORDER CLASS-WIDE EXPUNGEMENT 25

V THE AMICUS BRIEFS PRIMARILY ADDRESS POLICY ISSUES BEYOND THE PROVINCE OF THIS COURT 29

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) 8
Berry v. Schulman,
807 F.3d 600 (4th Cir. 2015) 25
Bosse v. Oklahoma,
137 S.Ct. 1, 196 L.Ed.2d 1 (2016) 8
Bucklew v. Precythe,
139 S. Ct. 1112, 203 L.Ed.2d 521 (2019) 5
Casale v. Kelly,
257 F.R.D. 396 (S.D.N.Y. 2009).....25
City of Chicago v. Morales,
527 U.S. 41 (1999) 6
City of Landrum v. Sarratt,
352 S.C. 139, 572 S.E.2d 476 (Ct. App. 2002) 16
Copeland v. Vance,
893 F.3d 101 (2018) 9
Crooks v. Mabus,
845 F.3d 412 (D.C. Cir. 2016).....9
Deiter v. Microsoft Corp.,
436 F.3d 461 (4th Cir. 2006) 24
Edgar v. Haines,
2 F.4th 298 (4th Cir. 2021) 9, 10, 11
Fazaga v. Fed. Bureau of Investigation,
916 F.3d 1202 (9th Cir. 2019) 26
Fusaro v. Howard,
19 F.4th 357 (4th Cir. 2021) 4, 5
Goss v. Lopez,
419 U.S. 565 (1975) 26
Hughes v. Rizzo,
282 F. Supp. 881 (E.D. Pa. 1968).....27
In re Amir X.S.,
371 S.C. 380, 639 S.E.2d 144 (2006) 21, 22
James v. United States,
550 U.S. 192, 127 S. Ct. 1586, 167 L.Ed.2d 532 (2007) 7

Johnson v. Quattlebaum,
664 F. App'x 290 (4th Cir. 2016) 16
Johnson v. United States,
576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) 7, 8, 11
Knox v. United States,
No. CIVA 9071792-HMHGCK, 2008 WL 2168871 (D.S.C. May 2, 2008).....28
Kolbe v. Hogan,
849 F.3d 114 (4th Cir. 2017) 10, 11
Kowall v. U.S.,
53 F.R.D. 211 (W.D.Mich.1971).....28
Maages Auditorium v. Prince George's County, Maryland,
681 F. App'x 256 (4th Cir. 2017)..... 9, 11
Manning v. Caldwell for City of Roanoke,
930 F.3d 264 (4th Cir. 2019) 15
Martin v. Lloyd,
700 F.3d 132 (4th Cir. 2012) ..... passim
McMellon v. United States,
387 F.3d 329 (4th Cir. 2004) 10
Payne v. Taslimi,
998 F.3d 648 (4th Cir. 2021) 10
Plains All American Pipeline L.P. v. Cook,
866 F.3d 534 (3d Cir. 2017) 9
Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections,
827 F.3d 333 (4th Cir. 2016) 12
Schleifer by Schleifer v. City of Charlottesville,
159 F.3d 843 (4th Cir.1998) 19, 20
Shalala v. Illinois Council on Long Term Care, Inc.,
529 U.S. 1 (2000) 8
State v. Perkins,
306 S.C. 353, 412 S.E.2d 385, (1991).....16
Sykes v. United States,
564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011) 7
United States v. Bagley,
899 F.2d 707 (8th Cir. 1990) 26
United States v. Comstock,
627 F.3d 513 (4th Cir. 2010) 12
United States v. D'Anjou,
16 F.3d 604 (4th Cir. 1994) 19

United States v. Esposito,
754 F.2d 521 (4th Cir. 1985) 14
United States v. Friesen,
853 F.2d 816 (10th Cir.1988) 27
United States v. Hasson,
26 F.4th 610 (4th Cir. 2022) 9, 10, 11
United States v. Linn,
513 F.2d 925 (10th Cir.) 27
United States v. McLeod,
385 F.2d 734 (5th Cir. 1967) 27
United States v. McMains,
540 F.2d 387 (8th Cir.1976) 27
United States v. Mettetal,
714 F. App'x 230 (4th Cir. 2017) 26, 27, 28
United States v. Miselis,
972 F.3d 517 (4th Cir. 2020) 12
United States v. Miselis,
972 F.3d 518 (4th Cir. 2020) 5
United States v. Salerno,
481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) 4
United States v. Stevens,
559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) 11
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489, 102 S.Ct. 1186, 71 L.E.D.2d 362 (1982) 4, 5
Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 23
Ward v. Dixie Nat. Life Ins. Co.,
595 F. 3d 164 (4th Cir. 2010) 23
Washington State Grange v. Washington State Republican Party,
552 U.S. 442, 128 S. Ct. 1184, 170 L.Ed.2d 151 (2008) 6, 11
Williams v. Williams,
335 S.C. 386, 517 S.E.2d 689 (1999) 14
Wolff v. McDonnell,
418 U.S. 539 (1974) 26

STATUTES

S.C. Code Ann. §16-17-420 ..... 21, 22
S.C. Code Ann. §63-19-2050 29

Rules

Fed. R. App. P. 32(a)(5).....31
Fed. R. App. P. 32(a)(6).....31
Fed. R. App. P. 32(a)(7)(B) 31
Fed. R. App. P. 32(f).....31

INTRODUCTION

Appellees are obviously displeased that students have been charged under the disturbing the schools and disorderly conduct statutes and prefer approaches under school disciplinary policies, but that displeasure is not based in a legal wrong and policy debates are beyond the province of this Court. The District Court applied the incorrect standard for a facial vagueness challenge and overlooked guideposts within the statutes and imposed by case law in finding that the statutes are vague. The validity of these statutes is also reinforced by their never having been overturned in the decades that they have been in effect, that the most recent reporting year in the record shows that only a miniscule number of students were charged under these laws and that the incident reports in the Joint Appendix show that the students charged have been engaged in criminal conduct.

In many of the accounts in their Brief, Appellees gloss over conduct that clearly constitutes disorderly conduct under the current statute and disturbing the schools under the statute as written prior to its 2018 amendment. Appellees do not attach incident reports about the conduct in most of their declarations of students to provide full information about their conduct. More significantly, the full incident reports related to other incidents summarized by Appellees clearly demonstrates criminal conduct as referenced below.

Brief of Appellees at p. 8, fn 3, omits that "suspect began to hit the door of the [Administration] office and upon removal from the office, he "broke away and approached the office." The officer attempted to restrain the student, and he and staff tried to calm him down. He walked off and efforts continued to calm him down before his arrest. JA, Vol. II, Part C – pp. 819-820.

P. 10 re 16 year old, omits that student was asked to refrain from obscene language in presence of adults and other students and said to officer " I don't give a f*. Do what you got to do" JA, Vol 2., Part B, p. 521. When notified of arrest, he "became disruptive and begin (sic) to snatch away from" officer.

P. 10 omits that student walked out of class, and when located, he cursed the assistant principal and said he was not '"f*ing going back to class.'" When taken to the counselor's office he was still disruptive. He told the officer '"f* you pig' and attempted to leave [the counselor's] office." JA, Vol. II, Part C, p. 807

P. 10 omits that Middle School student refused to take off his hood saying that he "ain't got to take my f*ing hood off" He was "belligerent and non-compl[iant]" JA, Vol. II, Part C, p. 814

P. 15 regarding a Latino student omits that he was not charged until after the officer asked the student for his school id, and the students replied with fighting words "[y]ou don't need to know who I am, and I've done nothing wrong for you to be stopping me p*ssy b*tch." As the officer and student were walking back to the school, the student repeatedly cursed the officer and refused to provide information as to a parent or grandparent who could pick him up in lieu of transporting him to a juvenile detention center. JA, Vol. II, Part C , pp. 811 & 812.

p. 15 As to the fourteen year old student, the Appellees omit that the student was yelling at a teacher and pounding his fist into his hand. When the officer instructed the teacher to go back to her class and directed the student to go back to his, the student said "f* you."

Page 34 omits that the 8th grader charged with disorderly conduct for being "loud and boisterous with his words and his physical gestures" in a school cafeteria, falsely and loudly accused the officer of spitting on him. When the officer asked him to come to the officer's office to discuss matters after he

> made additional loud comments, he told the officer he was "not going a damn place" When notified he was under arrest, he resisted arrest and continued to struggle despite the efforts of several teachers to calm him down and continued to struggle after being cuffed. JA, Vol. II, pp. 802 and 803.
>
> Page 35 omits the threatening conduct of an emotionally disturbed student who became "emotionally upset at school." The incident report states that she refused the school's administrator to go to an In School Suspension Room. When intercepted by the school monitor in a hallway and told to go to that room, she "became extremely belligerent, cursing and threat[ening]" the monitor. She told the resource officer "I aint afraid the [sic] go to Jail and yall better get the f* out my face." When the principal came she "continued with the threats and being very aggressive toward [the monitor and the officer. [She] told [the principal] that 'she better get the police out her face before I rock his s*.'" JA, V. II, p. 823.

Appellees do not cite or summarize a single incident report that does not, when read in full, demonstrate criminal behavior. They also overlook incidents such as the following as well as other reports quoted in Appellant's opening brief at page 12:

> In a class, the student screamed at the teacher "you want to listen to me now." He threw his pencil and work on the floor, and kicked his desk. When he refused to calm down, the teacher held the door open for the student to walk out, he pushed her into the door frame and slammed the door on her arm. ROA V. II, Part B, p. 523.

As discussed below, the District Court incorrectly applied the law, and the statutes are valid.

ARGUMENT

I

THE DISTRICT COURT APPLIED THE INCORRECT STANDARD FOR A FACIAL VAGUENESS CHALLENGE

The District Court should be reversed because it applied an incorrect standard for a facial vagueness challenge. The traditional standard for a facial vagueness challenge requires a challenger to show that the challenged "law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 71 L.E.D.2d 362 (1982). This standard is an application of the broader rule for facial challenges, which require a challenger to show "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Facial challenges to a law are among "the most difficult challenges to mount successfully . . . ." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). As this Court has recognized, the standard for facial challenges is "particularly demanding . . . ." *Fusaro v. Howard*, 19 F.4th 357, 373 (4th Cir. 2021).[1]

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1 Appellees misconstrue the State's argument on this point. The State does not "[d]iscount the[] well-established standards" for assessing vagueness challenges generally. Appellee Br. at 27. Indeed, the State

A demanding standard for a facial challenge makes sense given the objective of a facial challenge which seeks to vindicate not only the rights of the individual challenging the law but also the rights of all those "who may also be adversely impacted by the statute in question." *Fusaro v. Howard*, 19 F.4th 357, 373–74 (4th Cir. 2021); *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020) (describing a facial challenge as a claim that a statute is unconstitutional "as it applies to the population generally."). By seeking to invalidate a law in all its applications, it logically follows that a challenger must show that the law is actually invalid in those circumstances. Justice Scalia recognized the logic of this position in his dissenting

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acknowledges and recognizes the law for assessing a vagueness challenge. *See Hoffman Estates*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (noting that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and that laws must provide explicit standards to prevent "arbitrary and discriminatory enforcement.").

Instead, in *citing Hoffman Estates* and its related line of cases, the State simply emphasizes the different standards employed in granting a remedy on an as-applied or facial basis. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1127, 203 L.Ed.2d 521 (2019) ("So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy,' but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation."). Because Appellee seeks to facially invalidate the challenged statutes, they must demonstrate that the challenged statutes are unconstitutionally vague in all of their applications.

opinion in *City of Chicago v. Morales*, 527 U.S. 41, 77–78. 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999), succinctly observing that "before declaring a statute to be void in all its applications (something we should not be doing in the first place), we have at least imposed upon the litigant the eminently reasonable requirement that he establish that the statue was *unconstitutional* in all its applications."

A demanding standard also makes sense when one considers the fact that facial constitutional challenges are generally disfavored for "several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L.Ed.2d 151 (2008). First, "claims of facial invalidity often rest on speculation" and thus risk "premature interpretation of statutes." *Id*. Second, facial challenges run contrary to fundamental principles of "judicial restraint." *Id*. Finally, facial challenges threaten to "short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id*. at 451.

Given these concerns, the Supreme Court has regularly applied this standard to a wide variety of facial challenges. *See Morales*, 527 U.S. at 79–80, 119 S.Ct. 1849, 144 L.Ed.2d 67 (describing the history of the facial challenge standard). This Court has also consistently applied this standard to facial vagueness challenges. *See Martin v. Lloyd*, 700 F.3d 132 (4th Cir. 2012). In explaining how to apply the standard, this Court has observed: "When considering a facial challenge, courts first

determine whether the enactment implicates a substantial amount of constitutionally protected conduct. If it does not, then the challenge should only succeed if the law is 'impermissibly vague in all of its applications.'" *Martin*, 700 F.3d at 135.

In their response, Appellees argue that this standard has been "squarely rejected by the Supreme Court and this Court." Appellee Br. At 28. However, this argument misrepresents and oversimplifies Supreme Court and Fourth Circuit precedent on this standard.

In support of their argument, Appellees primarily rely on the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). *Johnson* held that the residual clause of the Armed Career Criminal Act violated the Constitution's guarantee of due process because the clause was unconstitutionally vague. 576 U.S. at 606, 135 S.Ct. 2551, 192 L.Ed.2d 569. In doing so, the Supreme Court expressly overruled two of its prior decisions—*Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011) and *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L.Ed.2d 532 (2007). *Sykes* and *James* previously rejected the argument that the residual clause is unconstitutionally vague.

In contrast to its treatment of *Sykes* and *James*, *Johnson* did not expressly

overrule *Hoffman Estates* or the broader rule governing facial challenges generally.[2] Rather, *Johnson* conclusorily asserted that prior holdings "contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S. at 602, 135 S.Ct. 2551, 192 L.Ed.2d 569.

This statement alone is insufficient to overrule decades of precedent regarding the standard for facial challenges. *See Bosse v. Oklahoma*, 137 S.Ct. 1, 2, 196 L.Ed.2d 1 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18. 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."); *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (cautioning that courts should not "conclude our more recent cases have, by implication, overruled an earlier precedent" and reaffirming that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

2 In fact, the majority opinion in *Johnson* does not contain a single citation to *Hoffman Estates*.

Courts from across the country, including this Court, continued to apply the traditional standard to facial vagueness challenges after *Johnson* was decided. *See Edgar v. Haines*, 2 F.4th 298, 313 (4th Cir. 2021) ("Accordingly, facial challenges typically require a showing that no set of circumstances exists under which the [law] would be valid, i.e., that the law is unconstitutional in all of its applications, or that the statute lacks any plainly legitimate sweep.") (internal quotation marks omitted); *Maages Auditorium v. Prince George's County, Maryland*, 681 F. App'x 256, 264 (4th Cir. 2017); *see also Copeland v. Vance*, 893 F.3d 101, 113 n.3 (2018), *cert denied* 139 S.Ct. 2714, 204 L.Ed.2d 1123 (2019) ("Under a long line of decisions that *Dimaya* did not disturb, a statute will generally survive a facial challenge so long as it is not *invalid* in all its applications."); *Plains All American Pipeline L.P. v. Cook*, 866 F.3d 534, 543 (3d Cir. 2017) ("To prevail on its facial challenges, Plains must demonstrate that no set of circumstances exists under which the [challenged law] would be valid.") (internal quotation marks omitted); *Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) ("Outside the First Amendment context, a plaintiff must show that the law in question is impermissibly vague in all of its applications to succeed on a facial challenge.").

Appellees cite to this Court's recent decision in *United States v. Hasson*, 26 F.4th 610 (4th Cir. 2022) to support their argument that the traditional standard for facial vagueness challenges no longer applies. However, *Hasson* does not bind this

Court for several reasons. First, the cited language in *Hasson* is dicta. The sole issue before this Court in *Hasson* was whether *Johnson* and *Dimaya* overruled the longstanding rule that a "plaintiff who engages in some conduct that is clearly proscribed cannot complaint of the vagueness of the law as applied to the conduct of others." 26 F.4th at 616 (internal quotation marks omitted). *Hasson*'s discussion of the traditional standard for facial vagueness standard was not necessary to its outcome and is, consequently, dicta. *See Payne v. Taslimi*, 998 F.3d 648, 654–55 (4th Cir. 2021).

Second, because *Johnson* did not expressly overrule *Hoffman Estates*, the *Hasson* panel lacked the authority to overrule prior Fourth Circuit opinions interpreting *Hoffman Estates*. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court."). In this case, prior Fourth Circuit precedent—such as *Edgar v. Haines*, 2 F.4th 298, 313 (4th Cir. 2021) or *Martin v. Floyd*, 700 F.3d 132 (4th Cir. 2012)—controls.[3]

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3 In a footnote in *Kolbe v. Hogan*, 849 F.3d 114, 148 n.19 (4th Cir. 2017), this Court, sitting en banc, noted that *Johnson* rejected the notion that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

However, *Kolbe* does not bind this Court for multiple reasons. First, *Kolbe*'s

Nevertheless, assuming arguendo that *Johnson* did overrule *Hoffman Estates*, *Johnson*—at most—rejected the "vague-in-all-its-applications standard" for facial vagueness challenges. *See Hasson*, 26 F.4th at 619. *Johnson* did not disturb other Supreme Court precedent regarding facial challenges.

Under this precedent, a facial challenge must fail where a statute has a plainly legitimate sweep. *See United States v. Stevens*, 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). In explaining the relationship between this standard and the vague-in-all-its-applications standard, the Supreme Court has observed:

> Under [*Salerno*], a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.* that the law is unconstitutional in all of its applications. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "plainly legitimate sweep."

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). This Court has likewise explained:

> Indeed, in [*Salerno*], the Supreme Court stated that a party asserting a facial challenge to a statute "must establish that no set of circumstances exists under which the Act would be valid." In the years since *Salerno*, some members of the Court have expressed reservations about the applicability of this stringent standard. But at the very least, a facial

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discussion of *Johnson* is dicta. *Kolbe* held that a challenged Maryland firearm regulation was not unconstitutionally vague. The majority thus necessarily did not need to reach the meaning of the *Johnson* decision. Second, *Kolbe* did not address the applicability of *Hoffman Estates* specifically. Third, since *Kolbe* was decided, this Court has regularly applied *Hoffman Estates* to facial vagueness challenges. *See Edgar*, 2 F.4th at 313; *Maages Auditorium*, 681 F. App'x at 264.

challenge cannot succeed if a "statute has a plainly legitimate sweep." *United States v. Comstock*, 627 F.3d 513, 518 (4th Cir. 2010). This Court has repeatedly applied this standard in assessing facial vagueness challenges. *See United Martin*, 700 F.3d at 135 ("As we have explained, a facial challenge is ineffective if the statute has a plainly legitimate sweep.") (internal quotation marks omitted); *see also United States v. Miselis*, 972 F.3d 517, 530 (4th Cir. 2020) ("In light of these twin concerns, a facial challenge typically requires a showing [that the law is unconstitutional in all its applications] or that the statute lacks any plainly legitimate sweep.") (internal quotation marks omitted).

Therefore, even if Appellees are correct that the *Hoffman Estates* framework no longer applies, they must still demonstrate that the challenged statutes lack any plainly legitimate sweep. The District Court failed to apply either standard in this case, warranting reversal and remand. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2016) ("When, as here, the district court applies the wrong standards, we tend to remand to allow the trier of fact to reexamine the record using the correct standards.") (internal quotation marks omitted).

If this Court proceeds to rule on the record before it under the correct standard, Appellees' vagueness challenge must fail for the reasons set forth below.

II

THE STATUTES ARE CONSTITUTIONAL

Appellees take a microscopic approach as did the District Court in focusing on snippets of the statutes while ignoring the overall import of the statutes and the limitations placed on them by case law. Moreover, they cannot show that enforcing the statutes has been a problem when only a miniscule percentage of students have been charged in the most recent reported school year in the record and incident reports show that the statutes have been applied to clearly criminal conduct.

A

Section 16-17-530 Is Not Vague

The Appellees attempt to support their argument with claims of subjective enforcement, references to school disciplinary codes regarding disorderly conduct, excerpts from incident reports when the complete versions show criminal conduct and claims of discriminatory enforcement as to students of color. These arguments all fail.

Appellees argue that the disorderly conduct statute lacks scienter and does not otherwise guide students or law enforcement. Scienter is not required but the statute is not without guidance. The disorderly conduct statute, when the subparts of part (A) are read together, is clearly intended to punish criminal conduct, not disciplinary

infractions.[4]

The provisions in part §16-17-530 (A)(1) regarding " [a]ny 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" provide limitations when construed together. Part (A)(1) encompasses only "grossly intoxicated condition" not lesser levels. To be consistent with the requirement for a heightened level of intoxication, the remainder of part (1) that includes a person "otherwise conducting himself in a disorderly or boisterous manner" must be interpreted as applying to a much higher degree of disruptive conduct that childish misbehavior. This interpretation is consistent with the part of the statute which applies to a person under §16-17-530 (A)(3) who "while under the influence or feigning to be under the influence of intoxicating liquor, without just

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4 As stated in *United States v. Esposito*, 754 F.2d 521, 524 (4th Cir. 1985):

> the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.

See also, Williams v. Williams, 335 S.C. 386, 390, 517 S.E.2d 689, 690–91 (1999) ("The Court should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.").

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, shall be deemed guilty of a misdemeanor . . . .” This construction is also compatible with the “fighting words” limitation imposed by case law (*see* below) on the “use of obscene or profane language” in part (A)(2).

Therefore, the terms “conducting himself in a disorderly or boisterous manner” require a criminal level of disruption beyond misbehavior that is consistent with the statute’s other parts that apply only to other criminal behavior including gross intoxication, use of fighting words, and discharge of a firearm near a school or highway without just cause or excuse except upon a person’s own premises. This construction is consistent with Captain Rinehart’s testimony that “just walking around engaged in conversation using a curse word. . . wouldn't be acting in a loud and boisterous manner. But if you have two individuals that are involved in an altercation and they're screaming and yelling at each other at the top of their lungs and every other word . . . is a cuss word, then, obviously, that would be loud and boisterous behavior.” JA, V. II , p. 830, ll 12-21. It is also coincides with the many incident reports discussed above that involve clearly criminal behavior. Therefore, the statute is not vague in that it “give[s] a person of ordinary intelligence adequate notice of what conduct is prohibited and . . . sufficient standards to prevent arbitrary and discriminatory enforcement.” *Manning v. Caldwell for City of Roanoke*, 930

F.3d 264, 272 (4th Cir. 2019).

The Supreme Court of South Carolina and the Court of Appeals have placed limits on the application of this statute to verbal conduct other than fighting words. *State v. Perkins*, 306 S.C. 353, 354–55, 412 S.E.2d 385, 386, (1991); *City of Landrum v. Sarratt*, 352 S.C. 139, 143–45, 572 S.E.2d 476, 478–79 (Ct. App. 2002); *Johnson v. Quattlebaum*, 664 F. App'x 290, 291 (4th Cir. 2016); see, Brief of Appellant at pp. 26 and 27. Appellees cite a non-binding 1994 Opinion of the Office of the Attorney General, but it precedes *Landrum* and *Quattlebaum* which are controlling.

Appellees have not supported their claim that the statute chills their free speech rights to criticize free speech under the above authority. They refer to a students charged after "exercising their right to criticize police," but the incident reports cited show fighting words or other disorderly conduct:

- when an officer asked for the student's identification card, he responded with fighting words "[y]ou don't need to know who I am, and I've done nothing wrong for you to be stopping me pus** bit**" (JA, V. II, p. 811);

- student asked to refrain from obscene language in presence of adults and other students said to officer " I don't give a f*. Do what you got to do" JA, Vol 2., Part B, p. 521. When notified of arrest, he "became disruptive and begin (sic) to snatch away from" officer. *Id.*

- Student pacing up and down hallway and refusing to comply with requests from administrators. She was yelling "I'm not going" and "stop following me" . . . She refused officer commands to stop and began using profane

language in the front hallway, The suspect was warned several times to stop this behavior . . . Students began coming out of their classrooms to see what was going on and visitors in the front lobby began showing concern. JA, Vol II. p. 526

- Student was "out of control and cursing and threatening staff." When the officer requested that he go back to class, he repeated "F* you and F* the Police." When advised that he was under arrest, he refused to cooperate and grabbed the officer's arm. JA, V. II, p. 816.

- Student was standing in a school hallway yelling at a teacher and pounding his fist into his hand. When the officer instructed the student to go back to his class, the student said "f* you" to the officer and "used obscene profane language" toward staff who tried to calm him down. JA, V. II, p. 519

- Plaintiff also cites the Kenny declaration, but she has been dismissed as a party to this case by consent. JA, V. III, p. 914. The incident report says she was "disruptive" as well as cussing after being asked to "get back." JA, V. II, p. 845.

In this section, Appellees also cite the S.P. declaration which shows that she was charged only after she refused to talk to the Principal and the School Resource Officer and then, on her way out of the library said "f* you" to a student with whom she had been arguing there and said "f* all of you" to students who clapped as she left the library. JA, V. II, pp. 378-379. Certainly, profanity used "in close proximity of smaller children" could be "a factor" along with "a lot of factors" in assessing whether disorderly conduct was occurring as Officer Rinehart testified. JA, V. 828 ll. 1-6 and 20-25.

As discussed above in the introduction, Appellees also attempt to rely on other

incident reports to bolster their arguments, but they omit key details and reports. The full reports show clearly criminal conduct.

The fact that some schools treat disorderly conduct as a disciplinary offense does not make this statute vague. That fighting or hitting may be treated as a disciplinary offense does not exempt it from being an assault and battery if charges are brought. In fact, the consequences for such behavior in a school under the 2015-2016 Charleston Student Code of Conduct, including "disruptive conduct," may result in a referral to law enforcement as well as school discipline. JA, V. II, p. 543. Appellees point to the 2020-2021 Charleston School District's Student Code of Conduct as treating disruptive behavior as a Level I offense, but that offense is at the elementary level. At the Secondary level under that Code, consequences for disruptive conduct may include referral to law enforcement as well as disciplinary measures. JA, V. II, p. 771. In fact, the Code states that "[s]ome instances of disruptive conduct may overlap certain criminal offenses, justifying both administrative sanctions and court proceedings." JA, V II, p. 770.

School resource officers understand the difference between disciplinary offenses and criminal conduct. That the opinions of individual law enforcement officers may differ does not make a statute unconstitutionally vague. *Martin v. Lloyd,* 700 F.3d 132, 137 (4th Cir. 2012). Captain Rinehart, whose responsibilities for the Greenville County Sheriff's Office include the school enforcement unit,

explained that that charges were made carefully only after investigation of the event, the totality of the circumstances, and discussions with school officials. JA, V. I, pp. 341, l. 3 – p. 344, l. 12; Brief of Appellant at p. 11.

Appellees argue that the statutes have been enforced in a discriminatory manner due to what they contend is an absence of objective criteria in the statute. They have no evidence of discriminatory enforcement other than racial differences in referrals which is patently insufficient. They do not compare substantively the conduct behind the referrals of white students and black students and have no evidence that the wording of the statutes is the reason for the differences in referrals. Therefore, the allegations regarding the different numbers by race as to referrals are insufficient to support Appellees' claims of vagueness. *Cf. United States v. D'Anjou*, 16 F.3d 604, 612 (4th Cir. 1994) ("[A] disproportionate impact upon blacks . . . is not sufficient to make out an Equal Protection Violation.) Appellees have not alleged an Equal Protection violation, but their allegations do not support their vagueness argument just as they would not support an Equal Protection claim.

Appellees attempt to distinguish individual cases cited by the Attorney General, but they all involve Courts upholding disorderly conduct statutes against vagueness challenges. The overarching principle is that courts generally find such statutes not to be unconstitutionally vague. As stated in *Schleifer by Schleifer v. City of Charlottesville,* 159 F.3d 843, 853 (4th Cir.1998), "[s]triking down ordinances (or

exceptions to the same) as facially void for vagueness is a disfavored judicial exercise. Nullification of a law in the abstract involves a far more aggressive use of judicial power than striking down a discrete and particularized application of it."

When Appellees allege that their action is as applied to a class of nearly 800,000 (JA, V. I, p. 263) school children, they do not present a case involving "a discrete and particularized application of . . ." the disorderly conduct statute. *Id.* Instead they ask this Court to remove a law enforcement tool that is applied to only a miniscule number of students each year relative to the student population as a whole and incident reports supplied by Appellees show serious criminal conduct in a number of instances. Many other charges are undoubtedly dismissed as they were with most of the individual Appellees in this case. Instead of striking this statute and taking away the enforcement tool, this Court should leave those students whose charges are not dismissed and expunged with the opportunity that they have under our criminal justice system to challenge these laws in Court as applied to them individually. Notably, in the many decades that the disorderly conduct statute has been in force, it has never been overturned by a State or Federal Court nor has it been found unconstitutional as applied to an individual student or adult. A broad stroke wiping out this statute as applied to all school children is not warranted.

B

The Disturbing The Schools Statute Is Not Vague

Contrary to Appellees' assertions, the statute does provide guidance and limitations as to its meaning. *In re Amir X.S.,* 371 S.C. 380, 639 S.E.2d 144 (2006) recognized several limitations in the statute. Appellees try to confine that Opinion to the overbreadth challenge it addresses, but the limitations are inherent in the wording of the statute and case law rather than in the nature of an overbreadth claim. Both the Appellees and the District Court err in limiting the construction of the statute to the overbreadth claim.

Appellees contend that the statute does not limit prohibited conduct to "disturb[ing] the learning environment." It does. *Amir X.S* expressly stated, that S.C. Code Ann. §16-17-420 "does not explicitly prohibit any type of gathering or expression except those which disturb the learning environment in South Carolina's schools." 371 S.C. at 380, 639 S.E. 2d at 149. The *Amir* construction follows the non-binding Opinions of the Office of the Attorney General and supplies the controlling interpretation of the laws.

Amir also recognized the restriction that "the statute is limited in the type of conduct that may be punished. The disturbance or interference is required to be done 'wilfully' or 'unnecessarily.' §16-17-420." 639 S.E.2d at 148–49. (emphasis added). *Amir* stated that §16-17-420, "is limited in its application by its own terms

so as to remove any substantial threat to constitutionally protected expression." *Id.* These terms limit the entire statute and although in the context of an overbreadth challenge, dispose of Appellees' claims that the statute infringe on conduct constitutionally protected via the due process clause. *Amir* further recognized that the statute does not reach protected speech:

> [Section 16-17-410] does not substantially prohibit First Amendment speech. By its terms, the statute does not apply to protected speech. Specifically, the disturbing schools statute does not prohibit spoken words or conduct "akin to 'pure speech.' " *Tinker*, 393 U.S. at 508, 89 S.Ct. 733. Nor does the statute broadly regulate conduct like a breach of the peace statute. [footnote omitted] *Broadrick*, 413 U.S. at 616, 93 S.Ct. 2908. Instead, § 16–17–420 criminalizes conduct that "disturbs" or "interferes" with schools, or is "obnoxious." S.C.Code Ann. § 16–17–420(1)(a) and (c). In applying the *Tinker* distinction between direct restrictions on silent, passive expression of opinion versus restrictions on expression when accompanied by disorder or disturbance of schools, § 16–17–420, like the regulations at issue in *McAlpine* and *S.H.B.,* clearly applies to the latter.

Amir X.S., 371 S.C. at 388–89, 639 S.E.2d and 148.

Therefore, §16-17-420 has the limitations that it must wilfully or unnecessarily disturb the learning environment, and it does not apply to protected speech. The remainder of Appellees' arguments regarding the disturbing the schools statute's attempt to distinguish Appellant's cases regarding the terms "interfere," obnoxious" and "loitering." They rely also on non-binding Opinions of the Office of the Attorney General that pre-date *Amir* and other cases. These terms are confined by the overall limitations in §16-17-420 recognized in *Amir*. This statute reaches

only criminal conduct that is well explained by *Amir* and the wording of the statute.

III

THE DISTRICT COURT ERRED IN CERTIFYING THE CLASS OF STUDENTS

The Court and Appellees rely on theoretical arguments about a common threat to the class of nearly 800,000 students rather than the reality that only a minute percentage of those students have been affected and are likely to be affected in the future. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' . . . ." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 349–50 (2011) '"What matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" *Id.* "Dissimilarities" in the instant case "impede the generation of common answers." Appellees cannot point to a single case in which a statutory issue was sufficient to create commonality among a vast class of dissimilar members.

That many, perhaps the vast majority of students, may prefer that the laws be enforced is not "merely speculative or hypothetical" as Appellees allege (citing *Ward v. Dixie Nat. Life Ins. Co.,* 595 F. 3d 164, 180 (4th Cir. 2010)). That less than

1/7 of 1% of the students were charged in the 2019-2020 school year supports a conclusion that the vast majority of students have no trouble conforming their conduct to the statute.[5] This tiny number of students charged and the incident reports of clearly criminal behavior supports a conclusion that many of that vast majority would favor the continued enforcement of the disorderly conduct statute and that they are unaffected by the disturbing the schools statute. For these same reasons, the class fails to benefit from the injunctive relief.

Appellees argue that all members of the class are threatened by the allegedly vague laws, but they point to no case reaching such a conclusion. Although claims of class members do not have to be identical, they must "advance the interests of absent class members." *Deiter* v. Microsoft Corp., 436 F.3d 461, 466–67 (4th Cir. 2006). As stated in *Deiter*:

> The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim. That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned. But when the variation in claims strikes at the heart of the respective causes of actions, we have readily denied class certification.

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5 Appellees say that schools were "not operating for a significant part of the" 2019-2020 school year. This Court should be able to take judicial notice that schools were not shutting down until after mid-March of that year.or slightly more than 25% of the year. Had schools been in session at the end of school year, the arrest numbers would still have been very low.

The claims of Appellees do not advance the interests of absent class members.

For the foregoing reasons, the District Court abused its discretion in certifying the class. *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015) ("An error of law or clear error in finding of fact is an abuse of discretion."). Its Order should be set aside.

IV

THE DISTRICT COURT LACKED THE AUTHORITY TO ORDER CLASS-WIDE EXPUNGEMENT

Appellees miss the point about class-wide expungement. The Court does have the authority to order class wide relief and the court does have the authority to order expungement, but not both together under the facts of this case. Expungement is sparingly granted by a court. It has been ordered as to class cases only in mass arrest situations of people similarly situated as to conduct, time and place. Instead, Appellees seek to inflate it here to cover potentially several thousand currently enrolled students.[6]

Appellees quote several cases, but in none of them did the Court apply expungement as a remedy. *Casale v. Kelly*, 257 F.R.D. 396, 414 (S.D.N.Y. 2009) involved only certification of a class rather than a determination of relief, and the

6 Although only around a thousand students were charged in the 2019-2020 school year, class wide relief would apply across several school years for the members of the class.

expungement sought in that case was alleged to have been refused by the defendants. The Court did not make a decision that expungement should be granted or how it would be implemented. Another case said that expungement should not be dismissed as a remedy at the Motion to Dismiss stage, but the Court apparently had not certified a class or decided the merits of the case, which was ultimately reversed on other grounds. *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1239 (9th Cir. 2019), opinion amended and superseded on denial of reh'g, 965 F.3d 1015 (9th Cir. 2020), rev'd and remanded, 142 S. Ct. 1051 (2022).

Appellees cite to *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974), but they appear to have misread the decision. In that case, the Supreme Court reversed the Court of Appeals' determination that "due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged."

Appellees cite *Goss v. Lopez*, 419 U.S. 565 (1975) as supportive, but it involves only removal of school disciplinary records of students who had been expelled – not criminal records that the Courts do not readily expunge. Courts have recognized that expungement of criminal records should be treated with much caution. As stated in *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990), a case cited in *United States v. Mettetal*, 714 F. App'x 230, 236 (4th Cir. 2017):

> The district court has a narrow power to expunge criminal records, *United States v. McMains*, 540 F.2d 387, 389–90 (8th Cir.1976), which is infrequently exercised, *United States v. Friesen*, 853 F.2d 816, 818 (10th Cir.1988), and reserved for unusual or extreme cases, *United States v. Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975). The district court balances the government's need to maintain extensive records to aid in effective law enforcement against the harm to the individual of maintaining these records by examining requests for expunction on a case-by-case basis.

Appellees argue that *Mettatal* is distinguishable because it was based upon an evidentiary issue rather than an unconstitutional law, but *Mettetal* referenced only mass arrest cases which are not like the instant case. Mettetal also noted that "Congress has provided for expungement of criminal records only in discrete and limited circumstances and . . . Legislation to further broaden the application of expungement has failed to progress. 714 F. App'x 230, 236, note 4.

The Police Accountability Project addresses class-wide expungement but, primarily cites authority regarding matters such as school integration and prison overcrowding rather than cases similar to the draconian order in the instant case that would expunge criminal record on several thousand students.

The cases regarding expungement cited in the Amicus Brief filed by the Police Accountability Project are inapposite. That amicus acknowledges that *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968) is a mass arrest case so it does not apply. *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) is also is inapplicable as a mass arrest case with some individual defendants all of whom were the subject of

voter intimidation. In contrast, each of the class members in the instant case was charged on a separate occasion for differing factual reasons.

To no avail, the Police Accountability also tries to distinguish *United States v. Mettetal*, *supra, Kowall v. U.S.,* 53 F.R.D. 211 (W.D.Mich.1971) and *Knox v. United States*, No. CIVA 9071792-HMHGCK, 2008 WL 2168871, at *6–7 (D.S.C. May 2, 2008), *report and recommendation adopted*, No. CA 9:07-1792-HMH-GCK, 2008 WL 2168866 (D.S.C. May 20, 2008), aff'd, 297 F. App'x 254 (4th Cir. 2008). *Mettetal* and *Knox* are applicable because they recognize that expungement is only to be used in "extreme circumstances." *Kowall* involved only one individual, and expungement was not allowed.

The Police Accountability brief makes various policy arguments related to the expungement of "minor convictions" in its records. Such policy matters are beyond the province of this Court. Moreover, although the statutes in question impose misdemeanor penalties, much of the conduct reflected in the incident reports is hardly minor. Those records should not be expunged under an extraordinary, sweeping order as to the class. Declining to award class-wide expungement does not deny any relief to students charged or convicted of delinquency. Those who want their records expunged could apply individually as permitted under South

Carolina law.[7]

V

THE AMICUS BRIEFS PRIMARILY ADDRESS POLICY ISSUES BEYOND THE PROVINCE OF THIS COURT

The three briefs filed primarily address policy issues regarding alternatives to criminal charges and the effects of charges generally on individuals which are beyond the jurisdiction of this Court to address. The Police Accountability Project brief does discuss legal issues related to expungement which are addressed above.

CONCLUSION

For the foregoing reasons, the District Court's Orders should be reversed except as to its dismissal of the Kenny and Nesmith Plaintiffs.

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7 S.C. Code Ann. § 63-19-2050 of the Juvenile Justice Code provides, in part, as follows
(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.
See also §63-19-3050 exceptions for persons who have certain prior adjudicatoions or if objection by law enforcement; §22-5-920 (Alternative expungement provisions for certain youthful offenders.).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) with the modified limit of 8,125 words, because it contains 7,475 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2022, I filed the foregoing Brief of Defendants-Appellant with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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