No. 17-1367

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KENNY, et al.,
Plaintiffs-Appellants,

v.

WILSON, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of South Carolina
Charleston Division

BRIEF OF PLAINTIFFS-APPELLANTS

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

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1367 Caption: Kenny, et al. v. Wilson, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

SP
(name of party/amicus)

by and through her next of kin Melissa Downs

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

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

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

Signature: s/ Sarah Hinger Date: 3/31/2017

Counsel for: Appellant

CERTIFICATE OF SERVICE

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I certify that on 3/31/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Sarah Hinger 3/31/2017
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No. 17-1367 Caption: Kenny, et al. v. Wilson, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Girls Rock, Inc.
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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Counsel for: Appellant

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No. 17-1367 Caption: Kenny, et al. v. Wilson, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Taurean Nesmith
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

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Counsel for: Appellant

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No. 17-1367 Caption: Kenny, et al. v. Wilson, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

DS
(name of party/amicus)

by and through her next of kin Juanita Ford

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Counsel for: Appellant

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Niya Kenny
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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Signature: s/ Sarah Hinger Date: 3/31/2017

Counsel for: Appellant

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STATEMENT OF JURISDICTION

Plaintiffs' claims arise under the Fourteenth Amendment Due Process Clause of the United States Constitution and 42 U.S.C. § 1983. JA 22 (Compl. ¶ 12). The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1334(a)(3)-(4). *Id.* (¶ 13). The District Court granted Defendants' motions to dismiss on March 3, 2017, JA 15 (ECF No. 91), and entered final judgment on March 6, 2017. JA 16 (ECF No. 92). Plaintiffs filed a Notice of Appeal on March 22, 2017. *Id.* (ECF No. 95). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

INTRODUCTION

Plaintiffs D.S., S.P., and proposed class members are schoolchildren who, by virtue of attending school—as adolescents, African Americans, and individuals with disabilities—are subject to the persistent threat of arrest[1] and prosecution under SC Code §§ 16-17-420 and 16-17-530 (respectively the "Disturbing Schools" and "Disorderly Conduct" statutes). These laws criminalize behavior deemed "disturb[ing]" or "disorderly," "obnoxious," or "boisterous," vague terms that encompass a range of conduct typical of developing adolescents. Under these laws, thousands of schoolchildren in South Carolina have entered the juvenile and

[1] South Carolina Code § 63-19-810 provides that when a juvenile sixteen or younger is "taken into custody," this is not referred to as an "arrest." As used in this brief, the term "arrest" encompasses the detention or seizure of both juveniles and adults as defined in South Carolina law.

criminal justice systems for behaviors such as not following directions, cursing, defending themselves, or being loud. Educators regularly address behaviors like these through classroom management techniques, positive supports, or a trip to the principal's office. Yet in the same circumstances, some students are subject to arrest for Disturbing Schools or Disorderly Conduct. Students have even faced arrest when speaking out against the mistreatment of a classmate by those charged with their protection.

Black students and students with disabilities are more likely to face prosecution for Disturbing Schools or Disorderly Conduct. Across the state, Black students like D.S. are nearly four times as likely as their white classmates to be charged with Disturbing Schools. D.S. and S.P., students with disabilities, have themselves experienced arrest under these statutes, and the collateral consequences that followed. They attend school each day under the threat of arrest pursuant to §§ 16-17-420 and 16-17-530. D.S., S.P., and class members have standing and seek to enjoin enforcement of the challenged laws so that they may pursue their education without fear of arbitrary and discriminatory arrest.

Plaintiffs also include young people, Niya Kenny and Taurean Nesmith, who have spoken out in protest when they witnessed police wrongdoing on their high school and college campuses only to be silenced through arrest and prosecution for

Disturbing Schools. The continued threat of arrest, made concrete through prior experience, chills the rights of these young people to voice their opinions about the appropriate and inappropriate roles of police on campus, and to go about their lives without fear of arbitrary and discriminatory police harassment. Niya Kenny and Taurean Nesmith have standing and together with Plaintiffs D.S., S.P., seek to enjoin enforcement of § 16-17-420 so that they may speak their opinions freely and attend and visit school without fear of arbitrary and discriminatory arrest and prosecution.

Plaintiff Girls Rock Charleston, Inc. ("Girls Rock"), a nonprofit organization that provides mentorship, music and arts education, and leadership development to its members, particularly those who have been or are at risk of involvement with the justice system, also has standing to challenge these laws, both as an association on behalf of its members and in its own right as an organization. Girls Rock members have standing on their own behalf, the interests at stake are germane to the organization's purpose, and the participation of individual members would be unnecessary in this suit for purely injunctive relief. Furthermore, in the course of its work, Girls Rock has had to divert significant resources to address the impact of the challenged statutes on its members that it would otherwise expend on other priorities—an injury to the organization that is concrete, traceable to the

defendants, and fully redressable by the requested relief. It should therefore be found to have standing along with the individual plaintiffs in this case.

STATEMENT OF ISSUE

1. Should the District Court's dismissal of individual Plaintiffs' claims on standing grounds be reversed?
2. Should the District Court's dismissal of Plaintiff Girls Rock, Inc.'s claims on standing grounds be reversed?

STATEMENT OF CASE

I. Statutory Framework

South Carolina Code § 16-17-420 provides:

> 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.

S.C. Code § 16-17-420(A). Violation is punishable by fine of not more than $1,000 or ninety days imprisonment. S.C. Code § 16-17-420(B). The law further provides that "[t]he summary courts are vested with jurisdiction to hear and dispose of cases involving a violation . . ." or if the person is a child, "jurisdiction must remain vested in the Family Court." S.C. Code § 16-17-420(C).

South Carolina Code § 16-17-530 provides, in relevant part:

> Any person who shall (a) be found . . . at any public place or public gathering . . . conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language . . . at any public place or gathering or in hearing distance of any schoolhouse . . . 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.

As provided by South Carolina Attorney General's Opinion, both statutes prohibit "[u]se of foul or offensive language toward a principal, teacher, or police officer," and "[u]se of obscene or profane language near a 'schoolhouse.'" 1994 S.C. Op. Att'y Gen. 62 (1994), No. 25, 1994 WL 199757. Further, the Disturbing Schools statute is construed to prohibit "[f]ailure by a student . . . to leave a school campus or school bus, when requested to do so," *id.*, "fighting," *id.*, and becoming "uncooperative and disruptive." Letter from Robert D. Cook, S.C. Assistant Att'y Gen., to Hon. John W. Holcombe, Sheriff, Chester Cty., 1999 WL 626642 (July 12, 1999). Attorney General's Opinions observe that "[n]o express limitations on the time of applicability of [§16-17-420's] prohibition are set forth," 1990 S.C. Op. Att'y Gen. 175 (1990), No. 90, 1990 WL 482448, and reason that the law can "apply to any part of the campus regardless of whether students or other students [sic] or faculty were present." 1994 S.C. Op. Att'y Gen. 62.

II. Statement of Facts

Each individually named Plaintiff has previously experienced arrest under either the Disturbing Schools or Disorderly Conduct statute, and in some cases, under both laws for the same conduct. JA 22-24, 35-36 (Compl. ¶¶ 17, 19, 21, 25, 86, 94). Additionally, over 9,500 young people in South Carolina have been charged with the crime of Disturbing Schools. JA 33 (¶ 70); JA 100 (French-Marcelin Decl. ¶ 15). When applied to school students, the Disorderly Conduct statute is enforced in a synonymous manner to the Disturbing Schools statute, JA 20, 34 (Compl. ¶¶ 6-7, 79-81); JA 196-207 (Kayiza Decl. Ex. B.1-5), and is similarly among the leading reasons young people enter the juvenile justice system, JA 33 (¶ 74); JA 193-194 (Kayiza Decl. Ex. A-B).

Plaintiffs D.S. and S.P. are adolescents who attend secondary schools in South Carolina. JA 21, 23 (Compl. ¶¶ 11, 18-21). D.S. is African American and both D.S. and S.P. have disabilities. JA 23 (¶¶18, 20). Plaintiffs face an ongoing risk of arrest under the Disturbing Schools and Disorderly Conduct statutes while attending schools. JA 21 (Compl. ¶¶ 10-11). They "fear being charged under the Disturbing Schools or Disorderly Conduct statutes in the future if, while on or around the grounds of a school, [their] actions are interpreted to fall under any of the broad terms of the statutes." JA 23 (¶¶ 19, 21). Similarly, proposed class

members are "elementary and secondary public school students in South Carolina, . . . each of whom faces a risk of arrest . . . under the broad and overly vague terms of the challenged statutes." JA 41 (¶ 109).

Normal adolescent development includes the development of behavioral and social skills. JA 31 (Compl. ¶ 55); JA 125-126 (Ryan Decl.). Educators routinely address adolescent behavior, and there are many techniques shown to prevent or reduce incidences of disruption and discipline. JA 31 (Compl. ¶¶ 56, 58); JA 130-145 (Ryan Decl.). In contrast, some practices can escalate student misbehavior and conflict. JA 31 (Compl. ¶ 60); JA 125-128 (Ryan Decl.). School Codes of Conduct reflect the impossibility of distinguishing behaviors—including "disruption," "fighting," "excessive noise," "boisterous play," and "profanity"— addressed through school responses from those treated as criminal under the Disturbing Schools and Disorderly Conduct statutes. JA 34 (Compl. ¶¶ 79-80); JA 222-224, 253-255 (Kayiza Decl. Ex. C.1); JA 287 (*id.* at Ex. C.2); JA 315 (*id.* at Ex. C.3); JA 413-414 (*id.* at Ex. C.5).

Students as young as seven have been charged with Disturbing Schools and Disorderly Conduct for infractions like cursing,[2] refusing to follow instructions,[3]

[2] JA 199 (Kayiza Decl. Ex. B.2) (African American male student arrested for Disorderly Conduct and Disturbing Schools after stating "in a loud and boisterous manner toward the SRO 'fuck you'"); B.3 (African American male student arrested for Disorderly Conduct after police

and involvement in a physical altercation that did not result in injuries.[4] JA 6, 20 (Compl. ¶¶ 6, 72). Student members of Girls Rock have been charged with Disturbing Schools for taking photographs in the restroom, talking to another student after being sent out of class, and complaining after being made to leave class and followed to the "tardy sweep" room, an incident that was also reported as Disorderly Conduct. JA 37-38 (Compl. ¶ 94); JA 206 (Kayiza Decl. Ex B.5); JA 62-64 (Carpenter Decl. ¶ 19).

Plaintiff D.S. was charged with Disturbing Schools after becoming involved in a physical altercation initiated by another student and in which D.S. was the only person who sustained an injury, a small lump on her head. JA 39 (¶ 101); JA 67-68 (D.S. Decl. ¶¶ 6-7, 71-74, Ex. A, B). Plaintiff S.P. was charged with

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officer "could clearly hear [Student] using obscene language while in the presence of adults and other students," student was advised "to refrain from the language or he would be charged" and the student allegedly stated "I Don't Give a F#ck, Do What You Got To Do!").

[3] JA 36 (¶ 92); JA 203-204 (Kayiza Decl. Ex. B.4) (Eight-year-old African American male student arrested for Disturbing Schools and Third Degree Assault after teacher reported that "the [student] stated 'there is a problem!' and then screamed at [the teacher] 'you want to listen to me now.' The teacher replied to him to calm down. He then began to grumple. He then threw his pencil on the floor along with his work and proceeded to kick his desk. The teacher repeated to [the student] three times to get his things but, he refused. He bugun [sic] his loud grumpling again. The teacher held the door open for him to walk out of the classroom and [the student] proceeded to push the teacher with his body shoving the teacher into the door frame. He then tried to slam the classroom door closed, catching the teacher[s] right arm. 'Ow! That Hurt [student]' the teacher replied. 'I don't care' stated [student].").

[4] JA 197 (Kayiza Decl. Ex. B.1) (twelve-year-old African American female arrested for Disorderly Conduct after a physical altercation with another student where "no injury [was] noted;" it was reported that the students "did disturb the normal operation of school").

Disorderly Conduct last year as a freshman. JA 38-39 (Compl. ¶ 99). S.P. has a Behavior Intervention Plan designed to address behavior associated with her disabilities, which impact her mood and conduct; the Plan designates "safety people" who S.P. can talk to if she gets upset. JA 38 (¶ 99); JA 84-85, 89 (S.P. Decl. ¶¶ 3-5, Ex. A). S.P.'s arrest stemmed from an incident that began when S.P. entered the library and encountered a girl who had been making fun of her throughout the morning. JA 38 (¶ 99). S.P. told the girl to stop talking about her before sitting down at another table. *Id.* Subsequently, the principal was called; when S.P. did not want to leave with the principal, she was told that she could be arrested and the School Resource Officer was called. *Id.* The student who had been making fun of S.P. was laughing and other students clapped as S.P. was escorted from the library. *Id.* As S.P. was leaving the library, she cursed at students who were making fun of her. *Id.* She was charged with Disorderly Conduct. *Id.*; *see also* JA 85-86, 93 (S.P. Decl. ¶¶ 6-23, Ex. D).

The numbers of Disturbing School charges have increased statewide from 2012 through 2015, as have racial disparities. JA 33 (Compl. ¶¶ 75-76); JA 100 (French-Marcelin Decl. ¶¶ 17-19). Statewide in 2014, Black students like D.S. were nearly four times as likely as their White classmates to be charged with Disturbing Schools. JA 33 (Compl. ¶ 76); JA 100 (French-Marcelin Decl. ¶ 19).

This is consistent with research showing that racial disparities in school discipline are most prevalent for more subjectively defined infractions, such as "disruption" or "excessive noise," than for infractions like smoking or vandalism, which are defined more objectively, and that disparities cannot be explained by differences in socioeconomic status or behavior across students of different races. JA 129-130 (Ryan Decl. pp. 8-9); JA 31-32 (Compl. ¶¶ 62-63). Students with disabilities like D.S. and S.P. are also more likely to be subjected to referral to law enforcement and arrest at school. JA 31 (Compl. ¶ 61); JA 128-130 (Ryan Decl.). As one South Carolina Solicitor recognized, "many [Disturbing Schools and Disorderly Conduct] charges are behavioral issues rather than criminal acts." JA 444 (Kayiza Decl. Ex. H).

Students have also faced arrest for Disturbing Schools when objecting to police misconduct. Plaintiff Taurean Nesmith is an African American student at Benedict College in Columbia, South Carolina, and resides in college-owned housing. JA 24, 36 (Compl. ¶¶ 24, 38); JA 54 (Nesmith Decl. ¶ 2). Plaintiff Niya Kenny received her G.E.D Diploma from Richland County Two School District in 2016. JA 22. Her younger sister attends Spring Valley High School, in Columbia, South Carolina, and Ms. Kenny is likely to "come to school to pick up [her] sister or to support her at a school event like her orchestra performance." JA 50 (Kenny

Decl. ¶ 28). Ms. Kenny also has "hopes of attending college in the near future." *Id.* (¶ 29).

Taurean Nesmith and Niya Kenny face "ongoing risk of arrest or referral under S.C. Code § 16-17-420," JA 21, and "fear[ ] future arrest and prosecution under the Disturbing Schools statute, if, while on or around the grounds of a school, [their] actions are interpreted to fall under any of the broad terms of the statute." JA 22, 24 (Compl. ¶¶ 17, 25). Ms. Kenny and Mr. Nesmith are particularly threatened by the potential for arrest when speaking critically of the police. JA 50 (Kenny Decl. ¶¶ 28, 29); JA 56 (Nesmith Decl. ¶ 26). This fear is engendered by their own prior experiences. JA 34-36 (Compl. ¶¶ 83-90).

The circumstances of Niya Kenny's arrest began when, while sitting in her high school math class, she noticed her teacher whispering to another student; she thought that the teacher was helping the student with her work until she heard him call for someone to escort the student from class. JA 34 (¶ 82). A police officer soon entered the room, and Ms. Kenny witnessed the officer forcefully pull her classmate from her desk, drag her across the floor, and handcuff her. JA 35 (¶ 84). Deeply frightened, Ms. Kenny attempted to document the incident and called out for someone to do something to stop the violent treatment of her classmate. *Id.* In response, Ms. Kenny was arrested, handcuffed, berated for voicing concern, and

eventually held in an adult detention center for several hours. *Id.* (¶ 85). The police incident report described her offense as a crime of Disorderly Conduct and she was charged with Disturbing Schools. *Id.* Humiliated and anxious after her experience, Ms. Kenny did not feel able to return to her high school; she withdrew and entered a GED program. *Id.*; *see also* JA 47-53 (Kenny Decl.).

Taurean Nesmith was arrested and charged with Disturbing Schools at his college-owned apartment building. A campus police officer who had repeatedly stopped and searched Mr. Nesmith and his friends approached them once more as the friends were leaving the apartment building, asking Mr. Nesmith's friend for identification. JA 36 (Compl. ¶ 88). Mr. Nesmith complained and continued to question the police officer's actions as the officer's attention turned toward Mr. Nesmith. *Id.* (¶ 89). Mr. Nesmith found himself handcuffed and transported to a detention center where he remained overnight. *Id.* (¶ 90). He was charged with Disturbing Schools and Disorderly Conduct; charges that were subsequently dropped. *Id.*; JA 54-57 (Nesmith Decl.).

Girls Rock is a non-profit organization providing mentorship, music and arts education, and leadership development programming to youth in Charleston, South Carolina. JA 24 (Compl. ¶ 22); JA 58 (Carpenter Decl. ¶ 4). Founded in 2011, Girls Rock advocates for and works directly with young people to develop leaders

dedicated to making positive change within their communities. Girls Rock operates a music and arts based summer camp, and has initiated a pilot program called the Girls Rock After School Program ("GRASP"), serving students in the Charleston County Public School System between the ages of twelve and eighteen, that targets youth who have struggled in school, have been expelled, or have been involved with the juvenile justice system. JA 59 (¶ 12). The program's goals include "interrupt[ing] youth involvement in the juvenile justice system and support[ing] a youth-led movement for social change in South Carolina." *Id.* GRASP youth leaders are encouraged to become mentors and leaders in the program, and participate in the group's organizing and outreach efforts. JA 60-61, 62 (Carpenter Decl. ¶¶ 14, 18).

In recognition of the negative impact that criminal justice involvement and specifically criminal charges for Disturbing Schools were having on its membership, Girls Rock has taken up efforts to challenge the Disturbing Schools statute and bringing awareness to the statute's negative impact on young people. JA 40 (Compl. ¶ 103); JA 59-60 (Carpenter Decl. ¶¶ 10-11). Toward this end, it has engaged in leadership development and advocacy training and has organized events and town halls at which participants provide testimony and performances

relating to school-based referrals to law enforcement and the impact of Disturbing Schools. JA 40 (Compl. ¶ 103); JA 62 (Carpenter Decl. ¶ 18).

Girls Rock has served students who attend Daniel Jenkins, an alternative middle school in Charleston that serves students who have been expelled from their schools for reasons including arrest for Disturbing Schools. JA 61 (Carpenter Decl. ¶ 16). In addition, Girls Rock has identified several individual members who have already been subject to arrest or criminal charges under the challenged statutes, including K.B., in the Charleston County School District, and D.D., a high school Student at Burke High School in Charleston. JA 37-38 (Compl. ¶ ¶ 93-98); JA 63-64 (Carpenter Decl. ¶ 19).

Girls Rock's organizing efforts challenging Disturbing Schools were initiated as an attempt to combat the harmful impact of the law on its members. JA 40 (Compl. ¶ 103); JA 62 (Carpenter Decl. ¶ 17). As a result of these harms, its volunteers have expended significant time and resources supporting students charged with Disturbing Schools and Disorderly conduct, including by mentoring and supporting young people harmed by criminal justice involvement and attending and presenting testimony at hearings. JA 40 (¶¶ 104-105); JA 64-65 (Carpenter Decl. ¶¶ 20-23). Because Girls Rock is primarily volunteer-run and has limited staff resources, the time Girls Rock volunteers have spent conducting these

activities has taken away from the time they would otherwise spend developing programming and providing other services to other young people, including providing them with music and arts education and taking them to arts events. It has also detracted from the time available to conduct critical administrative business necessary to sustain the operations of the organization, such as writing grant proposals and conducting fundraising activities. JA 40-41 (Compl. ¶ 105); JA 64-65 (Carpenter Decl. ¶ 22-23).

III. Procedural History

Plaintiffs filed suit on August 11, 2016, alleging that S.C. Code § 16-17-420 is void for vagueness on its face, and that § 16-17-530 is void for vagueness as applied to elementary and secondary school students. JA 7 (ECF No. 1). Citing the continued threat of arrest under the challenged statutes, and the significant injury to adolescents caused by an arrest, Plaintiffs filed seeking a Preliminary Injunction on August 16, 2016, and seeking Class Certification on August 17, 2017. Defendants subsequently moved to dismiss Plaintiffs' claims. JA 10-11 (ECF Nos. 27, 28, 34, 36, 41, 42, 44). Motions to Dismiss, as well as Motions for Preliminary Injunction and Class Certification were fully briefed. JA 8-14. Notice of hearing on Motion for Preliminary Injunction, Motion for Class Certification and Motions to Dismiss was provided on November 16, 2016. JA 14-15 (ECF Nos. 84, 85). The Court

heard argument on December 1, 2016, limited to issues raised in the Motions to Dismiss.[5] On March 3, 2017, the Court dismissed Plaintiffs claims for lack of standing. JA 15 (ECF No. 91).

SUMMARY OF ARGUMENT

Plaintiffs allege that S.C. Code § 16-17-420 is void for vagueness on its face, and that S.C. Code § 16-17-530 is void for vagueness as applied to elementary and secondary school students. Plaintiffs face a substantial risk of arrest under the challenged statutes, amply supported by alleged facts, including their own experiences and those of thousands of other schoolchildren statewide. Plaintiffs have sufficiently pled standing. [6] The District Court erred by requiring Plaintiffs to demonstrate a literal certainty of prosecution and a present intent to violate the challenged laws, and by failing to consider Plaintiffs' detailed allegations demonstrating a substantial risk of enforcement.

Plaintiffs establish standing on a number of well-recognized grounds. First, D.S., S.P., and proposed class members are members of a specific group,

[5] *See* JA 59 ("I'm not hearing any arguments on class certification"); JA 524 ("[W]inning an injunction against the enforcement of a state law, duly and properly passed by the state General Assembly, is a big deal. For a federal Court to do that, it's doing something you don't do every day. And, therefore, I don't think I should look at that."); JA 522-23.

[6] Defendants also sought dismissal on grounds of abstention. ECF No. 28. In reaching the question of Plaintiffs' standing to seek prospective injunctive relief, the District Court exercised its federal jurisdiction, necessarily concluding that abstention was not warranted.

adolescent school students, targeted by enforcement of the challenged statutes. On their face, the challenged statutes infringe Plaintiffs' constitutional rights, including due process rights and First Amendment rights. As such, the existence of a case or controversy is presumed.

Additionally, Plaintiffs' standing is demonstrated by the history of past enforcement, including against Plaintiffs themselves. Past enforcement against thousands of students is strongly indicative of the substantial threat of future enforcement. When coupled with the scope of enforcement authorized by the terms of the statutes and Attorney Generals' Office interpretations, it is abundantly clear that the threat of future enforcement is not abstract or hypothetical.

These alleged facts establish Plaintiffs' standing. It is well settled that Plaintiffs are not required to confess intent to violate the terms of a challenged law in addition. This principal is particularly relevant here, where Plaintiffs challenge §§ 16-17-420 and 16-17-530 as void for vagueness, lacking any clearly ascertainable standard that would provide notice to students or protect against enforcement that is arbitrary and discriminatory. Plaintiffs attend school every day exposed to the vague terms of unconstitutional laws, not knowing when their behavior will be characterized as criminally "disturb[ing]," or "disorderly," "obnoxious," or "boisterous."

Plaintiffs Niya Kenny and Taurean Nesmith face ongoing risk of arrest under the Disturbing Schools statute, including a chilling of their willingness to criticize police misconduct on or around school grounds. Plaintiffs were both previously arrested for Disturbing Schools after speaking out against police wrongdoing. The broad reach of the Disturbing Schools statute only amplifies Plaintiffs future risk of arrest. By its terms and through the Attorney General's Office's authoritative interpretation, the statute is applied when school is not in session, and in any place where students or teachers may be. As Mr. Nesmith's experience demonstrates, the broad and vague terms of the statute stretch from the college classroom to his own home.

Plaintiffs also include Girls Rock, an arts education and social justice advocacy organization serving at-risk youth in the Charleston area. Girls Rock seeks to enjoin the challenged statutes as an association on behalf of its members, as well as on its own behalf in order to protect its interests as an organization. Girls Rock's members have faced charges under and been directly harmed by the challenged statutes, and face a concrete and significant risk of future arrest. Moreover, as a volunteer-led organization with limited capacity, Girls Rock has had to divert scarce resources from the rest of its programming and from administrative activities critical to the organization's sustained viability in order to

provide support to students who have faced charges under the challenged statutes, and to engage in community organizing efforts aimed at reforming the challenged laws. The organization therefore has standing to seek injunctive relief on its own behalf as well as on behalf of its members.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* the District Court's dismissal of the complaint for lack of subject-matter jurisdiction. *Bennett v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 174, 178 (4th Cir. 2016). At the pleadings stage, the Court "must assume all well-pled facts to be true and draw all reasonable inferences in favor of the plaintiff."[7] *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013) (internal quotation marks omitted). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *see also Zak v. Chelsea Therapeutics Intern., Ltd.*, 780 F.3d 597, 601 (4th Cir. 2015).

[7] The District Court erred in applying "the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." JA 537-538 *Contrast Susan B. Anthony List*, 134 S. Ct.at 2342 ("[E]ach element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.") (citing *Lujan* at 504 U.S. 555); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (distinguishing a 12(b)(1) motion arguing that plaintiffs have failed to allege sufficient facts from a 12(b)(1) motion arguing that the jurisdictional allegations of the complaint are untrue).

II. Individual Plaintiffs face substantial risk of injury sufficient to confer standing.

A. Legal Standard

Article III standing is established when a plaintiff demonstrates "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 2336 (quoting *Lujan*, 504 U.S. at 560).

The District Court applied an unduly cramped application of the standing analysis, effectively requiring literal certainty of Plaintiffs' arrest, requiring Plaintiffs to allege a present "intention to engage in conduct proscribed by the challenged laws," JA 542; *see also id.* 543 ("the Court may not entertain a constitutional challenge to a state criminal statute . . . because [the plaintiff] *may* someday act in a manner that violates it."), and failing to consider the entirety of Plaintiff's complaint, discounting substantial factual allegations substantiating Plaintiffs' injury as concrete and far from hypothetical. JA 543 ("The allegations of 'fearing future arrest and prosecution' under the challenged laws . . . do not

demonstrate a likelihood of future injury[.]"). Each of these errors misconstrues Plaintiffs' allegations and the case law. While "[t]he difference between an abstract question and a 'case or controversy' is one of degree . . . and is not discernible by any precise test," case law points to several means of demonstrating a substantial risk of future injury without requiring literal certainty or a statement of intent to violate the law. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979). Plaintiffs' injuries far exceed the threshold requirements for standing under any measure, and their request for relief from the persistent threat of prosecution under unconstitutional laws is properly before the Court.

An unconstitutionally vague or overbroad law creates a particular form of injury. The existence of the law is coercive, requiring the individual to submit to arrest or contort her behavior in an effort to avoid prosecution. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). The contortions required may result in a silencing of speech and expressive conduct. *E.g. Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974) (plaintiff ceased distributing handbills to avoid risk of prosecution under challenged law). In the case of a vague law, where the line between innocent and illegal conduct is unclear, a plaintiff cannot adjust her conduct to eliminate the risk of prosecution. The Supreme Court has explained that a law is unconstitutionally vague

> not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.

Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (internal quotation marks omitted). Further, a vague law "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (internal alterations and quotation marks omitted). The law can be wielded to target disfavored individuals and groups. *See, e.g.*, *United States v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013) ("The sting operation that resulted in Defendant's arrest [for disorderly conduct] . . . specifically targeted gay men."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164, (1972) (in laws criminalizing vagrancy, "[d]efiniteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.").

For this reason, a plaintiff need not "'undergo a criminal prosecution' to obtain standing to challenge the facial validity of a statute." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 459 n.7 (1987) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973). In a pre-enforcement challenge, standing exists when "the threatened injury is certainly impending or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 134 S. Ct. at 2334 (internal quotation marks omitted) (citing

Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013)); *Kobe v. Haley*, 666 F. App'x 281, 294 (4th Cir. 2016); *see also Clapper*, 133 S. Ct. at 1150 n.5 ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.").

In pre-enforcement challenges, courts have found a substantial risk of harm where a plaintiff is among those "against whom the[ ] criminal statutes directly operate" or is particularly impacted by a statute because of her circumstances, even where no threat of prosecution has occurred. *Bolton*, 410 U.S. at 188 (1973) ("licensed doctors consulted by pregnant women" challenging criminal law governing abortions); *see also Fowler v. Alexander*, 478 F.2d 694, 697 (4th Cir. 1973) (discussing *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir. 1972), in which "plaintiffs engaged in the sale and distribution of newspapers . . . were threatened with prosecution under a permit ordinance"). As this Court has stated, "[a] non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents [ ] a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *N. Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) (internal quotation and alteration omitted) (non-profit distributing voter guides had standing to challenge law directed at entities attempting to influence

elections). This presumption applies when a statute facially infringes constitutional rights and "is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights." *Id.*

Similarly, a substantial risk of harm is found where plaintiffs express "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute."[8] *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298).

Additionally, although a plaintiff is not required to "undergo a criminal prosecution to obtain standing," evidence of prior enforcement "lends compelling support to the threat of future enforcement." *Hill*, 482 U.S. at 459 n.7 (internal quotation marks omitted). Prior enforcement against plaintiffs themselves is highly persuasive. *Susan B. Anthony List*, 134 S. Ct. at 2345 ("[T]he threat of future enforcement . . . is substantial. Most obviously, there is a history of past enforcement here[.]"). In *Kolender v. Lawson*, for example, the Supreme Court

[8] Whether a case or controversy exists "is not discernible by any precise test." *Babbitt*, 442 U.S. at 297. Accordingly, the Supreme Court's finding of standing on these grounds in *Babbitt* did not alter the standing requirement or establish an exclusive test. *Id.* at 298. As the Second Circuit recently noted, "the Supreme Court has not limited standing to pursue pre-enforcement challenges only to plaintiffs intending conduct arguably affected with a constitutional interest." *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 n.4 (2d Cir. 2015) (citing *Medimmune*, 549 U.S. at 122-25). Nor have plaintiffs been required to make specific statements of intended conduct, particularly where, "a statute is challenged for unconstitutional vagueness." *Id.* at 386 n.6 (citing *Holder v. Humanitarian Law Project*, 561 U.S. at 15–16). Further, as stated in *Susan B. Anthony List*, a plaintiff is not required to allege intent to engage in conduct proscribed by a statute. 134 S. Ct. at 2345.

easily found standing where plaintiffs were previously arrested under public order statutes that criminalized "loiter[ing] or wander[ing] on the streets." 461 U.S. at 353, 356 n.3. Enforcement against others in similar circumstances also demonstrates that the threat of enforcement is not hypothetical or "chimerical." *Steffel*, 415 U.S. at 459.

Past exposure coupled with the existence of a statute authorizing the unconstitutional conduct is strong evidence of substantial risk of harm. This principal is incorporated by distinction in cases finding plaintiffs lacked standing to seek prospective relief where defendants did not act pursuant to a law or policy. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), decided a few weeks after *Kolender*, the Supreme Court found that Lyons did not have standing to seek an injunction against the future use of police chokeholds. Lyons had not established a sufficient likelihood of injury where he would first have to be "stopped for a traffic violation or for any other offense" and resist arrest or commit some other action before the city's policy would authorize use of a police chokehold. *Id.* at 105. Lyons challenged conduct alleged to occur only after a police stop made pursuant to an unchallenged law, and then only authorized in reaction to resistance. *See also Church v. City of Huntsville*, 30 F.3d 1332, 1339 (11th Cir. 1994) (summarizing the factual posture in *Lyons*). In contrast, the Supreme Court reasoned that Lyons

would have standing if he alleged "that he would have another encounter with the police . . . and that the City *ordered or authorized* police officers [to perform illegal chokeholds where there is no resistance or provocation]." *Lyons*, 461 U.S. at105-106) (emphasis added). *Lyons* is thus consistent with the principle that a vague law that "authorizes or even encourages arbitrary and discriminatory enforcement," is subject to pre-enforcement challenge. *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Importantly, no method of demonstrating standing in a pre-enforcement challenge requires a plaintiff to "confess that he will in fact violate [the challenged] law." *Susan B. Anthony List*, 134 S. Ct. at 2345. Such a requirement would fail to capture the injury created by a vague or overbroad law. *MedImmune*, 549 U.S. at 128–29.

B. Plaintiffs D.S. and S.P. face a substantial risk of arrest under §§ 16-17-420 and 16-17-530.

Plaintiffs D.S., S.P., and proposed class members face an ongoing risk of arrest under the vague terms of the challenged statutes solely by virtue of attending school. JA 21 (Compl. ¶¶ 10, 11); JA 23 (¶¶ 19, 21). Plaintiffs allege ample facts demonstrating that the risk of harm is substantial and not hypothetical or "chimerical." *Steffel*, 415 U.S. at 459.

First, D.S., S.P., and members of the proposed class, by virtue of their position as school students in South Carolina, are members of a group "against whom the[ ] criminal statutes directly operate." *Bolton*, 410 U.S. at 188 (1973). Put another way, they are "engage[d] in a course of conduct"—attending school as adolescent students—which makes their actions susceptible to interpretation as violating the Disturbing Schools and Disorderly Conduct statutes. *Susan B. Anthony List*, 134 S. Ct. at 2342.

Amendments in 2010 specifically contemplate application of the Disturbing Schools statute to juveniles. JA 29 (¶ 46); S.C. Laws Act 273 (S.B. 1154) (vesting jurisdiction with the family courts for cases involving juveniles). Interpretations from the South Carolina Attorney General's Office contemplate application of both the Disturbing Schools and Disorderly Conduct statutes to school students in a range of circumstances. JA 30 (¶¶ 51-54). Attorney Generals' Opinions "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). Enforcement of these laws against juveniles is particularly relevant given that juveniles are required by law to attend school, S.C. Code § 59-65-10, bringing them directly under the reach of the challenged statutes. *Cf. Honig v. Doe*, 484 U.S. 305 (1988) (discussing

likelihood of future injury to student in the school setting in holding claims not moot); *J.W. v. Birmingham*, 143 F. Supp. 3d 1118, 1165 (N.D. Ala. 2015) (describing school student as an "involuntary member of a specific group of people" who "cannot avoid future exposure" to alleged unconstitutional conduct of school police).

Further, the challenged statutes impinge students' constitutionally protected rights, including the right to due process, the liberty to loiter for innocent purposes, and First Amendment freedoms. First, it is axiomatic that the use of profanity may not constitute a criminal offense except where such language constitutes fighting words; an exception that "requires particularly narrow application in cases involving words addressed to a police officer." *State v. Perkins*, 412 S.E.2d 385, 386 (1991) (citing *Hill*, 482 U.S. at 462). Yet South Carolina's Disorderly Conduct and Disturbing Schools statutes criminalize the mere use of profanity by students. S.C. Code § 16-17-530; 1994 S.C. Op. Att'y Gen 25 (1994) WL 199757); JA 20 (¶ 6). Numerous students, including S.P., face arrest for uttering a curse word. JA 34-35, 38-30 (¶¶ 80, 82-86, 99-100); JA 49, 52-53 (Kenny Decl. ¶ 24, Ex. A); JA 85 (S.P. Decl. ¶ 6); JA 199-201, 206-07 (Kayiza Decl. Ex. B.2-3, B.5).

The Disturbing Schools statute additionally prohibits "loitering," not joined with a second specific element of a crime, § 16-17-420, a provision which restricts

liberty rights protected by the Due Process Clause. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). And the statute's prohibitions against "interfer[ing] . . . in any way" or "act[ing] in an obnoxious manner," § 16-17-420, encroach on freedoms of expression, assembly, and association protected by the First Amendment. *Coates*, 402 U.S. at 615 ("Mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.").

The state has not disavowed the challenged statutes and their application to school students. *See Babbitt,* 442 U.S. at 302 (risk of injury was not speculative although defendants maintained that the criminal penalty provision "may never be applied" where "the State has not disavowed any intention of invoking the criminal penalty provision"). On these facts, the existence of a case and controversy is justifiably presumed and there is no basis for the Court to find the presumption overcome. *N. Carolina Right to Life*, 168 F.3d at 710.

The history of prior enforcement of the Disturbing Schools and Disorderly Conduct statutes against D.S., S.P., and other school students is further compelling evidence of their ongoing and substantial risk of arrest and prosecution under the challenged statutes. *Susan B. Anthony List*, 134 S. Ct. at 2345 ("[P]roceedings are not a rare occurrence. Petitioners inform us that the Commission handles about 20 to 80 false statement complaints per year[.]") (internal quotation marks omitted).

Charges of Disturbing Schools and Disorderly Conduct lead thousands of adolescents into the juvenile and criminal justice systems. JA 19-20, 33 (¶¶ 3, 5, 70); JA 100 (French Marcelin Decl. ¶ 15), JA 193-94 (Kayiza Decl. Ex A). Students are arrested for a range of common adolescent conduct, from not following directions to criticizing a police officer's use of force against a fellow student. JA 20, 23, 36-39 (Compl. ¶¶ 6, 19, 91-100); JA 196-207 (Kayiza Decl. Ex. B.1-5); JA 62-64 (Carpenter Decl. ¶19). The continually high numbers of students arrested for Disorderly Conduct and Disturbing Schools, year after year, reflects an ongoing substantial threat endured by Plaintiffs as they attend school.

Plaintiffs have alleged a substantial risk of harm under the challenged statutes. They are not required to "confess that [they] will in fact violate [the challenged] law[s]." *Susan B. Anthony List*, 134 S. Ct. at 2345. Clearly, intent cannot be require here, where the challenged criminal laws do not require intent to trigger enforcement. S.C. Code § 16-17-420 (criminalizing "unnecessary" conduct); S.C. Code § 16-17-530 (containing no intent requirement). Plaintiffs may also inadvertently violate the challenged laws. *Babbitt*, 442 U.S. at 301 ("Although appellees do not plan to propagate untruths, they contend—as we have observed—that erroneous statement is inevitable in free debate.") (internal quotation omitted).

Or they may be perceived to violate the laws. *Susan B. Anthony List*, 134 S. Ct. at 2344–45 ("SBA's insistence that the allegations in its press release were true did not prevent [SBA from being prosecuted]. And, there is every reason to think that similar speech in the future will result in similar proceedings[.]"). Plaintiffs face arrest for engagement in constitutionally protected conduct, like speaking out against police use of force. Plaintiffs also cannot ascertain in advance whether behaviors will be viewed as the type of common adolescent conduct routinely addressed by schools through supportive interventions or reprimand, or as criminally "disturb[ing]," " obnoxious," S.C. Code § 16-17-420, "disorderly," or "boisterous." S.C. Code § 16-17-530; JA 31-32 (¶¶ 55-58); JA 125-126, 130-45 (Ryan Decl.); *see also, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (recognizing that juveniles "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); *In re Jason W.*, 837 A.2d 168, 174 (Md. 2003) ("A typical public school deals on a daily basis with hundreds—perhaps thousands—of pupils in varying age ranges and with a variety of needs, problems, and abilities . . . Disruptions of one kind or another no doubt occur every day in schools, most of which, we assume, are routinely dealt with in the school setting[.]"). Teenagers are likely to act in ways that could be described by adults as disturbing, obnoxious, disorderly, or boisterous. These actions are

unintended or immature and unthinking, not contemplated in advance. Moreover, whether a young person's perceived "obnoxious" or "boisterous" behavior will be addressed by a simple redirection or reprimand, or through arrest is determined by the moment-to-moment judgment of those enforcing the challenged laws.

The risk of arrest under the challenged statutes is further heightened for D.S. and S.P. as students with disabilities, and for D.S. as an African American student. The vague terms of the Disturbing Schools and Disorderly Conduct statutes permit the same behaviors to be characterized as criminal when engaged in by D.S. or S.P. and as innocent when engaged in by a classmate. *See* JA 33 (Compl. ¶ 76); JA 100 (French-Marcelin Decl. ¶ 19); JA 31 (Compl. ¶ 61); JA 128-130 (Ryan Decl.). For years, and across the state, Black students are more likely than white classmates to be treated as criminally "disturbing" or "obnoxious" under the challenged law. This is consistent with research showing that racial disparities in school discipline are most prevalent for more subjectively defined infractions, such as "disruption" or "excessive noise," and that disparities cannot be explained by differences in socioeconomic status or behavior across students of different races. JA 129-130 (Ryan Decl. pp. 8-9); JA 31-32 (Compl. ¶¶ 62-63). *Cf. Woods v. City of Greensboro*, No. 16-1044, 2017 WL 1754898, at *10 (4th Cir. May 5, 2017) ("[Today,] where discrimination occurs, it does so in the context of more nuanced

decisions that can be explained based upon reasons other than illicit bias, which, though perhaps implicit, is no less intentional."). S.P.'s own experience provides an example of the criminalization of disability. When S.P. had a conflict with another student who had been making fun of her throughout the day, rather than implementing her Behavior Intervention Plan, which identified "safety people" who S.P. can talk to if she gets upset, a police officer was called in and she was charged with Disorderly Conduct. JA 38-39 (¶¶ 99-100); *see also* JA 444 (Kayiza Decl. Ex. H) ("[M]any [Disturbing Schools and Disorderly Conduct] charges are behavioral issues rather than criminal acts.").

Plaintiffs also seek relief from the future use of records related to arrest under the Disturbing Schools and Disorderly Conduct statutes against them. Absent relief, a prior charge under §§ 16-17-420 or 16-17-530 can bar a young person from participation in diversion. In other cases, records tied to enforcement of these unconstitutional statutes would reappear when a young person applies to college, seeks employment, or in a myriad of other circumstances. *Cf. United States v. Nesbeth*, 188 F.Supp.3d 179, 184 (E.D.N.Y. 2016) *appeal withdrawn* (September 9, 2016) (discussing collateral consequences stemming from a criminal record). The ongoing injury is evidenced by Defendants' reference to the retention of the record of D.S.'s guilty plea, (ECF No. 28-1 at 45), despite the reopening and

subsequent dismissal of her case. The ability for these records to be used against Plaintiffs works an ongoing injury, further securing Plaintiffs' standing.

The vague terms of the Disturbing Schools and Disorderly Conduct statutes authorize and even encourage the disparate arrest of Black students and students with disabilities, and for common adolescent behaviors and constitutionally protected conduct. They do not provide Plaintiff students with an objective means of understanding when their behavior will be considered criminal. Nor do the laws provide sufficient guideposts for law enforcement officers to avoid arbitrary and discriminatory enforcement. Plaintiffs have themselves experienced arrest and prosecution under these laws. The result is that Plaintiffs attend school each day under the threat of arrest under the challenged laws. The risk is substantial and establishes Plaintiffs standing to seek relief. The standing of D.S. and S.P. each independently assures the justiciability of the controversy before the Court. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (citing *Director, Office of Workers' Comp. Programs v. Perini North River Assocs.*, 459 U.S. 297, 303–305 (1983) (holding that presence of one party with standing assures that controversy before Court is justiciable); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264, and n. 9 (1977).

C. Plaintiffs Niya Kenny and Taurean Nesmith face substantial risk of arrest under § 16-17-420.

Plaintiffs Niya Kenny and Taurean Nesmith also face ongoing substantial risk of arrest under § 16-17-420, including in circumstances in which they would criticize police actions. JA 21-23 (Compl. ¶¶ 10, 17, 25); JA 50 (Kenny Decl. ¶¶ 28-29); JA 56 (Nesmith Decl. ¶ 26). Plaintiffs past actions are indicative of their willingness to speak out again in the future against police misconduct. JA 19 (Compl. ¶ 2).

Plaintiffs' fears of arrest are anything but speculative. Both have already faced arrest after protesting the actions of law enforcement. JA 35 (¶¶ 84-86); JA 36 (¶ 88). These arrests clearly infringed Plaintiffs' free speech rights. *Hill*, 482 U.S. at 462 ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). In authorizing and even encouraging these arrests, the Disturbing Schools statute chills Plaintiffs' ability to speak out against wrongdoing by police and to comment on the role of police on campus. Plaintiffs are subject to the terms of the Disturbing Schools statute on their own campus or when visiting a school campus Under the terms of the law, they face the threat of arrest and prosecution for any conduct or speech deemed to "disturb," or "interfere," or if they are considered in any way to be "loiter[ing] or

acting "in an obnoxious manner." § 16-17-420. These circumstances create a present injury and a substantial risk of harm satisfying the standing requirements.

The harm is amplified by the expansive reach of the Disturbing Schools law. Section 16-17-420 is interpreted to apply broadly, including to school property when school is not in session, JA 30 (¶ 54), and as far as a college-owned apartment building. JA 36 (¶¶ 88-99). Plaintiffs consequently risk arrest in a range of circumstances as they go about their lives. As Mr. Nesmith's experience demonstrates, he faces the threat of arrest when walking across campus to class and even at his own home.

The District Court incorrectly construed the broad reach of the challenged laws to conclude that Plaintiffs' injuries are too abstract. JA 543 ("[T]hese plaintiffs are no more entitled to equitable relief than any other citizen of South Carolina[.]").To the contrary, these laws' authorization to arrest and prosecute individuals with uncabined discretion adds to, rather than diminishes, Plaintiffs risk of arrest. An unconstitutionally vague law "set[s] a net large enough to catch all possible offenders" and in so doing produces a concrete injury. *United States v. Reese*, 92 U.S. 214, 221 (1876). "[W]here a harm is concrete, though widely shared, the Court has found injury in fact." *FEC v. Akins*, 524 U.S. 11, 24 (1998) (internal quotation marks omitted); *see also Public Citizen v. United States Dep't*

of Justice, 491 U.S. 440, 449–50 (1989) (plaintiffs had standing to challenge non-disclosure of information even where innumerable other parties might make identical requests for disclosure). *Contrast Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (plaintiffs lacked standing where they failed to show injury to "a particular right of their own, as distinguished from the public's interest in the administration of the law"). The more vaguely drafted the law, the more individuals are injured by the threat of enforcement. The reach of the law does not suggest that injury is abstract and not concrete; rather, it is indicative of its constitutional infirmity. "The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Hill*, 482 U.S. at 465 (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Powell, J., concurring).

D. Individual Plaintiffs satisfy Article III standing requirements of traceability and redressability.

The second and third elements of Article III standing, traceability and redressability, are also satisfied. "[A]n officer of a state is an appropriate defendant if he has some connection with the enforcement of the act." *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (citing *Ex Parte Young*, 209 U.S. 123, 157 (1908) ("The fact that the state officer by virtue of his office has some connection with the enforcement of the act[ ] is the important and material fact[.]")); *see also*

Parsons v. U.S. Dep't of Justice, 801 F.3d 701, 716 (6th Cir. 2015) (collecting cases).

No Defendant disputes their jurisdiction over schools in their respective counties or their responsibility for enforcement of the challenged statutes. JA 25-27 (Compl. ¶¶ 27-40). Sections 16-17-420 and 16-17-530 are enforced against students in each county of the state, including Charleston, Richland and Greenville, as evidenced by prior enforcement, including against Plaintiffs. JA 33-41 (Compl. ¶¶ 73, 83-87, 92-106). In each county, the county, each Defendant participates jointly in enforcement activities within and around the school district, including through assignment of school resource officers, who have statewide jurisdiction which permits them to enforce the law in schools outside of their county or city.[9] S.C. Code § 5-7-12; 2007 S.C. Op. Att'y Gen., 2007 WL 1651340, at *2 (May 9, 2007). Plaintiffs' injuries are fairly traced to Defendants, and that relief against each and any Defendant would redress Plaintiffs' injuries.

III. Plaintiff Girls Rock has established standing both through association and as an organization.

The District Court erroneously found that Girls Rock lacked standing to assert claims on behalf of its members on the same grounds that led it to deny

[9] See Plaintiffs' Opposition to Defendants Wilson et al.'s Motion to Dismiss, ECF 53, at p. 19 n.4 (collecting references to Defendants' school resource officer programs); Plaintiffs' Opposition to Defendants Motion to Dismiss, ECF 53, at p.10 n.1 (same).

standing for the individual Plaintiffs: that the injury to Girls Rock's members was too hypothetical, and that the organization had not alleged "an intention to engage in conduct proscribed by the challenged laws, or a credible threat of prosecution." JA 543. The District Court further found that Girls Rock lacked standing to sue on its own behalf because the harms it alleged lacked sufficient imminence, as they depended on the future actions of its members and "on the future action of law enforcement officers who may or may not be before the court," JA 545, and because Girls Rock did not fall within the applicable "zone of interests" protected. JA 546-47.

Each of these findings is erroneous. The District Court's order overlooked the well-established principle that permits organizations to assert claims on behalf of their members when their interests are sufficiently aligned, *or* on their own behalf when they themselves suffer harm, so long as the constitutional prerequisites of standing are otherwise met. In this case, Girls Rock has alleged injuries sufficient to meet the requirements for both associational standing on behalf of its members, and organizational standing to protect its own interests. This Court should reverse and remand.

A. Girls Rock has established associational standing on behalf of its members.

An organization establishes associational standing where: "(1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). "[T]o show that its members would have standing, an organization must 'make specific allegations establishing that at least one identified member had suffered or would suffer harm.'" *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)) (emphasis omitted). Moreover, the organization need not be a "membership" organization in a traditional or technical sense, so long as the organization serves a specialized community that benefits from its work. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977).

Girls Rock meets each of these requirements. First, it has a clearly defined membership—i.e. the school-aged youth in the Charleston area that it serves—that benefits directly from its work. JA 24 (Compl. ¶ 22-23); JA 59 (Carpenter Decl. ¶¶

4, 8). Girls Rock has also served students referred to the organization for participation in GRASP—an afterschool program specifically targeting "youth who have . . . been involved with the juvenile justice system" that is aimed at "interrup[ing] youth involvement in the juvenile justice system and support[ing] a youth-led movement for social change." JA 60 (¶12). Some of GRASP's participants attended Daniel Jenkins Creative Learning Center, an alternative middle school where students are placed when they have been expelled from their home school for reasons including criminal justice involvement. JA 60-62 (¶¶ 12, 16-17). GRASP youth leaders are members of Girls Rock, or, at a minimum, have the "indicia of membership." *Hunt*, 432 U.S. at 344. Young people who have completed the GRASP program are encouraged to become mentors and leaders in the program. JA 60-61 (Carpenter Decl. ¶ 14). These young people do not simply receive services from Girls Rock, they are direct participants in Girls Rock's organizing and outreach. JA 62 (¶ 18).

For the same reasons discussed above with respect to the individual Plaintiffs, Girls Rocks' members would have standing to assert claims in their own right. Girls Rock has identified three individual members who attend Charleston Schools, and who have already been charged under one or both of the challenged statutes. *See supra*; JA 37-38 (Compl. ¶ 94); JA 206 (Kayiza Decl. Ex B.5); JA 62-

64 (Carpenter Decl. ¶ 19). Those students have suffered numerous harms and disruptions in their education resulting from past charges, including being physically restrained and harmed, expelled and sent to an alternative school, and being placed in the Twilight program, an alternative program at Daniel Jenkins which is solely computer-based, provides less than a full day of instruction, requires students to arrange their own transportation, and restricts them from participation in most electives or extracurricular activities. JA 37-38 (Compl. ¶¶ 94-98); JA 61 (Carpenter Decl. ¶16). Moreover, both these students and other members of Girls Rock remain subject to—and face a concrete risk of future arrest and prosecution under—the challenged statutes due to their vagueness, merely as a byproduct of attending school. JA 24 (Compl. ¶ 23). *See Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 775–76 (4th Cir. 1995) (police association had standing to bring Fifth Amendment challenge to department policy requiring officers to take polygraph tests where policy remained in place and some members of the association would likely be affected it in the future). Girls' Rock therefore meets the first requirement for associational standing.

Second, the interests at stake are closely aligned with Girls Rock's mission. Girls Rock's "core principles . . . include challenging criminalization and promoting collective accountability for behavior." JA 24 (Compl. ¶22); JA 59

(Carpenter Decl. ¶ 7). Because of its focus on school-aged youth, "issues that affect students are central to the work that the organization does." JA 59 (Carpenter Decl. ¶ 6); JA 40 (Compl. ¶ 103). Girls Rock's first-hand experience observing the widespread negative impact of school-based referrals to law enforcement on "the ability of young people to contribute positively to their communities and to develop leadership skills, which are core objectives of Girls Rock's work," JA 59 (Carpenter Decl. ¶ 10), led it to initiate the GRASP pilot program. The organization's recent organizing efforts urging repeal of the Disturbing Schools law sprung directly from these organizational goals. Thus, the interests at stake in this case are not merely germane to Girls Rock's objectives, they lie at the very heart of its work. *See Equity in Athletics, Inc., v. Dep't of Educ.*, 639 F.3d 91 (4th Cir. 2011) (association of parents and students founded to challenge cuts in university athletic department mission was sufficiently aligned with those of its members in Title IX challenge to meet standing requirements).

Finally, because the relief sought is injunctive in nature, neither the claims brought nor the relief sought require the participation of individual members. All Girls Rocks members share an identical interest in being free from the threat of arrest and prosecution under these two unconstitutionally vague laws, and an injunction against their operation would provide complete relief to all Girls Rock

members equally. *See Equity In Athletics*, 639 F.3d at 99 (Title IX challenge to cuts in university athletics department brought by organization of students and parents did not require participation of individual members because suit sought only declaratory and injunctive relief); *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom. Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (nonprofit hospital association had standing to bring suit under § 1983 for violations of Social Security Act related to Medicaid reimbursements for member hospitals where relief sought was policy reform, and did not require findings specific to its individual members); *Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389, 392 (D.S.C. 2003). Moreover, while Girls Rock members could participate individually in the case, "[t]he relevant inquiry . . . is not merely whether circumstances permit members of the association to individually vindicate their own rights, but rather is whether the claims asserted or the relief requested *requires* each member to participate individually in the lawsuit." *Int'l Woodworkers of Am., AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1267 (4th Cir. 1981) (emphasis added). Girls Rock therefore satisfies the requirements for associational standing.

B. Girls Rock has standing to sue on its own behalf as an organization.

The District Court further erred in finding that Girls Rock lacked standing to challenge the laws on its own behalf as an organization on grounds that the harms it asserted were not sufficiently "imminent" and did not fall within the "zone of interest" at issue in the case. This reasoning erroneously conflated prudential standing considerations, third party standing and the zone of interest test, with the Article III standing requirement that a plaintiff demonstrate injury in fact. JA 546-547. The District Court failed to recognize the concrete harms Girls Rock suffers to its own financial and administrative operations as a result of the continued operation of the challenged statutes. Because these represent precisely the type of concrete harms that numerous courts have recognized are sufficient to confer organizational standing, and because the prudential considerations were misapplied in this case, this Court should reverse.

An organization has standing on its own behalf when it "seeks redress for an injury suffered by the organization itself." *White Tail Park*, 413 F.3d at 458 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). In such cases, the requirements of organizational standing are the same as applied to individuals: injury in fact, traceability, and redressability. *Id.*; *Friends of the Earth*, 528 U.S. at 180–81; *S. Walk at Broadlands Homeowner's Ass'n*, 713 F.3d at 182. "An organization may

suffer an injury in fact when a defendant's actions impede [the organization's] efforts to carry out its mission," or result in a "drain" on organizational resources to address a problem that the defendant is perpetuating or exacerbating. *Lane v. Holder*, 703 F.3d 668, 674-75 (4th Cir. 2012); *accord Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490, 493 (D. Md. 1996); *Equal Rights Ctr. v. Camden Prop. Trust*, No. CIV. PJM07-2357, 2008 WL 8922896, at *5-6 (D. Md. Sept. 22, 2008) (unpublished) (organization had standing when it has had to "divert its resources to investigate, test, and counteract" the defendant's alleged discriminatory conduct).

In finding that Girls Rock lacked standing, the District Court overlooked a long line of cases finding organizational standing in circumstances comparable to those presented here. In *Havens*, for example, the organizational plaintiff, HOME, was a non-profit whose mission was "to make equal opportunity in housing a reality." 455 U.S. at 368. In furtherance of this mission, it provided a "housing counseling service" and investigated and referred complaints of housing discrimination. *Id.* The Court found that HOME had established a concrete injury for purposes of asserting claims under the Fair Housing Act where the defendant's racial steering had frustrated the organization's "efforts to assist equal access to housing through counseling and other referral services." *Id.* at 379. Although

HOME as an entity obviously did not directly experience housing discrimination, the organization had devoted significant resources to identifying and counteracting defendant's discriminatory practices, which were contrary to its mission. *Id*. In light of the resulting "drain on the organization's resources" which had "impaired HOME's ability to provide counseling referral services" to low and moderate income residents, the Court found that there could "be no question that the organization has suffered injury in fact." *Id.* at 379.

Similarly, in *Valle del Sol Inc. v. Whiting*, the Ninth Circuit recognized that three separate organizations had standing to challenge a criminal provision related to transporting undocumented immigrants on vagueness and Supremacy Clause grounds. 732 F.3d at 1018. The organizations claimed that as a result of the law's enactment, they had been forced to "divert resources to educate . . . members," "address … members' and volunteers' concerns" about the law's effect, and to "counteract this frustration of [their] mission." In *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236, (11th Cir. 2012), the Eleventh Circuit found organizational standing for Alabama Appleseed Center for Law and Justice in a challenge to a law requiring public schools to report undocumented students to authorities, finding that the organization's diversion of resources away from the rest of the organization's immigration policy work and toward

educational presentations aimed at its members constituted injury sufficient to satisfy Article III. *Id.* at 1243–44. *Accord Georgia Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1260 (11th Cir. 2012) (finding organizational standing where increased inquiries forced organizations "to divert volunteer time and resources to educating affected members of the community and fielding inquiries").

Like the organizational plaintiffs in the above cases, Girls Rock has identified specific burdens placed on its activities directly resulting from the charging of students under §§ 16-17-420 and 16-17-530, and thus has standing as an organization. Contrary to the District Court's characterization, these injuries are not hypothetical or dependent "on the future action of law enforcement officers," JA 545, but have already occurred and continue to this day. In response to students being charged regularly under the challenged laws, Girls Rock has had to increase its public education efforts, advocacy, and outreach activities by redirecting its programming toward "efforts to challenge the Disturbing School statute and bring awareness to the statute's negative impact on Charleston area young people." JA 62 (Carpenter Decl. ¶¶ 17-18); JA 40 (Compl. ¶ 140). These efforts have included development of programming and community organizing activities such as speaking engagements and presentations by its members. *Id.* In addition, the

impact of the law on individual Girls Rock members has led Girls Rock volunteers to expend "significant time and resources to attend court hearings" in an effort to support those members in connection with adjudications for Disturbing Schools, JA 64-56 (Carpenter Decl. ¶¶ 20-21); JA 40-41 (Compl. ¶ 105). In light of the population that Girls Rock serves, it is more than likely that more of its members will face similar charges, and require the same supportive interventions, in the future.

Furthermore, the negative impact of the Disturbing Schools law on a broad scale has resulted in Girls Rock diverting scarce resources that would otherwise be spent on the organization's program and operations. Specifically, the time Girls Rock volunteers have spent on activities related to challenging the Disturbing Schools statute, including accompanying its members to judicial proceedings and providing activities through GRASP, is time that "would otherwise be spent developing programming and providing direct services to young people," which has "compromise[d] the positive mentorship activities that Girls Rock seeks to provide." JA 65 (Carpenter Decl. ¶ 22); JA 40-41 (Compl. ¶ 105). It has also diverted resources away from "attending to administrative business necessary to sustain the operations of the organization, such as writing grant proposals and conducting fundraising activities." JA 65 (Carpenter Decl. (¶ 23); JA 40-41

(Compl. ¶ 105).[10] These activities and the resulting harms amount to a "drain" on the resources of the organization—and frustration of its core mission of challenging criminalization and building youth empowerment—sufficient to confer standing. *See Havens*, 455 U.S. at 379; *Valle Del Sol*, 732 F.3d at 1018; *Williams*, 955 F. Supp. at 493; *Equal Rights Ctr.*, 2008 WL 8922896, at *5-6.

The District Court further erred in applying the prudential "zone of interest" test in this case. That test asks the question of whether a particular plaintiff "has a right to sue under [a] substantive statute," *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1393 (2014) (*quoting Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–676 (2013) (concurring opinion)), and "is not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). In this case, Girls Rock raises purely constitutional claims, rather than claims created pursuant to a substantive statute. To the extent the zone of interest test is applicable at all in such a context, it is

[10] In fact, since this suit was filed, the drain on the organization as a result of the necessity of conducting these activities has contributed to a severe budget crisis at the organization and resulted in a loss of funding for the GRASP program—although the organization continues to actively pursue replacement funding. As a result of this loss of funding, the organization is not able to serve as many students. Although these facts are not in the record at this time, Girls Rock would appreciate the opportunity to make this showing before the District Court should the case be remanded.

clearly satisfied where, as here, Section 1983 undisputedly provides a remedy.[11] *See Lewis v. Alexander*, 685 F.3d 325, 340 (3d Cir. 2012) (where plaintiffs had a private right of action for violation of the Supremacy Clause under section 1983, "we must necessarily conclude that they satisfy the zone-of-interests test"); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1526 (11th Cir. 1993) (in context of Section 1983, zone of interest test "requires only that the relationship between the plaintiff's alleged interest and the purposes implicit in the substantive provision be more than 'marginal'" (quoting *Clarke*, 479 U.S. at 399). Girls Rock may therefore challenge the laws in question so long as it has met Article III standing requirements, which, as shown above, it has done. *See Warth*, 422 U.S. at 511; *Havens*, 455 U.S. at 379; *White Tail Park*, 413 F.3d at 461*; Valle del Sol*, 732 F.3d at 1019; *Georgia Latino All. for Human Rights*, 691 F.3d at 1260.

Moreover, the District Court erred in applying the injury in fact standard to require violation of Girls Rock's own *Due Process* rights. JA 547. A legal violation may produce a variety of injuries conferring standing. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 183 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the

[11] As discussed *supra*, it is well-established that Section 1983 confers a private remedy to challenge laws that are unduly vague. *See Kolender v. Lawson*, 461 U.S. 352 (1983). Moreover, as a remedial statute, Section 1983 is to be liberally construed. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Dennis v. Higgins*, 498 U.S. 439, 443 (1991).

aesthetic and recreational values of the area will be lessened by the challenged activity.") (internal citation omitted); *Clinton v. City of N.Y.*, 524 U.S. 417, 432 (1998) (farmers' cooperative had standing to challenge tax law that "depriv[ed] them of a statutory bargaining chip" and thereby "inflicted a sufficient likelihood of economic injury"); *Craig v. Boren*, 429 U.S. 190, 193 (1976) (vendor had standing to pursue equal protection challenge to state law regulating alcohol sales).[12] Consequently, in the context of organizational standing, an organization need not suffer deprivation of the same rights at issue in the case. The plaintiff in Havens, for example, did not itself experience race discrimination, but instead, experienced harms related to its organizational mission and "core activities" as a result of the challenged practice. *See Havens*, 455 U.S. at 379 n.20; *see also Valle Del Sol*, 732 F.3d at 1018 (due process and supremacy clause challenge to state criminal law); *Georgia Latino All. for Human Rights*, 691 F.3d at 1260 (supremacy clause challenge to immigration law). As in those cases, the injuries Girls Rock has

[12] The District Court further erred when it failed to entertain Girls Rock's claims of injury on the ground that "third-party" standing was limited to the context of abortion or free speech rights. JA 546. On the contrary, third party standing has been found in a variety of different contexts. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 183 (Clean Water Act); *Clinton v. City of N.Y.*, 524 U.S. at 432 (tax law); *Havens*, 455 U.S. 363 (1982) (Fair Housing Act); *Craig*, 429 U.S. at 193 (Equal Protection); *Valle Del Sol*, 732 F.3d at 1018 (Due Process and Supremacy Clause challenge to state criminal law); *Arcia v. Florida Secretary of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014) (voting rights); *Georgia Latino All. for Human Rights*, 691 F.3d at 1260 (Supremacy Clause challenge to state immigration law). The District Court should therefore not have foreclosed standing for Girls Rock as an organization based on the nature of the claims asserted.

suffered as an organization in connection with combating the challenged laws and mitigating their effects on its members should be deemed sufficient both to confer standing and to place the organization within the relevant zone of interests for purposes of asserting a due process violation.

Finally, Girls Rock meets the requirements for both traceability and redressbility. The harms to Girls Rock as an organization are directly traceable to the Defendants, because they are a direct result of the arrest and prosecution of Girls Rock members under the challenged statutes. Each of the individuals charged with enforcing the law in Charleston schools is named as a party. JA 25-26 (discussing Charleston Defendants). The challenged laws empower these law enforcement officials with unbridled discretion to charge students under the laws—discretion that the record demonstrates they regularly exercise to charge students in Charleston schools with Disturbing Schools and Disorderly Conduct. JA 188 (Kayiza Decl. ¶¶ 11, 12) (Disturbing Schools was the number one reason for referral to the S.C. Department of Juvenile Justice in Charleston County in FY 2014-15); JA 37 (Compl. ¶ 94); JA 206-207 (Kayiza Decl. Ex. B.5) (K.B. Incident report); JA 104 (French-Marcelin Decl. Ex. A, Tab. IV (listing Charleston as among top five counties with highest rate of referral for Disturbing Schools)); JA 106 (*id.* Tab. V (showing racial disparities in arrests for Disturbing Schools in

Charleston)). These high rates of arrest of school-aged youth under these laws by the Charleston Defendants has led to an acute need to provide services to impacted youth and to conduct advocacy to raise awareness regarding the laws' effects, resulting in the concrete impact on Girls Rock's operations described above. These injuries are fully redressable by an injunction against the Charleston Defendants, as cessation of charging students with Disturbing Schools and Disorderly Conduct in Charleston would relieve the burden on Girls Rock volunteers whose time has been inordinately taken up with these activities. Girls Rock therefore meets the requirements of standing to seek an injunction against the challenged laws.

CONCLUSION

For the foregoing reasons, the dismissal of Plaintiffs' claims should be reversed.

REQUEST FOR ORAL ARGUMENT

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

May 15, 2017

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) because it contains 12,820 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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May 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2017, I filed the foregoing brief as well as the Joint Appendix filed herewith 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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ADDENDUM

2008 WL 8922896
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

The EQUAL RIGHTS CENTER, Plaintiff
v.
CAMDEN PROPERTY TRUST, et al., Defendants.

Civil No. PJM 07–2357.
|
Sept. 22, 2008.

OPINION

PETER J. MESSITTE, District Judge.

***1** Plaintiff Equal Rights Center (ERC), a non-profit civil rights organization located in Washington, D.C. that seeks, inter alia, to identify and challenge discriminatory architectural designs in housing and public facilities, has sued Defendants Camden Property Trust (CPT), a real estate investment trust organized under the laws of Texas that owns, develops, constructs and manages multifamily apartment communities throughout the country, and Camden Builders, Inc. (CBI), a Delaware corporation that provides contracting and building services and through which CPT conducts some of its business operations. Defendants have filed a Motion to Dismiss or, Alternatively, for Summary Judgment. Having considered the parties' arguments, the Court **DENIES** the Motion to Dismiss. [1]

I.

ERC represents the interests of 150 individual public members, most of whom are persons with disabilities. After conducting on-site testing at 46 CPT multi-family properties around the country, including facilities located in this judicial district, ERC alleges that it became aware that a large number of new multi-family housing complexes constructed by CPT do not include the elements of accessible design, as required by law, rendering those properties inaccessible to individuals with disabilities. [2] Following its testing, ERC examined Defendants' publications, including their website and Securities and Exchange Commission filings, and identified other of Defendants' properties possessing elements of design that ERC contends involve the same or similar violations. ERC submits that it found design deficiencies with all 46 CPT properties it tested—in the States of California, Colorado, Florida, Georgia, Nevada, North Carolina, Texas, Virginia, and the District of Columbia, as well as Maryland. ERC believes that approximately 80 other of Defendants' properties contain similar defects. It claims that these deficiencies violate the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3619(FHA), and the Americans with Disabilities Act, 42 U.S.C. §§ 3601–3619(ADA). ERC also claims that, since all subject properties were constructed for occupancy or remodeled after January 26, 1993, they are subject to the prohibition of discrimination found in 42 U.S.C. § 12182(a) and the design and construction requirements of 42 U.S.C. § 12183(a)(1) of the ADA. ERC alleges that these violations have been "continuing, ongoing, and demonstrate a pervasive pattern and practice of systematic and continuous FHA and ADA violations over many years." It seeks injunctive and declaratory relief as well as damages and attorneys' fees.

Defendants have filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, pursuant to Fed.R.Civ.P. 12(b)(1), (2), (6) and 56, arguing that the Court lacks personal jurisdiction over them, that ERC lacks Article III standing to bring its claims, and that many of ERC's FHA "design and construct" claims are time-barred. The Court addresses these issues in turn.

II.

***2** The Court first considers Defendants' argument that the Court lacks personal jurisdiction over them.

A.

Defendants argue that they are subject to neither general nor specific jurisdiction in Maryland. They further contend that they have had no contacts within Maryland related to ERC's claims that would satisfy the requirements for specific jurisdiction. Neither company, they say, played any role in the conduct underlying the Complaint, i.e. the design and construction of the Maryland subject properties. [3]

Defendants' principal argument with respect to general jurisdiction is that neither corporation has continuous and systematic contacts with this State. They point to CPT's status as a real estate investment trust organized under the laws of Texas and CBI's status as a Delaware corporation, suggesting that neither company owns property or conducts business in Maryland. Further, according to Defendants, CPT's status as a corporate parent of separate entities that may own and operate the subject properties does not make it subject to the Court's jurisdiction. They note that under Maryland law, a foreign corporation is not deemed to be "doing business within the state" for jurisdictional purposes "merely because of its subsidiary relationship to another corporation doing business in the state." *Glunt v. GES Exposition Servs., Inc.*, 123 F.Supp.2d 847, 873 (D.Md.2000).

ERC argues that evidence of Defendants' contacts with and presence in Maryland appears on Defendants' website as well as in Securities and Exchange Commission (SEC) filings. This evidence, says ERC, clearly establishes that Defendants are subject to both general and specific jurisdiction in this State. For example, on its publicly accessible website, www.camdenliving.com, CPT indicates that it "owns and operates" over 175 properties "dispersed across the United States." Six different properties located in Maryland are advertised as available. The CPT website contains one or more pages about CBI, where CBI is described as a "wholly owned subsidiary" of CPT, providing expertise, inter alia, in real estate "ownership, development, and management," "acquisition, disposition, and redevelopment," and "consulting, building, and construction services"—all things that CPT purports to do. The website, according to ERC, also provides a link to recent SEC filings and publications, including a 2006 Annual Report that advertises a Maryland property with the name "Camden Trace" as "Held for Sale." ERC points out that in the same document, Defendants announce a "gain" of $4.7 million from "partial sales of land" in a College Park, Maryland joint venture, in which they assert that they have retained a 30 percent interest. The Report also states that Defendants provided construction and development services to the joint venture, a 508–apartment community, totaling $1.9 million for 2006. Finally, ERC invites the Court's attention to CPT's SEC Form 10–K, in which CPT identifies its "Operating Properties" as including three "wholly owned" CPT properties in Maryland.[4] Here, too, CBI is identified as a "wholly-owned subsidiary of Camden ... one of the largest real estate companies in the nation ... [which is] publicly traded on the New York Stock Exchange (N.Y.SE) under the symbol CPT." ERC thus argues that CPT, through entities such as CBI, conducts continuous and systematic business, as well as very specific real estate operations, in Maryland and that the entities are subject to both general and specific jurisdiction in this Court.

B.

***3** When a court's power to exercise personal jurisdiction over a nonresident defendant is challenged by motion under Fed.R.Civ.P. 12(b)(2), "the jurisdictional question is to be resolved by the judge, with the burden on the plaintiff ultimately to prove grounds of jurisdiction by a preponderance of the evidence." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir.2003) (citing *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 59–60 (4th Cir.1993)). Where, as here, the court rules without conducting an evidentiary hearing, relying solely on the basis of the complaint, affidavits and discovery materials, "the plaintiff need only make a prima facie showing of personal jurisdiction." *Carefirst of Md.*, 334 F.3d at 396. In determining whether the plaintiff has proven a prima facie case of personal jurisdiction, the court "must draw all reasonable inferences arising from the proof, and resolve all factual disputes, in the plaintiff's favor." *Mylan Labs.*, 2 F.3d at 60.

C.

The Court agrees with ERC that the Court may exercise both general jurisdiction over Defendants and, insofar as any specific properties in this State may have challengeable design defects, specific jurisdiction as well.

"[F]or a district court to assert personal jurisdiction over a nonresident defendant, two conditions must be satisfied: (1) the exercise of jurisdiction must be authorized under the state's long-arm statute; and (2) the exercise of jurisdiction must comport with the due process requirements of the Fourteenth Amendment." *Carefirst of Md.*, 334 F.3d at 396. Because the limits of Maryland's long-arm statue for the exercise of personal jurisdiction are conterminous with the limits of the Due Process

Clause of the United States Constitution, the statutory inquiry necessarily merges with the constitutional inquiry. *Stover v. O'Connell Assocs., Inc. .,* 84 F.3d 132, 135–36 (4th Cir.1996). The court's exercise of jurisdiction comports with due process if defendant has "minimum contacts" with Maryland such that requiring it to defend its interests in the state "does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (internal citation omitted). General personal jurisdiction over a nonresident defendant exists if the defendant's activities in the state are "continuous and systematic." *Carefirst of Md.,* 334 F.3d at 397 (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.,* 293 F.3d 707, 711–12 (4th Cir.2002)). Specific jurisdiction exists if: "(1) ... the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) ... plaintiffs' claims arise out of those activities directed at the state; and (3) ... the exercise of personal jurisdiction would be constitutionally 'reasonable.' " *Id.* (citation omitted).

As ERC points out, CPT itself identifies several Maryland properties in its SEC Form 10–K, "wholly owned" properties as to which it has taken depreciation, an indication that CPT has availed itself of the privilege of conducting business activities within the State. Moreover, on CPT's website, www.camdenliving.com, CPT expressly holds itself out as doing business in Maryland. The website suggests that CPT "owns and operates" at least six properties in Maryland, ostensibly through CBI, while its Annual Report identifies the $4.7 million gain from a partial sale of land in the College Park joint venture. CPT also indicates that it received $1.9 million for design and construction services rendered in connection to the College Park endeavor, and $45 million in cash proceeds from the College Park land sales. All of these transactions would appear to have occurred with the active participation of CBI. The Court finds Defendants contacts with Maryland to be substantial, continuous and systematic, and fully sufficient to subject them to the general jurisdiction of the Court. Insofar as any of the Maryland buildings associated with CPT and CPI are alleged to have the accessible design deficiencies ERC complains of, both entities would also be subject to the specific jurisdiction of the Court.

III.

***4** The Court next considers Defendants' argument that ERC lacks Article III standing to bring claims under the FHA and ADA.

A.

Defendants first argue that ERC lacks organizational standing because the facts it alleges do not reveal a causal link between the challenged conduct and the injuries that ERC and its members allegedly sustained. *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (holding a court lacks subject matter jurisdiction under Article III unless plaintiff demonstrates that it has suffered an "injury in fact" that is "fairly ... trace[able] to the challenged action of the defendant") (citation omitted). Specifically, Defendants contend that ERC's claim that it has been frustrated in pursuit of its overall mission in "identifying, challenging, and eliminating discrimination in housing, employment, public accommodations, and government services" does not suffice to establish organizational standing. They argue that ERC's decisions to divert resources to investigate legal claims and pursue litigation do not constitute "injury in fact" for standing purposes; rather, say Defendants, these amount to no more than voluntary budgeting decisions that ERC has made on its own. Defendants argue that the critical inquiry for standing purposes under the FHA is whether a defendant's actions have "perceptibly impaired" the organization's ordinary activities. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). ERC's "generalized awareness that there may be violations of the law" at Defendants' properties, say Defendants, is, without more, too vague to constitute injury in fact for standing purposes.

Defendants continue: Even if ERC could establish standing with respect to some of the properties named in the Complaint, it cannot demonstrate standing as to properties outside ERC's named service area of Washington, D.C. Defendants note that ERC describes itself as serving disabled individuals in the Washington, D.C. area and thus argue that ERC cannot be harmed by any design and construction defects that might be found in buildings in Arizona, California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, North Carolina, Pennsylvania or Texas. Moreover, as to the 80 or so properties that ERC has listed in the Complaint,

but has not visited, Defendants argue that ERC cannot connect the alleged design and construction defects of these properties to an injury ERC has suffered. [5]

ERC responds that it has both organizational and representational (also known as "associational") standing. In other words, it claims damages to itself, as recognized in *Havens,* and also on behalf of its members. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 342–43, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The Supreme Court has made clear, it says, that Article III standing is available to organizations, such as ERC, that bring claims under the FHA. *See Havens,* 455 U.S. at 378–79 (holding that allegation that defendant's activities had caused plaintiff non-profit corporation to divert resources for organization's counseling and referral services was sufficient for Article III standing purposes for claims brought under the FHA). ERC submits that it did indeed suffer injury in fact within the meaning of the FHA when Defendants' actions caused it to divert resources to investigate, test, and counteract Defendants' perceived discriminatory conduct. Such injuries, says ERC, are of a piece with the types of injuries that *Havens* and its progeny have held sufficient for Article III standing for organizations. ERC also challenges the argument that because ERC's principal place of business is Washington, D.C., it lacks standing to assert FHA violations at properties outside the area, citing a decision from this District, *Equal Rights Ctr. v. Equity Residential, et al.,* 483 F.Supp.2d 482 (D.Md.2007), in which Judge Andre M. Davis of this Court held that the fact that ERC had undertaken a national investigation was sufficient to allege a cognizable injury outside of Washington, D.C. ERC contends that nothing in its Complaint suggests that its mission and activities are focused solely within the D.C. metropolitan area. It argues that whether all the properties it complains of have been visited or tested is legally irrelevant to the issue of standing. [6]

B.

***5** There are two ways to present a Rule 12(b)(1) motion to dismiss. *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir.1982). A defendant may either contend (1) that the complaint fails to allege facts upon which subject matter jurisdiction can be based, or (2) that the jurisdictional facts alleged in the complaint are untrue. *Id.* If, as in the case now before the Court, a defendant raises the first argument, then the allegations in the complaint are assumed to be true and the court will view the motion as it would one brought under 12(b)(6), *id.,* which motion "tests the sufficiency of a complaint." *Republican Party of N.C. v. Martin,* 980 F.2d 943, 952 (4th Cir.1992).

"For purposes of ruling on a motion to dismiss for want of standing, [the court] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Pacific Legal Found. v. Goyan,* 664 F.2d 1221, 1223 (4th Cir.1981) (quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

To establish Article III standing, a plaintiff must allege facts which demonstrate: (1) the existence of a "concrete and particularized" injury-in-fact; (2) "a causal connection between the injury and the conduct complained of"; and (3) that a favorable adjudication would likely redress the alleged injury. *Lujan,* 504 U.S. at 560–61. An organization may establish standing under two theories: either (a) standing in its own right, or organizational standing, or (b) representational, also known as "associational," standing based on the fact that members it represents have been harmed. *Md. Highways Contractors Ass'n, Inc. v. Maryland,* 933 F.2d 1246, 1250 (4th Cir.1991).

C.

The Court finds that ERC has alleged sufficient facts to support organizational standing in this case. [7]

Organizational standing under the FHA exists to the extent of constitutional "case or controversy" limits; prudential considerations play no role. *Havens,* 455 U.S. at 379. As the Supreme Court stated in *Havens:* "If, as broadly alleged, petitioners' steering practices have perceptibly impaired [the organization's] ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests ..." *Id.* at 379. Thus, to allege a redressable injury-in-fact caused by defendants under the FHA, a plaintiff need only allege facts that

demonstrate that the defendants' actions either caused the organization to divert resources to identify and counteract the defendants' unlawful practices, or that the challenged actions have frustrated plaintiff's mission. *Id.* at 369, 378–79. Moreover, in allowing suits by "aggrieved person[s]" under Section 3613 of the FHA, Congress evidenced an intent to define standing for purposes of the Act as broadly as is permitted by Article III, thereby depriving courts of the authority "to create prudential barriers to standing" in FHA suits. *Id.* at 372.

***6** In this case, ERC submits that it has had to divert resources to investigate, test, and counteract what it says is extensive discriminatory conduct on the part of Defendants. It argues that because of the forced diversion of resources, it has been frustrated in its mission of identifying, challenging, and eliminating discrimination in housing, employment, public accommodations, and government services through education, research, counseling, testing, enforcement and advocacy.

The Court agrees. The injuries claimed by ERC are precisely the types of injuries that *Havens* and its progeny have held sufficient for Article III standing. As Judge Davis of this Court said in *Equity Residential, supra* p. 9, "the very fact that plaintiff undertook a nationwide investigation of defendants' violations is proof positive of plaintiff's concrete injury; the resources devoted to the two-year investigation were clearly 'diverted.' Nothing more is required." 483 F.Supp.2d at 487. Other cases from this District and from other circuits have reached a similar conclusion. *See, e.g., Williams v. Poretsky Mgmt., Inc.,* 955 F.Supp. 490, 494 (D.Md.1996) (holding that the plaintiff met organizational standing requirements by alleging that it had "devoted significant resources to identifying and counteracting the defendant's practices, and because time was spent on these efforts, the organization was prevented from spending time on other efforts to end discrimination in the housing area"); *see also Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898, 905 (2d Cir.1993) (devotion and deflection of significant resources to identify and combat defendants' alleged conduct, including preparation of the lawsuit itself, is sufficient basis for standing); *Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir.1993) (same); *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.,* 982 F.2d 1086, 1095 (7th Cir.1992) (same); *Spann v. Colonial Village, Inc.,* 899 F.2d 24, 27–29 (D.C.Cir.1990).

Beyond this, the Court is unpersuaded by Defendants' arguments that ERC lacks standing to sue for relief for housing violations outside the Washington, D.C. area and that ERC cannot demonstrate injury-in-fact as a result of alleged violations at the 80 properties it has not yet visited. As Judge Davis of this Court noted in *Equity Residential,* ERC is an "organization with a mission that is national in scope and breadth," consequently rejecting defendants' argument that ERC could not have standing as a matter of law outside the greater Washington area. 483 F.Supp.2d at 487. Nothing in the Complaint in this case suggests that ERC's mission and activities are focused solely within the District of Columbia metropolitan area.

ERC has also alleged facts sufficient to demonstrate injury-in-fact as to those properties not yet visited. *See* Hr'g Tr. at 50–51, *Equal Rights Ctr. v. Archstone Smith Trust, et al.,* No. AMD–04–3975 (D.Md. Nov. 17, 2005) (Davis, J.); *Equity Residential,* 483 F.Supp. at 487; *see also Moseke v. Miller & Smith, Inc.,* 202 F.Supp.2d 492, 499–500 (E.D.Va.2002). As Judge Davis has noted, because "the tested properties share various combinations of common design elements with the untested properties, plaintiff may permissibly and reasonably allege on 'information and belief' the existence of violations at each of the properties named in the complaint." *Equity Residential,* 483 F.Supp.2d at 487. The same is true here. ERC has alleged that it tested over 30 percent of the subject properties and that it discovered FHA and/or ADA violations at every property tested. It also undertook efforts to ascertain violations at untested properties, including expending considerable staff time and resources reviewing published floor plans and composing a detailed analysis of tested to untested units. The composite of these allegations meets the *Havens* threshold for establishing ERC's standing under the FHA.

D.

***7** On statutory and prudential grounds,[8] Defendants also attack ERC's standing for purposes of the ADA. They argue that regardless of whether ERC meets the FHA's standing requirements, it may not pursue claims under the ADA unless it shows that it personally has been "subjected to discrimination" or that it has "reasonable grounds for believing that [it] is about to be subjected to discrimination." *Clark v. McDonald's Corp.,* 213 F.R.D. 198, 208 (D.N.J.2003). Defendants point out that

although Congress made clear that standing under the FHA extends "to the full limits of Article III," *Havens,* 455 U.S. at 372, Title III of the ADA contains no parallel expression of Congressional intent that would modify or abrogate prudential standing requirements; therefore stricter standing requirements must apply.

The Court agrees with ERC that it has standing to sue under the ADA. ERC reprises the injury-in-fact argument it makes in connection with its FHA claim, a proposition the Court has already endorsed.[9] The Court also agrees with ERC that rejection of prudential standing requirements is consistent with the legislative history and purpose of the Act. The ADA, including Title III, was modeled after other civil rights statutes where prudential standing limitations do not apply. *See* 42 U.S.C. §§ 12117, 12132, 12188 (enforcement of ADA is to be analogous to other remedies and procedures in other civil rights acts); *see also* H.R.Rep. No. 485, pt. 3, at 66 (1990). At least two Courts of Appeal have considered standing under Titles I and II of the ADA and have found that prudential limitations on standing do not apply. *See MX Group, Inc. v. City of Covington,* 293 F.3d 326, 335 (6th Cir.2002); *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 47–48 (2d Cir.1997), superseded on other grounds, *Zervos v. Verizon N. Y., Inc.,* 252 F.3d 163, 171 n. 7 (2d Cir.2001). District courts that have considered the matter of standing for claims brought under Title III of the ADA have also applied the *Havens* standard and have declined to restrict ADA claims by adding prudential limits on standing. *See Indep. Living Res. v. Or. Arena Corp.,* 982 F.Supp. 698, 760–61 (D.Or.1997); *Goldstein v. Costco Wholesale Corp.,* 278 F.Supp.2d 766, 769–72 (E.D.Va.2003) (finding no standing but using a *Havens* analysis).

Judge Davis summed up the relevant policy considerations in *Equity Residential:* "[I]t would be an absurdity of extraordinary proportions if, in this nationwide pattern and practice lawsuit seeking to vindicate the equal access rights of persons with disabilities, ERC were permitted to seek injunctive and declaratory relief which, if it were successful, would make it possible for persons with disabilities to live in otherwise nonconforming apartment units, while at the same time, as a result of a lack of plaintiff's standing under the ADA, persons with disabilities obtained *no access or limited access* to parking lots or leasing offices (public accommodations) at those very multi-family buildings." 483 F.Supp.2d at 487 n. 7.

***8** The Court concludes that ERC has established that it has standing to sue under the ADA.

IV.

The Court considers next Defendants' argument that ERC's claims regarding certain of the challenged properties are barred by the FHA's statute of limitations.

A.

Defendants contend that the FHA's two-year statute of limitations, 42 U.S.C. § 3613(a)(1)(A), bars claims with respect to many of the subject properties. They argue that the "continuing violations" theory, which provides that a plaintiff may recover for a string of incidents that form a single action even if some of those incidents occurred outside the limitations period, should not apply to an FHA claim involving a series of separately identifiable and actionable actions, such as failure to design and construct a building consistent with FHA requirements. In support of this proposition, they cite several recent Supreme Court cases in the employment discrimination context. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 120, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (holding that continuing violations theory applied to plaintiff's hostile work environment claim but not to the discrete, separately actionable claims of employment discrimination, such as termination, failure to promote, or denial of transfer, all of which must be brought within the applicable statute of limitations period); *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618, 127 S.Ct. 2162, 2175, 167 L.Ed.2d 982 (2007) (in the context of a Title VII pay discrimination claim, holding that discrete acts, even if they occur as serial violations, are different than continuing violations because they are each "independently identifiable and actionable"). Because, in this case, ERC's design and construction claims against Defendants constitute "discrete acts," Defendants argue, that those claims must have been brought within two years of the date the buildings were completed. Defendants submit that at least 106 subject properties in this suit were completed in their entirety prior to September 6, 2005. Accordingly, because ERC filed suit in this case on September 6, 2007, Defendants submit that ERC's FHA claims regarding those properties are time-barred.

Defendants cite several cases to the effect that the discriminatory practice in connection with design and construction claims that triggers the two-year statute of limitation period is the construction of each property, "which concludes on the date that the last certificate of occupancy is issued." *Garcia v. Brockway,* 526 F.3d 456, 466 (9th Cir.2008) (en banc). In *Garcia,* the Ninth Circuit held that plaintiffs had confused "a continuing violation with the continuing effects of a past violation" and noted that "[a]lthough the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct." *Id.* at 462–63. [10] In the same vein, Defendants argue that the alleged violations of which ERC complains in this suit constitute the continuing effects of a past violation rather than continuing violations and that the continuing existence of non-compliant properties does not toll the statute of limitations. *See Moseke,* 202 F.Supp.2d at 507 (noting that "a FHA noncompliant building which contains inaccessible features to disabled persons is more akin to a continuing effect rather than a continuing violation under the FHA" and holding that plaintiffs' design and construction claim was time barred); *Kuchmas v. Towson Univ., et al.,* No. RDB 06–3281, 2007 WL 2694186, at *——, 2007 U.S. Dist. LEXIS 66689, at *17 (D.Md. Sept. 10, 2007) (holding, in suit against defendant architects, that statute of limitations was triggered, "at the latest," when property was fully constructed). To apply the continuing violation doctrine to design and construction cases would effectively eliminate the statute of limitations, according to Defendants, because a developer could remain liable under Section 3604(f)(3)(c) decades after the completion of construction, regardless of whether the developer still owned the property.

***9** Finally, Defendants argue that ERC should not be able to recover for discrete violations that occurred outside the two-year statute of limitations by asserting that Defendants are repeat offenders of the FHA, even if the frequency and similarity of these violations demonstrate that Defendants engaged in a pervasive pattern and practice of discrimination. *See Morgan,* 536 U.S. at 105 (rejecting the notion that the "continuing violations" theory applies to "serial violations," even where the claims "are 'sufficiently related' to incidents that fall within the statutory period"). Private parties, say Defendants, may not bring a cause of action based on "pattern or practice" claims of discrimination. *See Lowery v. Circuit City Stores, Inc.,* 158 F.3d 742, 759–61 (4th Cir.1998) (in an employment discrimination case, holding that plaintiffs did not have a private pattern or practice cause of action), vacated on other grounds, 527 U.S. 1031, 119 S.Ct. 2388, 144 L.Ed.2d 790 (1999). Because the FHA authorizes the Attorney General, and not private groups or persons, to commence a civil action where he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" set forth in the FHA, Defendants contend that ERC cannot bring claims based on an alleged pattern or practice. *See* 42 U.S.C. § 3614.

ERC maintains that the continuing violation doctrine applies to the design and construction claims it brings under the FHA. [11] It argues that Defendants' reliance on *Morgan* and *Ledbetter* is inapposite, since those cases dealt with continuing violation claims in the Title VII context and not that of the FHA, where ERC asserts that both Congress and the Supreme Court have indicated their approval of the continuing violation theory. ERC relies principally on *Havens, supra* p. 8, where plaintiffs brought claims under the FHA alleging racial steering on the part of an apartment complex and its employees. There, says ERC, the Supreme Court expressly held that the "continuing violation" doctrine applies to FHA claims for statute of limitation purposes: "[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed [within the statute of limitations period after the] last asserted occurrence of that practice." 455 U.S. at 380–81.

ERC also argues that application of the continuing violation theory to claims brought under the FHA is supported both by the plain language of the statute and Congressional intent. It notes that in 1988, when Congress amended the FHA to include the provisions at issue here, it added language to clarify that a party can bring a claim within two years after the cessation of any ongoing discriminatory housing practice in order to bring the FHA in line with the *Havens* application of the continuing violations doctrine. *See* H.R.Rep. No. 100–711, at 33 (limitations period runs "from the time the alleged discrimination occurred or terminated"). Congress explained that the reason for the amendment was to

include the word "termination," which was "intended to reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice." *Id.* at 33, *reprinted in* 1988 U.S.C.C.A.N. at 2173, 2194 (citing *Havens,* 455 U.S. at 380–81).

***10** Finally, ERC argues that recent decisions in this district support a reading of the FHA that allows for application of the continuing violation theory to design and construction claims. It cites *Balt. Neighborhoods, Inc. v. Rommel Builders, Inc.,* 40 F.Supp.2d 700 (D.Md.1999), where the court held that the continuing violations theory was applicable in an FHA suit brought against a builder who claimed, as Defendants do here, that some of the units in the complex were built for occupancy more than two years prior to the action. Judge Black held that "the limitations period [did] not begin to run until the happening of the 'last asserted occurrence' of discrimination,' " which in that case was the sale of the last unit, i.e., when the owners and managers ceased to have control over the individual units. *Id.* at 710. ERC also cites an oral opinion of Judge Davis in *Archstone, supra* p. 13, in which he held that "the continuing violation theory recognized in *Havens* does and should apply" to design and construction claims brought under the FHA. Hr'g Tr. at 65. In addition, in *Equal Rights Ctr. v. Lion Gables Residential Trust, et al.,* No. DKC 07–cv–2358 (D.Md. Aug. 13, 2008), Judge Chasanow of this Court held that "the mere fact that a property was completed more than two years prior to the filing of the FHA claim does not automatically bar suit" and upheld the application of the continuing violation theory to FHA design and construction claims. Op. at 13. Judge Chasanow reasoned that the legislative history of the FHA, along with the differences in language between the FHA and Title VII, establish a distinction between continuing violation claims brought under the two Acts. *Id.* at 11–13.

B.

While not insensitive or unsympathetic to Defendants' arguments on the matter of limitations, the Court believes that ERC's arguments also have merit. Although this issue presents a close question, the Court is inclined to follow the recent decisions of colleagues who have upheld the application of the continuing violation theory to design and construction claims under the FHA. Accordingly, the Court holds that ERC's claims as to properties are not barred by the two-year statute of limitations. [12]

V.

The parties raise other issues that the Court finds warrant further discovery and which are more properly the subject of dispositive motions at a later stage in the proceedings.

First, Defendants argue that ERC's FHA claims regarding properties constructed prior to March 13, 1991, the effective date of the FHA, must be dismissed. [13] Defendants submit that at least one such property was not completed prior to that date. Second, Defendants argue that construction on nine properties had not yet been completed when the Complaint was filed and that those properties were not open for inspection or occupancy. Defendants thus submit that claims regarding those properties should be dismissed. ERC opposes both requests, noting that a motion to dismiss should not be converted to a motion for summary judgment "when the nonmoving party has not had the opportunity to discover information essential to [the] opposition." *McLaughlin v. Murphy,* 372 F.Supp.2d 465, 470 (D.Md.2004). The Court agrees with ERC and will deny Defendants' motion on those issues without prejudice.

***11** Defendants also request that the Court dismiss ERC's claims for retrofitting, [14] arguing that such relief would impose an onerous financial and logistical burden on Defendants out of proportion to ERC's claimed injuries. The Court believes it is too early in the proceeding to determine the appropriateness and availability of the requested relief. Defendants' Motion to Dismiss in this regard will also be denied without prejudice.

VI.

For the foregoing reasons, Defendants' Motion to Dismiss is **DENIED.** Defendants' Motion for Summary Judgment is **DENIED WITHOUT PREJUDICE.**

A separate order will ISSUE.

All Citations

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Footnotes

1 Although the Motion seeks Summary Judgment in the alternative, the Court finds that the issues before it are properly analyzable under the Motion to Dismiss and accordingly will proceed on that basis alone. The Motion for Summary Judgment will therefore be DENIED WITHOUT PREJUDICE at this time, with the understanding that such a motion may yet be appropriate following the close of discovery.

2 ERC claims that the noncompliant elements of accessible design include: doors in units that are not sufficiently wide so as to allow passage into kitchens, bathrooms, bedrooms and other areas by persons using wheelchairs; bathrooms and kitchens with insufficiently clear floor space for persons in wheelchairs; and light switches, electrical outlets and thermostats that are not placed in accessible locations.

3 In support of these assertions, Defendants cite the Affidavit of CPT's and CBI's Senior Vice President of Finance and Chief Financial Officer, Dennis M. Steen.

4 ERC notes that other Maryland properties are listed on Defendants' website as “under construction,” and that in the Schedule III to Defendants' 2006 SEC Form 10–K, Defendants indicate that they took depreciation on the Maryland apartment properties.

5 Defendants also argue that ERC has no representational standing to sue on behalf of its members. The claim that an unknown number of members have been injured, with no specific description of the nature of the injury to any members, is allegedly insufficient to establish standing. *See, e.g., ACLU v. NSA,* 493 F.3d 644, 673–74 (6th Cir.2007).

6 ERC also submits that it meets the requirements for representational standing.

7 Because the Court finds that ERC has adequately established organizational standing, it need not address the parties' representational standing arguments.

8 Even when Article III requirements are met, “a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.” *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99–100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979).

9 Defendants request jurisdictional discovery on the issue of whether ERC or its members have suffered injury in fact for Article III standing purposes. As previously explained in the text, the Court finds that ERC has adequately pled injury in fact for standing purposes. Discovery on the matter is therefore unnecessary.

10 Because the construction of properties in that case had been completed more than two years prior to plaintiffs bringing suit, the court held that plaintiffs' “failure to design and construct” claims were barred under the statute of limitations. *Id.* at 466.

11 ERC also submits that a number of the challenged properties were designed or constructed within two years prior to initiation of this lawsuit and that as long as it has alleged that some of the discriminatory conduct occurred within limitations, it can obtain relief for prior violations on the properties evidencing the same conduct.

12 The Court acknowledges that other circuits, including the Ninth Circuit in *Garcia, supra* p. 17, have taken a contrary view. 526 F.3d at 462–63 (holding that continuing violation theory does not apply to FHA design and construction claims in light of *Ledbetter*); *cf. Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.,* 210 Fed. Appx. 469, 481 (6th Cir.2006) (holding that “in cases where the plaintiff alleges that the owner of a multi-family housing development failed to design and construct the development so as to make it accessible to disables individuals, the limitations period will depend on the specific circumstances of each case”).

13 The FHA applies its accessibility requirements only to multifamily dwellings constructed for first occupancy “30 months after” the date of the Fair Housing Amendments Act of 1988. 42 U.S .C. § 3604(f)(3)(C). Because the FHAA was enacted on Sept. 13, 1988, the effective date for FHA design and construction claims is March 13, 1991.

14 ERC seeks full compensation for whatever detrimental effects Defendants' noncompliance with the various anti-discrimination laws may have had with respect to ERC's diverted activities as well as a comprehensive injunction ordering that all 126 of Defendants' properties at issue in this case be retrofitted so as to come into compliance with the requirements of the FHA and ADA.

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