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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

This case presents "a classic 'case' or 'controversy' within the meaning of Art. III." *Diamond v. Charles*, 476 U.S. 54, 64 (1986). Plaintiffs challenge South Carolina's Disturbing Schools and Disorderly Conduct statutes, S.C. Code §§ 16-17-420, 16-17-530, as unconstitutionally vague facially and as applied to elementary and secondary school students, respectively.

These laws infringe Plaintiffs' constitutional rights in numerous ways. They violate "the first essential of due process," *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015) (quotation marks and citation omitted), failing to provide notice and inviting arbitrary and discriminatory enforcement. *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (explaining that a law violates due process if it is impermissibly vague for either of two reasons: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." (internal quotation omitted)). For example, Black students are as much as six-and-a-half times as likely to be considered criminally "disturb[ing]." The vague statutes create further injuries to the right to loiter for innocent purposes, *City of Chicago v. Morales*, 527 U.S.

41, 53 (1999), the freedom to associate, *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971), and the right to verbally criticize police, "one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 463 (1987).

Plaintiffs' constitutional challenge to these statutes establishes a case or controversy in the absence of "compelling evidence to the contrary," a burden Defendants have not satisfied. *N. Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Plaintiffs' standing is further demonstrated by prior enforcement against them and against other students. The need to conform to an unascertainable standard, backed by the threat of arrest, follows students through their school experience each day. Defendants are jointly responsible for enforcement of the challenged laws against Plaintiffs and are proper defendants.

Girls Rock[1] is an organization whose members risk involvement with the justice system. Several have faced charges of Disturbing Schools and Disorderly Conduct. Girls Rock's organizational structure, emphasizing youth leadership and collective action, provides a platform through which disadvantaged youth come together to make their opinions heard. In

[1] Girls Rock Charleston, Inc. recently changed its name to Carolina Youth Coalition. For consistency, Plaintiffs will continue to refer to "Girls Rock" throughout this brief and will seek to amend the case caption as appropriate should the case proceed below.

addition, Girls Rock provides programming to build youth leadership capabilities. Arrest under the Disturbing Schools and Disorderly Conduct laws impacts youth negatively, undermining Girls Rock's mentorship and expanding the numbers of youth needing services. These facts establish Girls Rock's associational and organizational standing.

In response to this clear evidence, Defendants rely on incorrect legal standards and merits arguments that are both unpersuasive and irrelevant to standing. A case or controversy clearly exists and the dismissal of Plaintiffs' claims should be reversed.

ARGUMENT

I. Individual Plaintiffs have standing.

Plaintiffs establish standing on the basis of a future injury "if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, n.5 (2013)); *see also Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017), *cert. denied sub nom. Beck v. Shulkin*, No. 16-1328, 2017 WL 1740442 (U.S. June 26, 2017) ("we may also find standing based on a 'substantial risk' that the harm will occur") (quoting *Clapper*, 568 U.S. at 414 n.5). Defendants truncated reference to the "certainly impending" language of *Clapper*

misconstrues this standard. Defendants' Br. 2–4, 12. In any event, Plaintiffs establish both "substantial risk" of injury and "certainly impending" injury as argued below.

A. S.C. Code §§ 16-17-420 and 16-17-530 are non-moribund statutes that apply directly to Plaintiffs, presenting a clear case or controversy.

The assessment of standing must begin with the nature of this case as a challenge to state statutes, South Carolina's Disturbing Schools and Disorderly Conduct laws. S.C. Code §§ 16-17-420, 16-17-530. As stated by the Supreme Court, "[t]he conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III." *Diamond*, 476 U.S. at 64. The challenged statutes remain in effect and continue to be enforced against students, governing every aspect of Plaintiffs' school life. As students participate in class, walk through the halls, attend a football game or graduation—these laws announce to young people that they may be arrested and imprisoned if someone finds them "disturb[ing]," "disorderly," "obnoxious," or "boisterous." S.C. Code §§ 16-17-420, 16-17-530. In the case of the Disturbing Schools law, the threat follows students to college.

These vague laws encourage arbitrary and discriminatory enforcement. Through their own arrest or through witnessing the treatment

of classmates, schoolchildren learn that Black students are more often viewed as criminally disturbing, and that having a disability or criticizing authority can result in arrest. These laws present an impossible choice: submit to arrest or contort one's behavior in an attempt to avoid enforcement. This chills Plaintiffs' constitutional freedoms, including their rights to voice their opinions, associate with others, and loiter for innocent purposes. *See, e.g.*, *Morales*, 527 U.S. at 53 ("the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause"); *Coates*, 402 U.S. at 615 ("The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people.").

It also requires Plaintiffs to regulate other behavior in anticipation of what someone else might find objectionable. But a wide range of adolescent conduct might be found "disturb[ing]," "disorderly," "obnoxious," or "boisterous" to one person and not another. Whether these actions are *criminal* under §§ 16-17-420 and 16-17-530 is only defined in the moment-to-moment judgments of those charged with enforcement. The success of attempted compliance is ultimately beyond a young person's control. Plaintiffs are acutely aware of the sweeping power of these laws, as demonstrated by their own prior arrests.

Recognizing the impossibility of attempting to comply with an unconstitutionally vague law, the Supreme Court has made clear that an individual is not required to "confess that he will in fact violate [the challenged] law," *Susan B. Anthony List*, 134 S. Ct. at 2345, or "'undergo a criminal prosecution' to obtain standing to challenge the facial validity of a statute." *City of Houston v. Hill*, 482 U.S. at 459 n.7 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

Defendants make much of cases where no law or even policy authorized the feared injury. Defs.' Br. 15–16 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983)); *id.* at 18–19 (citing *O'Shea v. Littleton*, 414 U.S. 488, 496–97 (1974) ("the question becomes whether any perceived threat to respondents is sufficiently real . . . simply because they anticipate violating *lawful criminal statutes* and being tried for their offenses . . .")) (emphasis added); *id.* at 22–23 (describing *Beck*, 848 F.3d 262, a case in which "[p]laintiffs contended that the past data breaches increased the risk of future identity theft and the cost of protective measures"). In the absence of a law or policy, plaintiffs in these cases relied solely upon other evidence to argue that the feared injury was "certainly impending" or a "substantial risk," factual showings which fell short in these cases.

The Supreme Court and this Court have recognized that a challenge to a statute presents a fundamentally different circumstance. *See*, *e.g.*, *Lyons*, 461 U.S. at 106 (observing that to establish standing, Lyons would need to assert that police were likely to again place him in a chokehold either because they always do so *or* because "the City *ordered or authorized* police officers to act in such manner") (emphasis added). 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*, 168 F.3d at 710 (quoting *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)). The challenged laws apply directly to Plaintiffs, infringing their constitutional rights. Defendants provide no compelling evidence to rebut the existence of a case or controversy.

B. Injuries to Plaintiffs' First Amendment freedoms are particularly relevant to the vagueness challenge.

Niya Kenny was arrested and charged with Disturbing Schools after she witnessed her classmate being ripped from her chair and dragged across the room by a police officer and took the brave step to speak out for the mistreatment to stop. JA 34–35; 47–53. Taurean Nesmith was arrested after

he and his friends were repeatedly stopped by the same police officer and he questioned the officer's justification for stopping them yet again in the parking lot of his own apartment building. JA 36; 54–57. S.P. and other students have been charged under the challenged statutes upon uttering a curse word. JA 34–39; 52–53; 84–96; 199; 201; 206–207.

As these experiences demonstrate, a vague law's failure to provide notice and guidelines for enforcement is likely to produce injuries to other constitutional rights. Contrary to Defendants' assertion that these should be ignored, Defs.' Br. at 29, injuries to First Amendment rights are particularly relevant to vagueness analysis, prompting more stringent scrutiny. *See, e.g.*, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (recognizing First Amendment implications in applying due process vagueness analysis); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of those freedoms.'"); *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (recognizing the relevance of burdens on constitutional rights under the due process analysis).

Defendants also contend that the challenged statutes do not implicate First Amendment freedoms thanks to limiting constructions, thereby

eliminating standing. Defs.' Br. 26–28; 35–38. However, there is no limiting construction applicable[2] and a limiting construction would not eliminate standing. *Id.* at 35. Defendants' sole citation, *Moore v. Sims*, 442 U.S. 415 (1979), contains no discussion of standing. Moreover, the argument is tautological: arrest for exercising First Amendment freedoms would be unconstitutional, therefore no unconstitutional arrests will occur. Experience shows otherwise. To the extent the reach of § 16-17-530 has been limited in the context of adults, the failure of these efforts to protect the rights of

[2] Arguments regarding limiting constructions go to the merits of the case and were briefed below in Plaintiffs' Reply Memorandum of Law in Support of their Motion for Preliminary Injunction. ECF No. 56 at 4–5.

Defendants make several irrelevant and inaccurate contentions in discussing *Amir*. First, the single use of the term "disturb the learning environment" by the *Amir* court was not intended as a limiting construction and did not further clarify or narrow the law's terms. Defs.' Br. 27; 34. *Contrast In re Amir X.S.*, 639 S.E.2d 144, 149 (2006) ("Furthermore, [the statute] does not explicitly prohibit any type of gathering or expression except those which disturb the learning environment in South Carolina's schools."). In fact, the law may be enforced "regardless of whether students or other students or faculty [are] present," 1994 S.C. Op. Att'y. Gen. 62, 1994 WL 199757, and without limitation to the times of day or year when school is in session. 1990 S.C. Op. Att'y. Gen. 175, 1990 WL 482448. Second, *Amir* addressed overbreadth, a claim not at issue in this case, finding only that the statute did not implicate a "substantial" amount of First Amendment protected expression. *Amir*, 639 S.E.2d at 149. Third, Defendants inaccurately quote the terms of § 16-17-420 as prohibiting conduct engaged in "'willfully' and 'necessarily'" and alternatively "willfully disruptive and unnecessary." Defs.' Br. 34. This language does not appear in the statute or in *Amir*. Section 16-17-420 prohibits acting "willfully or unnecessarily."

students provides further evidence of the law's vagueness as applied.[3] *Johnson*, 135 S. Ct. at 2558 ("the failure of persistent efforts . . . to establish a standard can provide evidence of vagueness.") (internal quotations and citation omitted).

C. The constitutional inquiry properly focuses on the injury to those students impacted by the vague laws.

Defendants point to statistical evidence in *Beck*, 848 F.3d 262, which did not involve a vagueness challenge or a statute, to argue that Plaintiffs are not at substantial risk of arrest under the Disturbing Schools and Disorderly Conduct statutes. Defs.' Br. 24–25. These arguments miss the point. "Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992) (rejecting argument that the statute was not unconstitutional on its face because its "effects are felt by only one

[3] In their briefing on the Motion for Preliminary Injunction, Plaintiffs addressed the application of § 16-17-530 to the speech of elementary and secondary students. ECF No. 56 at 10–12. Plaintiffs and Defendants agree upon the well-recognized constitutional principle that speech cannot be subject to criminal penalty except in the narrow circumstance of fighting words. However, although the question is long settled in the context of adult arrestees, *State v. Perkins*, 412 S.E.2d 385 (S.C. 1991), opinions of the Attorney General's Office and patterns of enforcement confirm that this core constitutional principle is not respected for students under the terms of either statute. *See* Plaintiffs' Br. at 5.

percent of the women who obtain abortions"); *see also City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015).

While there are surely children in every school who occasionally act in a way that adults might describe as "disturb[ing]" or "obnoxious," it is true that not all of these children are charged with crimes under § 16-17-420. JA 100. Black students across the state are nearly four times as likely as their white peers to be charged with Disturbing Schools. JA 19–20; 101. In Greenville, Black students are 3.71 times more likely to be charged, JA 108, and in Richland, Black students are 4.78 times more likely to be charged, JA 111. In Charleston, Black students are more than six-and-a-half times as likely as their white classmates to be considered criminally "disturb[ing]" and the charge of Disturbing Schools is the most common reason that any young person in Charleston enters the juvenile justice system. JA 19—20; 106. The vague terms of § 16-17-420 authorize and encourage the use of discretion to enforce the law in an arbitrary and discriminatory manner. Black students bear the injury far more heavily than their classmates. So too, students with disabilities, those holding minority beliefs, and nonconformists are disparately burdened by the law. JA 128–129; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) ("These unwritten amenities [including wandering or strolling without any lawful purpose or object] have

been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness."). Disparate enforcement does not prove the law's constitutionality, but rather compounds the injury to students against whom it is enforced. Plaintiffs, having faced arrest before, are best suited to bring this case. If they do not have standing, no student would.

D. Section 16-17-420 "violates the first essential of due process" and can be challenged on its face.

Plaintiffs face substantial risk of numerous injuries in addition to injuries to First Amendment freedoms, most immediately, the injury to their due process rights. In response to substantial evidence establishing a case and controversy, Defendants argue on the merits that the application of the statute to Plaintiffs would be constitutional. These arguments are unpersuasive and have no bearing on standing. As this Court recently reiterated, "[i]n evaluating standing, the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 581–82 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15,

2017), *cert. granted*, No. 16-1436, 2017 WL 2722580 (U.S. June 26, 2017) (internal citation omitted).

To begin, Defendants propose to undo the vagueness doctrine, asserting that Plaintiffs cannot raise a pre-enforcement challenge to a criminal law on grounds other than the First Amendment. Defs.' Br. 31. Courts regularly consider facial challenges to criminal statutes and other laws and policies on a variety of grounds and commonly on due process grounds. *See, e.g.*, *Papachristou*, 405 U.S. at 171 (vagrancy statute violated due process on its face); *Johnson*, 135 S. Ct. 2551 (residual clause of federal sentencing law violated due process on its face); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (law prohibiting grocers from charging an "unjust or unreasonable rate" violated due process on its face); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (statute regulating abortion providers violated due process on its face). While civil laws and economic regulations may also be challenged facially, criminal laws are subjected to a heightened degree of scrutiny under the Due Process Clause. *See, e.g.*, *Hoffman Estates*, 455 U.S. at 499. "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson*, 135 S. Ct. at 2556–57 (quoting *Connally*

v. General Constr. Co., 269 U.S. 385, 391 (1926)). It would obliterate the vagueness doctrine to preclude a facial challenge to criminal laws.

Defendants' misapply a point of analysis typically arising where a criminal defendant challenges a statute under which he is convicted. As the Supreme Court stated, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Hoffman Estates, Inc.*, 455 U.S. at 495. This indicates a starting place for analysis, not a limitation on the ability to assert facial vagueness. It is inapplicable to a pre-enforcement challenge where the law may not have been enforced and where a plaintiff need not submit to arrest or confess intent to violate a law.[4] *See Susan B. Anthony List*, 134 S. Ct. at 2345; *Hill*, 482 U.S. at 459 n.7 (1987). Moreover, Defendants assume the law's application would be constitutional, a question of the merits presumed to favor Plaintiffs here. *Int'l Refugee Assistance Project*, 857 F.3d at 581–82. The Court should be particularly wary of extending this analysis, tied to the

[4] Moreover, as argued in Plaintiffs' opening brief, it is difficult if not impossible to confess intent to violate a law that does not require intent and that is so vague that it is not clear what conduct is prohibited. Pls.' Br. 21–22; 30–32.

refuted statement of dicta in *Hoffman Estates* that a law must be found vague in all applications, *see Johnson*, 135 S. Ct. at 2560–61.

Defendants continue to cling to the argument that a law must be vague in all applications. Defs.' Br. 33–39. As this Court recognizes, "Supreme Court precedent 'squarely contradicts the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Doe v. Cooper*, 842 F.3d 833, 842–43 (4th Cir. 2016) (quoting *Johnson*, 135 S. Ct. at 2560–61 (internal alteration omitted)).

In a similar vein, Defendants contend Plaintiffs' interpretation of the statute is unreasonably speculative. Defs.' Br. 35. Their argument is defeated by their own assertion that "the very kinds of misbehavior (cursing, disrupting class, refusing to follow instruction), which Plaintiffs claim is typical for enforcement under §16-17-420 . . . lies within the core of the statute's reach." Defs.' Br. 34. They again engage in circular logic, asserting that because § 16-17-420 authorizes arrest for a range of adolescent behaviors, these arrests are constitutional, and therefore, Plaintiffs cannot challenge the law on its face. Defs.' Br. 33. But the central question in this case is whether the Disturbing Schools statute is so vague as to authorize arbitrary and discriminatory enforcement, rendering the law—and any enforcement—unconstitutional.

E. The standing elements of traceability and redressability are met.

"The law is clear: when a plaintiff asserts a preenforcement challenge to a state statute, 'the proper defendants are the government officials charged with administering and enforcing it.'" *Ohio Valley Health Servs. & Educ. Corp. Health Plan v. Riley*, 149 F. Supp. 3d 701, 707 (N.D.W. Va. 2015) (quoting *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996)); *see also Mobil Oil Corp. v. Attorney General of Com. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power"); *Schulz v. Williams*, 44 F.3d 48, 61 (2nd Cir. 1994) ("It is well-settled that a state official may properly be made a party to suit seeking to enjoin enforcement of an allegedly unconstitutional act if that official plays some role in the enforcement of that act.").

This is true even where others play a role in enforcement. *See, e.g.*, *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 716 (6th Cir. 2015) ("[I]t need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement.") (citation omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Defendants contend that school officials make the choice "to pursue criminal

arrest and prosecution, rather than employing traditional forms of discipline." Defs.' Br. 30. The inability to differentiate behavior addressed through school discipline from crimes under §§ 16-17-420 and 16-17-530 and the further delegation of discretion to school officials to define and enforce the law is strong evidence of unconstitutional vagueness. These facts do not remove Defendants' role in enforcement.

Defendants do not dispute Plaintiffs' standing against Defendant Wilson but argue the remaining Defendants are not responsible for Plaintiffs' injuries. Plaintiffs have established a substantial risk of enforcement in each county where they attend school and live. *See, e.g.*, JA 33; 106; 108; 111. As set out in Plaintiffs' opening brief, no Defendant disputes jurisdiction or responsibility for enforcement of §§ 16-17-420 and 16-17-530. Pls.' Br. 38. Individual standing against Defendants confers Article III jurisdiction. *See Horne v. Flores*, 557 U.S. 433, 446–47 (2009) ("[T]he critical question is whether at least one petitioner has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.") (citations omitted); *Bostic v. Schaefer*, 760 F.3d 352, 371 (4th Cir. 2014).

Plaintiffs' standing against each Defendant is additionally and alternatively established by juridical link. A "juridical relationship among

defendants" establishes standing "where all members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which is alleged to be unconstitutional." *Dash v. FirstPlus Home Loan Owner Trust 1996–2*, 248 F. Supp. 2d 489, 504–05 (M.D.N.C. 2003) (quoting *Thompson v. Bd. of Educ. of Romeo Cmty. Schs.*, 709 F.2d 1200, 1205 (6th Cir. 1983)); *see also Payton v. Cty. of Kane*, 308 F.3d 673, 679 (7th Cir. 2002); *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838–39 (11th Cir. 1990). This Court, in *Faircloth v. Fin. Asset Sec. Corp. Mego Mortg. Homeowner Loan Trust*, recognized that the juridical link doctrine "might allow for third-party standing under the proper circumstances." *Faircloth v. Financial Asset Secs. Corp.*, 87 F. App'x 314, 318 (4th Cir. 2004) (citing *Payton*, 308 F.3d at 677–82; 5 James Wm. Moore, et al., Moore's Federal Practice ¶ 23.24(7)(b) (3d ed. 2003)); *see also Popoola v. Md-Individual Practice Ass'n, Inc.*, 230 F.R.D. 424, 431 (D. Md. 2005) (recognizing that the juridical link doctrine "could only be used to confer standing in cases where there exists 'either a contractual obligation among all defendants, or a state or local statute which requires common action by defendants,'") (quoting *Dash*, 248 F. Supp. 2d 489). Plaintiffs' claims present the exact exceptional circumstance in which the juridical link

doctrine applies. Defendants "are charged with enforcing . . . a state statute . . . which is alleged to be unconstitutional." *Dash*, 248 F. Supp. 2d at 504–05. Plaintiffs have standing against each Defendant.

F. Plaintiffs' claims continue to present a live controversy.

Defendants question whether Plaintiffs standing continues. Defs.' Br. 54 & n.8. This suggestion is without merit. All Plaintiffs had standing at the time the case was initiated, and while D.S. and Niya Kenny's sibling have graduated since the filing of Plaintiffs' opening brief, all continue to present a live controversy capable of redress.

Standing concerns whether a case or controversy exists at the outset of litigation, while mootness addresses whether there continues to be a live controversy during the duration of litigation. *See Friends of the Earth*, 528 U.S. at 190. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *United States v. Springer*, 715 F.3d 535, 540 (4th Cir. 2013). "It is no small matter to deprive a litigant of the rewards of its efforts . . . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."*Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). "As long as the parties have a concrete interest, however small, in the outcome of the

litigation, the case is not moot." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013). As a result, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *See Friends of the Earth*, 528 U.S. at 190; *accord Adarand*, 528 U.S. at 221 (explaining that lower court "confused mootness with standing and as a result placed the burden of proof on the wrong party") (internal quotation marks and citation omitted).

As discussed above, all Plaintiffs had standing at the time the case was initiated. S.P. continues to attend school in Greenville, and Defendants provide no basis for their suggestion to the contrary—a showing that is theirs to make. *See Friends of the Earth*, 528 U.S. at 190.[5] S.P., Taurean Nesmith, and Girls Rock clearly establish standing sufficient to conclude the

[5] In addition, this Court should not decline to review this appeal on standing or mootness grounds with respect to S.P. as an individual plaintiff simply because the school year has ended; her situation falls within the well-established exception for cases "capable of repetition yet evading review." This exception to a strict application of mootness applies for cases that are "in [their] duration too short to be fully litigated prior to its cessation or expiration, and . . . there is a reasonable expectation that the same complaining party would be subjected to the same action again." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *accord Lux v. Judd*, 651 F.3d 396 (4th Cir. 2011); *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 953 (E.D. Va. 2010). S.P. meets this standard: she will return to school in the fall, and, as the proceedings to date have shown, the case is unlikely to be litigated to completion within a single school year.

inquiry. *See, e.g.*, *Flores*, 557 U.S. at 446–47 ; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, & n.9 (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing . . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit[.]").

Nevertheless, D.S. and Niya Kenny maintain valid ties to their schools as alumni, and have other concrete interests entitling them to relief. They remain subject to the statutes on school grounds at alumni events, as guests of friends still in high school, and at other community events. *See Ross v. City Univ. of N.Y.*, 211 F. Supp. 3d 518, 523 (E.D.N.Y. 2016) ("Although graduation obviously may reduce frequency of visits to a university, a student's graduation alone does not necessarily preclude standing" where plaintiff "alleges intent to return to campus as an alumna for programs and activities."); *Denmeade v. King*, No. 00-CV-0407E(F), 2002 WL 31018148, at *4 (W.D.N.Y. Aug. 1, 2002) (claims of students with disabilities alleging college campus was inaccessible "are not mooted by their graduation because thereafter they are alumni in the same position that they were in as students—i.e., allegedly unable to access the buildings and events on campus."). They also remain subject to § 16-17-420 on college campuses, as Taurean Nesmith experienced, and "around" any school premises. S.C. Code

§ 16-17-420. D.S. hopes to begin studying nursing in the fall at Trident Technical College in North Charleston. And as discussed in Plaintiffs' opening brief, both Plaintiffs continue to seek relief from the future use of records related to their arrest under the challenged statutes. Pls.' Br. 33. In these circumstances, the "court can fashion some form of meaningful relief" to prevent the injury from enduring. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992); *cf. BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709, 714 (10th Cir. 2010) ("Even where it is too late to provide a fully satisfactory remedy the availability of a partial remedy will prevent the case from being moot." (internal quotation marks omitted; alterations incorporated)); *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 36 (1st Cir. 2011). Their continued exposure should moreover be sufficient to defeat a finding of mootness regardless of whether it would have established standing. *See Friends of the Earth*, 528 U.S. at 190.

Even if the Court found that D.S.'s individual claims are mooted, which it should not, a live controversy still exists because the case is a putative class action. Although the District Court's dismissal effectively denied Plaintiffs' motion for class certification without consideration, as argued in Plaintiffs' Memorandum in Support of their Motion for Class Certification, Plaintiff S.P., who remains a student in Greenville, was at the

time the suit was filed and remains an appropriate class representative. ECF No. 6 at 2–14. "[A] would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016).

Moreover, D.S. should similarly be considered an appropriate class representative regardless of any effects of her graduation, as her claims relate back to the date the suit was filed. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991) (recognizing mootness exception for class actions involving claims that are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires" (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). At a minimum, these issues merit consideration on remand because the putative class would have status independent of class representatives or the possible mootness of any class representatives' claims. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Harris v. Ballone*, 681 F.2d 225 (4th Cir. 1982) (partially reversing dismissal and denial of class certification, remanding to permit a proper representative to come forth, and observing that plaintiffs do

not necessarily lose eligibility as a class representative if they had standing at the time the case was filed, but their claims were mooted by a subsequent change in circumstances); *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978) (vacating dismissal and denial of class action without discovery).

II. Plaintiff Girls Rock has both associational and organizational standing.

A. Girls Rock has associational standing.

Girls Rock meets the requirements of associational standing, as stated in Plaintiffs' opening brief. Pls.' Br. 38–43. Its membership consists of Charleston students at risk of involvement with the justice system and includes several youth previously charged under the challenged statutes, including K.B. and D.D.[6] JA 37–38; 63–64. For the same reasons outlined by individual named Plaintiffs, these members would have standing to sue as individuals.

GRASP youth leaders are members of Girls Rock, or, at a minimum, have the "indicia of membership." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977). The purpose of associational standing is to assure "that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to

[6] Defendants mistakenly identify Plaintiffs Kenny, Nesmith, D.S., and S.P. as members of Girls Rock. Defs.' Br. 44.

have a 'personal stake in the outcome of the controversy.'" *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003) ("*OAC*") (quoting *Arlington Heights*, 429 U.S. at 261). This inquiry should not "exalt form over substance." *Hunt*, 432 U.S. at 345. Contrary to Defendants' assertion, the election of members or payment of dues are not necessary factors in establishing associational standing. Defs.' Br. 43.

Girls Rock is closely identified with its members and influenced by their interests. Young people who have completed GRASP are encouraged to become mentors and leaders, JA 60–61, and play an active role as direct participants in organizing and outreach. JA 62. This is in keeping with Girls Rock's organizational structure, which focuses on "community organizing" supporting "a youth-led movement for social change." JA 59–60. Public education activities, including town halls and the creation of advocacy materials, are organized through Girls Rock and provide "the means by which [members] express their collective views and protect their collective interests." *Hunt*, 432 U.S. at 345. Members of Girls Rock, many of whom struggle with homelessness and poverty, JA 38; 62–64, do not pay dues. Rather, Girls Rock provides a structure through which young people with otherwise limited resources are able to make their views known. Its

collective youth-led structure ensures that Girls Rock is "closely identified with and subject to the influence of" its members. *OAC*, 322 F.3d at 1111.

B. Girls Rock has standing as an organization.

Girls Rock satisfies all elements of organizational standing. Pls.' Br. 43–52. As this Court recognized in *Lane v. Holder*, "[a]n organization may suffer an injury in fact when a defendant's actions impede [the organization's] efforts to carry out its mission," 703 F.3d 668, 674 (4th Cir. 2012), where "the consequent drain on the organization's resources" constitutes "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

The plaintiff in *Lane* defined its purpose as "promoting the exercise of the right to keep and bear arms" through education, research, publishing, and legal action, *Lane*, 703 F.3d at 671, and it claimed injury solely because its "resources [were] taxed by inquiries into the operation and consequences of [the challenged law]." *Id.* at 674. Of further import, the *Lane* court determined that any injury to Second Amendment rights was "caused by decisions and actions of third parties not before [the] court rather than by the laws themselves." *Id.* at 673. In these circumstances, the organization had "merely abstract concerns with [the] subject." *Id.* at 675 (internal alterations, quotation marks, and citation omitted).

Like the plaintiff in *Havens*, Girls Rock's interests are far from the abstract interest in *Lane*. In *Havens*, the 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.* HOME established a concrete injury where the defendant's racial steering frustrated the organization's "efforts to assist equal access to housing through counseling and other referral services" and HOME devoted significant resources to counteracting the defendant's challenged practices. *Id.* at 379.

Girls Rock also serves a specific community and provides much more than responses to inquiries. Girls Rock has had to work harder and expend more resources in its mentoring and support efforts due to the enforcement of §§ 16-17-420 and 16-17-530 against students. JA 40; 60–61; 64–65. Contact with the justice system through enforcement of the challenged laws has collateral consequences and even a first time intervention by law enforcement significantly reduces the likelihood of graduation. JA 128; *see also Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245 (10th Cir. 2014) (Lucero, J., concurring) (discussing the negative consequences of criminalizing student behavior). When students are charged under §§ 16-17-

420 and 16-17-530, it undermines Girls Rock's efforts to help them develop skills to contribute positively and become leaders, a harm that directly impacts Girls Rock's mission. JA 59; 61. Moreover, the number of students charged places additional demand on Girls Rock's resources, which "detracts from Girls Rock's ability to help other young people." JA 40–44; 65. Additionally, similar to the need for increased investigation and complaint referrals to counteract discrimination in *Havens*, because § 16-17-420 significantly impacts youth members and communities supported through its mission, Girls Rock has had to increase efforts to challenge the statute, including organizing and participating in town halls to raise awareness and producing advocacy materials. JA 40, 62.

The time spent addressing the continuing consequences of criminal charges leaves Girls Rock less time for "providing direct services to young people…[and] attending to administrative business necessary to sustain the operations of the organization." *Id.* at 65.Girls Rock has amply demonstrated its standing.

CONCLUSION

The dismissal of Plaintiffs' claims should be reversed.

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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 6,443 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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July 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2017, I filed the foregoing brief 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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