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

KENNY, et al. Plaintiffs, v. WILSON, et al. Defendants.	Case No.: 2:16-cv-2794-CWH PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

AND MEMORANDUM OF LAW IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs respectfully move the Court to issue a preliminary injunction enjoining enforcement of South Carolina Code § 16-17-420 and, as enforced against elementary and secondary students, South Carolina Code § 16-17-503 until this Court renders a final judgment on the merits.

STATEMENT OF THE CASE

This is a constitutional challenge to South Carolina Code § 16-17-420, which among its terms makes it a crime for elementary and secondary school students to disturb their school or to act obnoxiously while attending school, and to the application of South Carolina Code § 16-17-530, Disorderly Conduct, to these students. Each year, thousands of adolescents enter into the juvenile and criminal justice systems on charges of Disturbing Schools and Disorderly Conduct. Absent intervention from this Court, when they return to school, children across the state of South Carolina will face the risk of criminal charges under these laws, in violation of their constitutional rights.

The vague terms of these laws allow a myriad of adolescent needs and behaviors to be funneled into the criminal justice system in an arbitrary manner. As the evidence in this case shows, students have been charged under § 16-17-420 and § 16-17-530 for a broad range of behaviors that cannot be distinguished from the types of adolescent conduct that school staff could be expected to address on a regular basis. Adolescent behaviors treated as criminal under these statutes include minor school infractions like refusing to follow directions and cursing, Declaration of S.P. ¶¶ 6; Declaration of K.B. ¶¶ 3, 8-9; Declaration of Micah Blaise Carpenter ¶ 19; Declaration of Niya Kenny ¶ 24, Ex. A, involvement in physical altercations, including where there was no injury or where the student was not the aggressor, Declaration of D.S. ¶ 10,

and expressing concern over the actions of a police officer. Kenny Decl. ¶ 24, Ex. A; Declaration of Taurean Nesmith ¶ 24; *see also infra* pp. 8-10. Children as young as seven years old have been charged with Disturbing Schools. Declaration of Megan French Marcelin ¶ 16.

The decision to treat adolescent behaviors as criminal does not harm all students equally. In 2014-2015, Black students were nearly four times as likely to be referred to the Department of Juvenile Justice for Disturbing Schools than were their white peers and racial disparities in Disturbing Schools referrals have increased in recent years. French Marcelin Decl. ¶ 19.

Disturbing Schools charges are consistently among the leading causes of young people's involvement with the justice system and referrals for Disorderly Conduct are also common. Declaration of Crystal Kayiza ¶ 5, Ex. A. The consequences of being charged under § 16-17-420 or § 16-17-530 are significant and the damage irreparable. In the process of being detained and charged, a young person may experience, among other things, forcible detention, handcuffing, and if seventeen[1] or older, transportation, detention, and prosecution as an adult. Adolescents charged with Disturbing Schools face up to ninety days imprisonment. S.C. Code § 16-17-420(B). A charge of Disorderly Conduct carries a potential of thirty days imprisonment. S.C. Code § 16-17-530. Even where a young person goes through a diversion program, or is not convicted or adjudicated, a criminal charge creates immediate and lasting burdens for her and her family. Young people may experience fear, anxiety, and humiliation and may feel ongoing stigmatization by their teachers, administrators, and peers at school. D.S. Decl. ¶¶ 18, 22; Kenny Decl. ¶¶ 8, 19, 22, 26. They may be required to submit to drug tests, evaluations, and other

[1] As of July 1, 2019, a young person who is 17 will be considered a juvenile if charged with Disturbing Schools. *See* SC LEGIS 268 (2016), 2016 South Carolina Laws Act 268 (S.916).

invasive requirements as a condition of diversion. D.S. Decl. ¶ 15, Ex. E. Families must find money for costs such as applications for a public defender, S.P. Decl. ¶ 27, and application and participation fees for diversion programs, which can amount to several hundreds of dollars. D.S. Decl. ¶ 15, Ex. E. Particularly for families with few economic resources, arranging transportation as well as work shifts, childcare, and other obligations to accommodate court dates, probation appointments, irregular alternative school schedules, and other requirements is onerous and detracts from the ability to provide positive support to a child who may be struggling. D.S. Decl. ¶ 17; Carpenter Decl. ¶ 19.

A Disturbing Schools or Disorderly Conduct charge has further collateral consequences for a young person's education. When a student's behavior is considered criminal, the disciplinary consequences applied are often more severe and can include expulsion, or assignment to alternative programs providing diminished educational opportunities. Carpenter Decl. ¶ 19; K.B. Decl. ¶¶ 17-22; S.P. Decl. ¶¶ 24-25; Expert Declaration of Joseph B. Ryan 7; *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245 (10th Cir. 2014)(Lucero, J., concurring)(discussing the negative consequences of criminalizing student behavior); *see also infra* pp. 8-10.

Enforcement of the Disturbing Schools and Disorderly Conduct laws is injurious not only to the young people who are charged but also to the broader school community and to educators attempting to instill positive school climate, Ryan Decl. 5, 6-7. Further, requiring the criminal justice system to respond to typical school conduct issues unnecessarily depletes resources. *See infra* pp. 20. It undermines law enforcement agencies seeking to develop positive relationships with young people and the broader community. *See infra* pp. 30. It is further damaging to the state, whose economic and civic interests are harmed when young people are diverted off of the

path toward educational degrees and good careers and into costly juvenile and criminal justice systems. *See infra* pp. 30-31.

BACKGROUND

I. School Approaches Have an Important Role in Shaping Adolescent Behavior

Although most educators would not think to discipline students for academic skill deficits, many rely on punitive approaches, including referral to law enforcement, to address behavioral and social skill deficits. Ryan Decl. 4.

Behavioral and social skills are learned through the course of normal adolescent development and educators can shape the behavior of developing adolescents positively by teaching and reinforcing pro-social behavioral skills. *Id.* at 4-5. Many well-researched practices have demonstrated success in allowing educators to prevent disruption or deescalate and restore the environment when a disruption begins. *Id.* at 9-23. These techniques exist to address a continuum of student abilities and needs, *id.* at 10-11, starting with simple tools like attention to the classroom environment, including layout and routine and providing praise to reinforce positive behavior and decrease challenging behavior. *Id.* at 11-12. While more intensive interventions may be required for the small percentage of students with the highest levels of need, *id.* at 15-17, implementation of techniques such as Functional Behavioral Analysis and wrap around services have demonstrated substantial positive outcomes for these students as well. *Id.* For example, a meta-analysis of studies of Functional Behavioral Analysis based interventions found problem behaviors were reduced by an average of 70.5%. *Id.* at 16.

Although these techniques have been well researched, at present, there is a significant "research to practice gap," with many teacher training programs failing to adequately address

behavior management and nearly half of newly certified teachers reporting feeling insufficiently prepared to handle classroom management. *Id.* at 4, 18-19. Where training and support are lacking, educators are left to intuition in managing behavior and may respond emotionally in interactions with students. *Id.* at 20. In lieu of teaching positive behavior, educators rely on punitive and exclusionary discipline, including referrals to law enforcement, a practice that has increased in recent years. *Id.* at 5-7. Students of color and students with disabilities are most harmed by the lack of training and support for classroom management. *Id.* at 7-9. These students are disproportionately likely to be subjected to punitive discipline, including referral to law enforcement. *Id.*

Punitive and exclusionary approaches to classroom management can encourage or escalate negative student behaviors and increase the likelihood of disruption. *Id.* at 4, 5-6. These practices can reinforce negative behaviors in both students and teachers, fail to teach positive behaviors, and remove the student from the learning environment. *Id.* at 4, 6. Students experience these learning environments negatively. *Id.* at 6-7. The negative environment also impacts teachers, who frequently report behavioral challenges as a reason for leaving the profession. *Id.* at 4-5, 7.

II. Statutes

A. S.C. Code §16-17-420, Disturbing Schools

Enacted in 1909, the elements of the offense of Disturbing Schools remain unaltered apart from extension beyond application solely to schools for women and girls to cover all schools. *See* Compl. ¶¶ 41-42, 44. The statute reads:

> 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).

B. S.C. Code § 16-17-530, Disorderly Conduct

South Carolina's Public Disorderly Conduct statute reads:

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

S.C. Code § 16-17-530.

III. Enforcement of § 16-17-420 and §16-17-530 Against Students

The charge of Disturbing Schools is consistently among the leading causes of involvement with the juvenile justice system. Kayiza Decl. ¶ 5, Ex. A. Between the 2010-2011 school year and March of 2016, over 9,500 adolescents entered the juvenile justice system on charges of Disturbing Schools. French Marcelin Decl. ¶ 15. In 2014-2015, in Charleston and several other South Carolina counties, more young people entered the juvenile justice system because of school disruption than for any other reason. Disorderly Conduct is also among the most common reasons for juvenile referral. *Id.*

The thousands of young people who have been referred to the Department of Juvenile Justice reflect only a partial picture of the enforcement of § 16-17-420 and §16-17-530. Students who are seventeen or older are charged as adults.

Black students overwhelmingly bear the burden of juvenile referrals under § 16-17-420. Statewide, Black students are nearly four times as likely to be referred for Disturbing Schools. *Id.* at ¶ 19. In some counties, racial disparities are even starker. For example in the 2014-2015 school year in Charleston, Black students were approximately six-and-a-half times more likely to be referred for Disturbing Schools than were their white classmates. *Id.* Racial disparities exist in counties with greater and lesser degrees of racial homogeneity and in counties both large and small. *Id.* at ¶ 24. Students with disabilities are also likely to be disproportionately impacted by arrest or referral under the Disturbing Schools and Disorderly Conduct statutes. Ryan Decl. 7-8.

Section 16-17-420 is also unevenly enforced from county to county and from year to year. While some counties in some years reported no referrals for Disturbing Schools, others reported referral rates as high as sixteen per 1,000 students. French Marcelin Decl. ¶ 22. Even within the same county, rates of referral varied from year to year. *Id.* In some counties, referrals have decreased in recent years, while in others, referrals increased. *Id.* at ¶ 17.

Students are charged with Disturbing Schools in a range of circumstances, including when expressing concern over police conduct, Kenny Decl. ¶ 24, Ex. A; Nesmith Decl. ¶ 24, when involved in minor physical altercations, D.S. Decl. ¶ 10; Kayiza Decl. Ex. B.1 (Richland County Sheriff's Office ("RCSO") Incident Report, Case No. 121108428), and for minor school infractions such as refusing to follow instructions or cursing. K.B. Decl. ¶¶ 3, 8-9; Carpenter Decl. ¶ 19; Kayiza Decl. Ex.B.2 (RCSO Incident Report, Case No. 1504002222); Kayiza Decl.

Ex. B.3(RCSO Incident Report, Case No.1310025007). Even very young students are charged with Disturbing Schools. French Marcelin Decl. ¶ 16; Kayiza Decl. Ex. B.4 (RCSO Incident Report, Case No. 15010092-07).

In schools, the Disorderly Conduct statute is applied to student behavior in a similar manner. For example, while Niya Kenny was charged with Disturbing Schools, the police report listed the incident type as "Disorderly Conduct." Kenny Decl. ¶ 24, Ex. A. K.B. was also charged with Disturbing Schools following an initial police report describing the charge as Disorderly Conduct. Kayiza Decl. Ex. B.5 (NCPD Incident Report, Case No. 2015030281). A twelve year-old involved in a physical altercation that did not result in injuries was charged with a crime of disorderly conduct and recommended for expulsion. Kayiza Decl. Ex. B.1. Disorderly Conduct has also been cited in detaining and charging students like S.P. for refusing to follow instructions and cursing in the presence of others. S.P. Decl. ¶ 6; Kayiza Decl. Ex.B.2-3.

School codes of conduct also reflect the arbitrary distinction between treating student behavior as a school matter or as a criminal violation. Several South Carolina School Districts include Disturbing or Disrupting School as a Level III Criminal Offense within their codes of conduct. *See, e.g.*, Kayiza Decl. Ex. C.1 (Charleston County School District Student Code of Conduct 2015-2016); Kayiza Decl. Ex. C.2 (Richland School District One Discipline Code of Conduct); Kayiza Decl. Ex. C.3 (Greenville Student Behavior Code). However, "Disturbing Schools" is distinguishable from lower level offenses chiefly through the consequences assigned.

For example, the Charleston School District Code of Conduct includes the Level III offense "Disturbing School," as well as the lesser Level II offense, "Major Disruption." The two

offenses are defined in relation to one another and educators are directed to select a code based upon the level of discipline sought. Charleston's Code provides the following definitions:

> **Disturbing School (3)**: To willfully or unnecessarily interfere with or disturb the students or teachers of any school, loiter about on school premises, or act in any obnoxious manner thereon; for any person to enter upon school premises or loiter around premises without permission of the principal; also Disorderly Conduct which includes behavior that tends to disturb the public peace, scandalize the community, or shock the public sense of morality **(for lesser offense use Major Disruption)**
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> **Major Disruption (2)**: Behavior that significantly interrupts the learning environment **(if a Level 3 offense, use Disturbing School)**

Kayiza Decl. Ex. C.1 at pp. 46-47 (emphasis added). Under these rules, students can receive consequences ranging from a parent conference, if deemed a lesser offense, to expulsion and referral to law enforcement if treated as criminal. *Id.* at pp. 15. Charleston also defines "Fighting" as a lower level offense that may incur discipline as minimal as a parent conference. *Id.* However, some students, like D.S., are charged criminally with Disturbing Schools. D.S. Decl. ¶ 10.

Notably, within the Charleston Code, the lowest level offenses, which include "excessive noise," "horseplay," described as "rough or boisterous play or pranks," and "inappropriate language," are collectively referred to as "Disorderly Conduct." *Id.* at pp. 14, 47. At the lowest level of discipline, these behaviors are subject to a verbal warning up to referral to an administrator. *Id.* However, Charleston also incorporates "Disorderly Conduct" into the definition of "Disturbing Schools," a Level III Criminal offense. *Id.* at 16, 46.

In the Greenville County School District, "use of obscene or profane language or gestures" and "other disorderly acts" are included among the lowest level offenses, which may be subject to discipline as minor as a verbal reprimand. Kayiza Decl. Ex. C.3 at p. 4; *see also*

Kayiza Decl. Ex. C.2, at pp. 18 (Richland County School District One similarly defines "Disruption of Class/Activity," making excessive noise, and profanity as Level I offenses). However, as S.P.'s experience demonstrates, students are also charged criminally for these actions. S.P. Decl. ¶ 6.

While Richland County School District Two does not provide complete discipline guidelines, *see* Kayiza Decl. Ex. C.4 (Richland School District 2, Back-2-School Handbook 2015-2016), the Spring Valley High School Student Handbook suggests a wide range of potential consequences for student behavior. Kayiza Decl. Ex. C.5 (Spring Valley High School Student Handbook 2015-2016). "Disruptive Behavior," to include promoting fighting, is subject to three hours of detention up to suspension and "[p]rofanity" is subject to six hours of detention up to expulsion," *id.* at 41, while "[v]erbal confrontation" may be subject to arrest. *Id.* at 42.

IV. Consequences of Enforcement

For students, the harms of being detained and charged with Disturbing Schools or Disorderly Conduct are severe and irreparable. The prior experiences of named Plaintiffs exemplify the consequences of treating student behavior as criminal.

Niya Kenny experienced the harm of approaching common student behavior as criminal beginning when she witnessed the treatment of a fellow classmate forcefully detained by a School Resource Officer ("SRO"). Kenny Decl. ¶¶ 3-11**.** Deeply frightened by the officer's actions, Ms. Kenny attempted to document the incident and called out for someone to do something to stop the violent treatment of her classmate. *Id.* at ¶¶ 5, 8-9.

In response, Ms. Kenny was herself arrested, handcuffed in front of her classmates, berated by the police officer and the school administrator, held in an adult detention center for

several hours, patted down, finger printed and photographed. *Id.* at ¶¶ 14, 16, 21. Throughout the incident, Ms. Kenny was scared and humiliated. *Id.* at ¶¶ 19, 26. Following this incident, Ms. Kenny felt anxiety at the prospect of returning to school and ultimately withdrew and enrolled in a G.E.D. program. *Id.* at ¶ 26.

Other students have also experienced fear, humiliation, and confusion upon being charged with crimes for school behavior. They experience the stress and burdens of navigating the justice system, as well as negative consequences for their education.

The Disturbing Schools statute permits sentencing of up to 90 days detention, while Disorderly Conduct may carry a sentence of up to 30 days, and some students are sentenced to confinement in a juvenile detention facility following a disturbing schools charge. French Marcelin Decl. ¶ 27. In many parts of the state, juveniles are detained far from home. *See* Kayiza Decl. Ex. D (South Carolina Department of Juvenile Justice, *Facilities*)(describing evaluation centers, detention center, and long term commitment facilities, including locations).

Many students are referred to pretrial diversion programs when charged with Disturbing Schools or Disorderly Conduct. French Marcelin Decl. ¶ 25. Students and their families decide whether to accept diversion before they are appointed a public defender. D.S. Decl. ¶¶ 12-13. The vague terms of the Disturbing Schools and Disorderly Conduct statutes and the broad circumstances in which the law is enforced make it difficult for families to assess whether to accept diversion or to challenge the charges.

Diversion may not be an option for families without sufficient financial resources. This can lead to particularly significant impacts for students charged in adult court. D.S., her friend, and two other students involved in the same incident all entered a guilty plea together and

without representation. D.S. Decl. ¶¶ 13-14, Ex. D. D.S. received a suspended sentence of $400 or 20 days detention if she failed to complete pretrial intervention. *Id.*at ¶ 14, Ex. C, Ex. D. Only after making her plea did she learn the costs of the diversion program. *Id.* at ¶ 15. Confronted with a $100 application fee, a $250 participation fee, and additional costs for mandatory drug screenings and other requirements, D.S. could not afford to participate in diversion and was rejected. *Id.* at ¶ 16. Facing detention due to her inability to complete the program, D.S. eventually secured a public defender and her case was reopened and dismissed. *Id* at ¶¶ 19-20. The process was confusing, time consuming and highly stressful for D.S. and her grandmother. *Id.* at ¶ 17-18.

Securing representation can also be costly and burdensome. In some counties, students who cannot afford an attorney must pay a fee to apply for a public defender. *See, e.g.*, Kayiza Decl. Ex. E (13th Judicial Circuit Public Defender Office, Frequently Asked Questions). S.P. and her mother could not afford to pay the application fee in the short time they were given to apply. S.P. Decl. ¶ 27. S.P. was eventually able to secure a public defender.

Many students who are convicted or adjudicated delinquent are placed on probation. French-Marcelin Decl. ¶ 27; Carpenter Decl. ¶ 19; K.B. Decl. ¶ 16. Students with few resources must make meetings with their parole officer and comply fully with any requirements imposed, or they may be detained for violating the terms of their probation. Carpenter Decl. ¶¶ 19, 21.

Clearing one's record of a Disturbing Schools or Disorderly Conduct charge brings additional costs.[2] Individuals must make an application to the local solicitor's office and pay up

[2] A juvenile record may only be expunged after a person turns seventeen, has completed any sentence, and only if there are no subsequent charges on her record. SC Code § 63-19-2050(A). Consistent with the amendment to define seventeen year-olds as juveniles, effective July 1, 2019,

to $310 in fees to have their records expunged. Kayiza Decl. Ex. F (South Carolina Judicial Department, Frequently Asked Questions About Expungements and Pardons in South Carolina Courts).

Even for those who never spend time in a juvenile detention center following a criminal charge, reentry to the education system can prove near impossible. Students may be suspended, expelled, sent to alternative schools or otherwise have their access to education limited following a criminal charge. D.S. Dec. ¶ 10, Ex. A; Kenny Decl. ¶ 26; S.P. Decl. ¶ 24; K.B. Decl. ¶¶ 17-22; Carpenter Decl. ¶ 19; *see also Hawker*, 774 F.3d at 1245 (Lucero, J., concurring). For example, K.B. and D.D. were placed in a program called Twilight, an entirely computer-based program that provides no more than three hours of education time per day, Kayiza Decl. Ex. G.1 (R.B. Stall High School, Twilight Alternative Program At a Glance), and does not offer the courses necessary to obtain a high school diploma in South Carolina. Kayiza Decl. Ex. G.2 (R.B. Stall High School, Twilight Program). Students are searched before entering the Twilight lab and are not permitted to remain on campus if they arrive late. Kayiza Decl. Ex. G.1. To access this minimal educational opportunity, students, including students like D.D. who have struggled with homelessness, must provide their own transportation to and from school and do not receive the school lunch benefits that they would obtain if attending a regular school program. Kayiza Decl. Ex. G.2. While students can ostensibly earn their way back to mainstream education, it seems all but impossible that they will be able to catch up with the educational opportunities missed while

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a juvenile records cannot be expunged until the person is at least eighteen. SC LEGIS 268 (2016), 2016 South Carolina Laws Act 268 (S.916)(effective July 1, 2019).

For those seventeen and older when charged, the charge may be expunged if it resulted in diversion or a first time conviction. S.C. Code § 17-22-910.

placed in Twilight. K.B. Decl. ¶ 22. Students like D.D. who persevere in attempting to access education through these limited programs may languish there for years. Carpenter Decl. ¶ 19.

ARGUMENT

I. Preliminary Injunction Standard

To obtain a preliminary injunction, "[p]laintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)(citing *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)). "While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" *Id.* at 247 (quoting *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013)).[3] "The traditional office of a preliminary injunction is to protect the *status quo* and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *United States v. S. Carolina*, 720 F.3d 518, 524 (4th Cir. 2013)(quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir.2003)). Consistent with this purpose, Plaintiffs seek a

[3] Plaintiffs recognize that this Court is bound by Fourth Circuit precedent interpreting *Winter*, 555 U.S. 7 (2008), to abrogate a more flexible standard that required only "serious questions" on the merits if other preliminary injunction factors weighed heavily in favor of relief. *See The Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355 (4th Cir.2010) (per curiam) (reaffirming standard articulated in *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009)). For purposes of preserving the issue on appeal, however, Plaintiff notes that the Second, Seventh, and Ninth Circuits have all disagreed with the Fourth Circuit's interpretation of *Winter*. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

prohibitory injunction to protect Named Plaintiffs and the Plaintiff class from being harmed or from further future harm to their constitutional rights. Arrest or referral under the Disturbing Schools or Disorderly Conduct statutes would produce immediate harm to Plaintiffs, diverting them from educational opportunities and placing them at increased risk of ongoing involvement with the criminal justice system. These harms cannot be undone.

II. Plaintiffs Are Likely to Succeed on the Merits.

A. Vagueness Standard

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

"The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). There is a strong requirement of certainty where, as here, a statute threatens to infringe upon constitutionally protected expressive conduct. *See Goguen*, 415 U.S. at 573 (1974); *Hoffman Estates*, 455 U.S. at 499. Additionally, as a criminal law under which individuals are

subject to criminal penalties, § 16-17-420 is subject to a heightened standard of certainty and "can be invalidated on its face 'even where it could conceivably have . . . some valid application.'" *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012)(quoting *Wright v. New Jersey*, 469 U.S. 1146, 1152 (1985)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015). As the Supreme Court has stated, "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson*, 135 S. Ct. at 2556-57 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

Moreover, unlike an economic regulation that is highly specific and applied to business professionals, *Hoffman Estates*, 455 U.S. at 499, the Disturbing Schools and Disorderly Conduct statutes are applied to school children and subject a broad range of common adolescent conduct to criminal penalties. The Supreme Court has repeatedly recognized that juveniles are in the process of cognitive development, and cited their "lack of maturity and an underdeveloped sense of responsibility" as indicators of diminished culpability. *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005), *see also, e.g*, *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010), *as modified* (July 6, 2010); *Hawker*, 774 F.3d at 1245 (Lucero, J., concurring)("Children are often unaware of some of the more nuanced aspects of the law, or the extent of an officer's discretion . . . ."). Because of their age and overall lack of education and experience in comparison to adults, it is imperative that juveniles be presented with clear guidance through the law if they are to understand that their actions will be treated as criminal.

B. Section16-17-420 is Void for Vagueness on Its Face

To "interfere or disturb . . . in any way" to "loiter" and "to act in an obnoxious manner" are all prohibited by the terms of § 16-17-420. In assessing the constitutional adequacy of each statutory term, this Court "must extrapolate its allowable meaning," in which it is "relegated[] to the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Grayned v. City of Rockford*, 408 U.S. 104,109-110 (1972)(internal quotations, alterations, and citations omitted). The South Carolina Supreme Court has not assessed the facial vagueness of § 16-17-420 or given further interpretation to its terms, although it has upheld the convictions of several juveniles under the law. *See* Compl. ¶45. Interpretations by the South Carolina Attorney General's Office affirm a broad reading to the statute, *see* Compl. ¶¶ 52-54, and these opinions are given persuasive weight in South Carolina courts. *See, e.g., Cahaly v. LaRosa*, 25 F. Supp. 3d 817, 826 (D.S.C. 2014), *vacated in part on other grounds*, 796 F.3d 399, 402 (4th Cir. 2015) ("[Attorney General's opinions] are afforded great weight in South Carolina, particularly in matters of statutory construction"). Each of the statute's terms introduces into the law additional ambiguities and the law's total vagueness is magnified by its all-inclusive and generalized nature.

1. Section 16-17-420 lacks any requirement of intent or actual effect of disturbing schools.

Section 16-17-420 contains no *mens rea* requirement that, if present, "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499; *see also Morales*, 527 U.S. at 55. Rather, §16-17-420 prohibits enumerated conduct engaged in "wilfully *or unnecessarily*." S.C.

Stat. §16-17-420 (emphasis added). The absence of a specific intent requirement coupled with the law's application to adolescents as young as seven makes certain that the law's imprecise terms will fail to provide adequate notice. Lack of notice in this context raises heightened concerns. In the circumstances of a juvenile who also lacks intent, the Supreme Court has found that moral culpability is "twice diminished." *Graham*, 560 U.S. at 69.

The Disturbing Schools statute also is not limited to the disruption of ongoing school instruction. Rather 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. *Contrast Grayned*, 408 U.S. at 114 (ordinance required willful action, causation, and "demonstrated interference with school activities"). It has been applied in disparate locations spanning high school hallways and off-campus college housing. D.S. Decl. ¶ 6; Nesmith Decl. ¶ 7. Without requirements of intent or even actual disruption of education, the Disturbing Schools statute fails to provide notice to the young people asked to comply with its vague terms.

2. Section 16-17-420's prohibition against "disturb[ing] in any way" fails to provide notice to school students and leads to arbitrary and discriminatory enforcement.

Section 16-17-420's unconstitutional vagueness is most apparent in its application to schoolchildren. In *Grayned*, the Supreme Court found that an anti-noise ordinance only closely avoided unconstitutional vagueness where, in addition to requiring intentional action and demonstrated causation, the law's application was limited to those on "grounds adjacent to any building in which a school or any class thereof is in session," 408 U.S. at 107-08, and required "the 'noise or diversion' be actually incompatible with normal school activity." *Id.* at 113-14. In this context, the Supreme Court found that disturbances could be "measured by their impact on

the normal activities of the school." *Grayned*, 408 U.S. at 112. Section 16-17-420 stands in stark contrast to the law considered in *Grayned*. The Disturbing School statute does not require intent, demonstrated causation, or actual disruption of classes. Moreover, the law is applied to the behaviors of school children within the school itself. The meaning of the law's prohibition against "disturb[ing] in anyway" a school, does not permit easy measurement of the behavior of adolescents.

Managing adolescent behavior is a regular part of school administration and it would make little sense to call classroom management and student discipline incompatible with normal school activity. As the Maryland Court of Appeals observed:

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

In re Jason W., 837 A.2d 168, 174 (Md. 2003). Further, the cause of school disruption often cannot be understood by viewing the actions of a student in isolation. Educators play an important role in determining whether student behavior will become disruptive. *See supra* pp.4-5. Schools and teachers that implement evidence-based practices can reduce the occurrence of challenging student behaviors, including for students who require more support. *Id.* In contrast, without training and supports, educators may act on emotion and intuition, and may provoke or exacerbate disruptions. *Id.* Thus, students are without complete control over the creation of disruption, and without notice of when their behavior will be considered criminal.

For the same reasons, §16-17-420's prohibition against "disturb[ance]" in "any way" does not provide an objective standard and instead, can be seen to "authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56; *see also Goguen*, 415 U.S. at 573; *Grayned*, 408 U.S. at 108-09. Research shows that discipline rules requiring a greater degree of subjective interpretation are more likely to be applied to students of color. Ryan Decl. 8-9. The vague terms of the Disturbing Schools statute are likewise disproportionately applied against Black students, who in 2015 were nearly four times more likely than their white peers to be referred for Disturbing Schools. French-Marcelin Decl. ¶ 19. Plaintiffs' experiences, as well as the discipline codes of school districts across the state, reflect the arbitrary nature of decisions to arrest or refer students rather than rely on school-based responses. *See* Kayiza Decl. Ex. C.1-5.

In these ways, §16-17-420 exhibits the same fundamental flaw found in vagrancy laws:

> The common ground which brings such a motley assortment of human troubles before the magistrates . . . is the procedural laxity which permits 'conviction' for almost any kind of conduct and the existence of the House of Correction as an easy and convenient dumping-ground for problems that appear to have no other immediate solution.

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) at 167-68 (internal quotation and citation omitted).

The Disturbing Schools statute's encouragement of arbitrary and discriminatory enforcement is all the more troubling because in the area of school management and student behavior, other solutions do exist. *See supra* pp. 4-5. Undoubtedly there are teachers, school districts, families, and community partners within South Carolina working to improve their approaches to the behavioral needs of students. For example, the Office of the Solicitor for the Eleventh Judicial Circuit highlighted available school-based interventions that can be employed in lieu of involving law enforcement. Kayiza Decl. Ex. H (Letter from Donald V. Meyers,

Solicitor, Eleventh Judicial Circuit, to Dr. Karen Woodward, Superintendent, Lexington County School District One (Jun. 3, 2010)). However, the Disturbing Schools statute leaves the meaning of its terms to discretion in every case, and thus it is unconstitutional on its face. *See Morales*, 527 U.S. at 71 (Breyer, J., concurring in part and concurring in the result)("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.").

3. Section 16-17-420's prohibition against "interfere[ing] . . . in any way" infringes First Amendment protected rights, provides no notice, and authorizes arbitrary and discriminatory enforcement.

The Disturbing Schools statute makes it unlawful for a person to "interfere with . . . in any way . . . the students or teachers of any school or college." S.C. Code § 16-17-420. The South Carolina Supreme Court has previously interpreted the phrase "'interference' . . . 'in any manner'" and found that the term failed to provide clear notice and infringed upon First Amendment protected rights. *Town of Honea Path v. Flynn*, 176 S.E.2d 564, 567 (S.C. 1970). Such a law, the court further reasoned, would "invite gross abuses of discretion and impose unfair penalities [sic] and burdens upon the citizenry." *Id.* As the South Carolina Supreme Court recognized, conviction "may well have rested upon nothing more than mere words uttered . . . which were not pleasing to the local police officers who obviously did not like anyone questioning or challenging their authority." *Id.* at 567-68.

The statutory term "interfere with . . . in any way . . .," S.C. Code § 16-17-420, is equally vague and produces equally troubling results, as Plaintiffs' experiences demonstrate. Ms. Kenny

was arrested under the Disturbing Schools law when she spoke out in reaction to what she witnessed to be inappropriate use of force by a police officer against a classmate. Kenny Decl. ¶¶ 3-14, 24. Similarly, Mr. Nesmith was arrested for Disturbing Schools after he questioned the grounds for a police officer to stop him and his friends in the parking lot of their college apartment complex. Nesmith Decl. ¶¶ 9-12, 24.

The application of the Disturbing Schools statute to individuals like Ms. Kenny and Mr. Nesmith clearly infringes First Amendment rights. A long line of precedent establishes that "[t]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *State v. Perkins*, 412 S.E.2d 385, 386 (S.C. 1991)(quoting *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987)); *see also Lewis v. City of New Orleans*, 415 U.S. 130 (1974), *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972). As both the United State Supreme Court and the South Carolina Supreme Court recognize, "the 'fighting words' exception may require narrow application in cases involving words addressed to a police officer 'because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen.'" *Perkins*, 412 S.E.2d at 386 (quoting *Hill*, 482 U.S. at 462). The reason for this rule is clear: "[t]he 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." *Id.*

4. Section 16-17-420's prohibition against "act[ing] in an obnoxious manner" infringes First Amendment protected rights, provides no notice, and authorizes arbitrary and discriminatory enforcement.

Section16-17-420 also makes it unlawful "for any person willfully or unnecessarily to act in an obnoxious manner [on a school or college premises]." "Obnoxious" is defined as

"unpleasant in a way that makes people feel offended, annoyed, or disgusted." Merriam-Webster, Obnoxious.[4] As with the term "abuse," considered by the South Carolina Supreme Court in *Flynn*, 176 S.E.2d at 566, "obnoxiousness" is not defined in the statute and "[o]ne's view as to what the term was intended to mean or connote would likely vary considerably." 176 S.E.2d at 567. What offends or annoys one person may be received as welcome or pleasant to another. It has long been clear that laws outlawing such subjectively understood conduct are impermissibly vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."). The line between adolescent misbehavior and criminal "obnoxiousness" cannot be drawn without moment to moment subjective judgements. In the course of normal development, adolescents may engaged in behaviors that some adults may find "unpleasant," "offensive," "annoying," or "disgusting," yet these characterizations would not ordinarily render the behavior criminal.

Moreover, §16-17-420's prohibitions against acting "in an obnoxious manner" on any school or college premises encroaches on freedoms of expression, assembly, and association protected by the First Amendment. It is firmly settled that "[m]ere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms." *Coates*, 402 U.S. at 615 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))(internal alteration omitted). Yet by its terms, the Disturbing Schools statute would make criminal an insult uttered, a political or religious argument that some find offensive, as well as interactions between individuals "whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance

[4] *Available at* http://www.merriam-webster.com/dictionary/obnoxious (last visited July 31, 2016).

is resented." *Coates*, 402 U.S. at 616. The Disturbing Schools statute lends itself to enforcement against disfavored expression and in so doing, operates to inhibit constitutional rights. *Grayned*, 408 U.S. at 109 ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.").

5. Section 16-17-420's prohibitions against "loitering" infringe First Amendment protected rights, provide no notice, and authorize arbitrary and discriminatory enforcement.

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

"The freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Morales*, 527 U.S. at 53. For this reason, "[s]tate courts have uniformly invalidated laws that do not join the term 'loitering' with a second specific element of the crime." *Id.* at 57-58 (citations omitted). The Supreme Court has also repeatedly and unequivocally found similar statutory language to be vague. *See, e.g.*, *id.* at 51; *Papachristou*, 405 U.S. at 164 ("restriction" of the law to wandering or strolling "without any lawful purpose or object" did not cure vagueness and instead created "a trap for innocent acts"); *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) (finding statute that penalized loitering "without any visible or lawful business" to be "vague and lacking ascertainable standards of guilt"); *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940) (striking down the statute as

unconstitutionally vague and concluding that the qualification "'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation" because "the words themselves have no ascertainable meaning either inherent or historical.") (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453-455).

The Disturbing Schools statute contains no second specific element of the crime. It is not limited by its terms to loitering that impairs school functions. Consistent with the law's permissive language, the Attorney General has interpreted the law to apply when school is not in session and when no students or faculty are present. *See* 1990 S.C. Op. Att'y. Gen. 175, 1990 WL 482448; 1994 S.C. Op. Att'y. Gen. 62, 1994 WL 199757. The difficulty of ascertaining which instances of loitering are prohibited by the Disturbing Schools statute is compounded as the law makes no distinction between students, employees, or any others. It could be applied to a child who lingers in walking home from school or who uses the playground on a weekend, or to any number of college students who enjoy loitering on the grounds of the campus or at their own apartment buildings. Additionally, school and to an even greater extent college "premises" and the area "around the premises," S.C. Code §16-17-420(A)(1)(b), (2), can encompass a large area that cannot be ascertained with precision. Indeed, the law has been applied to include an apartment complex owned by a college. Nesmith Decl. ¶¶ 7, 24. As the South Carolina Attorney General recognized, the Disturbing Schools statute is closely analogous to a Colorado school loitering statute declared unconstitutionally vague for this reason. 1990 S.C. Op. Att'y. Gen. 175, 1990 WL 482448 (citing *People in Interest of C. M.*, 630 P.2d 593 (Colo. 1981)).[5] As was found

[5] The Colorado statute provided "that a person commits a class 1 petty offense if he: 'Loiters in or about a school building or grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific, legitimate reason for being there, and not

of the Colorado statute, the indefinite reach of the Disturbing Schools statute fails to provide notice, leaves to the discretion of law enforcement which loitering is prohibited by the law, and infringes on personal liberties as well as freedom of assembly and association.

. . . . . .

Each term of §16-17-420 is impermissibly vague. Taken as a whole, the Disturbing Schools statute contains no scienter requirement and no requirement of actual disruption. *Contrast Grayned*, 408 U.S. 104. In addition, it incorporates into one law prohibitions on four categories of behavior, "disruption," "interference," "obnoxiousness," and "loitering" each of which is substantially vague. As the Supreme Court found in *Papachristou*, "[w]here the list of crimes is so all-in-clusive [sic] and generalized . . . those convicted may be punished for no more than vindicating affronts to police authority." 405 U.S. at 166-67. The law's imprecise terms infringe upon important constitutional rights of expression and liberty. Further, the evidence shows that the law is enforced with discriminatory impact, infringing upon the rights of Black students more frequently than their white classmates. Section 16-17-420 is the epitome of an unconstitutionally vague law, setting "a net large enough to catch all possible offenders, and leav[ing] it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *United States v. Reese*, 92 U.S. 214, 221 (1875).

C. S.C. Code § 16-17-530 is Unconstitutionally Vague as Applied to Elementary and Secondary School Students

When applied to the conduct of school children, § 16-17-530 suffers from the same constitutional infirmities seen in the Disturbing Schools statute. The law fails to provide students

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having written permission from a school administrator.'" *Interest of C. M.*, 630 P.2d at 594. (Colo. 1981) (quoting Co. C.R.S. Section 18-9-112(2)(d)).

with notice of when their behavior will be considered criminal and is open to arbitrary and discriminatory enforcement.

While the use of profanity may be addressed through school rules, standing alone, it cannot constitute a crime under Section 16-17-530's prohibitions on the use of "obscene or profane language." To be considered "obscene" and potentially subject to state prohibitions, "expression must be, in some significant way, erotic." *Cohen v. California*, 403 U.S. 15, 20 (1971). Use of the word "fuck" does not in itself constitute obscenity. *See, e.g., id.*; *Hess*, 414 U.S. 105.

Further, it is well settled that the use of profanity may not constitute a criminal offense except where such language constitutes fighting words. *See, e.g., City of Landrum v. Sarratt*, 572 S.E.2d 476, 478 (S.C. Ct. App. 2002). Fighting words are defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). It is equally clear that the "'fighting words' exception may require narrow application in cases involving words addressed to a police officer.'" *Perkins*, 412 S.E.2d at 386 (quoting *Hill*, 482 U.S. at 462). South Carolina courts have found probable cause lacking under § 16-17-530 where facts indicated an individual raised her voice and used mild profanity in witnessing what she believed to be excessive force against her husband. *See Martin v. Lott*, No. C/A 3:07-3782-JFA, 2010 WL 547175, at *7–8 (D.S.C. Feb. 9, 2010), *amended in part*, No. C/A 3:07-3782-JFA, 2010 WL 597209 (D.S.C. Feb. 16, 2010), and *aff'd*, 407 F. App'x 761 (4th Cir. 2011); *see also Sarratt*, 572 S.E.2d at 478 (citing *In re Louise C.*, 3 P.3d 1004, 1005–07 (A.Z. Ct.App.1999) (holding juvenile's use of the word "fuck" in argument with principal and another student over whether student had cheated her out of money, although offensive and unacceptable, did not constitute fighting words)).

Despite clearly established law, students in South Carolina are detained and charged with crimes of disorderly conduct for using profanity. *E.g.*, Kenny Decl. ¶ 24, Ex. A; S.P. Decl. ¶ 6; Kayiza Decl. Ex. B.2-3, 5.

Criminalizing the use of profanity and other conduct by elementary and secondary students under § 16-17-530's prohibitions on "conducting [oneself] in a disorderly or boisterous manner" is also fundamentally unfair. As with the Disturbing Schools statute's prohibitions on "disturb[ing]" and "act[ing] in an obnoxious manner," S.C. Code § 16-17-420, normal adolescent behavior and misbehavior cannot be distinguished from criminal "disorderly" or "boisterous" conduct without subjective judgment. S.C. Code § 16-17-530. Boisterous conduct in some children and in some settings may even be viewed positively. Among the definitions of "boisterous," Merriam-Webster includes, "marked by or expressive of exuberance and high spirits." Merriam-Webster.com, Boisterous.[6]

The inability of the Disorderly Conduct statute to provide notice to students or guidelines to those charged with its enforcement can be seen in school codes of conduct, which discuss disorderly conduct in the context of both minor infractions and criminal offenses. *See supra* pp. 8-10. Moreover, school codes of conduct as well as police incident reports make clear the close relationship between the Disturbing Schools and Disorderly Conduct statutes in characterizing student conduct as criminal. *Id.*; Kenny Decl. ¶ 24, Kayiza Decl. Ex. B.1-5. Subjecting students to the risk of police detention and criminal charges under these laws violates their core due process rights under the Fourteenth Amendment.

[6] *Available at* http://www.merriam-webster.com/dictionary/boisterous (last visited July 31, 2016).

III. Plaintiffs Have Satisfied the Other Preliminary Injunction Factors

A. Plaintiffs Will Suffer Irreparable Injury if the Preliminary Injunction is Withheld.

Plaintiffs are likely to suffer irreparable injuries if § 16-17-420 and § 16-17-530 continue to be enforced against them. In addition to the clear negative impact of a conviction or adjudication of delinquency under the laws, the costs of fines and the possibility of incarceration, plaintiffs face substantial collateral consequences. The process of being arrested and handcuffed in front of peers and school staff, questioned by police, and transported to adult jails or detention centers for processing produces stress, fear, and humiliation for young people. *See supra* pp. 10-14.

Plaintiffs also face significant negative consequences for their education. Students are subject to more severe discipline following an arrest and/or conviction or adjudication, which commonly limits their ability to access education, such as through referral to alternative school where access to course work, resources, and extracurricular activities is diminished. *See* supra pp. 10-14.

Moreover, the threat of arrest or referral under § 16-17-420 and § 16-17-530 chills the First Amendment protected conduct of students. "'Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Centro Tepeyac v. Montgomery Cty, Md.*, 722 F.3d 184, 190-91. As the arrests of plaintiffs Kenny and Nesmith make clear, plaintiffs are at risk of arrest if they speak out against perceived abuses by police. The threat of arrest or referral chills students' ability to participate in conversations about the role of police and the disciplinary climate within their own classrooms and colleges.

B. The Balance of Hardships Weighs in Favor of An Injunction

The balance of hardships weighs strongly in favor of granting a preliminary injunction. Plaintiffs face substantial irreparable injury from enforcement of § 16-17-420 and § 16-17-530. An injunction against enforcement of the statute also does not cause injury to Defendants. The Fourth Circuit has made clear that "'a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.'" *Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)).

Further, charging students criminally needlessly diverts the resources of the justice system. *See* Kayiza Decl. Ex. H. Arbitrary arrests and referrals undermine the objectives of police departments seeking to establish positive relationships with young people and communities, and well-intentioned police officers are placed in the untenable position of determining when adolescent behavior constitutes a crime under the vague terms of the laws. Kayiza Decl. Ex. I (U.S. Dep't of Justice, Office of Community Oriented Policing Services, Memorandum of Understanding Fact Sheet (2016)("COPS MOU Fact Sheet"));[7] *see also New Jersey v. T.L.O.*, 469 U.S. 325, 385–86 (1985)(Stevens, J., concurring in part and dissenting in part)("The schoolroom is the first opportunity most citizens have to experience the power of

[7] Law Enforcement Agencies that receive funding from COPS for school resource officer positions must have a Memorandum of Understanding between law enforcement and the school district clearly indicating "that SROs will not be responsible for requests to resolve routine discipline problems involving students." COPS MOU Fact Sheet 2. The Department of Justice explains that "[t]he placement of law enforcement officers in schools carries a risk of contributing to a "school-to-prison pipeline" process where students are arrested or cited for minor, nonviolent behavioral violations and then diverted to the juvenile court system. This pipeline wastes community resources and can lead to academic failure and greater recidivism rates for these students." *Id.*

government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life.").

C. Injunctive Relief is in the Public Interest

An in junction is in the public interest. It is always in the public interest to "uphold[] constitutional rights." *Centro Tepeyac*, 722 F.3d at 191 (internal quotation marks omitted); *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011). In addition, an injunction would benefit the economic wellbeing of the state. South Carolina currently ranks fortieth in the country in high school graduation rates, Kayiza Decl. Ex. J.1 (U.S. Dept. of Educ., Graduation Rates (showing South Carolina ranked fortieth in graduation rates and had a 6.8 graduation gap between White and Black students)), and high drop-out rates diminish the capacity of the state's workforce. *See* Kayiza Decl. Ex. J.2 (National Center for Education Statistics ("NCES"), Annual Earnings of Young Adults); Kayiza Decl. Ex. J.3 (NCES, Employment and Unemployment Rates by Educational Attainment). Involvement of law enforcement significantly decreases the likelihood of graduation, Ryan Decl. 7, creating negative long-term consequences for South Carolina's workforce.

CONCLUSION

For the foregoing reasons, this Court should grant the preliminary injunction and enjoin defendants from enforcing S.C. Code § 16-17-420 and from enforcing S.C. Code § 16-17-530 against elementary and secondary school students, until this Court enters a final judgment on the merits.

Respectfully submitted,

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**Pro Hac Vice Motion to follow*

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