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

Kenny, et al., **Plaintiffs**	:	
v.	:	**CIVIL ACTION NO. 2:16-2794-CWH**
Wilson, et al., **Defendants.**	:	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States, through undersigned counsel, submits this Statement of Interest regarding Defendants' Motions to Dismiss [ECF Nos. 27, 28, 28(1), 34, 34(1), 36, 36(1), 41, 42, 42(1), 44, 44(1)].

OVERVIEW

A proposed class of students and a non-profit youth services organization challenge two South Carolina statutes, the Disturbing Schools statute, S.C. Code Ann. § 16-17-420, and the Disorderly Conduct statute, S.C. Code Ann. § 16-17-530, on the grounds that they are unconstitutionally vague. Compl. ¶¶ 1, 5 Aug. 11, 2016, ECF No. 1 (Compl.). Plaintiffs allege that the statutes do not provide students with notice of what conduct is prohibited and that the absence of definite standards facilitates arbitrary and discriminatory enforcement. They further assert that enforcement of these vague statutes drives large numbers of young people into the juvenile and criminal justice systems, criminalizes common youthful behavior, results in racial

disparities and likely disparities on the basis of disability in arrest and justice system referrals, and subjects students to punishment that is disproportionate to their alleged misconduct.

On August 16, 2016, plaintiffs filed a motion for a preliminary injunction to enjoin enforcement of the statutes pending a final decision on the merits. On September 30, defendants filed motions to dismiss and responses to the plaintiffs' motion for a preliminary injunction. On October 19, plaintiffs filed oppositions and replies to defendants' motions and responses. On November 4, defendants filed replies in support of their motions to dismiss.

Taking plaintiffs' assertions as true and considering the pleadings in their entirety,[1] plaintiffs have properly stated a claim under the Due Process Clause of the Fourteenth Amendment.[2] As set out more fully below, provisions of the statutes at issue in this case raise significant concerns, particularly in light of the allegations of arbitrary and discriminatory enforcement.[3] As the United States' experience in enforcing civil rights laws elsewhere has demonstrated, significant racial disparities in the enforcement of a criminal statute may indicate

[1] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("*First*, faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true . . . *Second*, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (emphasis in original); *Zak v. Chelsea Therapeutics Intern., Ltd.*, 780 F.3d 597, 601 (4th Cir. 2015) (citing the *Tellabs* standard).

[2] The United States takes no position on any other issues raised in the Motions to Dismiss, or on Plaintiffs' motion for a preliminary injunction.

[3] In their motion for preliminary relief, plaintiffs challenge the Disturbing School Statute, S.C. Code Ann. § 16-17-420(A)(1) and (A)(2), and the Public Disorderly Conduct Statute, S. C. Code Ann. § 16-17-530(a) (second clause) and (b)).

that the statute is unconstitutionally vague.[4] As the agency tasked by Congress with enforcing the nation's federal civil rights laws, the United States Department of Justice (Department) has addressed arbitrary and discriminatory enforcement in matters across the country (*see* Section C).

INTERESTS OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States" in any case "pending in a court of the United States, or in a court of a State." The issues in this case – alleged violations of the Due Process Clause in the administration of juvenile justice – fall squarely within the ambit of the United States' enforcement authority. Under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141), the United States is charged with protecting children's statutory and constitutional rights in the administration of juvenile justice and with ensuring that people are free from police practices that violate the Constitution or statutory law.[5] As discussed more fully in Section C below, the United States' civil rights enforcement experience in other matters has demonstrated that the arbitrary or discriminatory enforcement of unconstitutionally vague standards can deprive

[4] The evidence of systemic discriminatory enforcement in the record thus far concerns the challenged provisions of the Disturbing Schools statute. The plaintiffs have introduced some evidence that the Disturbing Schools statute and the Disorderly Conduct statute are enforced interchangeably, *see, e.g.*, Compl. ¶86, 94, which suggests that both statutes may be enforced in an arbitrary and discriminatory manner. If the Court allows plaintiffs' claims to proceed to discovery, the discovery process will reveal whether this is, in fact, the case.

[5] The statute provides, in relevant part: "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141(a) (1994).

individuals of their civil rights and disproportionately affect minority populations. The United States therefore has a strong interest in ensuring that laws provide adequate guidance to law enforcement officers so that they are enforced consistently, without discrimination.

The United States has previously invoked its authority under Section 14141 and other federal civil rights statutes[6] to address the cycle of harsh school discipline leading to law enforcement and justice system involvement known as the "school-to-prison pipeline."[7] The

[6] These include Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.* (Title IV); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (Title VI) and its implementing regulations, 28 C.F.R. §§ 42.101-112; the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d (Safe Streets Act) and its implementing regulations, 28 C.F.R. § 42.201-215; the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* (EEOA); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C, § 794 (Section 504) and its implementing regulations, 28 C.F.R. § 42.501-540; and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.* (Title II) and its implementing regulations, 28 C.F.R. Pt. 35. These statutes and regulations collectively protect students in public schools from discrimination on the basis of race, color, national origin, sex, religion, language status, and disability. Moreover, Title VI, the Safe Streets Act, Section 504, and Title II prohibit police departments and other law enforcement agencies from discriminatory conduct in their activities.

[7] Loretta Lynch, Att'y Gen., Remarks at the White House Convening on School Discipline (Jul. 22, 2015) (Lynch School Discipline Remarks), *available at:* http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-school-discipline (noting the Department of Justice's determination to end the "unjust status quo" of youth being "suspended, expelled or even arrested as a result of unnecessarily harsh school discipline policies and practices that essentially criminalize minor infractions"). Members of Congress and juvenile court judges have also expressed alarm and surprise about the school-to-prison pipeline, and their support for efforts to end it. *See, e.g.*, Testimony of Senator Richard Durbin, Chairman, Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, "Ending the School-to-Prison Pipeline" at 1, Dec. 12, 2012, *available at*: https://www.judiciary.senate.gov/download/statement-of-senator-durbin-pdf-2012-12-12 (noting that "[a] schoolyard fight that used to warrant a visit to the principal's office can now lead to a trip to the booking station and a judge," and explaining how various justice system stakeholders were engaging in reform efforts to "meet this challenge") (STPP Hearing); Testimony of Judge Steven Teske, STPP Hearing, at 1-2, *available at*: https://www.judiciary.senate.gov/imo/media/doc/12-12-12TeskeTestimony.pdf ("When I took the bench in 1999, I was shocked to find that approximately one-third of the cases in my courtroom were school-related, of which most were low risk misdemeanor offenses.").

school-to-prison pipeline disproportionately affects students of color and students with disabilities.[8] As part of its efforts to stop the discriminatory funneling of students into this pipeline, the United States has entered into settlement agreements that prevent schools and law enforcement agencies from using the juvenile and criminal justice systems to address routine student misbehavior.[9]

The United States has also worked to address the school-to-prison pipeline through other Statements of Interest, enforcement actions, and non-regulatory guidance,[10] and through its

[8] Lynch School Discipline Remarks.

[9] Consent Order Between the United States and the Meridian Municipal Separate School District, *Barnhardt v. Meridian Mun. Sep. Sch. Dist*, No. 4:65-cv-01300-HTW-LRA (S.D. Miss. May 30, 2013), *available at*: https://www.justice.gov/sites/default/files/crt/legacy/2013/06/30/meridianconsentdecree.pdf; Consent Order Between the United States and Huntsville Board of Education, *Hereford & United States v. Huntsville Board of Education*, No. 5:63-cv-00109-MHH (N.D. Ala. Apr. 24, 2015), *available at*: http://www.justice.gov/sites/default/files/crt/legacy/2015/07/13/huntsvilleconsentorder.pdf; Settlement Agreement Between the United States and the City of Meridian, *United States v. City of Meridian, et. al*, No. 3:13-CV-978-HTW-LRA (S.D. Miss. Sept. 18, 2015), *available at:* http://www.justice.gov/crt/file/778016/download; Settlement Agreement Between the United States and the School District of Palm Beach County (Feb. 26, 2013); *available at*: https://www.justice.gov/sites/default/files/crt/legacy/2013/04/21/palmbeachagreement.pdf. *See also* Voluntary Resolution Agreement Between the United States Department of Justice and the Richland County Sheriff's Department (RCSD) ¶ 3 (August 10, 2016) (Richland County Agreement), *available at*: http://ojp.gov/about/ocr/pdfs/RCSD-SRO-ComplianceReview-08102016.pdf. Among other things, the agreement requires the RCSD to create precise guidelines that limit charging students under the Disturbing Schools statute to instances in which a student presents a "serious, real, and immediate threat to the safety of the school and its community," and to develop guidance to ensure that students are protected from arrest for public order offenses such as disorderly conduct and loitering, which should be "considered school discipline issues" and "addressed by school personnel rather than [school-based law enforcement officers]." Richland County Agreement ¶ 55.

[10] *See, e.g.*, Statement of Interest of the United States at 13, *S.R. & L.G. v. Kenton County, et.al.*, No. 2:15-cv-00143-WOB-JGW (E.D. Ky. Oct. 2, 2015), *available at*: https://www.justice.gov/crt/file/780706/download (asserting that the role of School Resource Officers should be carefully circumscribed to ensure that law enforcement officers do not become involved in routine disciplinary matters or criminalize behavior that educators can

federal financial assistance to law enforcement agencies.[11] In each of these activities, the United States has made clear that school-based law enforcement officers (often called School Resource Officers, or SROs) should take law enforcement actions, such as arresting students, only for serious criminal conduct or when necessary to protect students and staff from a threat of immediate harm. The United States has also emphasized the importance of policies, training, and other aspects of law enforcement and juvenile and criminal justice operations to protect against the arbitrary and discriminatory enforcement of law.[12]

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properly handle); Consent Decree Between the United States and the City of Ferguson, *United States. v. City of Ferguson*, No. 4:16-cv-000180-CDP at ¶ 212 (E.D. Mo. April 19, 2016), *available at*: https://www.justice.gov/opa/file/833431/download (City of Ferguson, Missouri, agreeing to ensure that School Resource Officers (SROs) and other Ferguson Police Department Officers "participate only in [school] situations where police involvement is necessary to protect physical safety and do not participate in any situation that can safely and appropriately be handled by a school's internal disciplinary procedures.") (Ferguson Consent Decree); U.S. Dep't of Education and U.S. Dep't of Justice, *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* 27 (Jan. 8, 2014), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/01/08/dcl.pdf (Discipline Dear Colleague Letter) (stating that the appropriate response to student behavior is to adopt effective, evidence-based practices that help students remain in their schools, and to ensure fidelity to the distinct roles and legal responsibilities of educators and law enforcement officials).

[11] The Department's Office of Community Oriented Policing Services (COPS Office) provides millions of dollars in grant funding to community-based policing programs, including to SRO programs in South Carolina. *See, e.g.*, COPS Office, COPS Hiring Program (CHP), *available at*: http://cops.usdoj.gov/default.asp?Item=2367. Agencies receiving funding must commit to limit the role of the SROs to ensure that they are not used to "resolve routine discipline problems involving students," since those issues should be handled by school administrators. *See* COPS Office, Memorandum of Understanding Fact Sheet, *available at:* http://cops.usdoj.gov/pdf/2016AwardDocs/chp/2016_CHP_MOU_FactSheet_v4.pdf; *see also* COPS Office, Pre-Award Frequently Asked Questions (FAQ) for 2016 COPS Office Hiring Program (CHP) at 7-8, *available at*: http://cops.usdoj.gov/pdf/2016AwardDocs/chp/2016_CHP_FAQs_v2_508.pdf (as a requirement of receiving Department of Justice grant funds for SROs, law enforcement officers "cannot be involved in the administrative discipline of students").

[12] *See, e.g.*, Ferguson Consent Decree; Dep't of Justice, St Louis County Family Court Findings Letter 55-58 (July 31, 2015), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf;

The United States' agreements referenced above are guided in part by the recognition that student behavior is often a natural outgrowth of children's diminished maturity and their lack of "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (noting, in the context of a custodial police interrogation, children's lack of capacity to "exercise mature judgment").[13] Many students who are or will become productive members of society could be characterized as behaving in an "obnoxious" or "boisterous" manner, each of which is prohibited under the criminal statutes challenged in this case. Protecting children's developmentally appropriate behavior from being inappropriately, arbitrarily, and discriminatorily criminalized is an important duty of the Department under Section 14141 and other federal civil rights statutes.

In light of the interests articulated above, the United States files this Statement of Interest.

Compl. at ¶ 186, *U.S. v. City of Meridian, et al*., No. 3:13-cv-00978 (S.D. Miss. Oct. 24, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/10/24/meridian_complaint_10-24-12.pdf (City of Meridian Compl.); Dep't of Justice, Baltimore Police Department Findings Letter 39 (Aug. 10, 2016), *available at* https://www.justice.gov/crt/file/883296/download (Baltimore Police Department Findings).

[13] Indeed, several Supreme Court decisions consider children's relative maturity and developing cognitive abilities as a dispositive feature in a range of justice system issues. *See, e.g., J.D.B.*, 564 U.S. at 274 ("[E]ven where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults") (custodial interrogation); *In re Gault*, 387 U.S. 1, 26-27 (1967) ("It is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted.") (due process in juvenile court proceedings).

BACKGROUND

Plaintiffs challenge the Disturbing Schools statute, which provides:

> (A) It shall be unlawful:
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> (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 Ann. § 16-17-420. They also challenge the Public Disorderly Conduct statute, which provides:

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

S.C. Code Ann. § 16-17-530. Plaintiffs allege that students are often referred to the Department of Juvenile Justice for violating these statutes,[14] with more than 9,500 students aged 16 and younger referred for violations of the Disturbing Schools statute since 2010—including children

[14] "Referral" indicates, at a minimum, arrest and temporary custody, and for some students, may involve longer-term custody in a juvenile or adult facility while awaiting a trial. Researchers have found that long-term negative consequences can result when a youth's conduct is met with "official sanctions" such as arrest. *See* Robert J. Sampson & John H. Laub, *A Life Course Theory of Cumulative Disadvantage and the Stability of Delinquency*, *in* DEVELOPMENTAL THEORIES OF CRIME AND DELINQUENCY 15 (Terence P Thornberry ed., 1997). ("The theory specifically suggests a 'snowball' effect – that adolescent delinquency and its negative consequences (e.g., arrest, official labeling, incarceration) increasingly 'mortgage' one's future, especially later life chances molded by schooling and employment").

as young as seven years old.[15] Compl. ¶¶70, 72; Pls' Mot. for Prelim. Inj. Attach. 7, Marcelin Decl. ¶ 15, Aug. 16, 2016, ECF No. 5. They contend that the statutes make an undefined array of childhood behaviors punishable by up to 90 days of incarceration and $1,000 in fines.[16]

The terms of the statutes are broad enough that they may permit arrest for disturbing schools or disorderly conduct if a student asks to speak to a school mentor after being tardy to class;[17] jokes repeatedly in class; takes photographs of friends in a group;[18] remains on the school grounds after class; engages in a conversation while sitting outside of class;[19] or practices a loud breakdance routine.

ARGUMENT

A. The Constitution Requires Statutes to be Specific Enough to Avoid Discriminatory and Arbitrary Enforcement

[15] Students who are 17 or older are currently subject to prosecution as adults; thus, plaintiffs allege, the 9,500 referrals "provides only a partial picture of the law's impact." Compl. ¶ 71. Beginning in July 2019, 17-year-olds who are charged with these offenses will be considered juveniles. *See* S.C. LEGIS 268 (2016), 2016 South Carolina Laws Act 268 (S.916).

[16] Even when students are not subject to a loss of their liberty through incarceration, the impact of fines can be significant. They can have a considerable, enduring impact on students' economic prospects, as fees levied for citations, diversion programs, public defender applications, or court costs, as well as fines imposed by courts or state law, can be economically debilitating to the student and family. *See, e.g.*, Jessica Feierman et al., DEBTORS' PRISONS FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM, Juvenile Law Center (Sept 6, 2016), *available at*: http://www.jlc.org/system/files/topic_related_docs/JLC_debtorsPrison_9-6v2.pdf?download=1; *see also* U.S. Dep't of Justice "Dear Colleague Letter on Fines and Fees" (March 14, 2016), *available at*: https://www.justice.gov/crt/file/832461/download.

[17] *See* Pls' Mot. for Prelim. Inj. Attach. 5-6, K.B. Decl. ¶¶ 3-15 (K.B. Decl.).

[18] *See* Pls' Mot. for Prelim. Inj. Attach. 5-3, Carpenter Decl. ¶ 19(A) (Carpenter Decl.).

[19] *See id.* ¶ 19(C).

The prohibition on vague statutes is rooted in the Due Process Clause and the "ordinary notions of fair play" it embodies. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.*; *see also City of Chicago v, Morales*, 527 U.S. 41, 56 (1999); *S.C. Med. Ass'n v. Thompson*, 327 F.3d 346, 354 (4th Cir. 2003) (explaining that a statute violates due process if "it is so unclear with regard to what conduct is prohibited that it may trap the innocent by not providing fair warning, or it is so standardless that it enables arbitrary and discriminatory enforcement") (internal quotation marks omitted). Nonetheless, facial challenges are held to a high standard. *City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443, 2449 (2015). Plaintiffs have alleged that the challenged statutory language does not put school children on notice as to what conduct is illegal and does not provide sufficient guidance for police officers to avoid arbitrary and discriminatory enforcement.

Under the vagueness doctrine, a statute fails if its language is so standardless as to "necessarily entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (citations omitted). This lack of guidance for law enforcement can turn statutes into "a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (internal quotation marks omitted). Thus for punishment to be fair, it is axiomatic that that law enforcement must have sufficient guidance in the law to protect against arbitrary and discriminatory enforcement.[20]

[20] The requirement that statutes be unambiguous and establish clear standards of behavior is particularly critical in the criminal and juvenile justice contexts. In contrast, the Supreme Court has provided greater latitude to public schools in the development and enforcement of a school

The Supreme Court has "recognized . . . that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement" because "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (internal quotation marks omitted); *see also Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 868 (4th Cir. 1998) ("Although due process requires that a statute satisfy both requirements," the requirement about avoiding arbitrary and discriminatory enforcement is "of special importance"). And the Court has cautioned that "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). "The law itself must draw a sufficiently clear line between the legal and the illegal for both our police and our citizens." *Schleifer by Schleifer*, 159 F.3d at 868.

The Supreme Court has repeatedly struck down statutes that fail to provide the necessary direction to law enforcement. For example, when a statute criminalized standing on the sidewalk in a group of three or more people and acting "in a manner annoying to persons passing by," the Court found it unconstitutionally vague because it left the determination of what is annoying to the subjective assessment of the police officer. *Coates v. Cincinnati*, 402 U.S. 611, 614-15 (1971). Similarly, the Court found unconstitutionally vague a statute that criminalized "treat[ing] contemptuously the flag of the United States," because the statute did not draw "reasonably clear lines" between innocent and criminal conduct and permitted "selective enforcement." *Smith v. Goguen*, 415 U.S. 566, 567-69, 574-76 (1974).

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discipline code, and has held that school disciplinary rules "need not be as detailed as a criminal code which imposes criminal sanctions." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (upholding a school discipline code that was challenged as unconstitutionally vague).

In *Papachristou,* the Court invalidated a statute that made it criminal to be, among other things,

> persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business …[and] persons able to work but habitually living upon the earnings of their wives or minor children.

405 U.S. at 162. The Court explained that the generality of the terms in the statute set the stage for the "easy roundup of so-called undesirables." *Id.* at 171. Likewise, the Court found unconstitutionally vague a law that criminalized "a gang member loitering in any public place with one or more other person" because it required police officers to determine if people standing on the street had an "apparent purpose." *City of Chicago*, 527 U.S. at 47 n.2, 60-61. In each of these cases, the Supreme Court found due process was violated by vague statutory language that cast a broad net and created too great a risk of discriminatory and/or arbitrary enforcement.

B. The Facts Alleged in Plaintiffs' Complaint Suggest That There May Be Arbitrary and Discriminatory Enforcement of the Statutes At Issue In This Case

The statutes at issue in the instant case appear to "reach a substantial amount of innocent conduct" and to extend substantial discretion to the "moment-to-moment" decisions of law enforcement officers. *See City of Chicago*, 527 U.S. at 60. The question for the court is whether, like the loitering statute held unconstitutional in *City of Chicago* and the vagrancy statute held to violate Due Process in *Papachristou,* the laws at issue here fail to provide sufficient guidance to police. In the absence of adequate guidance, students "may be punished for no more than vindicating affronts to police authority," and get caught in a "net" so large that it captures even those "who are vaguely undesirable in the eyes or police and prosecution." *Papachristou*, 405 U.S. at 165-67.

At this stage of the case, plaintiffs have sufficiently alleged that certain groups of students may be targeted for enforcement of the Disturbing Schools and Disorderly Conduct statutes. Law enforcement officers who lack clear guidelines regarding what conduct is criminal and when enforcement is appropriate may not apply the law equitably, whether or not the differences in enforcement are intentional. *See Kolender*, 461 U.S. at 358.

Plaintiffs put forward statistics alleging that black students were 3.93 times more likely than their white peers to be referred to the Department of Juvenile Justice for Disturbing Schools in the 2014-2015 school year across the state, with even higher disparities evidenced in some counties. Compl. ¶¶ 4, 76-78. For example, they allege that in Charleston, black students were more than six times as likely as white students to be referred for charges. Compl. ¶ 4. Plaintiffs further allege that such racial disparities in the school context are not explained by differences in behavior across racial groups. Compl. ¶ 62.[21]

A stricter enforcement regime of an imprecise statute against black students than against white students is exactly the type of harm the Supreme Court cautioned against when it invalidated the vagrancy law at issue in *Papachristou*. *See* 405 U.S. at 166-67. The significant racial disparities alleged here are the sort that the Supreme Court has stated would be relevant to a vagueness challenge. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982) (rejecting vagueness challenge to ordinance where "no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner"). And the allegations easily distinguish the plaintiffs' claim from other cases where the harms are merely far-fetched hypotheticals. *See Martin v. Lloyd*, 700 F.3d 132, 137 (4th Cir.

[21] In addition to alleging disparate enforcement, plaintiffs have also adduced evidence documenting this disparity. S*ee* Pls' Mot. for Prelim. Inj. Attach. 7, Marcelin Decl. ¶¶19, 23, 24.

2012) (noting that in the 81-year history of enforcing the challenged statute and its predecessor, "Appellants could not refer the Court to a single instance demonstrating that South Carolina had enforced these statutes" in the manner they envisioned). If accurate, the disparities in enforcement alleged by plaintiffs in the instant case are indicators that the underlying statutes may be unconstitutionally vague, and thus can be useful in the court's determination of whether the risk of discriminatory enforcement is too great.

The defendants have failed to address the alleged disparity in enforcement. None of their multiple motions to dismiss, responses, or replies substantively address plaintiffs' claim that black students and students with disabilities are subject to arbitrary and discriminatory enforcement. This is the crucial second element of any vagueness analysis, one which cannot be ignored, as the Department of Justice's extensive enforcement experience indicates. *See Kolender*, 461 U.S. at 357-58.

C. The Department of Justice's Enforcement Experience Underscores the Connection Between Vague Standards and Arbitrary or Discriminatory Enforcement

The Department of Justice recently considered the tight link between vague standards and arbitrary enforcement in its investigation of juvenile justice practices in Lauderdale County, Mississippi. In Lauderdale County, students on probation were being incarcerated for alleged, often minor, school discipline infractions, including profanity and disrespect, because local probation contracts stated that all school suspensions and expulsions constituted probation violations, and that all school suspensions would be served in detention.[22] Because the probation

[22] Dep't of Justice, City of Meridian, Lauderdale County Youth Court and State of Mississippi Findings Letter 9 (Aug. 10, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/08/10/meridian_findletter_8-10-12.pdf, (Lauderdale Findings).

contracts lacked any additional information about what type of behavior could lead to suspension or what types of underlying allegations about a child's suspension could lead to his or her detention, the Department found that the probation contract did not provide sufficient notice to youth about the behavior that would result in incarceration.[23] Moreover, as the Department's 2012 findings explained, "The vagueness of Lauderdale County's probation contracts, combined with the lack of procedural protections in the probation revocation process, vest the probation officer with complete discretion to determine whether a probation violation has occurred and what the punishment should be."[24] These and other probation practices, the Department found, allowed for "selective and abusive government action" by those involved in the administration of juvenile justice in Lauderdale County.[25]

As another example, in August 2016, the Department found that the Baltimore City Police Department's (BPD) enforcement of ordinances criminalizing loitering, trespassing, and failing to obey was unconstitutional. Because police officers did not provide "clear warning about the specific types of conduct that will result in . . . arrests," BPD practice did not meet the requirements of due process "and risk[ed] arbitrary and discriminatory enforcement."[26] The Department also found that "BPD's warrantless arrests for discretionary misdemeanor offenses exhibit[ed] substantial racial disparities."[27] In particular, "African Americans comprise 91

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[23] *Id.*; *see also* City of Meridian Compl. at ¶¶ 115-119, 186-188.

[24] Lauderdale Findings at 9; *see also* City of Meridian Compl. at ¶ 186 ("The policies, practices and procedures employed by Defendants to incarcerate children for suspensions from school, rooted in the written probation contract used in Lauderdale County, are void for vagueness.").

[25] Lauderdale Findings at 10.

[26] Baltimore Police Department Findings at 39.

[27] *Id.* at 55.

percent of trespassing charges [and] 91 percent of failure to obey charges" though they make up only 63 percent of Baltimore's population.[28] Moreover, reviewing officials declined to charge African Americans arrested for these misdemeanor street offenses at higher rates than charges against non-African Americans. The Department concluded that the vagueness of the charges facilitated discriminatory enforcement: "the large racial differences in the proportion of dismissed charges" for these offenses, the Department found, "demonstrate that, where officers have wider discretion to make arrests, they exercise it in a discriminatory manner."[29]

The Department's findings underscore the importance of the Supreme Court's admonitions about the dangers of enforcing unclear laws. Both the Department's civil rights enforcement experience and scholarly research[30] have demonstrated that when law or policy is unclear, the implicit or explicit bias of decisionmakers can lead to discriminatory enforcement.

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[28] *Id.*

[29] *Id.* at 57.

[30] *See* Rosemary Sarri et al., *Decision Making in the Juvenile Justice System: A Comparative Study of Four States* 274-75 (2001), *available at*: https://www.ncjrs.gov/pdffiles1/nij/grants/198620.pdf (finding an "overprocessing of youth in the juvenile justice system" due, *inter alia*, to "increased ambiguity in state laws with respect to selected offenses," and noting that when vague laws exist, "[i]n many cases, there are discriminatory consequences for the poor, immigrants, and youth of color when these laws are enforced."); Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 171-72 (1999) (criticizing "status offenses" – conduct that is prohibited for youth but would not be unlawful for adults – as vague and inviting "arbitrary and capricious enforcement," and noting concerns that the "exercise of standardless discretion to regulate noncriminal misconduct disproportionately affected poor, minority and female juveniles."); Johanna Wald, CAN "DE-BIASING" STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE 2-3 (2014) *available at*: http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Implicit-Bias_031214.pdf ("The more subjective the category of the offense – i.e., insubordination, disobedience, disruption, defiance – the greater the risk that bias (either explicit or unconscious) will seep into the process.").

Thus, significant racial disparities in the enforcement of an imprecise criminal statute, such as the statutes challenged by plaintiffs here, may indicate that the statute is impermissibly vague in violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the United States files this Statement of Interest regarding defendants' Motion to Dismiss.

Respectfully submitted,

November 28, 2016

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

KENNY, et al.	)	Civil Action No 2:16-2794-CWH
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
WILSON, et al.	)	
	)	
Defendants,	)	
	)	
	)	

CERTIFICATE OF SERVICE BY THE COURT'S OFFICAL ELECTRONIC CASE FILING SYSTEM

The undersigned hereby certifies that on November 28 2016, he caused the attached UNITED STATES' STATEMENT OF INTEREST to be filed and served on Counsel via the Court's e-noticing system as indicated below:

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