Case Brief: *Carolina Youth Action Project v. Wilson*[*]

INTRODUCTION

In late October of 2015, at Spring Valley High, two young, Black high school students were settling into their seats for their algebra class.[1] Both were unaware that they would be leaving school early in handcuffs and each facing criminal charges for "disturbing a school."[2]

One of the students, Niya Kenny, remembers being a bit late to class and barely noticing that the teacher was conversing with the other young girl, who was being admonished for having her cell phone out during class.[3] Niya's classmate refused to put her phone away, so the teacher called the school's administration, which radioed for a school resource officer.[4] As soon as Niya realized the responding school resource officer was Officer Ben Fields[5]—known to the students as "Officer Slam" for his reputation of slamming students to the ground—Niya immediately began filming the interaction and encouraged other students to do the same.[6]

Officer Fields flipped the student's desk before flinging her out of her seat and onto the ground.[7] As he dragged the student across the floor and out of the classroom, Niya jumped to her feet screaming for him to stop.[8] The rest of the students froze and the teacher looked on while the student on the floor was dragged out, and Niya Kenny was the only one asking what the student had done to deserve this.[9] Officer Fields turned to Niya and said, "[o]h, you have a lot to say? You're coming too."[10]

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1. Kat Chow, *Two Years After a Violent Altercation at a S.C. High School, Has Anything Changed?*, NPR (Oct. 24, 2017, 6:00 AM), https://www.npr.org/sections/ed/2017/10/07/548510200/what-s-changed-in-south-carolina-schools-since-violent-student-arrest [https://perma.cc/3XVF-RWZR]; *see also A South Carolina Student Was Arrested for 'Disturbing a School' when She Challenged Police Abuse, so We Sued*, ACLU (Aug. 11, 2016), https://www.aclu.org/news/racial-justice/south-carolina-student-was-arrested-disturbing [https://perma.cc/E5Q9-SRUC] [hereinafter ACLU, *South Carolina Student Arrested*].

2. *See* ACLU, *South Carolina Student Arrested*, *supra* note 1; Chow, *supra* note 1.

3. Chow, *supra* note 1.

4. *Id.*

5. For the purposes of this Case Brief, Ben Fields is referred to as "Officer Fields" to give perspective to Niya's story. Officer Fields was fired shortly after this incident. *See* Amy Davidson Sorkin, *What Niya Kenny Saw*, NEW YORKER (Oct. 30, 2015), https://www.newyorker.com/news/amy-davidson/what-niya-kenny-saw [https://perma.cc/8LBC-LQDM (staff-uploaded, dark archive)].

6. ACLU, *South Carolina Student Arrested*, *supra* note 1; *see also* Sorkin, *supra* note 5.

7. Sorkin, *supra* note 5.

8. *Id.*

9. Chow, *supra* note 1; *see* Sorkin, *supra* note 5.

10. Chow, *supra* note 1.

Though the resource officer was later fired, charges were also filed against the two students.[11] At a press conference a few days later, the sheriff was shocked and "almost offended" when asked if the charges against Niya were going to be dropped.[12] According to his department, Niya had violated the law—and compared to the other students, she was the only one making a scene.[13]

Niya Kenny was one of the plaintiffs in the recent class action suit, *Carolina Youth Action Project v. Wilson*.[14] In *Carolina Youth Action Project* ("*CYAP*"), the Fourth Circuit decided the constitutionality of two provisions in South Carolina's penal code that created misdemeanors for elementary and secondary schoolchildren who act disorderly or disturb schools.[15] The Fourth Circuit held these laws as unconstitutionally vague due to the outlawed conduct being too broad and impossible to distinguish from typical child-like behaviors seen in grade schools.

It is impracticable to characterize the differences between criminal behavior and age-appropriate misbehavior of children due to the ambiguous conduct described in these laws.[16] This lack of distinction forces children to become victims of the criminal justice system.[17] *CYAP* is an example of how the courts can protect children in school and prevent the school-to-prison pipeline that has become increasingly prevalent in grade schools nationwide.[18]

This Case Brief will provide a brief synopsis of the case, analyze the legal issues, explore these types of laws in other states, including in North Carolina, and conclude by discussing the potential implications of the Fourth Circuit's decision. Niya's story is not unique. However, her courage to speak out against police abuse in schools highlighted the issues with intertwining schools'

11. Sorkin, *supra* note 5.

12. *Id.*

13. *Id.* At this press conference, the sheriff insisted that Niya needed to be held accountable for disrupting the classroom and preventing the teacher from continuing on with a lesson. *Id.* The sheriff did not acknowledge whether Officer Fields slamming a student to the ground contributed to the classroom disruption. *Id.* Although Officer Fields was fired, it was only due to his not using the proper technique—the police department supported his use of force and his decision to arrest both students. *Id.*

14. 60 F.4th 770, 770 (4th Cir. 2023).

15. *Id*. at 775 (the provisions stipulated that they could be "in" or "near" the schools). If convicted and charged as adults under these laws, students could serve ninety-day jail sentences. ACLU, *South Carolina Student Arrested*, *supra* note 1; *see also* Sorkin, *supra* note 5.

16. *Carolina Youth Action Project*, 60 F.4th at 782–83.

17. *See id.* at 784.

18. *See generally* Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016) (arguing that an increase of law enforcement presence in schools and delegation of disciplinarian roles to police involves students in the criminal justice system sooner and will have "severe consequences" on their futures); NATHERN S. OKILWA, MUHAMMAD KHALIFA & FELECIA M. BRISCOE, THE SCHOOL TO PRISON PIPELINE: THE ROLE OF CULTURE AND DISCIPLINE IN SCHOOL (2017) (exploring how discipline policies with racial animosity exacerbate the school-to-prison pipeline).

disciplinary processes with the criminal justice system. In doing so, she became part of the large class of plaintiffs fighting to prevent kids from going to jail for "simply acting their age."[19]

FACTS OF THE CASE

The *CYAP* plaintiffs challenged two provisions in the Code of Laws of South Carolina: the public disorderly conduct statute[20] ("disorderly conduct law") and the disturbing schools statute[21] ("disturbing schools law").[22] The disorderly conduct law made it a misdemeanor to

> (a) . . . conduct[] [one]self 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 . . . .[23]

The disturbing schools law, amended in 2010,[24] made it unlawful

> (1) for any person willfully 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.[25]

In the spring of 2018, the Governor of South Carolina signed into law an amendment to the disturbing schools law that specifically outlawed school disturbances by *nonstudents*.[26] The original intent of the 2010 version was to

19. ACLU, *South Carolina Student Arrested*, *supra* note 1.

20. S.C. CODE ANN. § 16-17-530 (2015). This section of the code was amended in 2019 to include more procedural guidelines; however, when the plaintiffs in *CYAP* first challenged the statute, it was the original text. *See* § 16-17-530(A) (Supp. 2023); *see also Carolina Youth Action Project*, 60 F.4th at 776.

21. S.C. CODE ANN. § 16-17-420 (2015) (current version at S.C. CODE ANN. § 16-17-420 (Supp. 2023)).

22. *Carolina Youth Action Project*, 60 F.4th at 775–76.

23. § 16-17-530(a)–(b) (2015) (current version at S.C. CODE ANN. § 16-17-530(A)(1)–(2) (Supp. 2023)).

24. Omnibus Crime Reduction and Sentencing Reform Act of 2010, No. 273, § 12, 2010 S.C. Acts 1937, 1953 (codified as amended at S.C. CODE ANN. § 16-17-420 (2015)).

25. § 16-17-420(A)(1)–(2) (2015) (current version at S.C. CODE ANN. § 16-17-420(A)(1)–(2) (Supp. 2023)).

26. Press Release, Shaundra Scott, ACLU S.C., Governor Signs into Law Important Amendments to Disturbing Schools Statute (May 18, 2018), https://www.aclusc.org/en/press-releases/governor-signs-law-important-amendments-disturbing-schools-statute [https://perma.cc/RUL9-NF88]. This modification occurred after the first constitutional challenge brought by the same plaintiffs. *Id.* The procedural posture will be explored more in-depth later in this Case Brief. It is important to note that the Fourth Circuit ruled that the original provision was unconstitutionally vague; there has been no ruling on the new modification. *Carolina Youth Action Project*, 60 F.4th at 776 n.2.

deter "outside agitators" from disturbing schools and students;[27] however, since its inception in 1919, the disturbing schools law has undergone various edits to broaden the conduct, types of perpetrators, and locations, leading to vague application due to the increasingly inclusive language used.[28] By 2010, the language of the statute made it unlawful for "any person" to disturb a school or to enter, loiter, or act obnoxiously inside school property.[29] Specifically, the extensiveness of "any person" included students and their behavior, which led to an increase in law enforcement personnel assigned to handle disciplinary issues.[30]

The plaintiffs challenged the pre-2018 version of the bill that allowed for students to be criminally charged for behavior that is ordinary for school-age children.[31]

The impact of these laws is profound. One South Carolina school district referred so many students for criminal charges that the local prosecutor pled with the school board to have disciplinary issues settled by the schools themselves.[32] Over six years, schools across the state referred 3,735 children between the ages of eight and eighteen for prosecutions under disorderly conduct.[33] And over 9,500 students were referred by school officials for criminal charges for violating the disturbing schools law.[34] At least one child was only seven years old.[35]

The process was systematic:

(1) The child misbehaved, and a teacher, a school administrator, or in "unmanageable" situations, a school resource officer responded.[36]

27. Press Release, ACLU S.C., *supra* note 26.

28. Complaint ¶¶ 43–44, Kenny v. Wilson, 2016 WL 4363016 (D.S.C. 2016) (No. 2:16-cv-2794-CWH). The original text applied to any college or school attended by "women or girls." *Id.* ¶ 43. In 1968, the statute was amended to apply to any school. *Id.* ¶ 44 (citing Act of Mar. 2, 1968, No. 943, § 1, 1968 S.C. Acts 2308, 2308 (codified as amended at S.C. CODE. ANN. § 16-17-420 (1972))). As a result, the law was applied to arrest protestors on a college campus. *See generally* Bistrick v. Univ. of S.C., 324 F. Supp. 942, 945 (D.S.C. 1971) (charging a student with interfering with the "normal operation[s]" of the school when he refused to leave a building during a campus protest and bringing the charges under the disturbing schools statute).

29. S.C. CODE ANN. § 16-17-420(A)(1)–(2) (2015) (current version at S.C. CODE ANN. § 16-17-420(A)(1)–(2) (Supp. 2023)).

30. *See* Press Release, ACLU S.C., *supra* note 26.

31. *See Carolina Youth Action Project*, 60 F.4th at 776.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.*; *see also* Sorkin, *supra* note 5. Having school resource officers in schools has been cited to reduce criminal behavior and threats of school shootings; however, it has caused an increase in student-police interactions for minor offenses that are probably not "unmanageable." Corey Mitchell, Joe Yerardi & Susan Ferriss, *When Schools Call Police on Kids*, CTR. FOR PUB. INTEGRITY (Sept. 8,

(2) After the school responded, it made a referral to the South Carolina Department of Juvenile Justice.[37]

(3) The department, in turn, made a recommendation to the local prosecutor's office.[38]

(4) The prosecutor decided whether to formally charge the student for violations of South Carolina's penal code.[39]

(5) And finally, the case was adjudicated in family court if the charges were not dismissed.[40]

Even if the charges were ultimately dismissed, they still appeared on the student's records with the Department of Juvenile Justice and the local prosecutor's office.[41]

In 2016, four students and a nonprofit organization filed a class action that challenged the constitutionality of these laws.[42] The district court dismissed their case for lack of standing due to the alleged injury lacking "imminence."[43] On appeal, the Fourth Circuit found that the plaintiffs had established an injury-in-fact, since they regularly attended school, and demonstrated a likelihood that they would have another encounter with school resource officers who could find their expressive conduct in violation of the statutes.[44] The case was remanded for rehearing consistent with the Fourth Circuit's ruling.[45]

The district court certified one main class, represented by the two original students, that included all elementary and secondary school students in South Carolina who were at risk of criminal convictions or juvenile referral under the disorderly conduct provision.[46]

2021), https://publicintegrity.org/education/criminalizing-kids/police-in-schools-disparities/ [https://perma.cc/9GW2-2F9G]; *see also* James Paterson, *Making Schools Safe and Just*, NEA TODAY (Apr. 28, 2022), https://www.nea.org/nea-today/all-news-articles/making-schools-safe-and-just [https://perma.cc/8PUQ-26BR]. A full analysis and exploration into the effects of having school resource officers is beyond this Case Brief, but for a more detailed account and an analysis on data from the U.S. Department of Education, see Mitchell et al., *supra*.

37. *Carolina Youth Action Project*, 60 F.4th at 776.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* The fact that the charges stayed on the child's school record permanently was an issue in this case for which the plaintiffs sought redress through an order from the Fourth Circuit requiring the school to delete all prior records. *Id.* at 787–88.

42. *Id.* at 776.

43. Kenny v. Wilson, No. 2:16–cv–2794–CWH, 2017 WL 4070961, at *8–9 (D.S.C. Mar. 3, 2017), vacated and remanded, 885 F.3d 280 (4th Cir. 2018).

44. Kenny v. Wilson, 885 F.3d 280, 289 (4th Cir. 2018).

45. *Id.* at 291.

46. *Id.* The district court also certified two subclasses, which were allocated between the two provisions and comprised "[a]ll elementary and secondary school students in South Carolina, each of whom faces a risk of . . . arrest or juvenile referral under the broad and *overly vague* terms of . . . [the two laws] while attending school." *Id.* (emphasis added).

The court granted summary judgment to the plaintiffs, finding that both laws were unconstitutionally vague due to their failure to provide "sufficient notice" of the prohibited conduct and the subjectivity of any assessment by school officials.[47] Additionally, the lower court enjoined the defendant school officials from keeping any records of the members of either subclass that related to being in custody, charges, disposition, or any issue adjudicated under either provision.[48] The final order of the district court granted the plaintiffs' requested remedy: class-wide expungement.[49] South Carolina's Attorney General appealed the district court's ruling to the Fourth Circuit.[50]

LEGAL ISSUES AND OUTCOMES

A. *Class Certification*

The Attorney General challenged the class certification under three components of Rule 23; however, in a novel argument, he challenged the supposed error using concepts of justiciability.[51] Without directly asserting the plaintiffs' lack of standing, the Attorney General's argument against the lower court's finding used Article III standing requirements.[52] For instance, when referring to the typicality element, he raised the issue that the majority of elementary and secondary school children have not been charged under these laws.[53] The Fourth Circuit relied on the principle of class standing that once the individual representative achieves standing, the threshold requirement is met.[54]

The Fourth Circuit was also not moved by the Attorney General's challenges to the class certification under Rule 23.[55] As it pertains to commonality, Rule 23 "requires an entire set of claims [to] 'depend upon a common contention' that is 'capable of classwide resolution.'"[56] The Attorney General contended that since the plaintiffs had been charged under these laws, they did not represent the whole class—all secondary and elementary school-age children—the majority of whom had not been charged or referred under these provisions.[57] The Fourth Circuit rejected this assertion because the common contention among the plaintiffs and the whole class was that the vague

47. Kenny v. Wilson, 566 F. Supp. 3d 447, 464, 469 (D.S.C. 2021).

48. Carolina Youth Action Project v. Wilson, 60 F.4th 770, 787 (4th Cir. 2023).

49. *Id.*

50. *Id.* at 777.

51. *Id.* at 779–80; *see* FED. R. CIV. P. 23(a)(1)–(4). The four elements for class certification under Rule 23(a) are numerosity, commonality, typicality, and adequacy. *Id.*

52. *Carolina Youth Action Project*, 60 F.4th at 779.

53. *Id.*

54. *Id.*

55. *Id.* at 780.

56. *Id.* (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)).

57. *Id.*

provisions fail to provide sufficient notice and allow for discriminatory enforcement.[58] The court held that this resolution was class-wide because a ruling from the court would provide an answer to whether these laws were valid.[59]

The typicality requirement necessitates that the plaintiff's claims do not vary from the claims of the absent class members they represent such that the individual's resolution would not advance the absent class members' claims.[60] The Attorney General claimed that the plaintiff representatives were atypical of the class since the majority of South Carolina schoolchildren had not been charged under these laws.[61] The court rejected this argument because the plaintiffs' challenge was aimed at resolving future charges and referrals; their past convictions had no bearing on that resolution.[62] Furthermore, their past convictions were not relevant to their shared, typical experiences in school with the possibility of being charged looming over them—just like every other student.[63]

Based on these findings, the Fourth Circuit affirmed the district court's class certification.[64]

B. *Laws Held Unconstitutionally Vague*

The court then addressed the constitutional issue presented—whether the laws were too vague.[65] The void-for-vagueness doctrine is a component of the Fourteenth Amendment's due process protection.[66] The doctrine bars the government "from taking away life, liberty, or property under a law that fails to 'give a person . . . adequate notice of what conduct is prohibited' or lacks 'sufficient standards to prevent arbitrary and discriminatory enforcement.'"[67] To succeed on a vagueness challenge, the plaintiffs have the burden to show that the law is vague in all its applications.[68]

The Supreme Court has opined that a vague law runs the risk of "arbitrary and discriminatory application" because "policemen, judges, and juries" are

58. *Id.*

59. *Id.*

60. *See* Deiter v. Microsoft Corp., 436 F.3d 461, 466–67 (4th Cir. 2006).

61. *Carolina Youth Action Project*, 60 F.4th at 780.

62. *Id.*

63. *Id.*

64. *Id.* at 781. The Attorney General also raised the issue of the adequacy requirement—however, the Fourth Circuit found that the Attorney General did not identify any potential conflicts of interest. *Id.* at 780.

65. *Id.* at 781.

66. *Id.*; *see also* Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1051 (2020) ("[V]ague statutes violate a basic requirement of due process . . . .").

67. *Carolina Youth Action Project*, 60 F.4th at 781 (quoting Manning v. Caldwell for Roanoke, 930 F.3d 264, 272 (4th Cir. 2019) (en banc)).

68. Vill. of Hoffman Ests. v. Flipside, 455 U.S. 489, 497 (1982).

making subjective analyses of the alleged conduct.[69] And yet, there is not a bright-line standard for determining vagueness.[70] Instead, the Court has said,

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[71]

When the challenged provision is civil in nature, the Court exercises more tolerance toward vagueness.[72] However, when a law imposes criminal penalties, the Court applies a stricter standard.[73] The Fourth Circuit has said that when a statute provides criminal penalties, it can be invalidated even when it "conceivably" could have had "some valid application."[74]

1. Attorney General Advocated for a More Lenient Test

The South Carolina Attorney General presented three arguments for applying a more lenient vagueness test when evaluating the disorderly conduct and disturbing schools laws.[75] The Fourth Circuit rejected each argument.[76]

First, the Attorney General argued that the challenged laws did not "implicate a substantial amount of constitutionally protected conduct."[77] He argued that if the laws do not implicate a "substantial" amount of conduct that is protected by the Constitution, then they cannot be ruled vague unless they are vague in *all* their applications.[78] The Fourth Circuit pointedly rejected this argument, finding it to misread *Village of Hoffman Estates v. Flipside*,[79] in which

69. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

70. *See Hoffman Ests.*, 455 U.S. at 498.

71. *Id.* (quoting *Grayned*, 408 U.S. at 108–09).

72. *Id.* at 498–99.

73. *Id.*; *see also* Carolina Youth Action Project v. Wilson, 60 F.4th 770, 781 (4th Cir. 2023).

74. Martin v. Lloyd, 700 F.3d 132, 135 (4th Cir. 2012) (quoting Wright v. New Jersey, 469 U.S. 1146, 1152 (1985) (Brennan, J., dissenting) (citations omitted)).

75. *Carolina Youth Action Project*, 60 F.4th at 781. More lenient tests have been used for enactments with civil penalties and economic regulations. *Hoffman Ests.*, 455 U.S. at 498–99.

76. *Carolina Youth Action Project*, 60 F.4th at 781–82.

77. *Id*. at 781. If a law does not implicate constitutionally protected conduct, a vagueness challenge will only be successful if it is vague in every way it is applied. *Martin*, 700 F.3d at 135; *see also supra* note 71 and accompanying text. "However, where a statute imposes criminal penalties, the standard of certainty is higher and the statute can be invalidated on its face 'even where it could conceivably have . . . some valid application.'" *Martin*, 700 F.3d at 135 (quoting *Wright*, 469 U.S. at 1152).

78. *Carolina Youth Action Project*, 60 F.4th at 781.

79. 455 U.S. 489 (1982).

the Supreme Court held that the "'all of its applications' standard" only applied to laws that did not implicate constitutionally protected conduct.[80]

Second, the Attorney General argued that since neither challenged law criminalizes any constitutionally protected conduct, a lenient approach should be used.[81] The Fourth Circuit had resolved the issue in its 2016 opinion in this case that held these laws had a direct impact on the First Amendment.[82] The court ruled that these laws "have a chilling effect on . . . free expression," especially for children inside and near schools.[83]

Lastly, the Attorney General claimed that these challenges should have been viewed as facial challenges, and the lower court failed to use the appropriate standard—specifically, that facial challenges are viewed with "disfavor."[84] Dismissing this argument as "much ado about little," the Fourth Circuit reasoned that the Attorney General failed to present evidence that an as-applied challenge would change the legal standard for determining the constitutionality of these laws.[85]

2. Vagueness of These Laws

Next, the Fourth Circuit broke down why both challenged laws should be ruled unconstitutionally vague.[86] Starting with the disorderly conduct law, the court ruled that there was no way to distinguish the prohibited conduct "from *garden-variety* disorderly . . . misbehavior."[87] Since children naturally tend to be disorderly, how are officials and schools supposed to determine when their behavior breaches the line into disorderly conduct and how are the students effectively given notice of the type of behavior that implicates criminal charge referrals?

The Fourth Circuit turned to the dictionary.[88] Specifically, the court looked to the statute and defined both the words: "boisterous" and "disorderly."[89] The court concluded that "any person passing a schoolyard during recess is likely witnessing a large-scale crime scene" based on how the

80. *Carolina Youth Action Project*, 60 F.4th at 781 (quoting *Hoffman Ests.*, 455 U.S. at 495).

81. *Id.* at 782.

82. *Id.*

83. *Id.*

84. A facial challenge is an argument that no application of the statute would be constitutional. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010). Here, the Fourth Circuit acknowledges that the there is a "muddy dispute" whether the plaintiffs' challenges should be described as facial, as-applied, or both. *Carolina Youth Action Project*, 60 F.4th at 782.

85. *Carolina Youth Action Project*, 60 F.4th at 782.

86. *Id.* at 782–86.

87. *Id.* at 782–83.

88. *Id.* at 783.

89. *Id.*

law was written.[90] Additionally, since the law provided little guidance on what precise conduct was prohibited, the schools' officials had broad discretionary power to enforce it against children.[91] The court determined that South Carolina was likely not intending to criminalize many "childish shenanigans" and the law was impermissibly vague.[92]

Beyond its concern for criminalizing childish shenanigans, the Fourth Circuit was concerned that Black youth were charged with disorderly conduct incidents at seven times the rate of their white peers.[93] Due to the overwhelming amount of discretion given to law enforcement, the disparate impact on minority children, and the fact the "disorderly conduct" law fails to give children fair warning of its terms, the Fourth Circuit ruled it was unconstitutionally vague.[94]

The Fourth Circuit easily dispatched the disturbing schools law, which allowed South Carolina to prosecute all "unnecessary disturbances, loitering, and obnoxiousness in school."[95] The Court determined that this "utter[ly] fail[ed] to describe the specific conduct" prohibited and, therefore, was impermissibly vague.[96] The court stated that the judicial docket had the potential to be "overrun by preteens."[97]

C. *Remedy*

The Attorney General challenged the remedy sought by the plaintiffs, which he characterized as "class wide expungement."[98] The plaintiffs had requested that the lower court permanently enjoin all government officials from keeping the disciplinary records of anyone in the class.[99] The Fourth Circuit affirmed the injunction because it ruled that the laws were invalid and, therefore, keeping records would be unnecessary.[100]

The Fourth Circuit concluded that this decision was not meant to leave schools without means to discipline students.[101] However, these laws exposed minors to criminal prosecution for conduct that was too loosely defined, and with consequences that were too severe.[102]

90. *Id.*
91. *Id.* at 784.
92. *Id.* at 783–84.
93. *Id.* at 784.
94. *Id.* at 786.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 787.
99. *Id.*
100. *Id.*
101. *Id.* at 788.
102. *Id.*

Allowing juvenile criminal records for this conduct encourages a "vicious and insidious cycle."[103] There is a common misconception that juvenile records are sealed, yet confidentiality exceptions will continue to affect children's futures.[104]

D. *A Note on the Dissent*

Judge Niemeyer offered a substantial dissent that argued the plaintiffs lacked standing to bring this challenge—suggesting that no plaintiffs had standing to seek class-wide expungement and that the challenged laws were not vague as applied to the plaintiff representatives.[105] He critiqued the majority for blurring together the individual statutes and separated his analysis with respect to each challenged provision.[106] On the disorderly conduct statute, Judge Niemeyer argued that the conduct of one of the named plaintiffs (the only one with an existing referral on her record) fell within the bounds of the statute, and therefore, it was not impermissibly vague when applied to her.[107]

Using the specific student plaintiffs' stories of misconduct in or around the school, Judge Niemeyer concluded that they were clearly disrupting the school (or acting disorderly).[108] Judge Niemeyer examined the specific conduct of the individual plaintiff students, arguing that much of their conduct reasonably required disciplinary action or intervention from the school administration.[109] However, Judge Niemeyer's analysis failed to account for mitigating factual circumstances such as bullying and diagnosed medical or psychological conditions.[110]

103. *Id.*

104. *Id.* For instance, you need to report charges on job applications and college applications. *Id.*

105. *Id.* at 789 (Niemeyer, J., dissenting).

106. *Id.*

107. *Id.* at 790.

108. *Id.* at 790–91.

109. He highlighted that one child got into a physical altercation at school, while another refused to leave the library and as she was being escorted out, shouted "f——k you all," and the third one was suspended because he threatened to shoot up the school. *Id.* at 789–90. Judge Niemeyer excluded from his analysis that the student who was in a physical altercation had suffered from lead poisoning as child, which impacted her development and led to her requiring an Individualized Education Plan. Kenny v. Wilson, 566 F.Supp.3d 447, 455 (D.S.C. 2021). He also left out that the student who created a disturbance in the library had been harassed by a school bully all day and the school resource officer had been called because she had demanded they "stop talking about" her. *Id.* at 455–56. She was also diagnosed with a disruptive mood dysregulation disorder. *Id.* at 455. And finally, he excluded that the young student accused of threating to shoot up the school vehemently denied making any statements, the school failed to provide any sufficient evidence, and the case against him was eventually dismissed. *Id.* at 453–54. The charge for "disturbing schools" remained on his record. *Id.* at 454.

110. *Carolina Youth Action Project*, 60 F.4th at 789–90.

DISTURBING SCHOOLS AND DISORDERLY CONDUCT LAWS AROUND THE COUNTRY

Twenty-three states currently have a form of a disturbing schools law or a disorderly conduct law that covers schools and could be enforceable against students.[111] Contrary to the common belief that these laws are a response to modern student misbehavior, criminal activity, or even gun violence, these laws have had a long history in the United States.[112]

This part begins with an overview of the disturbing schools and disorderly conduct laws currently in force across the states.[113] It then turns to a closer examination of North Carolina's disturbing schools law.

A. *Beyond South Carolina and the Fourth Circuit*

1. Disturbing Schools Laws in Other States

Professor Shanon Taylor, an expert on special education policy, compiled a report on the current national landscape of disturbing schools laws.[114] That report guided the research and information in the following sections and the following tables rely on that report's compilation of statutes.

Twenty-one states have specific disturbing schools laws; only three out of those twenty-one have laws that explicitly exclude students with respect to their conduct on school property.[115] As previously mentioned, after the first constitutional challenge in the Fourth Circuit, South Carolina's government amended its disturbing schools law in 2018 to specifically apply to nonstudent actors.[116] The statutes of New Hampshire and Texas similarly constrain their application to nonstudents.

111. *See infra* Tables 1–3 and accompanying text (detailing the statutes in force across the nation).

112. *See generally* Shanon S. Taylor, *School Disturbance Laws: What They Are, How They Are Used, and How They Impact Students*, SAGE J. (June 20, 2024), https://journals.sagepub.com/doi/10.1177/21582440241262856 [https://perma.cc/8QED-LTE9] (detailing the history of school disturbance laws around the nation).

113. For a more in-depth examination into how these laws are applied and whether they impact schoolchildren, see *id*. *See also* Frank LoMonte & Ann Marie Tamburro, *From After-School Detention to the Detention Center: How Unconstitutional School-Disruption Laws Place Children at Risk of Prosecution for Speech Crimes*, 25 LEWIS & CLARK L. REV. 1, 24–30 (2021).

114. *See generally* Taylor, *supra* note 112 (reviewing and analyzing the breadth of disturbing schools laws in the United States).

115. *See infra* Tables 1–2.

116. *See supra* note 26 and accompanying text.

Table 1: States with Disturbing Schools Laws for Nonstudents

State	Citation	Relevant text
South Carolina	S.C. CODE ANN. § 16-17-420 (2018).	"It is unlawful for a person who is not a student to willfully interfere with, disrupt, or disturb the normal operations of a school or college in this State . . . ."
New Hampshire	N.H. REV. STAT. ANN. § 193:11 (1973).	"Any person not a pupil who shall willfully interrupt or disturb any school shall be guilty of a misdemeanor."
Texas	TEX. EDUC. CODE ANN. § 37.124 (2013).	"A person other than a primary or secondary grade student enrolled in the school commits an offense if the person . . . intentionally disrupts . . . school activities."

The other eighteen states do not distinguish between student and nonstudent actors and their statutes could be applied and enforced against elementary and secondary schoolchildren.

Table 2: States with Disturbing Schools Laws That Could Be Used Against Students

State	Citation	Relevant text
Arizona[117]	ARIZ. REV. STAT. ANN. § 13-2911(A) (2024).	"A person commits interference with or disruption of an educational institution . . ."
Arkansas	ARK. CODE ANN. § 6-21-606 (2024).	"Any persons who shall . . ."

117. Arizona's statute more clearly defines the prohibited behavior and has narrowed its disturbing schools provision to threatening to injure someone at the school, threatening to damage school property, and remaining on school property with the intent to interfere with its operations. ARIZ. REV. STAT. ANN. § 13-2911(A)(1)–(2) (2024); *see also* Taylor, *supra* note 112, at 4.

California	CAL. EDUC. CODE § 32210 (2024).	"Any person who willfully disturbs . . ."
Colorado[118]	COLO. REV. STAT. § 18-9-109(1) (2024).	"No person shall . . ."
Delaware	DEL. COD ANN. TIT. 14, § 4110 (2020).	"Whoever disturbs a public school . . ."
Florida	FLA. STAT. § 877.13 (2024).	"It is unlawful for any person . . ."
Georgia[119]	GA. CODE ANN. § 20-2-1181(a) (2024).	"It shall be unlawful for any person . . ."
Maine	ME. REV. STAT. ANN. § 6804 (2023).	"A person who enters the property . . . of a school . . ."
Maryland	MD. CODE ANN., EDUC. § 26-101 (2024).	"A person may not willfully disturb . . ."
Mississippi	MISS. CODE ANN. § 37-11-23 (2024).	"If any person shall willfully disturb . . ."
Montana	MONT. CODE ANN. § 20-1-206 (2023).	"Any person who shall willfully disturb . . ."
Nevada	NEV. REV. STAT. § 203.119 (West 2023).	"It is unlawful for any person . . ."
New Mexico	N.M. STAT. ANN. § 30-20-13(D) (2024).	"No person shall willfully interfere . . ."
North Carolina	N.C. GEN. STAT. § 14-288.4(a)(6) (2024).	"Disrupts, disturbs, or interferes with the teaching of students . . ."
North Dakota	N.D. CENT. CODE § 15.1-06-16 (2023).	"It is a class B misdemeanor for any person . . ."
South Dakota	S.D. CODIFIED LAWS § 13-32-6 (2024).	"A person, whether pupil or not . . ."
Washington	WASH. REV. CODE § 28A.635.030 (2024).	"Any person who shall willfully create a disturbance . . ."
West Virginia	W. VA. CODE ANN. § 61-6-14 (2024).	"If any person willfully interrupt, molest, or disturb . . ."

118. Colorado is another state that more narrowly defines the conduct prohibited by its disturbing schools laws. *See* COLO. REV. STAT. § 18-9-109(1)–(3) (2024); *see also* Taylor, *supra* note 112, at 4.

119. Georgia's statute's conduct is still broad but outlines specific steps the school administration needs to take before initiating a complaint. *See* GA. CODE ANN. § 20-2-1181(b)(2)–(4) (2024).

Beyond whom the statutes target, the conduct these statutes outlaw is comparably vague to the challenged South Carolina provisions. For instance, Maryland law outlaws "willful[] disturb[ances]"[120] and makes it illegal for anyone to "willfully prevent the orderly conduct of the activities, administration, or classes of any institution of elementary, secondary, or higher education."[121]

2. Disorderly Conduct Laws (Applied to Schools) in Other States

As Judge Niemeyer's dissent noted, disorderly conduct statutes have existed and been upheld for decades[122]—"[a]lmost every state has a disorderly conduct statute on the books."[123] However, many disorderly conduct laws do not implicate students on school grounds, unlike South Carolina's.[124] And states have taken steps to expressly proscribe application in this context. For example, Virginia recently modified its disorderly conduct law to read: "The provisions of these sections shall not apply to any elementary or secondary school student if the disorderly conduct occurred on the property of any . . . school."[125] According to data collected in 2021, Virginia referred students to law enforcement at a rate "at least twice the national average," and in the 2011–12 school year, Virginia referred more students than any other state.[126] In response, Virginia revised its disorderly conduct statute and exempted students to decrease the number of referrals.[127]

Currently, two states' disorderly conduct statutes encompass conduct that occurs on school grounds *and* do not exempt students from being charged as the perpetrators.

120. MD. CODE ANN., EDUC. § 26-101(a) (2024).

121. *Id.*

122. *See* Carolina Youth Action Project v. Wilson, 60 F.4th 770, 791 (2023) (Niemeyer, J., dissenting).

123. John Mascolo, *Disorderly Conduct*, FINDLAW (Aug. 21, 2023), https://www.findlaw.com/criminal/criminal-charges/disorderly-conduct.html [https://perma.cc/Q3VD-V9S9 (staff-uploaded archive)].

124. S.C. CODE ANN. § 16-17-530(A)–(B) (2023 & Supp. 2023).

125. VA. CODE ANN. § 18.2-415(D) (2024).

126. Mitchell et al., *supra* note 36.

127. *See id.*; *see also* § 18.2-415(D).

Table 3: States with Disorderly Conduct Laws That Apply to Schools

State	Citation	Relevant Text
Alabama	ALA. CODE §§ 13A-11-1, -7(a)(2) (2024).	Defines public place as "includ[ing] . . . schools . . ."
Rhode Island	11 R.I. GEN. LAWS § 11-11-1 (2020).	"Every person who shall willfully interrupt or disturb . . . any public or private school . . ."

B. *North Carolina*

Professor Phil Dixon of the University of North Carolina School of Government compared the South Carolina laws to North Carolina's own disorderly conduct law.[128] Specifically, North Carolina's law makes it a misdemeanor to "disrupt," "disturb," or "interfere with the teaching of students" or to engage in conduct that "disturbs the peace, order, or discipline" at any "educational institution."[129]

The Supreme Court of North Carolina has ruled that disorderly conduct needs to have substantially interfered with the operation of the school to come within the statute.[130] In *State v. Wiggins*,[131] the Supreme Court of North Carolina limited how the disorderly conduct statute is litigated, but Professor Dixon is unsure if this limitation is enough to save it from being ruled unconstitutionally vague.[132] In 1967, the defendants in *Wiggins* were charged under the disturbing schools law for protesting on school grounds against the inefficient desegregation process that had slowly started to occur across the state.[133] The court "found no difficulty in applying" the law and stated it was "mystified" how the defendants considered the conduct to be described as vague.[134] Professor Dixon doubts that a similar charge could withstand a constitutional challenge today.[135]

128. Phil Dixon, *Is NC's Disorderly Conduct at Schools Statute Unconstitutionally Vague?*, UNC SCH. OF GOV'T: ON THE CIV. SIDE BLOG (May 3, 2023, 9:00 AM), https://civil.sog.unc.edu/is-ncs-disorderly-conduct-at-schools-statute-unconstitutionally-vague/ [https://perma.cc/YT2Z-MPUB]; *see also* N.C. GEN. STAT. § 14-288.4(6) (2024).

129. N.C. GEN. STAT. § 14-288.4(6).

130. *See* Dixon, *supra* note 128; *see also* State v. Wiggins, 272 N.C. 147, 159–60, 158 S.E.2d 37, 46–47 (1967) (ruling that silent picketers outside the school sufficiently distracted students inside the school to be considered disorderly conduct).

131. 272 N.C. 147, 158 S.E.2d 37 (1967).

132. Dixon, *supra* note 128.

133. *Wiggins*, 272 N.C. at 152, 158 S.E.2d at 41; *see also* Dixon, *supra* note 128.

134. *Wiggins*, 272 N.C. at 153–54, 158 S.E.2d at 42.

135. Dixon, *supra* note 128.

Close to thirty years ago, the Supreme Court of North Carolina forcefully articulated students' individual rights to a "sound basic education."[136] Although that guarantee is the subject of ongoing litigation,[137] the current North Carolina disturbing schools law prevents students from realizing that right. The *CYAP* decision provides a pathway to challenge the North Carolina provision for unconstitutional vagueness and failure to inform students of the prohibited conduct that could leave them with a criminal record.

POTENTIAL IMPACT AND IMPLICATIONS

"*[C]hildren . . . are unfinished products; human works in progress*."[138]

Protecting youth development, encouraging normal childlike behavior, and dismantling a system that subjects minor children to the criminal justice system for "boisterous" and "obnoxious" behavior should be an education policy priority. Considering the ultimate implication of these provisions, it is important for students to be clearly aware of what conduct could result in criminal charges. The education system fails when it stains a seven-year-old with a criminal record.[139]

Students who have suspensions, expulsions, and "become embroiled" in the juvenile criminal system are less likely to complete their schooling.[140] Student referrals to law enforcement disparately affect Black minors and minors with disabilities more than any other students.[141] In North Carolina, both Black students and students with disabilities are referred to law enforcement at a rate over two times that of their white and nondisabled counterparts.[142]

136. Leandro v. State (*Leandro I*), 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). This constitutional guarantee is currently in a stage of indetermination. *See* Ann Doss Helms, *Five Tries and 30 Years: NC Supreme Court Takes Up* Leandro *School Funding Case Again*, WFAE (Feb. 22, 2024), https://www.wfae.org/education/2024-02-22/five-tries-and-30-years-nc-supreme-court-takes-up-leandro-school-funding-case-again [https://perma.cc/7EJB-CDAB]; *see generally* Robert F. Orr, *The Long and Winding Road: The* Leandro *Case Saga Continues*, 101 N.C. L. REV. F. 222 (2023) (providing context to the first four *Leandro* decisions and the threat to the educational landscape in North Carolina).

137. *See* Helms, *supra* note 136.

138. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 270 (2014) (emphasis added).

139. *See* U.S. COMM'N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 74 (2019), https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf [https://perma.cc/9X59-C8RF].

140. LoMonte & Tamburro, *supra* note 113, at 54–55; *see also* U.S. COMM'N ON C.R., *supra* note 139, at 74.

141. *See* Mitchell et al., *supra* note 36 (noting that Black students and students with disabilities were "referred to law enforcement at nearly twice" the rate "of the overall student population").

142. ACLU OF N.C., THE CONSEQUENCES OF COPS IN NORTH CAROLINA SCHOOLS 3, https://static1.squarespace.com/static/64d3ad6abbf62a6134c8401a/t/65313ce2edb0aa4fde389edd/1697725667593/2023.10.18-NC-Discipline-Final.pdf [https://perma.cc/5UBT-WJKH].

The *CYAP* court outlawed the first disturbing schools statute enacted in the United States.[143] The forceful decision requires such laws to clearly outline what conduct is prohibited and emphasizes the seriousness with which criminal consequences are taken.

With respect to the broader implications of this case, there is an open door to make a constitutional vagueness challenge to North Carolina's disturbing schools statute. Similarly, the opinion follows the trend of combatting school-to-prison pipeline mechanisms from recent years.[144] After the order was released, the ACLU expressed hope that this decision will be instructive to the school districts and states around the country that have laws that target disorderly conduct and other vague crimes.[145]

"Neither law represent[ed] an empty threat."[146] The impact of these laws cannot be overstated—specifically their effect on Black children, children with disabilities, and other children of minorities.[147]

Niya Kenny dropped out of her high school and pursued her GED—she no longer felt safe returning to school.[148] "Officer Slam" was later fired, but never faced criminal charges for slamming a minor to the ground.[149]

This opinion provides a persuasive authority for future constitutional challenges against vague laws enforced against students while at school.

MEGAN MILLS RASH**

143. Taylor, *supra* note 112; *see* Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/ [https://perma.cc/X9UF-VXW8 (dark archive)].

144. *See supra* note 139 and accompanying text.

145. *Id.*

146. Carolina Youth Action Project v. Wilson, 60 F.4th 770, 776 (4th Cir. 2023).

147. *See supra* note 93 and accompanying text.

148. ACLU, *South Carolina Student Arrested*, *supra* note 1.

149. *See id.*; *see also* Kelly Cohen, *Justice Dept. Files Statement in South Carolina Student Tossing Case*, WASH. EXAM'R (Nov. 30, 2016, 9:23 PM), https://www.washingtonexaminer.com/news/1243032/justice-dept-files-statement-in-south-carolina-student-tossing-case/ [https://perma.cc/2G7R-4CLB].

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