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

NIYA KENNY; TAUREAN NESMITH; GIRLS ROCK CHARLESTON, INC.; D.S., by and through her next of kin Juanita Ford, and S.P., by and through her next of kin Melissa Downs, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ALAN WILSON in his official capacity as Attorney General of South Carolina; J. ALTON CANNON, JR. in his official capacity as the Sheriff of Charleston County, SC; GREGORY G. MULLEN in his official capacity as the Chief of the Police Department of the City of Charleston, SC; EDDIE DRIGGERS, JR in his official capacity as the Chief of the Police Department of the City of North Charleston, SC; CARL RITCHIE in his official capacity as the Chief of the Police Department of the City of Mt. Pleasant, SC; LEON LOTT in his official capacity as the Sheriff of Richland County, SC; W.H. HOLBROOK in his official capacity as the Chief of the Police Department of the City of Columbia, SC; STEVE LOFTIS in his official capacity as the Sheriff of Greenville County, SC; KEN MILLER in his official capacity as the Chief of the Police Department of the City of Greenville, SC; LANCE CROWE in his official capacity as the Chief of the Police Department of the City of Travelers Rest, SC; STEVE MOORE in his official capacity as Interim Chief of the Police Department of the City of Simpsonville, SC; M. BRYAN TURNER in his official capacity as the Chief of the Police Department of the City of Mauldin, SC; DAN REYNOLDS in his official capacity as the Chief of the Police Department of the City of Greer, SC; A. KEITH MORTON in his official capacity as the Chief of the Police Department of the City of Fountain Inn, SC; on behalf of themselves and others similarly situated,

Defendants.

Case No. 2:16-cv-2794-CWH

ORDER

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The plaintiffs Niya Kenny ("Kenny"), Taurean Nesmith ("Nesmith"), Girls Rock Charleston, Inc. ("Girls Rocks"), D.S. by and through her next of kin Juanita Ford ("D.S."), and S.P. by and through her next of kin Melissa Downs ("S.P.") (collectively, the "plaintiffs") bring this case pursuant to 18 U.S.C. § 1983 to redress alleged deprivation of rights secured by the United States Constitution under color of state law, challenging S.C. Code § 16-17-420 (the "Disturbing Schools Law") as unconstitutionally vague. (Compl. ¶¶ 1, 12, 15, ECF No. 1). The plaintiffs D.S. and S.P. also challenge S.C. Code § 16-17-530 (the "Disorderly Conduct Law") as unconstitutionally vague when applied to elementary and secondary school students, seeking to bring a class action on behalf of all elementary and secondary school students "who face an ongoing risk of arrest or referral under [the Disorderly Conduct Law] while attending school." (Compl. ¶ 11).[1]

The plaintiffs seek solely equitable relief. They request that the Court use its authority under Rule 57 of the Federal Rules of Civil Procedure and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, to issue: (1) a declaratory judgment that the challenged laws violate their constitutional right to due process under the Fourteenth Amendment of the United States Constitution; (2) a preliminary injunction enjoining enforcement of the challenged laws by the defendants; (3) a permanent injunction enjoining the same; and (4) an order enjoining the defendants from considering the plaintiffs' records relating to arrests, charges filed, bookings, mugshots, fingerprints, associated bench warrants, judicial proceedings, adjudications, dispositions, and sentencings under the challenged laws, and from retaining such records except

[1] The Complaint is conflicting as to whether D.S. and S.P. seek to bring a class action challenging only the Disorderly Conduct Law or also the Disturbing Schools Law. For example, in the "Class Allegations" section of the Complaint, Paragraphs 109 through 120 refer to challenging both laws. (Compl. ¶¶ 109-120). Conversely, in the "Claims for Relief" section setting forth two causes of action, the Second Cause of Action refers only to the Disorderly Conduct Law, stating that the Disorderly Conduct Law's "vague terms as applied to elementary and secondary school students violate Plaintiffs' right to due process . . . ." (Compl. ¶¶ 123-124). Likewise, in the "Prayer for Relief" section, the only relief requested as to elementary and secondary students are the preliminary and permanent injunctions enjoining enforcement of the Disorderly Conduct Law. (Compl. at 27).

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as would be permissible following expungement under S.C. Code § 17-1-40. (Compl. at 27-28; see also Compl. ¶¶ 10-11, 15). The declaratory and injunctive relief requested is sought against each defendant, each defendant's officers, employees, and agents, and any person acting in concert or participation with any defendant or under any defendant's supervision, direction, or control. (Compl. at 28).

This matter is before the Court on seven motions to dismiss by thirteen defendants. (ECF Nos. 27, 28, 34, 36, 41, 42, and 44).

I. FACTUAL BACKGROUND[2]

A. The Challenged Laws

The Disturbing Schools Law states in pertinent part:

> (A) It shall be 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.

S.C. Code § 16-17-420(A).

A violation of the Disturbing Schools Law is a misdemeanor, punishable by a fine of not more than $1,000 or ninety days imprisonment. S.C. Code § 16-17-420(B). Furthermore, "[t]he summary courts are vested with jurisdiction to hear and dispose of cases involving a violation of this section. If the person is a child as defined by Section 63-19-20, jurisdiction must remain vested in the Family Court." S.C. Code § 16-17-420(C).

[2] These facts are as alleged in the Complaint.

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The Disorderly Conduct Law provides in pertinent part that "[a]ny person who shall (a) be found . . . at any public place . . . conducting himself in a disorderly or boisterous manner, [or] (b) use obscene or profane language . . . at any public place . . . or in hearing distance of any schoolhouse . . . shall be deemed guilty of a misdemeanor[.]" S.C. Code § 16-17-530. A violation is punishable by a fine of not more than $100 or thirty days imprisonment. Id.

B. The Plaintiffs

Kenny is a nineteen-year-old African-American female who resides in Richland County, South Carolina. (Compl. ¶ 16). On October 26, 2015, Kenny was in math class at Spring Valley High School in Richland School District Two when she was arrested and charged under the Disturbing Schools Law. (Compl. ¶¶ 17, 83). While the students practiced a math lesson on their laptops, Kenny noticed the teacher whispering to another student and thought the teacher was helping that student with the lesson until the teacher called for someone to escort the student from the classroom. (Compl. ¶ 83). Kenny wondered what the student could have done wrong because nothing seemed out of the ordinary. (Id.). Shortly thereafter, a school resource officer ("SRO")—a sworn police officer of the Richland County Sheriff's Office—entered the classroom. (Compl. ¶ 84). Kenny witnessed the SRO forcefully pull the student from her desk, drag her on the floor, and handcuff her. (Id.). Deeply frightened by the SRO's actions, Kenny attempted to document the incident and called out for someone to stop the violent treatment of her classmate. (Id.). In response, Kenny was also arrested, handcuffed in front of her classmates, berated by the SRO and a school administrator for voicing her concern and distress, and taken to an adult detention center where she was patted down, fingerprinted, photographed, and held for several hours. (Compl. ¶ 85). The police incident report described her offense as a crime of disorderly conduct, but she was charged under the Disturbing Schools Law. (Compl. ¶

86). Throughout her experience, Kenny was scared and humiliated. (Compl. ¶ 87). Although she desired to complete her senior year at Spring Valley High School, due to the humiliation and anxiety she experienced, Kenny felt she could not return. (Id.). She obtained her G.E.D. diploma in June 2016. (Compl. ¶¶ 16, 87). Kenny fears future arrest and prosecution under the Disturbing Schools Law if her actions, while on or around the grounds of a school, are interpreted to fall under any of the broad terms of the statute. (Compl. ¶ 17).

Nesmith is a twenty-one-year-old African-American male who resides in Kingstree, South Carolina. (Compl. ¶ 24). He is a student at Benedict College in Columbia, South Carolina. (Id.). On a date not alleged, a campus police officer was patrolling in the parking lot of Nesmith's college-owned apartment building as Nesmith and his friends left the building and got into their cars. (Compl. ¶ 88). The officer approached one of Nesmith's friends and asked him for identification. (Id.). Nesmith complained to another friend that the officer was stopping them because of their race as the officer had done previously. (Compl. ¶ 89). When the officer asked Nesmith for his identification, he asked the officer why he needed to see it and continued to question the officer's actions. (Id.). Nesmith was eventually handcuffed and transported to a detention center where he remained overnight. (Compl. ¶ 90). He was charged under both the Disturbing Schools and Disorderly Conduct Laws, but those charges were later dropped. (Compl. ¶¶ 25, 90). He fears future arrest and prosecution under the Disturbing Schools Law if his actions, while on or around the grounds of a school, are interpreted to fall under any of the broad terms of the statute. (Compl. ¶ 25).

D.S. is a seventeen-year-old African-American female who resides in Charleston, South Carolina. (Compl. ¶ 18). D.S. experienced lead poisoning as a young child and has an "Individualized Education Plan." (Id.). During the 2015–2016 school year, she was enrolled at

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Stall High School in the Charleston County School District, and at the time of filing the Complaint, she had plans to enroll at Summerville High School in Dorchester County School District Two in August 2016. (Id.). While attending school on a date not alleged, she was involved in a physical altercation that she did not initiate. (Compl. ¶ 101). D.S., her friend, and two other students involved in the altercation were charged as adults under the Disturbing Schools Law and pleaded guilty without legal representation. (Compl. ¶ 102). D.S. received a suspended sentence of a $400 fine or twenty days imprisonment conditioned on completion of a pretrial intervention program ("PTI"). (Id.). She was unable to afford the $300 or more cost of PTI participation, and D.S. was subsequently rejected from the PTI program. (Id.). She obtained a public defender who reopened her case, and her charges were eventually dismissed. (Id.). She fears being charged under the Disturbing Schools and Disorderly Conduct Laws if her actions, while on or around the grounds of a school, are interpreted to fall under any of the broad terms of the statutes. (Compl. ¶ 19).

S.P. is a fifteen-year-old Caucasian female who resides in Travelers Rest, South Carolina. (Compl. ¶ 20). During the 2015–2016 school year, she was enrolled at Travelers Rest High School in Greenville County and plans to continue her enrollment there. (Compl. ¶¶ 20, 99). Because S.P. has been diagnosed with mood and behavior disabilities, she receives special education services and has a behavior intervention plan. (Id.). While attending school on a date not alleged, she was referred to law enforcement for disorderly conduct because of an altercation with another female student who had been making fun of her. (Compl. ¶¶ 21, 99). S.P. encountered the other student in the library and told her to stop talking about her. (Compl. ¶ 99). The school principal came to the library and told S.P. to leave with him. (Id.). When she refused and complained that the other student did not get in trouble, the principal told S.P. he was

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addressing only her because she could be arrested for refusing to leave with him. (Id.). When an SRO arrived, S.P. agreed to leave the library. (Id.). As she was escorted, S.P. cursed at students who began clapping and the student who teased her. (Id.). Several months later, S.P. was charged under the Disorderly Conduct Law for these actions. (Compl. ¶ 100). She fears being charged under the Disturbing Schools and Disorderly Conduct Laws if her actions, while on or around the grounds of a school, are interpreted to fall under any of the broad terms of the statutes. (Compl. ¶ 21).

Girls Rock is a nonprofit organization with its principal office in Charleston, South Carolina. (Compl. ¶ 22). Girls Rock provides mentorship, music and arts education, and leadership development to young people in Charleston and operates an afterschool program serving at-risk youth and minors who have been involved in the justice system. (Id.). Its core mission includes "challenging criminalization and promoting collective accountability for behavior." (Id.). Girls Rock is suing on behalf of its members—students who risk arrest or referral under the Disturbing Schools and Disorderly Conduct Laws—and on its own behalf because it is "substantially burdened in its mission by the continued practice of charging students under [the Disturbing Schools Law]." (Compl. ¶ 23). Girls Rock "has taken up efforts to challenge the [Disturbing Schools Law] and bring awareness to the statute's negative impact on Charleston area young people." (Compl. ¶ 103). Girls Rock volunteers have expended significant time and resources to address the impacts of disturbing schools adjudications through mentorship and support of young people in the Girls Rock After School Program ("GRASP"), such as by attending hearings where they testify to a participant's character and progress in GRASP. (Compl. ¶ 104). As a primarily volunteer-run organization with limited resources, the time and resources Girls Rock spends supporting young people charged under the Disturbing

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Schools Law detract from its ability to help other young people. (Compl. ¶ 105). Additionally, the time it spends addressing ongoing court involvement and other collateral consequences of disturbing schools adjudications detracts from the positive mentorship activities Girls Rock seeks to provide because it would otherwise expend its efforts "developing programming and providing direct services to young people and attending to administrative business necessary to sustain the operations of the organization, such as writing grant proposals and conducting fundraising activities." (Id.).

C. Allegations Related to Enforcement of the Challenged Laws Across South Carolina

The plaintiffs contend that their experiences and those of other students in South Carolina reflect the arbitrary and discriminatory enforcement and broad reach of the Disturbing Schools and Disorderly Conduct Laws. (Compl. ¶¶ 81, 106). They argue that the terms of the Disturbing Schools Law are vague and fail to provide notice to students and others expected to comply with its terms or to provide sufficient guidance to those charged with its enforcement, permitting arbitrary and discriminatory enforcement. (Compl. ¶ 106). They also contend that the Disorderly Conduct Law is equally vague when applied to elementary and secondary school students. (Id.). They claim that infractions including "disruption," "behavior that significantly interrupts the learning environment," "fighting," "excessive noise," "boisterous play or pranks," and "profanity" are behaviors that can be addressed through school interventions, yet these behaviors may lead to charges of disturbing school or disorderly conduct. (Compl. ¶ 80).

School Codes of Conduct across South Carolina allegedly reflect the impossibility of distinguishing criminal behavior under the challenged laws from behavior that should be addressed through school responses, such as verbal warnings and parent conferences. (Compl. ¶ 79). The plaintiffs allege that black students and students with disabilities are disproportionately

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more likely to be subjected to exclusionary discipline, such as out-of-school suspension, referral to law enforcement, and arrest at school. (Compl. ¶ 61). Disparities are allegedly most prevalent in categories of discipline that require subjective determination of whether a school rule was violated, such as offenses of "disruption" or "excessive noise." (Compl. ¶ 63).

The Complaint additionally details alleged experiences by other students who have been referred to Girls Rock but who are not named as plaintiffs. (Compl. ¶¶ 93-98). In Richland School District One, an eight-year-old African-American student was charged with disturbing school and assault when the student, after being directed to leave class, "attempted to slam the classroom door and the teacher's arm was caught." (Compl. ¶ 92). In Charleston, an African-American student was charged with disturbing school, subsequently adjudicated delinquent, and referred to Girls Rock as a condition of her probation after she and a group of other students were reported for taking photographs of themselves and other students in the girls' restroom. (Compl. ¶ 93).

Also in Charleston, a thirteen-year-old Latina student was charged with disturbing school and later adjudicated delinquent after an incident that began with her late arrival to gym class. (Compl. ¶ 94). When the student started to loudly protest her removal from class, an SRO was called. (Id.). The SRO physically restrained the student, took her to the ground, caused bruises, then handcuffed and searched her before releasing the student to her mother. (Id.). She was sentenced to probation and referred to Girls Rock by her probation officer. (Compl. ¶ 95). When she returned to her high school after being charged, she was placed in a program called "Twilight" through which she was provided no more than three hours of computer-based education per day and which did not provide access to the courses necessary to obtain a high

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school diploma. (Id.). Because she was permitted to be on campus only during program hours, she had to find her own transportation to school, which was a costly expense. (Id.).

As a final example, an African-American student was charged with disturbing school after an incident at her Charleston middle school where she was sent out of class for talking. (Compl. ¶ 97). While she sat on a bench outside the classroom, another student walked by and began speaking to her. (Id.). When an SRO noticed the conversation, she was detained, handcuffed, charged with disturbing school, subsequently placed on probation, and referred to Girls Rock. (Id.). When she started high school, she was placed in the Twilight program. (Compl. ¶ 98). After being picked up for truancy, she was detained for violating the terms of her probation. (Id.).

D. Class Allegations

D.S. and S.P. bring this action on behalf of themselves and all elementary and secondary public school students in South Carolina, each of whom risks arrest or juvenile referral under the allegedly broad and overly vague terms of the Disorderly Conduct Law (the "plaintiff class"). (Compl. ¶ 109). There are allegedly over 750,000 elementary and secondary public school students residing in South Carolina. (Compl. ¶ 110).

This class action is brought against the named defendants individually and against all South Carolina law enforcement agencies that might enforce the Disturbing Schools and Disorderly Conduct Laws against the plaintiff class (the "defendant class"). (Compl. ¶ 115). There are allegedly more than 200 state and local law enforcement agencies in South Carolina, employing over 11,000 personnel. (Compl. ¶ 116).

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II. RELEVANT PROCEDURAL BACKGROUND

The defendants filed seven motions to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.[3] (ECF Nos. 27, 28, 34, 36, 41, 42, 44). The grounds raised are: (1) the plaintiffs lack standing to bring this lawsuit; (2) the defendants are not proper; (3) this action is not ripe; (4) abstention forecloses this action; (5) the Rooker-Feldman doctrine and res judicata necessitate dismissal of claims by any plaintiff who has been convicted of or pleaded guilty to charges of violating the Disturbing Schools or Disorderly Conduct Laws; and (6) the challenged laws are not vague. The plaintiffs filed two responses in opposition, and the moving defendants filed several replies thereto. On December 8, 2016, the Court heard oral argument on all pending motions.

This Order addresses the issue of standing. The Court applies the standard under Rule 12(b)(1) of the Federal Rules of Civil Procedure to determine whether dismissal for lack of standing is warranted. See Taubman Realty Grp. Ltd. P'ship v. Mineta, 320 F.3d 475, 480 (4th Cir. 2003) (applying 12(b)(1) standard to dismissal for lack of standing).

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. See Fed. R. Civ. P. 12(b)(1). The plaintiff invoking the Court's jurisdiction bears the burden of establishing that the Court has the requisite subject-matter jurisdiction to grant the relief requested. Richmond, Fredricksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991) (citation omitted). When ruling on a 12(b)(1) motion, the Court "should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to

[3] The defendant Chief Reynolds has not filed a motion to dismiss or other responsive pleading. He has no counsel of record in this case.

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show that a genuine issue of material fact exists." Id. (citation omitted). The Court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Id. (citation omitted). "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Id. (citation omitted).

IV. ANALYSIS

Although some elements of standing are "merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of [Article III's] case-or-controversy requirement[,]" which limits the Court's subject-matter jurisdiction. Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-60 (1992) (citation omitted). Standing sets apart the "cases" and "controversies" that are the justiciable sort referred to in Article III, "'serv[ing] to identify those disputes which are appropriately resolved through the judicial process.'" Id. at 560 (alteration in original) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). If the plaintiffs lack Article III standing, then the Court lacks subject-matter jurisdiction to entertain their claims.

Standing must be established by individual and organizational plaintiffs alike. White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir. 2005) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982)). "An organizational plaintiff may establish standing to bring suit on its own behalf when it seeks redress for an injury suffered by the organization itself." Id. (citation omitted). Additionally, an organizational plaintiff may establish "associational standing" on behalf of its members "when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither

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the claim made nor the relief requested requires the participation of individual members in the suit." Id. (citation omitted).

There are three constitutional requirements for standing: (1) an "injury-in-fact," which means "invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) a causal relationship where the injury is fairly traceable to the defendant's conduct; and (3) a favorable court decision is likely to redress the injury. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 663-64 (1993) (citations omitted). The elements of standing are not merely pleading requirements but are "an indispensable part of the plaintiffs' case," and the plaintiffs bear the burden of proof. Lujan, 504 U.S. at 561. Standing "depends not upon the merits . . . but on whether the plaintiff is the proper party to bring [the] suit." White Tail Park, 413 F.3d at 460 (alteration in original) (citations omitted).

To demonstrate injury-in-fact, a plaintiff "must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct[,] and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." City of L.A. v. Lyons, 461 U.S. 95, 101-02 (1983) (citations omitted). However, a plaintiff seeking injunctive and declaratory relief must demonstrate a sufficient likelihood of future injury from the unconstitutional conduct to warrant such equitable relief. See id. at 105, 111 (citation omitted) (holding allegation of prior incident of chokehold use by police as insufficient to confer standing to sue for equitable relief); see also Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122 (1974) (requiring allegations to show a substantial controversy of sufficient immediacy and reality to warrant declaratory relief); see also Fed. R. Civ. P. 57 advisory committee's note to 1937 adoption (quoting Ashwander v. Tenn. Valley Auth., 297

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U.S. 288 (1936)) ("The 'controversy' must necessarily be 'of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts.'").

In the present case, the plaintiffs do not seek relief for past arrests under the challenged laws; rather, they seek equitable relief from future injury. Thus, this case is a pre-enforcement challenge to the Disturbing Schools and Disorderly Conduct Laws. Courts "have permitted pre-enforcement review under circumstances that render the threatened enforcement [of a law] sufficiently imminent. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014). "[A] plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" Id. (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

Accordingly, to satisfy the injury-in-fact requirement of standing, the plaintiffs in this case must allege an intention to engage in a course of conduct proscribed by the challenged laws, affecting their Fourteenth Amendment due process rights, and a credible threat of prosecution. Because the plaintiffs seek injunctive and declaratory relief from future injury, not pecuniary damages for past wrongs, their alleged injuries cannot be "conjectural" or "hypothetical[,]" Lyons, 461 U.S. at 102; "remote[,]" Warth v. Seldin, 422 U.S. 490, 507 (1975); "speculative[,]" Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42-46 (1976); or "[a]bstract[,]" O'Shea v. Littleton, 414 U.S. 488, 494 (1974). Rather, they must be "certainly impending." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (citation omitted).

Lyons is an illustrative case where the plaintiff failed to show a likelihood of future harm. In that case, during the course of a traffic stop, the plaintiff was handcuffed by police and subsequently choked without provocation or justification until he blacked out. 461 U.S. at 97.

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He later sued to enjoin as unconstitutional the use of chokeholds by the Los Angeles Police Department in instances where an officer was not threatened with deadly force. Id. at 98. The United States Supreme Court held that the plaintiff did not have standing to seek injunctive relief; although he could bring suit seeking damages for his injuries, the plaintiff lacked standing to enjoin the police because he failed to demonstrate the likelihood that he would be choked again in the future. Id. at 105. A conversely comparative case is County of Riverside v. McLaughlin, where the plaintiff pleaded likelihood of future harm sufficient to withstand a motion to dismiss. 500 U.S. 44, 51 (1991) (denying motion to dismiss in lawsuit challenging county's arraignment policy allowing long delays over weekends and holidays before arraignments because plaintiffs were under arrest and in custody upon filing complaint, alleging that they would "continue to suffer that injury until they received the probable cause determination to which they were entitled.").

As a final illustration, in Lujan, the United States Supreme Court considered a challenge to a federal regulation exempting government activities outside the United States from the Endangered Species Act. 504 U.S. at 557-60. The plaintiffs claimed that the regulation's noncompliance with the Act "with respect to certain funded activities abroad increase[es] the rate of extinction of endangered and threatened species." Id. at 562 (alteration in original) (citation omitted). Two of the plaintiffs made allegations describing their trips abroad to observe endangered species. Id. at 563. Applying Lyons, the Supreme Court held that the plaintiffs lacked standing because they failed to demonstrate the likelihood of future injury by destruction of endangered species abroad. Id. at 564 (alteration in original) (citation omitted) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). The

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allegations that the plaintiffs made trips in the past "prove[d] nothing," and their intent to return in the future "some day" was insufficient for standing "without any description of concrete plans or indeed any specification of when the some day will be . . . ." Id.

A. Standing of Kenny, Nesmith, D.S., S.P., and Girls Rock on behalf of its members

In the present case, the pleaded facts of past exposure to allegedly unconstitutional conduct are likewise insufficient to support equitable relief; the plaintiffs must allege impending harm or at least "an intention to engage in a course of conduct arguably affected with a constitutional interest" accompanied by "a credible threat of prosecution[.]" Driehaus, 134 S. Ct. at 2342. With regard to future injury, the individual plaintiffs—Kenny, Nesmith, D.S., and S.P.—each allege the same: they "fear[] future arrest and prosecution" under either or both the Disturbing Schools and Disorderly Conduct Laws "if, while on or around the grounds of a school," his or her "actions are interpreted to fall under any of the broad terms" of the laws. (Compl. ¶¶ 17, 19, 21, 25). The proposed plaintiff class members—"all elementary and secondary public school students in South Carolina" represented by D.S. and S.P.—allegedly "face[] a risk of arrest or juvenile referral under the broad and overly vague terms of the challenged statutes." (Compl. ¶ 109). Finally, for the suit it brings on behalf of its members, Girls Rock similarly states that its members are "students who risk arrest or referral under [the Disturbing Schools Law] or [Disorderly Conduct Law] while attending school." (Compl. ¶ 23).

The question thus becomes whether the allegations of "fear" or "risk" of future arrest, prosecution, or referral under the challenged laws constitute injuries-in-fact necessary to confer standing to these plaintiffs. These future injury allegations are insufficient to confer standing because they fail to state facts showing imminent harm, an intention to engage in conduct proscribed by the challenged laws, or a credible threat of prosecution. Although imminence is "a

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somewhat elastic concept, it cannot be stretched beyond its purpose . . . —that the injury is certainly impending." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Lujan, 504 U.S. at 564 n.2). The Supreme Court has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact and that allegations of possible future injury are not sufficient." Id. (quoting Whitmore, 495 U.S. at 158).

In the present case, like the plaintiff in Lyons, Kenny, Nesmith, D.S., and S.P. allege past injuries to their constitutional right to due process, which may endow them with standing to seek monetary damages; yet they seek equitable relief like the plaintiffs in Lujan, which requires that they plead a likelihood of future injury that is certainly impending and not merely possible. The allegations of "fearing future arrest and prosecution" under the challenged laws followed by a conditional clause—"if, while on or around the grounds of a school" a plaintiff's "actions are interpreted to fall under any of the broad terms" of the laws—do not demonstrate a likelihood of future injury, an intention to engage in proscribed conduct, or a credible threat of prosecution. (See Compl. ¶¶ 17, 19, 21, 25). The same is true of the claims that Girls Rock brings on behalf of its members "who risk referral under [the Disturbing Schools Law] or [Disorderly Conduct Law] while attending school. (See Compl. ¶ 23). The allegations pertaining to Kenny, Nesmith, D.S., S.P., and Girls Rock's members do not rise above speculation, and thus the Court cannot provide the injunctive and declaratory relief requested.

Absent allegations of a sufficient likelihood that these students will be charged under the challenged laws again or that a credible threat of prosecution looms, these plaintiffs are no more entitled to equitable relief than any other citizen of South Carolina, and the Court may not entertain a constitutional challenge to a state criminal statute merely because a citizen desires to have it struck down or even because she may some day act in a manner that violates it. See

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Lyons, 461 U.S. at 111 ("Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional."). The speculative and hypothetical nature of the individual plaintiffs' alleged future injuries is insufficient to confer standing where only equitable relief is sought. Girls Rock likewise lacks associational standing to sue on behalf of its members because they lack standing to sue as individuals due to the speculative and hypothetical nature of their allegations. See White Tail Park, 413 F.3d at 458 (requiring organizational plaintiff's members to have standing individually in order for their organization to sue on their behalf). Therefore, the Court dismisses the claims of Kenny, Nesmith, D.S., S.P., and Girls Rock on behalf of its members for lack of standing.

B. Standing of Girls Rock on its own behalf

With respect to the suit Girls Rock brings on its own behalf, the organization states that it "is substantially burdened in its mission by the continued practice of charging students under [the Disturbing Schools Law]." (Compl. ¶ 23). It further alleges that enforcement of the Disturbing Schools Law "has . . . impacted Girls Rock as an organization[]" and that it "has taken up efforts to challenge the Disturbing Schools statute and bring awareness to the statute's negative impact on Charleston area young people." (Compl. ¶ 103). These efforts include: (1) "operat[ing] an afterschool program serving at-risk youth and youth who have been involved in the justice system[,] . . . guided by core principles that include challenging criminalization and promoting collective accountability for behavior[,]" (Compl. ¶ 22); (2) "provid[ing] mentorship, music and arts education, and leadership development to young people in Charleston, South Carolina[,]'" (id.); and (3) advocating "on behalf of individual students who have been charged under the

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challenged statutes, foster[ing] leadership and community involvement in the young people it serves, and help[ing] create opportunities for them to advocate for their own rights—including the right to be free from enforcement of [the challenged laws]." (Mem. in Opp'n to Defs.' Mots. to Dismiss 3, ECF No. 54). For the following reasons, these allegations are insufficient to confer standing on Girls Rock to sue on its own behalf because it lacks two requirements of injury-in-fact: imminence of harm and invasion of a legally protected interest.

1. Injury-in-fact: Imminence

When a plaintiff "is not [it]self the object of the government action . . . [it] challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Lujan, 504 U.S. at 562 (citation omitted). Like the other plaintiffs' injuries sought to be redressed with equitable relief, Girls Rock's alleged injury of being substantially burdened in its mission by the continued practice of charging students under the Disturbing Schools Law is insufficient to confer standing because it depends on the future action of law enforcement officers who may or may not be before the Court. See id. Such future action by law enforcement would have to further arise from the future conduct of non-party students whose behavior results in disturbing schools prosecution, sentencing, and subsequent referral to Girls Rock. See id. Girls Rock's injury is premised on hypothetical circumstances and lacks impendency. Moreover such injury is too attenuated from the claims before the Court: that the challenged laws violate students' Fourteenth Amendment due process. See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154-55 (4th Cir. 2000) (requiring courts to consider attenuation between the illegal conduct and injury when examining allegations related to Article III standing). Therefore, the imminence requirement is not satisfied.

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2. Injury-in-fact: Invasion of a Legally Protected Interest

"Proper regard for the complex nature of our constitutional structure" does not require the Court to avoid confrontation with other branches of government, "nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered a cognizable injury." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982). Accordingly, the Court refrains from determining the constitutionality of the challenged laws "unless obliged to do so in the proper performance of . . . judicial function, when the question is raised by a party whose interests entitle him to raise it." Id. (quoting Blair v. United States, 250 U.S. 273, 279 (1919)).

Generally, a plaintiff "must assert his own legal rights and interests" and may not rely on the legal rights or interests of third parties. Id. (citation omitted). An exception exists "in the First Amendment context" where litigants may "challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988) (citation omitted). However, this exception does not apply in the present case because the Complaint does not allege infringement of First Amendment rights. Another exception has been allowed in cases challenging abortion laws, also not applicable to the case at hand. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844-45 (1992) (allowing abortion providers to bring pre-enforcement challenge to Pennsylvania law requiring husband's consent prior to his wife's abortion).

A complaint must fall within the zone of interests protected by the statute or constitutional provision in question. Valley Forge, 454 U.S. at 475 (citation omitted). Here, the Complaint contains no allegations demonstrating that Girls Rock's interests fall within the zone

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of interests protected by the constitutional provision in question—the Due Process Clause of the Fourteenth Amendment—to render its interests at stake in this case. Therefore, the requirement of invasion of a legally protected interest is not satisfied. In summation, Girls Rock does not have standing to sue on its own behalf because it lacks the injury-in-fact requirements of imminence of harm and invasion of a legally protected interest. Accordingly, the Court dismisses Girls Rock's claim on its own behalf.

V. CONCLUSION

For the foregoing reasons, the plaintiffs lack Article III standing. Therefore, the Court lacks subject-matter jurisdiction to hear their claims. The Court grants the motions to dismiss (ECF Nos. 27, 28, 34, 36, 41, 42, and 44). Accordingly, the case is dismissed without prejudice.

AND IT IS SO ORDERED.

C. Weston Houck

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

February 28, 2017
Charleston, South Carolina

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CWH.