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

KENNY, et al. Plaintiffs, v. WILSON, et al. Defendants.	Civil Action No.: 2:16-cv-2794-CWH PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF LAW IN SUPPORT

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiffs, through their undersigned attorneys, respectfully move the Court for an order certifying the classes of plaintiffs and defendants set forth in the Complaint, naming as class representatives the plaintiffs and defendants set forth in the above caption, and naming the undersigned attorneys as co-lead counsel, pursuant to Federal Rule of Civil Procedure 23.

PROPOSED CLASSES

In this vagueness challenge to South Carolina's "Disturbing Schools" and Disorderly Conduct statutes, Plaintiffs D.S and S.P.[1] ("Named Plaintiffs") move this Court pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure to certify a plaintiff class consisting of all elementary and secondary public school students in South Carolina ("Plaintiff Class"), each of whom faces a risk of arrest or juvenile referral under the broad and overly vague terms of the challenged statutes. Plaintiffs further move pursuant to Rules 23(a), 23(b)(1) and (b)(3) to certify a defendant class of all law enforcement agencies with authority to enforce S.C. Code §§ 16-17-420 and 16-17-530 against Plaintiffs ("Defendant Class"). Plaintiffs' motion should be granted because the Plaintiffs meet the requirements of each of these rules as to both of the proposed classes.

Support for certification is provided below.

[1] Plaintiffs do not move on behalf of Niya Kenny, Taurean Nesmith, or Girls Rock Charleston, because they do not fall within the proposed class elementary and secondary public school students at risk of enforcement under the Disturbing Schools and Disorderly Conduct statutes. Those individual Plaintiffs will remain outside of the Plaintiff Class and proceed on an individual basis in this case.

ARGUMENTS AND AUTHORITIES IN SUPPORT

I. THE COURT SHOULD CERTIFY THE PLAINTIFF CLASS.

Plaintiffs meet each of the prerequisites for class certification under Rules 23(a) and 23(b)(2). First, joinder would be impracticable because the proposed Plaintiff Class includes over 750,000 elementary and secondary students enrolled in public schools from across the state. Second, the Named Plaintiffs' and Plaintiff Class members' claims present the common legal question of whether the Disturbing Schools and Disorderly Conduct statutes are impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Because of this common legal question, the claims of the Named Plaintiffs are typical (and, indeed, identical to) those of members of the class, and they are adequately equipped to protect the interests of the class. Finally, with respect to the requirements of Rule 23(b), because Defendants have applied the Disturbing Schools and Disorderly Conduct laws in a manner that applies generally to the class, relief is appropriate respecting the Plaintiff Class as a whole.

A. The Plaintiffs Meet All of the Requirements for Class Certification Under Rule 23(a).

1) The Plaintiff Class Satisfies the Numerosity Requirement, Joinder Is Impracticable, and Membership Is Readily Ascertainable.

The numerosity requirement is met when the number of potential plaintiffs is "so numerous that joinder of all members [of the class] is impracticable." Fed. R. Civ. P. 23. "No specified number is needed to maintain a class action under Fed. R. Civ. P. 23; application of the rule is to be considered in light of the particular circumstances of the case." *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (certifying class with eighteen members). "[W]here general knowledge and common sense would indicate that [the

class] is large, the numerosity requirement is satisfied." *Harris v. Rainey*, 299 F.R.D. 486, 489 (W.D. Va. 2014) (*citing Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 556 (D. Md. 2006)). Certification is appropriate when joinder of all members would be extremely difficult or inconvenient—though the standard is not that it be impossible. *See Cuthie v. Fleet Reserve Ass'n*, 743 F. Supp. 2d 486, 498 (D. Md. 2010); *Bullock v. Bd. of Educ. of Montgomery Cty.*, 210 F.R.D. 556, 559 (D. Md. 2002).

In the instant case, the proposed class, all public elementary and secondary students in South Carolina, clearly meets these requirements. The South Carolina Department of Education reports that 763,588 students were actively enrolled in South Carolina public schools as of the forty-fifth day of the 2015-2016 school year. South Carolina Department of Education, Active Student Headcounts.[2] Courts have routinely found numerosity met in proposed classes of far fewer students. *See Bullock*, 210 F.R.D. at 559 (certifying class of "several hundred" homeless students); *Horton v. Goose Creek Indep. Sch. Dist*., 690 F.2d 470, 484 (5th Cir. 1982) (certifying class of 15,400 members made up of all students enrolled in school district). Joinder of this large a number of plaintiffs would clearly be impracticable.

Moreover, although the precise number of matriculated students may fluctuate, this class is sufficiently clearly defined to meet Rule 23's "implicit" requirement "that the members of a proposed class be 'readily identifiable.'" *Moodie v. Kiawah Island Inn Co., LLC*, 309 F.R.D. 370, 375 (D.S.C. 2015) (citing *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)). The class is itself clearly defined, and class membership is ascertainable through "minor discovery" of state and district records. *Id.* at 376–77 (finding ascertainability where members of class of workers were "easily identified by reference to Defendant's payroll records" and other standard

[2] *Available at* http://ed.sc.gov/data/other/student-counts/active-student-headcounts/ (last visited Aug. 2, 2016).

forms); *Reed v. Big Water Resort, LLC*, No. 2:14-CV-1583-DCN, 2015 WL 5554332, at *4 (D.S.C. Sept., 21 2015) (finding ascertainability where class of between 257 and 750 private club members could be identified by reviewing their individual contracts). The proposed class is thus both sufficiently numerous and ascertainable to meet the requirements of Rule 23(a)(1).

2) Plaintiff Class Members' Claims Present the Common Legal Question of Whether the Disturbing Schools and Disorderly Conduct Laws are Unconstitutionally Vague.

In order to demonstrate commonality, Plaintiffs will need to show proof that they suffer a common injury, and that resolution of the claim would provide class-wide relief. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). Common questions may be questions of law *or* of fact. *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 161 (S.D. W. Va. 1996). Thus, "[t]his requirement is satisfied when there is even a single common question that will resolve an issue central to the validity of each of the class member's claims." *Plotnick v. Computer Scis. Corp. Deferred Comp. Plan for Key Execs.*, No. 1:15-CV-01002, 2016 WL 1704158, at *4 (E.D. Va. Apr. 26, 2016). Yet, "[w]hile the claims of the class members must arise from similar practices and be based on the same legal theory, the commonality requirement does not require that all class members share identical factual histories." *Scott v. Clarke*, 61 F. Supp. 3d 569, 586 (W.D. Va. 2014); *Bullock*, 210 F.R.D. at 560. Rather, "a class-wide proceeding must be able to generate common answers that drive the litigation." *Brown v. Nucor Corp.*, 785 F.3d 895, 909 (4th Cir. 2015). Accordingly, allegations of a common law or policy that subjects an entire class to unlawful treatment will satisfy the commonality requirement. *See Plotnick*, 2016 WL 1704158, at *4; *Brown*, 785 F.3d at 915 (finding commonality satisfied for purposes of liability determination in light of "a pattern of engrained discriminatory decision-making that consistently disadvantaged black workers"); *R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, 569 F.

App'x 41 (2d Cir. 2014) (summary order) (Appendix 2) (affirming certification of class of students classified as disabled and receiving supplemental services under IDEA where claims were "predicated on a policy that [was] applied uniformly to all students"); *Scott v. Clarke*, 61 F. Supp. 3d at 586 (finding commonality prong met in Eighth Amendment challenge to inadequate provision of medical care in correctional facility).

Courts routinely find commonality to be satisfied where the relief requested is principally or solely declaratory and injunctive relief. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). This is because in such cases, "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Id*. Thus, "where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, [ ] there is [ ] no need for *individualized* determinations of the propriety of injunctive relief." *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (emphasis in original). *See also Berry v. Schulman*, 807 F.3d 600, 608–09 (4th Cir. 2015) ("[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members." (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir.1998))); *Scott v. Clarke*, 61 F. Supp. 3d at 585 ("[S]uits for injunctive relief by their very nature present common questions of law and fact." (quoting *McGlothlin v. Connors*, 142 F.R.D. 626, 633 (W.D. Va. 1992))); 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1763 (3d ed. 2005) ("[C]lass suits for injunctive or declaratory relief by their very nature often present common questions[.] . . . When plaintiff is alleging the existence of a pattern and practice of discrimination or the existence of a discriminatory policy applicable to the class members, the question of the discriminatory character of defendant's conduct is basic to the action and the fact

that the individual class members may have suffered different effects from the alleged discrimination is immaterial for purposes of this prerequisite.").

Here, the plaintiffs seek to enjoin the operation of the Disturbing Schools and Disorderly Conduct statutes based on the single legal theory that the statutes are unconstitutionally vague. Whether or not a law is vague is a purely legal question. *Henry v. Jefferson Cty. Planning Comm'n*, No. 99-2122, 215 F.3d 1318, 2000 WL 742188, at *4 (4th Cir. 2000) (unpublished table opinion) (Appendix 1). The common legal question in a vagueness challenge is whether the law is so vague that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and "encourages arbitrary and erratic arrests and convictions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (internal citation omitted); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) ("[An enactment] may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983))). The vagueness doctrine is animated by the concern that such imprecision "may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56; *see also Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

Whether or not a law is vague is an objective, rather than a subjective, inquiry. *Papachristou*, 405 U.S. at 162 (a statute is vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute") (internal citation omitted); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which

either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").[3] The outcome of the claim thus does not turn upon the subjective perceptions or personal experiences of the individual plaintiffs. Given the consistency of the legal theory behind the Plaintiffs' claim, the resolution of which would determine the outcome of the litigation, and the lack of need for an individualized inquiry, the commonality prong is satisfied. *See Brown*, 785 F3d at 909; *Clarke*, 61 F. Supp. 3d at 585–88; *Bullock*, 210 F.R.D. at 556; *Olvera-Morales v. Int'l Labor Mgmt. Corp., Inc.*, 246 F.R.D. 250, 256 (M.D.N.C. 2007) (citing *Peoples v. Wendover Funding, Inc*., 179 F.R.D. 492, 498 (D. Md.1998)); *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) (certiorari denied).

In addition to asserting a single legal theory, Plaintiffs also assert a common set of facts resulting in a common injury: being subject to actual and threatened enforcement of an overly vague criminal statute commonly applied to penalize a broad range of normal adolescent conduct. For purposes of their vagueness challenge, the single, common injury sustained by all public elementary and secondary students is the lack of certainty as to how to regulate their behavior in order to avoid running afoul of the law and the risk of arrest or juvenile referral under the laws in an arbitrary and discriminatory manner. *See Morales*, 527 U.S. at 71 (Breyer, J., concurring in part and concurring in the judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the

[3] The standard for assessing certainty is higher in the criminal context, particularly where the statute lacks a *mens rea* requirement. *See Kolender v. Lawson*, 461 U.S. at 372; *Morales*, 527 U.S. at 55; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.").

That the details of the specific incidents precipitating charges for disturbing schools or disorderly conduct may vary does not defeat a finding of commonality, as those details are not necessary for adjudication of the Plaintiffs' vagueness claim. *See Brown*, 785 F.3d at 898; *Harris v. Rainey*, 299 F.R.D. at 490 ("[W]hatever factual nuances may exist among putative class members, the legal relief sought is the same: a declaratory judgment . . . and a permanent injunction barring [ ] enforcement [of state laws prohibiting same-sex marriage]."); *Clarke*, 61 F. Supp. 3d at 585–86 (finding commonality met in Eighth Amendment challenge to denial of medical care where claims "do not turn on an individual plaintiff's particular personal health concerns, but rather on [defendants'] alleged systemic failure to provide a level of medical care to all of its residents that complies with constitutional norms"); *Bullock*, 210 F.R.D. at 560 (finding commonality met despite differences including family living arrangements, location of schools, and feasibility of providing transportation); *R.A.G. ex rel R.B.*, 569 F. App'x at 42 (Appendix 2) (finding that a putative class of students' injuries were sufficiently similar under *Wal-Mart* when students were subjected to the same policy (citing *Wal-Mart*, 562 U.S. at 350)). Rather, they merely serve to illustrate the breadth of the conduct covered by the statute's impermissibly vague terms, as well as its arbitrary and discriminatory enforcement—examples of common adolescent behaviors treated as criminal under the statute include involvement in a physical altercation in which there were no significant injuries, cursing, refusing to follow

instructions, and expressing concern over the actions of a police officer, *see* Kenny Decl.24; Nesmith Decl. ¶ 24; Carpenter Decl. ¶ 19; D.S. Decl. ¶ 10; S.P. Decl. ¶ 6; K.B. Decl. ¶¶ 3, 8-9.[4]

It should be noted that the Supreme Court's disapproval of a finding of commonality in *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), is of limited authority outside of the context of Title VII, and is, in any event, not controlling in this case. The crux of the claims in *Wal-Mart* concerned a Title VII challenge to a *lack* of company policy regarding hiring and promotion that plaintiffs claimed led to discrimination in hiring and promotion by managers and personnel at over 3,400 stores located around the country. *Id.* at 359–60. Here, by contrast, Plaintiffs assert that they are all subject to a single law that applies statewide. *See Brown*, 785 F.3d at 910 (distinguishing *Wal-Mart* where plaintiffs challenged policy and practice of discriminatory hiring and promotion at a single plant); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 116 (4th Cir. 2013) (limiting *Wal-Mart*'s application where plaintiffs had adequately specified company-wide practices of arbitrary decision making at the management level). While arbitrariness is a common thread between the two cases, discretion and arbitrary enforcement are fundamental elements of

[4] Nor should the statewide nature of the Plaintiff class be considered dispositive as defeating certification under *Wal-Mart*. In that case, the geographic boundaries included the entire country. *Wal-Mart*, 564 U.S. at 342, 345. Here, the boundaries lie within a single state—and statewide class actions have always been and clearly remain viable. *See Fariasantos v. Rosenberg & Assocs., LLC*, 303 F.R.D. 272, 278 (E.D. Va. 2014) (rejecting plaintiff's arguments for limiting the class to one county, and instead concluding that, because "there [were] no material differences between [one county's] claims and those from other counties," and because "[a] Virginia class . . . would reduce the number of cases, preserve judicial resources, and adjudicate the claims of all Virginia residents," a statewide class action was the superior method of resolution); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 179–80 (4th Cir. 2010) (holding that the district court did not err in certifying a statewide class of plaintiffs in a suit for breach of contract against an insurance provider); *Whitt v. Wells Fargo Fin., Inc.*, 664 F. Supp. 2d 537, 543 (D.S.C. 2009) (holding that a statewide class of workers filing FLSA claims was not collaterally estopped from doing so because a prior, nationwide class had been denied certification).

a vagueness claim. *See Papachristou*, 405 U.S. at 162. *Wal-Mart*'s holding thus cannot be understood as precluding class challenges on vagueness grounds.[5]

3) The Claims of the Named Plaintiffs Are Typical of the Class.

Rule 23(a)(3) requires that the claims of class representatives be "typical" of the members of the putative class. However, typicality does not require "that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006); *accord Moodie*, 309 F.R.D. at 378. Rather, "[t]he typicality requirement is met if a plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Moodie*, 309 F.R.D. at 378 (citing *Parker v. Asbestos Processing, LLC*, No. 0:11-CV-01800-JFA, 2015 WL 127930, at *7 (D.S.C. Jan 8, 2015)); *accord Bullock*, 210 F.R.D. at 560. The typicality requirement also "tends to merge with the commonality and adequacy-of-representation requirements." *Dieter*, 436 F.3d at 466.

In this case, as argued above, the claims of the individual Plaintiffs and the absent class members arise from the same course of conduct—enforcement of the Disturbing Schools and Disorderly Conduct statutes against students—and rest on the identical legal theory—the claim that the statute is unconstitutionally vague. *See DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (named plaintiffs' claims were typical of those of a proposed class of children in long-term foster care in challenge to denial of due-process right to personal security

[5] Furthermore, to permit *Wal-Mart* to extend to this context would disturb decades of settled law permitting such claims to proceed, and to prevail. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 384 n.5, 390 (1979) (holding that § 5(a) of the Pennsylvania Abortion Control Act, challenged by a class of physicians, was unconstitutionally vague); *Baggett v. Bullitt*, 377 U.S. 360, 368 (1964) (holding that statutes requiring teachers and state employees to take loyalty oaths, challenged by a class comprised of faculty, staff, and students at the University of Washington, were unconstitutionally vague).

and safe living conditions as a result of a policy of overburdening caseworkers); *M.D. v. Perry*, 294 F.R.D. 7, 45 (S.D. Tex. 2013) (named minor plaintiffs "need not have suffered identical harms or even have harms that were caused in the exact same way" to have claims typical of the class of foster children that they represented); *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012) (complaints of four named African American plaintiffs in challenge to policy and/or practice of stopping and frisking people in violation of the Fourth and Fourteenth Amendments were "precisely the typical ones that are made by other[ ] [classmembers] who bring or could bring claims for . . . violations by defendants"); *R.A-G ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, No. 12-CV-960S, 2013 WL 3354424, at *11 (W.D.N.Y. July 3, 2013) (Appendix 3), *aff'd sub nom. R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, 569 F. App'x 41 (2d Cir. 2014) (unpublished table opinion)(Appendix 2) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." (quoting *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993))); *Moodie*, 309 F.R.D. at 378 (finding that, even where some named plaintiffs did not share all of the claims in the complaint, the standard for typicality was met, because "[t]ypicality does not require that every class representative have exactly the same claims as every member of the class"); *City of Ann Arbor Emps.' Ret. Sys. v. Sonoco Products Co.*, 270 F.R.D. 247, 251–52 (D.S.C. 2010) (finding typicality satisfied where the "information that the [named] plaintiff assert[ed] [was] materially false and misleading [was] the same information that would be used by other class members to prove their case").

The relief sought is strictly injunctive in nature and does not depend upon adjudication of individual facts, or of individual damages. *See* Wright et al., *supra*, § 1763; *see also id.* § 1764

("[M]any courts have found typicality if the claims . . . of the representatives and the members . . . are based on the same legal theory. . . . Rule 23(a)(3) has been satisfied . . . when defendant's conduct or practices are alleged to violate the class members' constitutional rights."). As was true in the commonality inquiry, the individual incidents that precipitated the individual Named Plaintiffs' charges are immaterial to the outcome of their vagueness claim. And similarly, while the corollary harms suffered as a result of the statute's enforcement—including disruption to the Plaintiffs' education, financial costs, and dignitary harms—may vary from person to person, the precise contours of those harms are not necessary for adjudication of the merits of the claim. *See Brown v. Nucor Corp.*, 576 F.3d 149, 159 (4th Cir. 2009); *Clarke*, 61 F. Supp. 3d at 588–90; *Bullock*, 210 F.R.D. at 559–60. Rather, they go to the individual Plaintiffs' standing to seek declaratory and injunctive relief, and illustrate the deep and irreparable impact of these overly broad and vague statutes on students across the state.

Thus, a ruling for the Named Plaintiffs will result in a better outcome for all the Plaintiff Class members, and "as goes the claim of the named plaintiff[s], so go the claims of the class." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)); *Harris v. Rainey*, 299 F.R.D. at 490 (typicality found where "the relief sought would benefit all class members in an identical manner"); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 595 F. Supp. 1404, 1408 (D. Md. 1984) (finding typicality where "all class members will benefit"); *Doe v. Heckler*, 576 F. Supp. 463 (D. Md. 1983) (finding typicality where "all members of the class will benefit from the suit").

4) The Named Plaintiffs Will Adequately Protect the Interests of the Class.

The courts' inquiry into adequacy is "two-pronged," "requiring evaluation of: (1) whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation;

and (2) whether Plaintiffs' claims are sufficiently interrelated with and not antagonistic to the class claims as to ensure fair and adequate representation." *Moodie*, 309 F.R.D. at 378. Both requirements are met here.

First, the ACLU is the nation's preeminent legal organization litigating in the constitutional and civil rights arena; its attorneys have litigated and won countless cases brought under Section 1983, and have expertise bringing due process challenges specifically. Class counsel in this case are a team of experienced civil rights litigators with decades of experience among them. They also have considerable expertise in prosecuting class actions. Proposed class counsel thus meets the requirements of both Rule 23(a)(4) and Rule 23(g).[6]

Moreover, because the individual Named Plaintiffs' claims are identical to those of the Plaintiff Class, there are no conflicts of interest between named parties and the class they seek to represent. None of the class members would be harmed in any way, and all would benefit from, an injunction against the operation of an unconstitutionally vague statute. *See Moodie*, 309 F.R.D. at 378; *Holsey*, 743 F.2d at 217 (African-American employees' discrimination and retaliation claims under Title VII were typical of the plant-wide practices challenged and thus named plaintiffs satisfied requirement for fair and adequate representation). Thus, the adequacy requirement should not seriously be questioned in this case.

B. The Requirements of Rule 23(b)(2) Are Satisfied.

As the Fourth Circuit has observed, "Rule 23(b)(2) was created to facilitate civil rights class actions." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) (citing Wright et al., *supra*, § 1775); *see also Harris v. Rainey*, 299 F.R.D. at 494 ("[S]uits brought for

[6] Although the Federal Rules of Civil Procedure were amended in 2003 to include a separate requirement for adequacy of class counsel in Rule 23(g), courts in the Fourth Circuit continue to address adequacy of counsel under Rule 23(a)(4) and generally treat the requirements as coextensive. *See, e.g., Harris v. Rainey*, 299 F.R.D. at 490–91 & n.3; *Moodie*, 309 F.R.D. at 378.

injunctive relief alleging civil rights violations are precisely the type of suit for which Rule 23(b)(2) was intended to provide class certification."). Accordingly, Rule 23(b)(2) is "liberally applied in the area of civil rights." *Bumgarner v. NCDOC*, 276 F.R.D. 452, 457 (E.D.N.C. 2011).

Certification under Rule 23(b)(2) is appropriate when defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). *See also Berry v. Schulman*, 807 F.3d 600, 608–09 (4th Cir. 2015) ("[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members." (quoting *Allison*, 151 F.3d at 413)); *accord Harris v. Rainey*, 299 F.R.D. at 494–95.

In this case, as detailed above, the entire class of public elementary and secondary students is subject to and at risk of enforcement under the vague Disturbing Schools and Disorderly Conduct laws, and the Defendants' actions in enforcing those laws are applicable to the class as a whole. The declaratory and injunctive relief sought would clearly benefit all members of the class by eliminating the uncertainty as to what conduct is permitted and the risk of being charged under a vague law. *See Harris v. Rainey*, 299 F.R.D. at 497–98. Thus, as has been true in numerous other civil rights class actions seeking declaratory and injunctive relief, certification of the class is appropriate here. *See, e.g.*, *Harris v. Rainey*, 299 F.R.D. at 494–95 (certifying two sub-classes of same-sex couples who wished to wed in Virginia in statewide challenge to laws prohibiting same-sex marriage); *Scott v. Clarke*, 61 F. Supp. 3d at 590 (certifying class of female prisoners in Eighth Amendment challenge to denial of medical care); *R.A-G ex rel. R.B.*, 2013 WL 3354424, at *12 (certifying 23(b)(2) class of students seeking declaratory and injunctive relief for violations of IDEA and § 504 of the Rehabilitative Act); *J.D.*

v. Nagin, 255 F.R.D. 406, 416–17 (E.D. La. 2009) (certifying class of detainees in juvenile facility, challenging conditions of confinement under the First, Sixth, Eighth, and Fourteenth Amendments as well as numerous state and federal statutes, under Rule 23(b)(2)).

II. THE COURT SHOULD CERTIFY THE DEFENDANT CLASS.

Plaintiffs' motion to certify the Defendant Class pursuant to Rules 23(a) and 23(b)(1) or (b)(3) of the Federal Rules of Civil Procedure should also be granted because the Defendants meet the requirements of each of these rules. First, joinder would be impracticable because the proposed Defendant Class likely includes close to 12,000 sworn personnel working in the nearly 300 state and local law enforcement agencies across the state. Second, the Defendant Class members will share the same set of defenses available in a challenge to the facial validity state statutes; such defenses would not vary based on individual facts. Because of these common legal defenses, the anticipated defenses of the Attorney General, Sheriffs, and Police Chiefs named by the Complaint ("Named Defendants") will be typical (and, indeed, identical to) the anticipated defenses of the members of the class. The Named Defendants are also adequately equipped to protect the interests of the Defendant Class. Finally, with respect to the requirements of Rule 23(b), because there will be a risk of inconsistent adjudication in the absence of class certification, and because common questions predominate and class certification is a superior means of resolution, this class should be certified under either Rule 23(b)(1) or 23(b)(3).

The Federal Rules of Civil Procedure allow courts to certify a defendant class. Rule 23(a) states that "[o]ne or more members of a class may sue *or be sued*." Fed. R. Civ. P. 23(a) (emphasis added). *See also* Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment (discussing "defendant class actions"). Defendant class certification is particularly common when plaintiffs challenge a law executed by multiple defendants at the local level, such as

sheriffs' departments and local prosecutors. *See, e.g.*, *Autry v. Mitchell*, 420 F. Supp. 967, 969 (E.D.N.C. 1976) (defendant class of "all district attorneys of the State of North Carolina and other officers and persons who have applied, or in the future may apply, [the constitutionally questionable statute]"); *Callahan v. Wallace*, 466 F.2d 59, 60 (5th Cir. 1972) (defendant class of "all justices of the peace, . . . and all sheriffs and state troopers"); *Strawser v. Strange*, 105 F. Supp. 3d 1323, 1330 (S.D. Ala. 2015) (defendant class of judges and others charged with enforcing Alabama law); *Monaco v. Stone*, 187 F.R.D. 50, 53 (E.D.N.Y. 1999) ("defendant class of local criminal court judges"); *Ragsdale v. Turnock*, 734 F. Supp. 1457, 1464 (N.D. Ill. 1990), *aff'd*, 941 F.2d 501 (7th Cir. 1991) ("defendant class consisting of all State's Attorneys in the State of Illinois"); *Akron Ctr. For Reprod. Health v. Rosen*, 110 F.R.D. 576, 584 (N.D. Ohio 1986) ("defendant class of municipal prosecutors"): *Harris v. Graddick*, 593 F. Supp. 128, 137–38 (M.D. Ala. 1984) ("[defendant] class consisting of . . . the probate judge, clerk of the circuit court, and sheriff of each county"). *See also* Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 631 (1978) ("[S]uits brought against local public officials challenging the validity of a state law, [along with patent cases] are the most typical defendant class actions.") (internal citations omitted).

A. The Proposed Defendant Class Satisfies the Prerequisites of Rule 23(a).

1) The Defendant Class Satisfies the Numerosity Requirement and Joinder Is Impracticable.

As noted above, numerosity does not demand a threshold number of class members. Rather, the test is whether it would be impracticable—very difficult or inconvenient—to join all members. This criterion is also applied more liberally to the certification of defendant classes: "[I]t is generally more likely that defendant classes will contain fewer class members than plaintiff classes. . . . The defendant classes have fewer members than the typical plaintiff class."

2 William B. Rubenstein, *Newberg on Class Actions* § 5:6 (5th ed. 2012); *see also Alvarado Partners, L.P. v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990) ("[T]he requirements of Rule 23(a)(1) are applied more liberally when certifying a defendant class than when certifying a plaintiff class.").

In the instant case, the proposed class of law enforcement agencies across the state charged with the responsibility of enforcing the Disturbing Schools and Disorderly Conduct statutes likely includes close to 12,000 members. The latest available statistics from the Bureau of Justice Statistics suggests that there are approximately 272 state and local law enforcement agencies in South Carolina, employing approximately 11,674 sworn personnel. *See* Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, NCJ 233982 (Bureau of Justice Statistics), July 2011, at 15.[7] Like the proposed Plaintiff Class, these members would be readily identifiable through, for instance, minor discovery of state and district payroll records. *See Moodie*, 309 F.R.D. at 376–77.

2) Defenses Will Be Common to All Members of the Defendant Class.

Assessment of the commonality and typicality of claims among defendant class members focuses on "the defendants' anticipated defenses" to plaintiffs' claims. Rubenstein, *supra*, § 5:9. Defendants will have the same set of defenses available to a facial challenge to a state statute; there will be no additional defenses based upon individual facts. *See, e.g., Harris v. Graddick*, 593 F. Supp. at 137 (concluding that, because claim was based on state-wide circumstances, "any defenses to the claim would be state-wide, and would be common and typical for all members of the class"); *Bell v. Disner*, No. 3:14-CV-91, 2015 WL 540552, at *3 (W.D.N.C. Feb. 10, 2015) (finding that the trier of fact in "[a] fraudulent transfer case [ ] simply looks at whether there was

[7] *Available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf.

a fraudulent transfer to all the [defendants] that must be repaid, without regard to the individual circumstances of participation in the scheme"). *See also Defendant Class Actions*, *supra*, at 643–44, 647 ("If the class action simply challenges the facial validity of the law, as opposed to the manner in which it is administered or enforced, there is by definition only one issue at stake perfectly common to all the class members. Individual advocacy pertaining to the manner of enforcement is irrelevant.").

3) The Defenses of Named Defendants Are Typical of the Defendant Class.

Like commonality, "[t]he typicality requirement does not mandate that the defenses of the representative parties and the class be completely identical or perfectly coextensive." *Bell*, 2015 WL 540552, at *4. However, in this case, as noted above, it is difficult to imagine how the defenses of the class members could vary at all. Because all of the class members are law enforcement officers charged with enforcing the same law, they inevitably share the same defenses of the law, which will not depend on the personal circumstances of the individual law enforcement personnel. Thus, the claims of the Named Defendants will be typical of the claims of the Defendant Class. *See Bell*, 2015 WL 540552, at *4 ("Because the Class Representatives participated in the same [Ponzi] scheme, they inevitably share the same defenses against liability . . . , which does not depend on the personal circumstances of particular [defendants]."); *Marcera v. Chinlund*, 595 F.2d 1231, 1238–39 (2d Cir. 1979), *vac'd on other grounds*, 99 S.Ct. 2833 (1979) (finding that named defendant's necessity defenses were typical of the kind of defenses that members of the defendant class would raise to defeat a charge that their policies were unconstitutional, even where the named defendant argued that there was "substantial variation" among the class members).

4) The Defendants Will Adequately Protect the Interests of the Defendant Class.

Because of the similarity of their defenses, the Named Defendants will adequately represent the interests of the Defendant Class. There is no conflict between Named Defendants and other class members. Since the Attorney General is a Named Defendant in this case, and would be charged with defending the law in any event, there can be little question about the adequacy of his representation.

B. The Requirements of Rule 23(b)(1) and 23(b)(3) Are Satisfied.[8]

1) The Defendant Class Meets the Requirements of Rule 23(b)(1).

Federal Rule of Civil Procedure 23(b)(1)(A) allows a court to certify a class when "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Rule 23(b)(1)(A) applies "in cases where the party is obliged by law to treat the members of the class alike ([e.g.,] a utility acting toward customers; a government imposing a tax)." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted).

Here, the prosecution of separate actions would create a risk of inconsistent adjudications. In the absence of class certification, an action brought by plaintiffs against the Named Defendants would not be binding on those law enforcement agencies that were not named in this suit, leaving the members of the Plaintiff Class subject to "incompatible standards of conduct" depending on where they attend school. *See* Fed. R. Civ. P. 23(b)(1)(A). Thus,

[8] The Fourth Circuit appears to have precluded the use of Rule 23(b)(2) to certify defendant classes, because (b)(2) requires that "injunctive relief be sought *in favor of* the class." *Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980) (internal citation omitted) (emphasis added).

certification of the Defendant Class is appropriate in order to ensure uniformity of the law's application.

2) The Defendant Class Meets the Requirements of Rule 23(b)(3).

Federal Rule of Civil Procedure 23(b)(3) allows a court to certify a class when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." This requirement is composed of two primary elements: the "predominance" of the claims common to the class, and the "superiority" of class action as the method of resolution. *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 394 (M.D.N.C. 2015) (quoting *Thorn*, 445 F.3d at 319)). The Rule provides a list of "matters pertinent to these findings":

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

(A) Lack of Interest in Individually Controlling the Defense

Individual class members' interest in controlling the litigation is minimal where potential statutory damages are small. *See, e.g.*, *Krakauer*, 311 F.R.D. at 400; *Mateo-Evangelio v. Triple J Produce, Inc.*, No. 7:14-CV-302-FL, 2016 WL 183485, at *8 (E.D.N.C. Jan. 14, 2016). By the same logic, individual members' interest in controlling the *defense* should be minimal where potential statutory *payout* is small. In the present case, members of the Defendant Class, in their official capacities, have no interest in controlling the defense. The Plaintiff Class seeks only declaratory and injunctive relief, as opposed to money damages, against the Defendant Class, minimizing the interest of the Defendant Class members in controlling the litigation.

Furthermore, as those charged with the enforcement of the law, Defendant Class members' only interest should be in the enforcement of constitutionally sound laws.

(B) Absence of Litigation Against Class Members

To the best of Plaintiffs' knowledge, no other litigation is already begun by or against Defendants on this issue, weighing in favor of Defendant Class certification. Fed. R. Civ. P. 23(b)(3).

(C) Desirability of Concentrating the Litigation in the District

The third factor of the 23(b)(3) analysis

> requires the court to "evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results, . . . [and] . . . whether the forum chosen . . . represents an appropriate place to settle the controversy, given the location of the interested parties, the availability of witnesses and evidence, and the condition of the court's calendar."

Montague v. Dixie Nat. Life Ins. Co., No. CIV.A. 3:09-687-JFA, 2010 WL 4156365, at *6 (D.S.C. Oct. 19, 2010) (quoting 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1762 (2d ed. 1986)). In cases where these factors are satisfied, both parties will benefit from the "economies of time, effort, and expense, and . . . uniformity of decision as to persons similarly situated." *Id.* (citing *Amchem Products*, 521 U.S. at 615); *see also Thomas v. FTS USA, LLC*, 312 F.R.D. 407 (East. Dist. VA., 2016) at 426. Class certification further serves the interests of providing "a single proceeding in which to determine the merits of the plaintffs' claims, and therefore protect[ing] *the defendant* from inconsistent adjudications," *Montague*, 2010 WL 4156365, at *6 (citing *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 427 (4th Cir. 2003)) (emphasis in original). Diffuse class members also weigh in favor of class certification. *See Thomas*, 312 F.R.D. at 426 ("[B]ecause potential class members are spread over the entirety of the United States, it would be very desirable to hear the case in one forum and thus allow for a more efficient, consolidated resolution of the common issues."). Moreover,

"[i]t is obviously desirable" to keep plaintiffs and defendants "in place" where the activities at the center of the controversy have occurred. *See Good v. Am. Water Works Co., Inc.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015).

In the present case, the District of South Carolina "represents an appropriate place to settle the controversy[ ] given the location of the interested parties." *Montague*, 2010 WL 4156365, at *6 (quoting Wright & Miller, *supra*, § 1762). All of the activities at the center of this controversy have taken place in South Carolina. The Defendant Class members are diffuse, and reside in every corner of South Carolina. Finally, "[b]ecause all potential class members are South Carolina residents and potential witnesses and evidence is located in South Carolina, this court is a proper forum for this controversy." *Montague*, 2010 WL 4156365, at *6.

(D) Unlikelihood of Difficulty in Managing This Class Action

Courts must also take into consideration any challenges posed by certification of a defendant class. Manageability is commonly found in cases where there is a high level of "similarity of factual and legal issues." *Thomas*, 312 F.R.D. at 426. In addition, the ease of ascertaining the membership of the class, such as through "payroll records and employee data," reduces and may even eliminate the difficulty of managing the class. *See Mateo-Evangelio*, 2016 WL 183485, at *8 (finding manageability prong met where class members "were all employed by the same interrelated [ ] employers . . . that maintained payroll records and employee data for all of the [ ] workers . . . for the entire time period covered"). While there may still be some "management issues that arise," courts should remain cognizant of the "inefficient, costly and time consuming alternative"—individual trials in each case, *Good*, 310 F.R.D. at 297, which may involve "enormous redundancy of effort, including duplicative discovery, testimony by the same witnesses in potentially hundreds of actions, and relitigation of many . . . identical[ ] legal

issues." *Thomas*, 312 F.R.D. at 421 (quoting *Gunnells*, 448 F.3d at 424). Certification is appropriate when consolidation would, by contrast, "conserve important judicial resources." *Id.*

Manageability is clearly satisfied here. As argued above, the claims of the Plaintiff Class members are identical, which in turn creates a uniform set of available defenses for the Defendant Class. The Defendant Class is also ascertainable, through such information as "payroll records and employment data." *Mateo-Evangelio*, 2016 WL 183485, at *8. Finally, any management issues that could arise would not be great enough to outweigh the "economies of time, effort, and expense" offered by class action in this case. *Montague*, 2010 WL 4156365, at *6 (citing *Amchem Products*, 521 U.S. at 615).

(E) Predominance

Courts in the Fourth Circuit frequently consider predominance separately from the four factors listed in Rule 23(b)(3). *See., e.g., Moodie*, 309 F.R.D. at 379–81; *Montague*, 2010 WL 4156365, at *5–7; *Thomas*, 312 F.R.D. at 421–26; *Good*, 310 F.R.D. at 296–97. Predominance is similar to the commonality inquiry, except that commonality is "subsumed" by the more stringent predominance requirement, which is "far more demanding." *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 700 (4th Cir. 2011) (citing *Amchem Products*, 521 U.S. at 609, 623). This is because "commonality requires little more than *the presence of* common questions of law and fact," *Comer v. Life Ins. Co. of Alabama*, No. C/A 0:08-228-JFA, 2010 WL 233857, at *6 (D.S.C. Jan. 14, 2010) (quoting *Thorn*, 445 F.3d at 319) (emphasis added), rather than a requirement that common questions take precedence over any differences. Like Rule 23(b)(3)(C), the predominance inquiry is animated by the desire to ensure that the class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated." *Gray*, 444 F. App'x at 701 (quoting *Amchem Products*, 521 U.S.

at 623); *see also Thomas*, 312 F.R.D. at 421; *Good*, 310 F.R.D. at 296. The predominance inquiry also overlaps with Rule 23(b)(3)(D), because claims common to the class must predominate for a court to find that "individual issues do not present great difficulties in managing the class." *Krakauer*, 311 F.R.D. at 400. Accordingly, as the Supreme Court has observed, "[w]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 362–63.

As noted previously, there is only one legal question in this challenge to the facial validity of the statutes challenged in this case. The purely legal question of the facial constitutionality of these laws predominates over any other question—indeed, it is unlikely that there are even colorable "individual" questions in this case. *See Defendant Class Actions*, *supra*, at 643–44, 647; *compare Matthews v. Buel, Inc.*, No. CA 7:11-162-TMC, 2012 WL 1825273, at *3 (D.S.C. May 18, 2012) ("[I]f the individual claims were brought, they would present the same legal question."). That question is "whether the law is so vague that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Papachristou*, 405 U.S. at 162. Consequently, common issues clearly predominate.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for certification of a Plaintiff Class under Rules 23(a) and 23(b)(2) and a Defendant Class under Rules 23(a) and 23(b)(1) or (b)(3).

Respectfully Submitted,

s/Susan K. Dunn_____
SUSAN K. DUNN (Fed. Bar #647)
American Civil Liberties Union
Foundation of South Carolina
P.O. Box 20998
Charleston, S.C. 29413-0998
Tel: (843) 282-7953
Fax: (843) 720-1428
sdunn@aclusc.org

SARAH HINGER*
GALEN SHERWIN*
DENNIS D. PARKER*
LENORA LAPIDUS*
American Civil Liberties Union
125 Broad Street 18th FL
New York, NY 10004
Tel: 212-519-7882
shinger@aclu.org

**Pro Hac Vice Motions to be submitted*

ATTORNEYS FOR PLAINTIFFS