IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,	)	
Plaintiff,	)	**Civil Action No. 1:23-cv-302**
v.	)	
JOSH STEIN, et al.	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF SECOND AMENDED MOTION FOR CERTIFICATION OF A DEFENDANT CLASS

Plaintiff ACLU of North Carolina (ACLU-NC), a 501(c)(4) non-profit organization, filed this suit asserting that N.C. Gen. Stat. § 14-288.2 (the "Anti-Riot Act" or "Act") violates its fundamental rights to due process, free speech, assembly, and petitioning in violation of the federal and state constitutions. *See* ECF No. 25. These rights are held equally by ACLU-NC employees and members wherever they reside, work, or participate in public demonstrations throughout North Carolina.

Defendants Satana Deberry, Avery Crump, and Lorrin Freeman are, respectively, the elected District Attorneys for North Carolina's 16th, 24th, and 10th prosecutorial districts. In their official capacities, Defendants Deberry,

Crump, and Freeman—like all of the estimated 43 elected or appointed District Attorneys serving in each prosecutorial district in the state—possess identical constitutional and statutory authority to prosecute violations of North Carolina's criminal laws that occur within their districts, including violations of the Anti-Riot Act. *See* N.C. Gen. Stat. § 7A-61; N.C Const. art. IV, sec. 18.

Litigating challenges to the Act on a district-by-district basis would create a substantial risk of inconsistent adjudications, imposing different standards of conduct throughout the state. Absent class certification, North Carolinians' ability to exercise their fundamental constitutional rights would depend on where they live or happen to engage in speech and protest activities encompassed by the Act. District attorneys could disparately enforce the Act depending on where they were elected. To facilitate a just, efficient, and consistent resolution of this facial constitutional challenge to the Act, Plaintiff respectfully seeks certification of a Defendant District Attorney Class pursuant to Federal Rules of Civil Procedure 23(a), (b)(1)(A), and (b)(1)(B), defined as:

> All district attorneys in North Carolina elected or appointed to serve in a prosecutorial district in the state in accordance with N.C. Gen. Stat. Ann. § 7A-60.

FACTUAL BACKGROUND

In the aftermath of overwhelmingly peaceful demonstrations against police killings of Black Americans, state legislators decided to crack down on North Carolinians' right to publicly assemble and protest. ECF No. 25, ¶¶ 58-72. To do so, they turned to the Anti-Riot Act, a law originally enacted in 1969 in response to racial justice and anti-war protests of that era. *Id.* ¶¶ 43-46. As in the past, legislators sought to undermine a movement for social justice by recasting peaceful protestors as unpatriotic "thugs" who needed to be punished in order to restore "law and order." *Id* ¶¶ 59-61.[1]

Governor Cooper vetoed the General Assembly's first attempt to expand the Anti-Riot Act, House Bill 805, in 2021. *Id.* ¶ 61. But, in 2023, the legislature passed House Bill 40 ("H.B. 40"), which expanded the Act despite repeated warnings that it perpetuated and exacerbated violations of North Carolinians' fundamental constitutional rights. *Id.* ¶¶ 62-72.

In particular, H.B. 40 reiterated the Anti-Riot Act's vague and overbroad definition of a "riot"— a definition that leaves North Carolinians who

[1] One of the earliest uses of the Act was to prevent a group of Black protestors, "many wearing shirts inscribed with 'Malcolm-X'", from joining a protest in support of striking dining services workers on the campus of the University of North Carolina at Chapel Hill. *Fuller v. Scott*, 328 F. Supp. 842, 846 (M.D.N.C. 1971); *see also* Nick Robinson, *Rethinking the Crime of Rioting,* 107 Minn. L. Rev. 77, 101 (2022) (describing how states responded to racial unrest in the 1960s by enacting anti-riot laws).

participate in public demonstrations guessing regarding their potential liability for the conduct of others, and which plausibly encompasses peaceful actions of individuals who participate in protests where disorderly or violent conduct occurs. *See* ECF No. 25-1, North Carolina Session Law 2023-6, Section 1 (to be codified as N.C. Gen. Stat. § 14-288.2(a)). H.B. 40 also doubled down on the Act's criminalization of mere advocacy of unlawful conduct by adding a prohibition on "urg[ing]" a riot. *Id.,* North Carolina Session Law 2023-6, Section 1 (to be codified as N.C. Gen. Stat. § 14-288.2(e1)). The General Assembly enacted this prohibition despite a recent Fourth Circuit decision holding that such "urging" is protected by the First Amendment. *See United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020). And H.B. 40 dramatically expanded the consequences of violating the Act by increasing criminal penalties, allowing for lengthy detention periods, and making defendants civilly liable for treble damages. ECF No. 25-1, North Carolina Session Law 2023-6, Sections 1, 4 (to be codified as N.C. Gen. Stat. §§ 14-288.2(f), 15A-534.8(b)).

H.B. 40 became law without Governor Cooper's signature on March 17, 2023. ECF No. 25 ¶ 72. Plaintiff filed this action on April 10, 2023, contending that the Act, as amended and expanded by H.B. 40, is overbroad and vague in violation of the First and Fourteenth Amendments to the United States

Constitution and article I, sections 12, 14, and 19 of the North Carolina Constitution. ECF No. 1. Plaintiff, whose members and employees engage in public protests and demonstrations throughout North Carolina, named as defendants Attorney General Josh Stein, in his official capacity, and District Attorneys Satana Deberry, Avery Michelle Crump, and Lorrin Freeman, in their official capacities and as representatives of a class of all elected district attorneys in North Carolina. *Id.*

After Plaintiff filed its initial complaint and motions for a preliminary injunction and certification of a defendant class, the General Assembly passed Senate Bill 626 ("S.B. 626"), which removed the unconstitutional urging provisions from the Anti-Riot Act. ECF No. 25-2 (North Carolina Session Law 2023-71, Section 4(a)). But S.B. 626 did not in any way clarify or narrow the Act's vague and overbroad definition of a riot. *Id.* Governor Cooper signed S.B. 626 into law on June 30, 2023. ECF No. 25, ¶ 76.

QUESTIONS PRESENTED

1. Whether the proposed Defendant District Attorney Class meets the requirements for certification set forth in Rule 23(a):
    a. Numerosity;
    b. Commonality;
    c. Typicality; and

d. Adequacy?

2. Whether the proposed class also meets the requirements of Rule 23(b)(1)(A) and/or 23(b)(1)(B)?

3. Whether this Court should appoint Elizabeth Curran O'Brien and Joseph Finarelli of the North Carolina Department of Justice as class counsel pursuant to Rule 23(g)?

ARGUMENT

I. The proposed defendant class satisfies the requirements of Rule 23(a).

Although most class actions involve plaintiff classes, Rule 23 authorizes defendant classes. *See Bell v. Disner*, No. 3:14CV91, 2015 WL 540552, at *2 (W.D.N.C. Feb. 10, 2015), *aff'd sub nom.*, *Bell v. Brockett*, 922 F.3d 502 (4th Cir. 2019). Indeed, Rule 23 expressly provides that "[o]ne or more members of a class may sue *or be sued* as representative parties." Fed. R. Civ. P. 23(a) (emphasis added). Defendant class actions have long been utilized where plaintiffs seek to vindicate fundamental constitutional rights. *See, e.g.*, *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (defendant class of all sheriffs tasked with enforcing statute requiring racial segregation in jails); *United States v. Cantrell*, 307 F. Supp. 259, 261

(E.D. La. 1969) (defendant class of bar proprietors directed to enforce an ordinance requiring racial discrimination against soldiers).

To be certified, a proposed defendant class must first meet the standard Rule 23(a) requirements: (1) numerosity; (2) commonality of factual or legal issues; (3) typicality of claims or defenses of class representatives; and (4) adequacy. *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 423 (4th Cir. 2003). The proposed Defendant District Attorney Class meets these requirements.

A. Rule 23(a)(1) – Numerosity.

Rule 23(a)(1) requires that the number of potential parties be "so numerous that joinder of all members [of the proposed class] is impracticable." Fed. R. Civ. P. 23(a)(1). While there is no magic number that must be reached to satisfy Rule 23(a)(1), a proposed class comprised of 40 or more members "raises a presumption of impracticability of joinder based on numbers alone." *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 234 (4th Cir. 2021) (quoting 1 Newberg on Class Actions § 3:12 (5th ed. 2021)).

The proposed Defendant District Attorney Class satisfies Rule 23(a)(1)'s numerosity requirement. There are 43 prosecutorial districts in North Carolina, each with its own elected or appointed district attorney. N.C. Gen. Stat. §§ 7A-60(a)-(a)(1). Thus, based on numbers alone, joinder is

presumptively impracticable. *In re Zetia*, 7 F.4th at 234; *see also Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) (finding numerosity for class of between 46 and 60 people without further analysis). Further, other relevant factors also illustrate the impracticability of joinder. Certification of the proposed class would serve judicial economy by avoiding multiple individual actions against district attorneys who are scattered across the entire state. *In re Zetia*, 7 F.4th at 239 (explaining that certifying class served judicial economy interests given "geographic dispersion" of members).

District courts have regularly concluded that defendant classes comprised of local officials tasked with enforcing a statewide statute meet Rule 23(a)(1)'s numerosity requirement. *See, e.g.*, *Strawser v. Strange*, 307 F.R.D. 604, 611 (S.D. Al. 2015) (defendant class of 68 probate judges responsible for administering state marriage laws satisfied Rule 23(a)(1)); *Monaco v.* State, 187 F.R.D. 50, 64 (E.D.N.Y. 1999) (defendant class of more than 40 judges responsible for administering involuntary commitment statute satisfied Rule 23(a)(1)). The 43-member proposed Defendant District Attorney Class similarly meets Rule 23(a)(1)'s numerosity requirement.

B. Rule 23(a)(2) – Commonality.

Rule 23(a)(2) requires "questions of law or fact common to the class." Simply put, class claims must depend upon a common contention that is

capable of class-wide resolution. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This "means that determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* It does not mean that all factual and legal issues must be common for all proposed class member: a single common factual or legal question will suffice. *Id.* at 369; *see also Gardner v. Country Club, Inc.*, No. 4:13-CV-03399-BHH, 2017 WL 11613887, at *3 (D.S.C. Jan. 26, 2017) ("[M]inor differences in the facts do not preclude a finding of commonality and a single common question of law or fact is sufficient.").

The proposed Defendant District Attorney Class meets Rule 23(a)(2)'s commonality requirement because every class member's authority to enforce the Anti-Riot Act depends upon the "truth or falsity" of Plaintiff's central legal contention: that the Anti-Riot Act, because of its vague and overbroad definition of a "riot," facially violates the First and Fourteenth Amendments of the U.S. Constitution and article I, sections 12, 14, and 19 of the North Carolina Constitution. ECF No. 25, ¶¶ 82-127. The facial nature of Plaintiff's claims means that the legal question upon which the Act's enforceability depends is identical for every putative class member. All proposed class members' ability to continue enforcing the Act in their respective prosecutorial districts will "rise and fall together" based on this Court's resolution of that

legal question. *Williams v. Martorello*, 59 F.4th 68, 92 (4th Cir. 2023) (quoting *Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1115 (9th Cir. 2014)).

The proposed Defendant District Attorney Class is similar to the defendant class of all city prosecutors in Ohio certified in *Akron Center for Reproductive Health v. Rosen,* which involved a constitutional challenge to a state abortion law. 110 F.R.D. 576 (N.D. Ohio 1986). There, the district court explained that the commonality requirement was met because

> [t]his case presents one constitutional issue regarding one state statute: does [the Ohio abortion law] on its face violate due process . . . ? This same constitutional issue obviously arises with respect to the enforcement of [the law] by any Ohio prosecutor designated to perform this duty. Since the same constitutional issue is applicable to each proposed class member, each has the same legal defenses to the facial challenge to the statute. While the specific facts arising in separate prosecutions across the state would doubtlessly vary, the questions of law on the constitutionality issue and the defendants' claims would not deviate from those resolved by this Court. The very nature of this action, . . . assures commonality and typicality.

Id. at 581; *see also Nelson v. Warner*, 336 F.R.D. 118, 123 (S.D. W.Va. 2020) (finding commonality in proposed defendant class of ballot commissioners because every official "face[s] the same exact legal questions" regarding facial constitutionality of state election law they administered); *Strawser*, 307 F.R.D. at 612 (proposed defendant class of state probate judges satisfied commonality

requirement because "[t]he question common to the entire Defendant Class is whether their enforcement of [a state marriage law] violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment").

As in *Rosen* and similar cases, what all members of the proposed Defendant District Attorney Class have in common is their obligation to enforce North Carolina's Anti-Riot Act in their jurisdiction. The legal question of the Act's facial constitutionality is thus the "glue" holding the class together. *Dukes*, 564 U.S. at 352. Accordingly, the proposed Defendant District Attorney Class meets Rule 23(a)(2)'s commonality requirements.

C. Rule 23(a)(3) – Typicality.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The typicality inquiry is similar to the commonality inquiry, and the threshold for satisfying it is "not high." *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) (quoting *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir.1993)). Rule 23(a)(3) requires only that the named class members' defenses be "typical" of the class, not that every putative class member be identically situated.

Here, the proposed Defendant District Attorney Class meets the typicality requirement for the same reasons it meets the commonality requirement. All putative class members are sued in their official capacity and

possess the same statutory and constitutional authority to enforce the Anti-Riot Act. Unless the facial constitutionality of the Act is successfully defended, they—and their successors—will be unable to exercise that authority. The scope of every district attorney's authority to enforce the Act thus depends upon this Court's resolution of Plaintiff's facial constitutional claims, not individual factual circumstances relating to how the Act is enforced. *Cf. Payton v. Cnty. of Kane*, 308 F.3d 673, 680 (7th Cir. 2002) (typicality present where "essence" of suit involves facial constitutionality of state statute).

Typicality exists notwithstanding potential differences of opinion among putative class members regarding the permissible scope and proper interpretation of the Act. *Cf. Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214,* 540 F. Supp. 2d 985, 991 (N.D. Ill. 2008) (finding typicality despite "differences of opinion among class members as to the [challenged] statute's validity"). That is because all elected district attorneys, in their official capacities, are responsible for enforcing the Act within their respective jurisdictions. *See* N.C. Gen. Stat. § 7A-61; N.C. Const. art. IV, sec. 18. For every putative class member, defending the facial constitutionality of the Act in this action is critical to each's ability to enforce the Act in the future.

Other district courts have found the typicality requirement met for defendant classes under similar circumstances. *Nelson*, 336 F.R.D. at 123

(typicality present where every local official member of defendant class possessed authority to implement challenged state statute); *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1137 (W.D. Mo. 2019), *aff'd sub nom. Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021) (representative prosecuting attorney's defense of constitutionality of state regulation would be typical of every prosecutor's defense of regulation); *Protectmarriage.Com v. Bowen*, 262 F.R.D. 504, 508 (E.D. Cal. 2009) (same). The same reasoning applies here. All members of the proposed class are constitutionally and statutorily responsible for enforcing the Anti-Riot Act. All members of the proposed class will only be able to enforce the Act if it is facially constitutional. Accordingly, the proposed Defendant District Attorney Class satisfies Rule 23(a)(3).

D. Rule 23(a)(4) – Adequacy.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." There are two components of adequacy under this rule: (1) potential conflicts between representatives and class members; and (2) the representatives' ability and willingness to vigorously litigate the matter. *Nelson*, 336 F.R.D. at 124. Only fundamental conflicts defeat adequacy, *see Gunnells*, 348 F.3d at 430, and the adequacy of

class counsel is presumed absent specific evidence to the contrary, *see Gardner*, 2017 WL 11613887, at *3. Both prerequisites are satisfied here.

Named Defendants Deberry, Crump, and Freeman are all experienced prosecutors who, in their official capacities, share the same interest in (and responsibility for) enforcing North Carolina's criminal laws as every other putative class member. Indeed, the offices of Defendants Crump and Freeman have prosecuted people for felony violations of the Act in the past three years. *See* Ex. 1, Declaration of Samuel Davis, ¶ 4. And many others have been arrested for rioting within Defendant Deberry's jurisdiction during this time. *See* Ex. 2, WRAL Article on Durham Protests (describing arrest of 22 protestors for felony inciting a riot in July, 2020). The named Defendants, like all district attorneys in North Carolina, "share common objectives and the same . . . legal positions" with respect to enforcing duly enacted criminal laws. *Gunnells*, 348 F.3d at 431.

The Eastern District of North Carolina considered adequacy in a similar defendant class context in *Autry v. Mitchell*, a case involving a challenge to the constitutionality of North Carolina's outlawry statutes. 420 F. Supp. 967, 969 (E.D.N.C. 1976). The plaintiffs in that case sought to proceed against all district attorneys in North Carolina who possessed the authority to issue "outlawry proclamations" under the challenged statute. *Id.* The court

concluded that the named class representative—a district attorney—adequately represented all other district attorneys in the state because he was "an experienced and able prosecutor well versed in both the procedural and substantive aspects of the criminal laws of North Carolina" who "knows as well as any prosecutor would know the utility and value of the challenged statute and is well able to define its proper scope and defend its constitutionality." *Id.*; *see also Doe v. Miller*, 216 F.R.D. 462, 466 (S.D. Iowa 2003) (every county attorney is "equally qualified" to represent defendant class comprised of all county attorneys). The same holds true for Defendants Deberry, Crump, and Freeman, who are adequate representatives for the proposed Defendant District Attorney Class.

II. The proposed defendant class satisfies the requirements of Rule 23(b).

In addition to satisfying the prerequisites of Rule 23(a), a party seeking class certification must show that the proposed class meets the requirements of at least one of the categories of classes specified in Rule 23(b). The proposed Defendant District Attorney Class may be maintained as a class under Rule 23(b)(1)(A) and (B).

Certification of a defendant class under Rule 23(b)(1) is generally appropriate where plaintiffs challenge the facial validity of a state law and the putative defendant class members are individual local officials tasked with

enforcing the law. *See United States v. Trucking Emp., Inc.*, 75 F.R.D. 682, 686 (D.D.C. 1977) (defendant classes are appropriate in cases that "involve attempts to enjoin numerous governmental officials from enforcing a statute" if "the central issue . . . is whether the statute itself is facially invalid"). Because the facial constitutionality of the Anti-Riot Act is the same in every jurisdiction within the state, it serves efficiency and fairness interests to litigate this issue in a single suit. This Court should certify the proposed Defendant District Attorney Class under both of these Rule 23(b)(1) categories.

A. Rule 23(b)(1)(A).

Rule 23(b)(1)(A) provides that a class may be certified if "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." Certification pursuant to Rule 23(b)(1)(A) is appropriate when the putative class members have an obligation to treat all individuals opposing the class in a like manner. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Absent certification, the party opposing the class will have inconsistent obligations under the same law depending on which putative class member is enforcing it and where the party's conduct occurs.

The risks to Plaintiff that Rule 23(b)(1)(A) is designed to ameliorate are present in this case. The Anti-Riot Act is either facially unconstitutional under the federal and/or state constitutions, or it is not: whatever the case, the Act's facial validity is the same everywhere the Act applies. Yet were Plaintiff to proceed against every district attorney in North Carolina individually—at great expense to itself and considerable burden to the court system—there is a risk that different proceedings could generate competing interpretations of the Act, issued at different times. Plaintiff, its members and employees, and all North Carolinians would be forced to navigate different legal rights and obligations when participating in public demonstrations depending on their location and timing.[2]

[2] This is not an idle concern. Recently, a federal district court concluded that a Tennessee state law banning drag performances was unconstitutionally vague and overbroad, and enjoined the named defendant—the Shelby County District Attorney—from enforcing it. *See Friends of Georges, Inc. v. Mulroy*, No. 223CV02163TLPTMP, 2023 WL 3790583, at *7 (W.D. Tenn. June 2, 2023). Although the district court ruled that the law was *facially* unconstitutional, Tennessee's Attorney General maintained publicly that because the ruling did not technically bind any parties outside of Shelby County, the drag ban "remains in effect outside Shelby County." Emily Cochrane, *Judge Finds Tennessee Law Aimed at Restricting Drag Shows Unconstitutional*, The New York Times (June 3, 2023), https://www.nytimes.com/2023/06/03/us/politics/tennessee-drag-ruling.html. Certifying a defendant class of District Attorneys in this case would, consistent with the purpose of Rule 23(b)(1), avoid similar efforts to undermine this Court's rulings.

The Southern District of West Virginia confronted a similar situation in *Nelson*, wherein plaintiffs brought a facial constitutional challenge to a West Virginia ballot access statute. 336 F.R.D. at 121. There, the district court certified a defendant class of all county ballot commissioners in the state pursuant to Rule 23(b)(1)(A), reasoning that "[u]nless all ballot commissioners are parties to this case, ballot commissioners throughout the state, who may not even be aware of this case, could continue implementing the [challenged statute]," in violation of the constitution. *Id.* at 125. Alternatively, "other individuals or groups could bring similar actions against other ballot commissioners contesting the constitutionality of the Statute," resulting in multiple potentially divergent adjudications. *Id.* Either circumstance could lead to "inconsistent decisions on the Statute's constitutionality, resulting in incompatible standards of conduct" and the law being "inconsistently applied throughout the state." *Id.*

Indeed, district courts have on numerous occasions concluded that defendant classes comprised of local officials tasked with enforcing a state law satisfy Rule 23(b)(1)(A) in cases involving facial challenges to that law, due to the risk of inconsistent outcomes resulting from adjudicating multiple facial constitutional challenges. *See, e.g.*, *Sherman ex rel. Sherman*, 540 F. Supp. at 993 (certifying defendant class of all school districts tasked with enforcing

state school prayer law); *Miller*, 216 F.R.D. at 466 (certifying defendant class of all county attorneys in Iowa in facial challenge to sex offender statute due to "enormous" risk of inconsistency from county-by-county adjudications); *Nat'l Broad. Co. v. Cleland*, 697 F. Supp. 1204, 1217 (N.D. Ga. 1988) (certifying defendant class of local elections officials in facial challenge to statewide ban on exit polling); *CBS Inc. v. Smith*, 681 F. Supp. 794, 802 (S.D. Fla. 1988) (same). Accordingly, certification is appropriate here due to the substantial risk of inconsistent adjudications that would establish inconsistent standards for North Carolinians under the Act in different prosecutorial districts throughout the state.

B. Rule 23(b)(1)(B).

Rule 23(b)(1)(B) provides that certification is appropriate if "prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(1)(B)'s purpose "is to protect non-parties from the effects of determinations *adverse* to the individual class members who are in the action." *Canadian St. Regis Band of Mohawk Indians by Francis v. New York*, 97 F.R.D. 453, 458 (N.D.N.Y. 1983).

A decision by this Court declaring the Anti-Riot Act unconstitutional and enjoining a limited number of named district attorneys from enforcing it would likely be considered dispositive—or, at minimum, highly persuasive—in future suits seeking to restrain other district attorneys from enforcing the Act. Thus, as a practical matter, the adjudication of Plaintiff's claims in this case against only the three named Defendants would dispose of, impair, or impede the ability of other non-party district attorneys to enforce the Act. Absent certification, other district attorneys would not be entitled to adequate representation of their interests in this suit. They would have varied authority—and likely confusion about that authority—to prosecute alleged violations of the Act occurring in their respective prosecutorial districts.

This is precisely the circumstance Rule 23(b)(1)(B) was designed to prevent. *See, e.g.*, *Zessar v. Helander*, No. 05 C 1917, 2006 WL 573889, at *3 (N.D. Ill. Mar. 7, 2006) (certifying defendant class of local elections officials pursuant to Rule 23(b)(1)(B) because resolution of facial claim against one official "would give rise to additional future litigation against [other officials]"); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004) (affirming certification of defendant class pursuant to Rule 23(b)(1)(B) where individual adjudications would "decide the rights of [putative class members] without the class action's assurance that they be adequately represented"); *Wyandotte*

Nation v. City of Kansas City, Kansas, 214 F.R.D. 656, 664 (D. Kan. 2003) (same); *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 836 (W.D. Pa. 1995) (same); *Lake v. Speziale*, 580 F. Supp. 1318, 1334 (D. Conn. 1984) (same). Accordingly, the proposed Defendant District Attorney Class may be maintained pursuant to Rule 23(b)(1)(B).

III. The named Defendants' attorney should be appointed as class counsel under Rule 23(g).

Counsel for Defendants Deberry, Crump, and Freeman is qualified to be appointed to represent the class in this matter and should be appointed as class counsel pursuant to Rule 23(g).

In appointing class counsel, the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The Court may also: "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class"; request additional information from class counsel; or make specific orders related to the appointment. *Id.* at (g)(1)(B)-(E). Ultimately, the Court must determine that class counsel will fairly and adequately represent the interests of the class. *Id.* at (g)(4).

Here, named Defendants will be represented by Special Deputy Attorney Generals Elizabeth Curran O'Brien and Joseph Finarelli from the North Carolina Department of Justice. *See* ECF No. 15. All relevant factors[3] weigh in favor of their appointments.

Ms. O'Brien and Mr. Finarelli are experienced and knowledgeable litigators who have previously defended North Carolina officials, including district attorneys, in civil rights and constitutional matters (including ones involving First Amendment and due process claims) in state and federal court on numerous occasions.[4] *Id.* at (g)(1)(A)(ii)-(iii). Moreover, their office—the

[3] Some of the Rule 23(g) considerations, such as the work done by counsel to investigate or identify claims, *see* Fed. R. Civ. P. (g)(1)(A)(i), are not relevant to appointment of a defendant class counsel in the early stages of a case.

[4] *See, e.g., Davis v. Univ. of N. Carolina at Greensboro*, No. 1:19CV661, 2022 WL 3586093 (M.D.N.C. Aug. 22, 2022) (Mr. Finarelli representing University of North Carolina at Greensboro and Board of Governors); *Breedlove v. Heath*, No. 5:21-CV-132-D, 2022 WL 433312 (E.D.N.C. Feb. 11, 2022) (Mr. Finarelli representing North Carolina Administrative Office of the Courts); *Grabarczyk v. Stein*, No. 5:19-CV-48-BO, 2021 WL 308600 (E.D.N.C. Jan. 29, 2021), *aff'd*, 32 F.4th 301 (4th Cir. 2022) (Mr. Finarelli representing district attorney); *Samson v. North Carolina*, 848 F. App'x 581 (4th Cir. 2021) (same); *Nat'l Ass'n for Rational Sexual Offense L. v. Stein*, No. 1:17CV53, 2021 WL 736375 (M.D.N.C. Feb. 25, 2021) (same); *Mangum v. Bond*, No. 1:20-CV-449, 2020 WL 6482179 (M.D.N.C. Oct. 5, 2020), *aff'd*, 841 F. App'x 604 (4th Cir. 2021) (Ms. O'Brien representing district attorney's office); *Brown v. North Carolina*, No. 321CV00461RJCDCK, 2022 WL 2019970, (W.D.N.C. June 6, 2022), *aff'd*, No. 22-1667, 2022 WL 17103775 (4th Cir. Nov. 22, 2022) (Ms. O'Brien representing multiple state defendants including district attorney); *Cioffi v. Ingram*, No. 4:20-CV-177-FL, 2021 WL 2481668 (E.D.N.C. June 17, 2021) (Ms. O'Brien representing court clerk); *Hartley v. Freeman*, No. 5:20-CT-

North Carolina Department of Justice (NCDOJ)—is amply qualified to provide class counsel in this matter. The legislature has expressly tasked NCDOJ with defending state entities, *see* N.C. Gen. Stat. § 114-2, and, as a government agency, it has the resources to fully litigate this matter. All indications—including Ms. O'Brien's and Mr. Finarelli's considerable experience in handling constitutional litigation and defending district attorneys in civil suits—demonstrate that they will fairly and adequately represent the Defendant District Attorney Class.

CONCLUSION

Maintaining this action as against a class of the 43 elected or appointed district attorneys responsible for enforcing North Carolina's criminal laws within their respective prosecutorial districts will facilitate an efficient, just, and consistent resolution of Plaintiff's facial challenges to the constitutionality of the Anti-Riot Act. For the reasons specified above, Plaintiff respectfully requests that this Court grant its Motion for Certification of the proposed

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3066-FL, 2021 WL 4447627 (E.D.N.C. Sept. 28, 2021) (Ms. O'Brien representing district attorney); *Bishop v. Funderburk*, No. 3:21-CV-679-MOC-DCK, 2022 WL 1446807 (W.D.N.C. May 6, 2022) (Ms. O'Brien representing state Court of Appeals judges); *Grabarczyk v. Stein*, No. 5:21-CV-94-BO, 2021 WL 5810501 (E.D.N.C. Dec. 7, 2021) (Ms. O'Brien representing district attorney).

Defendant District Attorney Class under Rule 23(b)(1)(A) and 23(b)(1)(B) and appoint Elizabeth O'Brien and Joseph Finarelli as class counsel pursuant to Rule 23(g).

Respectfully submitted this 6th day of July, 2023 by:

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CERTIFICATE OF WORD COUNT

Pursuant to L.Cv.R. 7.3(d), I hereby certify that this brief is less than 6,250 words, as calculated by the word processing software used to prepare this brief.

/s/ Kristi L. Graunke

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed in the U.S. Court for the Middle District of North Carolina this 6th day of July, 2023 using the Clerk's CM/ECF system, which will send notification of this filing to the parties.

/s/ Kristi Graunke