STATE OF WISCONSIN **CIRCUIT COURT** **BROWN COUNTY**

ANTRELL THOMAS, **MELVIN CLEMONS**, **CHRISTIAN PITTMAN**, **CHANCE KRATOCHVIL**, **KELSIE MCGESHICK**, **JEROME BROST**, **DWIGHT MOORE**, **SEBASTIAN POPOVICH**, **MELINDA MESHIGAUD**, **ELMORE ANDERSON**, **CASHUN DRAKE**, **TERRY JOHNSON**, **TIMOTHY WILLIAMS**, **WILLIAM LOWE**, **TIVON WELLS**, **DAVADAE BOBBITT**, **DONALD JUECK**, and **CORY HANSEN**, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ANTHONY S. EVERS, in his official capacity as the Governor of Wisconsin; **KELLI THOMPSON**, in her official capacity as the Wisconsin State Public Defender; **JAMES M. BRENNAN**, in his official capacity as Chair of the Wisconsin Public Defender Board; **JOHN J. HOGAN**, in his official capacity as Vice Chair of the Wisconsin Public Defender Board; **ELLEN THORN**, in her official capacity as Secretary of the Wisconsin Public Defender Board; **ANTHONY COOPER, SR.**, in his official capacity as a member of the Wisconsin Public Defender Board; **REGINA DUNKIN**, in her official capacity as a member of the Wisconsin Public Defender Board; **PATRICK J. FIEDLER**, in his official capacity as a member of the Wisconsin Public Defender Board; **INGRID JAGERS**, in her official capacity as a member of the Wisconsin Public Defender Board; **JOSEPH MIOTKE**, in his official capacity as a member of the Wisconsin Public Defender Board; and **MAI NENG XIONG**, in her official capacity as a member of the Wisconsin Public Defender Board,

Defendants.

Case No. 2022-CV-1027

Hon. Thomas J. Walsh

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

As detailed in Plaintiffs' Amended Class Action Complaint, for years, the State of Wisconsin has systematically failed to timely provide public defense counsel to thousands of eligible criminal defendants in violation of the U.S. and Wisconsin Constitutions. Plaintiffs seek to end this constitutional crisis with judicial relief to facilitate a system that safeguards the right to counsel.

This motion is the first step to facilitating that relief. Plaintiffs seek an Order certifying a class under Section 803.08 of the Wisconsin Statutes—specifically, a class of all past, current, and future defendants who (on or after January 1, 2019) requested and were found eligible for public defense counsel but did not receive an attorney within 14 days of their initial appearances.

To certify a class action, four prerequisites must be satisfied under Section 803.08(1)—numerosity, commonality, typicality, and adequacy of representation—and the case must qualify as one of the "types" of class actions in Section 803.08(2). Plaintiffs need only establish these requirements by a preponderance of the evidence. And, if all requirements are met, the court must certify the class.

The proposed class and subclasses easily satisfy the requirements for class certification:

- **Numerosity** is satisfied because there are thousands, if not tens of thousands, of class members (and hundreds, if not thousands, of members of each subclass). *See infra* Section I(A).

- **Commonality** is satisfied because this case seeks to resolve a common question: whether a delay of 14 days (or, alternatively, delays of 30, 60, or 120 days) in the appointment of public defense counsel is categorically unreasonable under the U.S. and Wisconsin Constitutions. *See infra* Section I(B).

- **Typicality** is satisfied because Plaintiffs and the Class have suffered the same injury and have the same legal basis for their claims under the U.S. and Wisconsin Constitutions: They have been denied appointed counsel for 14 days or more after their initial appearances. *See infra* Section I(C).

- **Adequacy of Representation** is satisfied because Plaintiffs' claims are typical of those of the class such that their interests are presumptively aligned, and they are

represented by qualified, experienced, and capable counsel from a coalition of advocacy organizations and law firms. *See infra* Section I(D).

- Finally, this proposed class action satisfies Section 803.08(2)(b) because (1) Defendants' failure to appoint counsel within 14 days is a "refus[al] to act on grounds that apply generally to the class," and (2) Plaintiffs' requested declaratory judgment, and injunction would apply equally to "the class as a whole." *See infra* Section II.

For these reasons, and as detailed below, Plaintiffs respectfully request that the Court certify the proposed class and subclasses.[1] Plaintiffs separately request that the Court approve the undersigned counsel to serve as class counsel pursuant to Section 803.08(12).

BACKGROUND

The U.S. and the Wisconsin Constitutions require the State of Wisconsin to appoint counsel for qualified defendants that cannot afford legal representation. Am. Compl. ¶¶ 1–2, 65–68. Such appointment must occur within a ***reasonable*** time after the prosecution begins, and any ***unreasonable*** delay in appointment violates the constitutional right to counsel. *Id.* at ¶¶ 2, 69–72. To fulfill its obligations, the State of Wisconsin enacted a statutory and regulatory scheme that provides for the establishment, funding, and operation of a statewide public defense system. *Id.* at ¶¶ 4, 73. Under this system, the Office of the State Public Defender ("SPD") is the agency responsible for directly representing qualified defendants or paying members of the private bar to do so. *Id.* at ¶¶ 4, 74–78.

Wisconsin's public defense system is in crisis. Because of inadequate funding and salary caps, the SPD cannot recruit and retain enough public defenders to represent all the defendants eligible for direct SPD representation. *Id.* at ¶¶ 5, 89–91. And because the SPD can only pay private attorneys a woeful $70/hour, the SPD cannot hire enough private attorneys to make up the difference. *Id.* at ¶¶ 5, 92–98. As a result of this shortage of public defense attorneys, criminal defendants are being denied

[1] If the Court denies certification of the proposed class, Plaintiffs request that the Court certify any of the proposed subclasses as the class and to certify all the lesser-included proposed subclasses as subclasses.

counsel for weeks, months, and—in some cases—over a year after the State has begun prosecuting them. *Id.* at ¶¶ 6–7, 80–81. These denials have dire legal and personal consequences for the defendants, especially for the significant number who are in custody. *Id.* at ¶¶ 8, 82–87.

Plaintiffs are Wisconsinites who have been charged with offenses punishable by terms of imprisonment and were denied attorneys for 14 days or more after their initial appearances. *Id.* at ¶¶ 26, 35–52. Defendants are the public officials responsible for administering Wisconsin's public defense system or otherwise ensuring the State meets its constitutional obligations. *Id.* at ¶¶ 27, 53–64. Plaintiffs allege that Defendants failed to appoint counsel on their behalf within a reasonable time and thereby violated their rights to counsel under the U.S. and Wisconsin Constitutions. *Id.* at ¶¶ 28–29. Plaintiffs allege further that insofar as Wisconsin's statutory and regulatory scheme for public defense constrains Defendants from timely appointing counsel on their behalf, this scheme is unconstitutional as applied to them. *Id.* at ¶ 29. Among other relief, Plaintiffs seek a declaration that the delays they and the Class have experienced are unreasonable, that their and the Class's constitutional rights have been violated, and that Wisconsin's public defense system, as currently administered, is unconstitutional as to them and the Class. *Id.* at ¶ 30(b). Plaintiffs also seek an order enjoining Defendants from administering Wisconsin's public defense system to the extent it is unconstitutional and directing Defendants to establish a public defense system that timely appoints attorneys on behalf of qualified defendants. *Id.* at ¶ 30(c)–(d).

The initial complaint in this case was filed on August 23, 2022. Although all eight original plaintiffs had been waiting for legal representation for some time, conspicuously, within a month of filing, all but one had been appointed counsel. *Id.* at ¶¶ 35–40. The State moved to dismiss the complaint on October 10, 2022, claiming that Plaintiffs' claims were moot because they had all received counsel between the filing of the complaint and the State's filing of its motion to dismiss. On December 16, 2022, Plaintiffs filed an Amended Complaint, adding more named plaintiffs, all of

whom had been waiting months for legal representation. Again, immediately thereafter, these new named plaintiffs began receiving attorneys. And again, within weeks of the Amended Complaint's filing, all had received public defense counsel. The State then moved to dismiss the Amended Complaint on January 30, 2023, again claiming that Plaintiffs' claims were moot. This motion follows.

ARGUMENT

This Court should grant Plaintiffs' motion for class certification because class actions for injunctive relief are favored in civil rights cases and suited to address systemic issues within the criminal justice system. *See* Newberg on Class Actions § 25:18 (4th ed. 2002) ("The class action device was specifically designed to aid the court and the parties in resolving certain difficulties common to criminal justice class suits."). As the Wisconsin Supreme Court has explained, certifying classes of similar claims "achieves judicial economy" by "saving time, litigation costs, and judicial resources" rather than having countless "individual, repetitive trials[, which] would place a tremendous burden on the court system." *Leverence v. PFS Corp.*, 193 Wis. 2d 317, 327, 328 n.12, 532 N.W.2d 735 (1995) (citations omitted).

At this stage, when "the necessary factual issues may be resolved without discovery, it is not required." *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). This is especially so when "Plaintiffs have presented sufficient information for the Court to form a reasonable judgment on whether the [class] requirements . . . are satisfied and discovery by the State Defendants into the requested matters will not be of assistance to the Court's determination of whether certification is appropriate." *Fernandez v. Dep't of Soc. & Health Servs.*, 232 F.R.D. 642, 645 (E.D. Wash. 2005) (citation omitted); *see also Fox v. Cnty. of Saginaw*, No. 19-CV-11887, 2020 WL 6118487, at *6 (E.D. Mich. Oct. 16, 2020) (granting class certification without discovery based on "documentary evidence" from a complaint).

No discovery is necessary for this Court to determine that it should certify the following class and subclasses under Section 803.08 of the Wisconsin Statutes:

- **Class Definition:** All past, current, and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 14 days of their initial appearances.

- **30-Day Subclass Definition:** All past, current, and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 30 days of their initial appearances.

- **60-Day Subclass Definition:** All past, current, and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 60 days of their initial appearances.

- **120-Day Subclass Definition:** All past, current, and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 120 days of their initial appearances.

As described below, the proposed class and subclasses satisfy the requirements for class certification.

I. Section 803.08(1)'s prerequisites are satisfied.

There are four prerequisites for maintaining a class action in Wisconsin state court—"numerosity, commonality, typicality, and adequacy." *Rave v. SVA Healthcare Servs., LLC*, 2021 WI App 36, ¶ 7, 400 Wis. 2d 88, , 968 N.W.2d 703 (quoting Wis. Stat. § 803.08(1)). All four prerequisites are satisfied here.

A. Numerosity is satisfied.

First, the putative class satisfies the prerequisite of numerosity, which requires that the proposed class be "so numerous that joinder of all members is impracticable." Wis. Stat. § 803.08(1)(a). In Wisconsin, numerosity is generally satisfied when the putative class consists of 40 or more individuals. *See Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI APP 53, ¶ 55, 388 Wis. 2d 546, , 933 N.W.2d 654 (holding that a 42-member proposed class satisfied numerosity); *Hammetter v. Verisma Sys.*, 2021 WI App 53, ¶ 10, 399 Wis. 2d 211, 963 N.W.2d 874, *review denied*, 2022 WI 98 ("In *Harwood* we determined that for purposes of satisfying the numerosity requirement, forty-two identified class

members was sufficient."); *Mulvania v. Sheriff of Rock Island City*, 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient . . . ."); Newberg on Class Actions § 3:12 ("[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."). But this is not a hard and fast rule. "A class can be certified without determination of its size, so long as it's reasonable to believe it large enough to make joinder impracticable and thus justify a class action suit." *Orr v. Shicker*, 953 F.3d 490, 497 (7th Cir. 2020) (citation omitted).

Here, numerosity is easily satisfied. Wisconsin public officials—including those who are defendants here—have repeatedly admitted that there is an enormous backlog of defendants waiting for the SPD to appoint public defense counsel on their behalf. In Brown County, the Board of Supervisors noted in 2021 that the SPD was facing a backlog of "approximately 350 defendants" in Brown County *alone*, "which currently need SPD representation, 17 of which have been in custody and sought representation for over 100 days." Declaration of Sean H. Suber, **Ex. A**. On March 15, 2022, Defendant Tony Evers announced that he was providing "funding to help alleviate the pandemic-related backlog of criminal cases." Suber Decl., **Ex. B**. And by April 2022, Defendant Kelli Thompson, the Wisconsin State Public Defender, explained the depth of this backlog, admitting publicly that the SPD was "seeing a backlog somewhere coming out of the pandemic of about 35,000 cases, so pretty significant," and "it's going to take years" to clear the backlog of cases. *See* Suber Decl., **Ex. C**.

Based on publicly available information, to date, the proposed class numbers in the thousands, if not the tens of thousands. As of December 11, 2022, there were 11,149 defendants in Wisconsin who had been unrepresented for at least 14 days. *See* Am. Compl., Ex. A; Suber Decl. **Ex. D**. Based on this number alone, it is reasonable to infer that thousands of these individuals have requested and been found eligible for public defense counsel. Indeed, based on a review of 100 randomly selected

cases, it appears that at least 38 (and perhaps as many as 67[2]) defendants requested and were found eligible for public defense counsel but had not received an attorney within 14 days. *See* Suber Decl. **Ex. D**. Assuming that a randomly selected sample is representative of the whole, it is very likely that at least 4,236—and likely considerably more—of the 11,149 defendants are putative class members. *See id.* Furthermore, because the shortage of public defense attorneys has persisted for years, countless more defendants have experienced similar unreasonable delays before the State belatedly appointed counsel on their behalf, and thus are putative class members as well.[3] Lastly, as new cases are added to the SPD's backlog, the putative class is growing by the day. Based on publicly available information and common sense, the Court can infer that the putative class numbers in the thousands if not tens of thousands. *See Jenkins v. Mercantile Mortg. Co.*, 231 F. Supp. 2d 737, 744 (N.D. Ill. 2002) (noting that courts may "rely on common sense assumptions or reasonable inferences in determining numerosity").

Because the putative class is composed of thousands—if not tens of thousands—of people, and is increasing in size by the day, it would be impracticable to join such an enormous number of individuals as plaintiffs. Thus, numerosity is satisfied. *See Hammetter*, 2021 WI App 53, ¶ 10 (finding that defendants could not successfully dispute numerosity because "there appear[ed] to be thousands [of class members]"); *Weaver v. Reagen*, 701 F. Supp. 717, 721 (W.D. Mo. 1998) (holding that because joinder of unknown future class members is impracticable, the numerosity requirement was satisfied); *Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) ("[T]he fluid nature of a plaintiff class . . . counsels in favor of certification.").

B. Commonality is satisfied.

[2] For 29 of the cases, SPD eligibility could not be determined from the docket alone.

[3] *See generally In re Petition to Amend SCR 81.02*, 2018 WI App 83, ¶ 1 (describing in 2018 how "[c]hronic underfunding" and "abysmally low" compensation rates result in a shortage of public defense attorneys, causing "significant delays in appointment of counsel").

Second, Plaintiffs' proposed class satisfies Section 803.08's prerequisite of commonality, which requires that "there are questions or law or fact common to the [proposed] class." Wis. Stat. § 803.08(b). Only one question need suffice, which "must be of such a nature that it is capable of classwide resolution—which means that [its] determination . . . will resolve an issue that is central to the validity of each one of the claims in one stroke." *Harwood*, 2019 WI App 53, ¶ 25 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014). For example, in *Ross v. Gossett*, a group of inmates brought a class action against certain prison administrators, claiming that the correctional agencies' policy of conducting prison-wide shakedowns at certain prisons violated the Eighth Amendment's prohibition on cruel and unusual punishment. *See Ross v. Gossett*, 33 F.4th 433, 436-37 (7th Cir. 2022). The district court found that commonality was satisfied because the shakedowns were carried out under a common policy and the answer to whether that policy constituted cruel and usual punishment would resolve all of the class member's Eighth Amendment claims in one stroke. *Id.* at 437.

Commonality is satisfied here because, similar to the inmates in *Gossett*, Plaintiffs are challenging the constitutionality of Wisconsin's public defense system insofar as it results in severe delays in appointment of public defense counsel. *See id*, at 436-37. The State has denied counsel to each class member for 14 days or more— "conduct common to members of the class." *Suchanek*, 764 F.3d at 756. Indeed, Defendant Thompson has already admitted that this "is a statewide problem." Suber Decl., **Ex. C**. Per Randy Kraft, Communications Director for the SPD in Madison, about 140,000 defendants statewide need a public defender each year, yet there are under 1,000 private defense attorneys in the state certified for public defender appointments; of those 1,000 attorneys, almost 20% did not take a single appointment in 2017. *See* Suber Decl., **Ex. E**. Kraft acknowledged

that if the trend continues, the state will find itself in a "crisis situation." *Id.* Suzanne O'Neill, Regional Attorney Manager for the SPD in Wasau and Stevens Point, has noted that many clients plead out after sitting in jail for weeks waiting for an attorney. *See* Suber Decl., **Ex. F**.

Whether delays of 14 days (or of 30, 60, or 120 days) that the class members are facing are categorically unreasonable under the U.S. and Wisconsin Constitutions is a common question because its answer will resolve an issue central to the validity of each class members' claim in one stroke. If the answer is "yes," the State of Wisconsin has violated the class members' right to counsel by the delay alone; conversely, if the answer is "no," it has not. Thus, commonality is satisfied.

C. Typicality is satisfied.

Third, Plaintiffs satisfy the prerequisite of typicality, which requires "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Wis. Stat. § 803.08(1)(c). Typicality requires that the named plaintiffs' claims "arise from the same practice or course of conduct that gives rise to the claims of other class members, are based on the same legal theory, and ultimately have the same essential characteristics as the claims of the class at large." *Hammetter*, 2021 WI App 53, ¶ 20 (cleaned up); *see e.g.*, *Harwood*, 2019 WI App 53, ¶ 57 (finding typicality where the trial court concluded that the named plaintiff and the class had suffered the same injury, had the same legal basis for their claims, and would be entitled to the same remedy if the statutory violation was established).

Here, the Named Plaintiffs and the Class have suffered the same injury: they were denied appointed counsel for 14 days or more after their initial appearances. Again, Defendant Thompson admitted that the backlog of cases due to attorney shortages at the SPD "is a statewide problem"—in other words, it is typical. *See* Suber Decl., **Ex. C**. Adam Plotkin, the SPD Legislative Liaison, says the state's public defenders are stretched thin across offices. Suber Decl., **Ex. G**. He noted previously that a snapshot of caseloads in 2019 showed an open caseload of 32,000 cases, while a similar snapshot in 2022 showed an open caseload of 64,000 cases. Suber Decl., **Ex. H**. And Jeffrey Cano, Regional

Manager for the SPD in Green Bay and Appleton, noted that, "Every day, when we go to lockups, there's a pile of cases that have not gone to our office." Suber Decl., **Ex. F**.

Because of this denial, the Named Plaintiffs and the Class have the same legal basis for their claims: violations of their right to timely appointed counsel under the U.S and the Wisconsin Constitutions. And Plaintiffs and the Class are entitled to the same relief: a declaratory judgment that, among other things, declares that their constitutional rights have been violated and that Wisconsin's public defense system is unconstitutional as to them.

D. Adequacy of representation is satisfied.

Finally, Plaintiffs satisfy the last prerequisite of adequacy of representation, which requires "the representative parties will fairly and adequately protect the interests of the class." Wis. Stat. § 803.08(1)(d). "In determining adequacy of representation, the primary criteria are: (1) whether the plaintiffs or counsel have interests antagonistic to those of absent class members; and (2) whether class counsel are qualified, experienced and generally able to conduct the proposed litigation." *Hammetter*, 2021 WI App 53, ¶ 21 (quotation omitted). Both criteria are satisfied here.

For one, Plaintiffs' and the class members' interests align. Plaintiffs do not have interests antagonistic to the class members they seek to represent. The typicality and adequacy of representation inquiries are similar in this regard. If the named plaintiffs' claims are typical of those of the class, their interests are aligned absent a showing to the contrary. *See Harwood*, 2019 WI App 53, ¶ 57; *Gomez v. V. Marchese & Co.*, 2022 WL 3228047, at *65 (E.D. Wis. Aug. 10, 2022) (noting that "[t]o be an adequate representative '[a] named plaintiff must be a member of the putative class and have the same interest and injury as other members'" and concluding adequacy was met because "[t]he defendants have not identified any conflicts of interest") (quoting *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1027 (7th Cir. 2018)). As established above, Plaintiffs' claims are substantially similar to the class members. They have all suffered the same injury—the denial of counsel for at least 14 days after their initial

appearances. And the requested declaratory judgment and injunction will benefit the Plaintiffs and class members equally. Thus, the interests of Plaintiffs and the class members are in alignment.

Further, Plaintiffs are represented by qualified, experienced counsel that are able to conduct this lawsuit. Section 803.08(12) states that "[i]n appointing class counsel, the court must consider all of the following:

a. The work counsel has done in identifying or investigating potential claims in the action.

b. Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action.

c. Counsel's knowledge of the applicable law.

d. The resources that counsel will commit to representing the class."

"[E]xperienced and qualified law firms and legal aid agencies are more than capable of serving as adequate class counsel." *Holmes v. Godinez*, 311 F.R.D. 117, 222 (N.D. Ill. 2015). Here, Plaintiffs are represented by qualified, experienced, and capable attorneys from a coalition of advocacy organizations and law firms. Lisa M. Wayne and Bonnie Hoffman of the National Association of Criminal Defense Lawyers and Jason D. Williamson of the Center on Race, Inequality, and the Law have significant experience handling class actions challenging public defense systems and have extensive knowledge of the applicable law. *See* Suber Decl., **Ex. G**. John A. Birdsall and Henry R. Schultz are career Wisconsin defense attorneys who maintain a deep familiarity with Wisconsin's public defense system. *Id.* And the attorneys from Winston & Strawn LLP have expertise in the "nuts and bolts" of class action litigation and can draw upon the resources of a global law firm with a substantial commitment to pro bono work. *Id.* To date, Plaintiffs' counsel has done extensive work investigating potential claims and identifying individuals who have been wronged by Defendants' failure to timely appoint counsel to qualified defendants. This includes identifying the names, locations, charges, and hearing dates of indigent defendants across the state of Wisconsin who are

waiting to be appointed an attorney. Moreover, counsel has no interests in conflict with the putative class members.

Adequacy of representation is satisfied, and Plaintiffs' counsel are qualified to be class counsel.

II. This lawsuit qualifies as a Section 803.08(2)(b) class action.

Once "numerosity, commonality, typicality, and adequacy are established, the second part of the test is to determine if § 803.08(2) is satisfied," which it is here. *See Rave*, 2021 WI App 36, ¶ 7. A putative class action must fall into one of the "types" of class actions set forth in Section 803.08(2). One such type is a Section 803.08(2)(b) class action, which mirrors a Rule 23(b)(2) class action and may be maintained if "[t]he party opposing the class has 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." Wis. Stat. § 803.08(2). "The key to the [803.08(2)(b) class action] is the indivisible nature of the injunctive or declaratory remedy warranted." *Dukes*, 564 U.S. at 360. This Rule "applies only when a single injunction or declaratory judgment would provide relief to each member of the class" and "not . . . when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Id.* "Colloquially, [Section 803.08(2)(b)] is the appropriate rule to enlist when the plaintiffs' primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class." *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 441 (7th Cir. 2015); *see also* Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(B)(2)*, B.U. L. REV. at 64 (noting that class actions for injunctive or declaratory relief "help to ensure that any system-wide problems receive a system-wide response").

Plaintiffs' proposed class action satisfies Section 803.08(2)(b). They allege that Defendants failed to appoint public defense counsel on their and the Class's behalf within 14 days—constituting a "refus[al] to act on grounds that apply generally to the class." Wis. Stat. § 803.08(2). Further, Plaintiffs seek a declaratory judgment that Defendants' omission in this regard, among other things, was

unreasonable and violated their and the Class's rights, thus requiring "corresponding declaratory relief . . . respecting the class as a whole." *Id.* And Plaintiffs' requested injunctive relief is class-wide as well: they seek an order prohibiting Defendants from administrating Wisconsin's public defense system in violation of the constitutional rights of Plaintiffs and the Class and requiring Defendants to establish a constitutional system.

Accordingly, the requirements for certification under Section § 803.08(2)(b) are satisfied.

CONCLUSION

For these reasons, Plaintiffs request that the Court certify the proposed class under Section 803.08—or alternatively, the proposed subclasses under Section 803.08(7). Plaintiffs also request that the Court approve the undersigned counsel to serve as class counsel pursuant to Section 803.08(12).

Dated: February 1, 2023

By: */s/ Marc L. Krickbaum*

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Memorandum of Law in Support of Plaintiffs' Motion for Class Certification with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Date: February 1, 2023.

/s/ Marc L. Krickbaum
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