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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Wisconsin's public defense system is in crisis. The United States and Wisconsin constitutions guarantee the prompt provision of counsel to defendants facing imprisonment who cannot afford legal representation. In recent years, however, thousands of such defendants—including Plaintiffs here—have been forced to wait weeks, months, and, in some cases, *over a year* for attorneys. The public officials responsible for securing counsel for these individuals—Defendants here—have not eliminated (or even meaningfully ameliorated) these drawn-out delays. And, to date, the Legislature has not shown any interest in addressing the situation. Thus, Plaintiffs now seek judicial intervention on behalf of themselves and the thousands of other people in Wisconsin who were, currently are, or will be stuck in legal limbo.

There is a simple but important question at the heart of this case: Are the lengthy delays suffered by the putative class or any subclass (e.g., the defendants who waited 120 days—*four months*—or more) categorically unreasonable? If the answer is yes, Wisconsin's public defense system is unconstitutional as to hundreds, if not thousands, of people, and by inflexibly and uniformly administering the underlying statutory and regulatory scheme, Defendants have violated—and are continuing to violate—the very constitutional rights they are charged with safeguarding.

Instead of allowing this lawsuit to proceed so that the Court may answer this question, however, the State has done everything possible to keep this case at the starting gate. For one thing, in a blatant but misguided effort to moot Plaintiffs' claims, and thereby prevent judicial review, the State appears to have prioritized securing legal representation for Plaintiffs over other, equally qualified defendants waiting for counsel. For another, the State has refused to respond to Plaintiffs' discovery requests about the putative class, hiding behind the stay triggered by its motion to dismiss. By seeking to prevent the Court from considering the important, constitutional issue at the heart of this case, the State is litigating this case at the expense of those individuals who Defendants are supposed to protect.

Such tactics continue in the State's Opposition Brief to Plaintiffs' Motion for Class Certification. Remarkably, although this case concerns a systemic problem affecting thousands of people in a similar way, the State argues that Plaintiffs have satisfied *none* of the statutory requirements for a class action. For example, although it is common knowledge among practitioners and judges that there are *many* defendants who have waited longer than two weeks for legal representation in the past four years, and Defendants have admitted as much publicly, the State surprisingly disputes that the putative class is so numerous that it would be impracticable to join all class members. Moreover, the State disputes that Plaintiffs' counsel—a dozen attorneys from a coalition of well-respected law firms and public interest organizations—can adequately represent this class. This is nonsense.

The Court should reject the State's arguments against class certification. Plaintiffs have established that the prerequisites for class certification—numerosity, commonality, typicality, and adequacy of representation—are met and that Defendants have engaged in conduct generally applicable to the class such that Plaintiffs' request for equitable relief is appropriate. Accordingly, the Court should grant Plaintiffs' Motion for Class Certification. In the alternative, if the Court finds that any of these prerequisites are in doubt, the Court should grant Plaintiffs leave to conduct class discovery.

ARGUMENT

I. The class certification criteria are met, and the State's counterarguments fail.

Plaintiffs have satisfied the requirements for class certification. Specifically, Plaintiffs have established that the class is sufficiently numerous, there is a question common to the class, Plaintiffs' claims are typical of the class's claims, and Plaintiffs and their counsel will adequately represent the class. Further, Plaintiffs have established that Defendants have engaged in conduct that applies generally to the class such that class-wide equitable relief is appropriate. For the reasons explained

below, Defendants' arguments in opposition fall short. Thus, the Court should grant Plaintiffs' Motion for Class Certification.

A. There is enough evidence to conclude that the class is sufficiently numerous.

Plaintiffs have presented sufficient evidence for the Court to find that the "class is so numerous that joinder of all members is impracticable." Wis. Stat. § 803.08(1). The State does not dispute that, as a legal matter, a class composed of approximately 40 individuals or more satisfies the numerosity requirement. Defs.' Opp. at 15 (Dkt. 99). And although the State Public Defender ("SPD") presumably has information about how many defendants have been found qualified for a public defense attorney in a given period of time and how long these defendants have waited for legal representation, the State does not assert or provide any evidence that there are *in fact* less than 40 putative class members. Instead, the State argues that Plaintiffs have not produced *enough* evidence for the Court to conclude that, over the last four years, there were at least 40 criminal defendants in Wisconsin, who—despite being found eligible for public counsel—did not receive an attorney within 14 days of their initial appearances.

The SPD has repeatedly acknowledged that there are large numbers of people across the state waiting for a lawyer to be assigned to them. And other stakeholders in Wisconsin's criminal justice system have called attention to the ongoing constitutional crisis as well. Plaintiffs have pointed to a sampling of these concerns in their previous papers:

- The meeting minutes of the Public Safety Committee of the Brown County Board of Supervisors noting that the SPD was facing a backlog of "approximately 350 defendants which currently need SPD representation, 17 of which have been in custody and sought representation for over 100 days and approximately 27 defendants have been in custody between 30–100 days," which demonstrates that, in March of 2021, there were 44 defendants in custody in Brown County alone who had been waiting longer than 30 days. Decl. of S. Suber (Dkt. 65), Ex. A;

- The article in the Green-Bay Press-Gazette from October 23, 2018 describing the statewide problem of providing counsel to eligible criminal Defendants. The article notes that "[i]t's not unusual . . . for an indigent defendant in Brown County Circuit Court to sit in jail for weeks

as the State Public Defender's office searches for a lawyer willing to the take the case." The article explains the systemic problem, highlighting the disparity in pay for public defenders that has caused a consistent decrease in the number of attorneys willing to act as public defenders or take the public-defender appointed cases. Decl. of S. Suber (Dkt. 65), Ex. E;

- The article in the Sheboygan Press from August 27, 2019 describing the public defender shortage and the impact on indigent defendants. The article states that "[s]ome defendants wait for weeks, even months, to get assigned an attorney[.] . . . In the meantime, they sit in jail – not knowing when they'll be released or when their cases will move forward." The article continues by describing "[a] system in crisis," explaining the low rates paid to attorneys taking public-defender appointed cases and the implications on the Sixth Amendment rights of these unrepresented defendants. Decl. of S. Suber (Dkt. 65), Ex. F;

- The article by WEAU News, published December 8, 2022, describes the shortage of public defense attorneys and the impact on court proceedings. A spokesperson for the Eau Claire County District Attorney Peter Rindal stated that "[d]ue to the State Public Defender shortage, criminal defendants are waiting significantly longer now than ever before for appointment of an attorney to represent them." The article continues to describe the systemic conditions, like inability to fill vacancies due to compensation, that cause the delay in the appointment of representation. Decl. of S. Suber (Dkt. 65), Ex. G; and

- The article in The Journal Times, dated August 24, 2022, describing the present case and providing that in "in two recent cases in Racine County Circuit Court . . . the judge has told an unrepresented defendant the court has contacted over 1,000 attorneys without success." The article describes the compensation rates, factors that impact appointment of counsel, and the ongoing nature of the problem. Decl. of S. Suber (Dkt. 65), Ex. H.

This evidence,[1] along with "common sense assumptions and reasonable inferences," *Lau v. Arrow Fin. Servs., Ltd. Liab. Co.*, 245 F.R.D. 620, 624 (N.D. Ill. 2007), establishes that there are well over 40 class members. *See Indiana C.L. Union Found., Inc. v. Superintendent, Indiana State Police*, 336 F.R.D. 165, 173 (S.D. Ind. 2020) (finding that newspaper articles, while not establishing a specific number of putative class members, did "establish the likely existence of those individuals, and cause the Court to conclude that it is reasonable to infer that the class . . . is so numerous that joinder would be impracticable").

[1] And since Plaintiffs filed their opening brief, additional statements on the public record lend further support to a finding of numerosity. On March 21, 2023, for example, in response to a debate question about attorney shortages and pay rates, Wisconsin Supreme Court Justice-elect Janet Protasiewicz observed: "The shortfall impacted my courtroom each and every day. Each and every day. The public defender's office would send me a letter and say, 'Dear Judge Janet, we contacted 700, 800, 600, potential attorneys to see if we could find someone to represent the accused,' and they frequently couldn't. Justice was delayed. We had to adjourn cases over and over and over because there were not enough public defenders or public defender appointments in the system." Suber Decl., ¶ 8.

Indeed, there is unrebutted evidence showing that there were 44 class members being held in custody in Brown County in March 2021, which suggests that the number of class members in and out of custody across the entire state for the last four years is at least in the hundreds if not thousands. Decl. of S. Suber (Dkt. 65), Ex. A.

In response, the State makes three failed arguments. First, the State asserts that Plaintiffs must provide "data or statistics regarding how many people are in the putative class or subclasses[.]" Defs.' Opp. at 16–17 (Dkt. 99). But although 40 or more members "is a general rule of thumb for determining numerosity, 'a class can be certified without a determination of its size, so long as it is reasonable to believe [the class] is large enough to make joinder impracticable and thus justify a class action suit.'" *Wilson v. City of Evanston*, 2017 U.S. Dist. LEXIS 139248, at *18 (N.D. Ill. Aug. 30, 2017) (quoting *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014)) (citation omitted). Because the public records evidence identified above makes it reasonable to believe that the class is too big to join all members as plaintiffs, Plaintiffs need not provide "data or statistics" about the size of the class to establish numerosity.

Second, the State argues that certain information about the putative class is out-of-date or incomplete because it does not concern how many defendants are currently without counsel. Defs.' Opp. at 16 (Dkt. 99). But the State is misconstruing Plaintiffs' putative class definition. The putative class includes criminal defendants who, *since January 1, 2019*, were found eligible for public defense counsel but did not receive attorneys within 14 days. Pls.' Mem. ISO Class Cert. ("Mem.") at 5 (Dkt. 66). Thus, defendants who experienced such delays are class members *even if they were later appointed counsel*. The class is defined this way because the State's belated appointment of an attorney does not "cure" the constitutional violation—the unreasonable delay *itself* violates the right to counsel. *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008). Thus, evidence suggesting that, in the last four years, there were eligible defendants anywhere in Wisconsin who waited longer than 14 days for an attorney

supports a finding of numerosity, regardless of whether such evidence is "two years old" or "limited to a single county."

Third, the State argues that some of Plaintiffs' evidence means something else. For example, the State argues that the "backlog" of 35,000 cases that Defendant Thompson referenced is the backlog of cases that must be decided, not the number of cases with uncounseled defendants. Defs.' Opp. at 17 (Dkt. 99). But although Defendant Thompson is a party to this case, the State provides no evidence in support of this interpretation. Regardless, even if the 35,000 figure is the backlog of unresolved cases, Defendant Thompson's statement is still probative of numerosity. Indeed, in light of the other evidence of the shortage of public defense counsel and resulting delays, it is simply not believable that Defendants promptly provided defense counsel in the vast majority of these "backlogged" cases.

B. There is a common question in this case.

Plaintiffs have established that there is at least one "question[] of law or fact common to the class." Wis. Stat. § 803.08(b). For a question to be "common," it "must be of such a nature that it is capable of class-wide 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 v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 25, 388 Wis. 2d 546, 933 N.W.2d 654 (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). Here, Plaintiffs assert that Defendants have failed to provide public defense counsel to each Plaintiff and class member within specified lengths of time (14, 30, 60, and 120 days) and that these delays are categorically unreasonable. If the Court agrees, then Plaintiffs and class members will necessarily prevail on their constitutional claims. Thus, whether the delays are categorically unreasonable is a contention capable of class-wide resolution.

In response, the State posits that each Plaintiff and putative class member has different circumstances in his or her underlying criminal case that might lead to delays in appointing counsel. But Plaintiffs' argument is that these delays—considering their prolonged length and the fact that they are due to Wisconsin's deficient public defense system—are categorically unreasonable. In other words, such delays cannot be justified by any case-specific circumstances. Indeed, if a constitutional violation that generally requires a case-specific reasonableness inquiry results from a defendant's policy or practice, and it is sufficiently egregious as shown by "systemic and gross deficiencies in equipment or procedures," it can be adjudicated on a class-wide basis. *See Driver v. Marion Cnty. Sheriff*, 859 F.3d 489, 492–95 (7th Cir. 2017) (evaluating an alleged Fourth Amendment violation and finding that, given the extended length of time plaintiffs were detained without legal justification, "[a]t some point well short of [the time] alleged here, there is no reason to believe that individual issues would account for that delay"). Whether or not the Court agrees that these delays are categorically unreasonable under the circumstances here is a merits issue—not a class certification issue.

In any event, the only two "reasons for delay" that the State identifies are the fewer number of attorneys per capita in less populous counties and the relative severity of criminal charges between defendants. Defs.' Opp. at 7–9 (Dkt. 99). But the State fails to provide any evidence that these theoretical "reasons" are actually driving the delays of any particular Plaintiff or class member, and thus these reasons are pure conjecture. Moreover, the State fails to cite any authority providing that Wisconsin's obligation to provide counsel to qualified defendants within a reasonable time varies based on where the particular defendants live. The right to counsel does not mean something different in Langlade and Forest Counties than it does in Dane and Milwaukee Counties. Relatedly, the State points to no case holding that the fact that a defendant is charged with a more serious crime justifies a longer delay in the appointment of counsel. On the contrary, such individuals need the prompt assistance of an attorney too.

Regardless, even assuming the State is correct that the SPD has difficulty timely securing counsel for rural defendants and those charged with serious crimes, the State is conflating effects with causes. It is precisely *because* Wisconsin's public defense system is so rigid, overloaded, and under-resourced that the SPD must find private-bar attorneys for these individuals but consistently fails to do so in a timely manner.

The State's reliance on *Allen v. Edwards*—a nonbinding decision from a Louisiana state court—is misplaced. True, that case similarly involved a challenge to the constitutionality of a public defense system under the Sixth Amendment. But the nature of the claim and the nature of the class were very different in that case. The claim there was that Louisiana's overburdened public defense system was causing defense attorneys to provide ineffective assistance of counsel to their clients. *See* 322 So. 800, 804–05 (La. App. 1st Cir. 2001). And the class consisted of essentially all indigent criminal defendants across the state. *Id.* at 807. Because of the myriad ways in which attorneys could injure their clients (by failing to provide effective representation) and the fact that the class was not limited to defendants that had been injured in a particular way, the court found it could not determine, *on a class-wide basis*, whether class members had in fact received objectively deficient representation. *Id.* at 809–11. Here, on the other hand, Plaintiffs and class members have all suffered the same, specified injury—delays of certain, minimum lengths in the provision of counsel. If, at the merits stage, the Court agrees that these delays are categorically unreasonable, then it will have provided a common answer "central to the validity" of Plaintiffs' and the class's constitutional claims.

Next, the State argues that *Ross v. Gossett* is distinguishable because there the defendants acted according to a uniform policy of conducting shakedowns of inmate cells, and Plaintiffs do not argue that the "SPD has a 'uniform policy' of not appointing counsel within 14 days[.]" Defs.' Opp. at 10 (Dkt. 99). But this argument misses the forest for the trees. Defendants *are* acting according to a policy. Plaintiffs allege (and Defendants do not dispute) that Wisconsin has enacted a comprehensive *statutory*

and regulatory scheme that provides for the establishment, funding, and operation of a statewide public defense system, and Defendants' continued administration of Wisconsin's public defense system according to that scheme has resulted in lengthy delays in the provision of counsel. The fact that the "policy" at issue in this case is more complex and nuanced than the shakedown policy in *Ross* does not matter—what matters is that it is uniformly harming Plaintiffs and the putative class.

Thus, Plaintiffs have satisfied the commonality requirement.

C. Plaintiffs' claims are typical of their fellow class members' claims.

Plaintiffs' claims "are typical of the claims . . . of the class." Wis. Stat. § 803.08(1)(c). The State agrees that "[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and [is] based on the same legal theory." *Lacy v. Cook Cnty.*, 897 F.3d 847, 866 (7th Cir. 2018); *see* Defs.' Opp. at 12 (Dkt. 99). Plaintiffs assert that Defendants' administration of Wisconsin's deficient public defense system—"a course of conduct"—caused delays in the provision of legal representation that violated Plaintiffs' constitutional rights. Mem. at 3. Plaintiffs seek to represent a class of individuals who suffered similar delays as a result of Defendants' conduct. Accordingly, Plaintiffs' claims "arise from the same course of conduct" as the putative class's claims and "are based on the same legal theory." *Lacy*, 897 F.3d at 866.

The State makes two failed arguments in support of its argument against a finding of typicality. First, the State argues that Plaintiffs "cannot logically represent a class of people who lack appointed counsel." Defs.' Opp. at 12 (Dkt. 99). But again, the putative class is not limited to those who have been waiting for an unreasonable amount of time for an attorney; the class also includes individuals who eventually received counsel after suffering an unreasonable delay. *See* discussion *supra* at 5–6. Moreover, the fact that Plaintiffs now have counsel does not mean that their claims are not typical. As the State notes, "a class representative must . . . possess the *same interest* and suffer the *same injury* as the class members." *Dukes*, 564 U.S. at 348–49 (emphases added). Plaintiffs suffered the same

injury—the unreasonable delay in the appointment of counsel—as the other class members (both those who later received counsel and those who are still waiting). And Plaintiffs have an interest in seeking redress for those claims—an interest shared by the class members.

The State asserts that Plaintiffs and the other class members who eventually received representation will not necessarily need attorneys appointed on their behalf. But even so, the State points to no authority providing that named plaintiffs must be eligible for every permutation of the relief available to class members for their claims to be typical of the class's claims, particularly where the named plaintiffs' claims and the class's claims are substantively identical. Indeed, in *Oshana v. Coca-Cola Co.* (which the State cites), the named plaintiff's claim failed to meet the typicality requirement because it rested on a *different legal theory* than that of certain class members, *see* 472 F.3d 506, 514 (7th Cir. 2006), which is not the case here.

Next, the State argues that "each Plaintiff has completely different circumstances that could lead to justifiable delays in appointing counsel." Defs.' Opp. at 12 (Dkt. 99). This is a rehash of the State's commonality argument, and it fails for the same reasons. Even if the State's hypothetical differences existed, "'factual distinctions between the claims of the named class members and those of other class members' do not necessarily defeat a finding of typicality." *In re Sulfuric Acid Antitrust Litig.*, 2007 U.S. Dist. LEXIS 20380, at *12 (N.D. Ill. Mar. 21, 2007) (quoting *De La Fuente v. Stokely-Van Camp Inc.*, 713 F.2d 225, 233 (7th Cir. 1983)); *see also Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239, 255 (S.D. Ill. 2015) ("[T]ypicality does not require the facts underlying every claim to be identical"). Indeed, as long as Plaintiffs' claims have the "*same essential characteristics* as those of the proposed class members," *In re Sulfuric Acid*, 2007 U.S. Dist. LEXIS 20380, at *12 (emphasis added), typicality is met.

Both Plaintiffs' and the proposed class members' claims rest on the same legal theory: Defendants' continued administration of Wisconsin's public defense system, despite the resulting shortage of attorneys willing and able to provide representation, caused the delays at issue in this case;

therefore, the delays are categorically unreasonable. Accordingly, despite potential minor factual differences, these claims share the same essential characteristics, and the typicality requirement is satisfied.

D. Plaintiffs and their counsel will adequately represent the class.

The Court can conclude that the class is adequately represented based on the current record. The State agrees that the class is adequately represented if: (1) the named plaintiffs and counsel do not have interests antagonistic to those of the absent class members; and (2) class counsel is qualified, experienced, and able to conduct the litigation. Defs.' Opp. at 13 (Dkt. 99) (citing *Hammetter v. Verisma Sys., Inc.*, 2021 WI App 53, ¶ 21, 399 Wis. 2d 211, 963 N.W.2d 874). However, the State argues that neither of these requirements are met here.

First, the State argues that Plaintiffs have interests antagonistic because they are not members of the putative class. That is false. For a third time, the State is misconstruing the class definition. The class is defined as "[a]ll 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." Mem. at 5 (emphasis added). As such, the putative class includes individuals, who—like Plaintiffs—were belatedly appointed counsel after experiencing an unreasonable delay. Accordingly, Plaintiffs are members of the class they seek to represent.

The State fails to explain why the fact that Plaintiffs have now received counsel would make their interests *antagonistic* to those who are still waiting. The State asserts—with no support—that Plaintiffs "have no ongoing interest" in this case because they have attorneys. Defs.' Opp. at 13 (Dkt. 99). This argument demonstrates the State's failure to grasp the gravity and scope of the problem at issue here. By failing to appoint counsel for Plaintiffs for weeks, months, and in some cases, *over a year*, Defendants violated Plaintiffs' constitutional rights—just as they are currently violating the rights of those who have not yet received counsel. These constitutional violations were not "cured" by the

belated appointments of counsel, and Plaintiffs continue to have interest in seeking declaratory relief. Indeed, despite now having public defense attorneys, none of Plaintiffs have requested to opt out of this lawsuit. Plaintiffs' interest in vindicating their constitutional rights makes them more than adequate representatives of all class members, regardless of whether they have attorneys or not.

Next, the State argues that Plaintiffs' counsel—a coalition of over a dozen attorneys from prominent, reputable law firms and public interest organizations—have not demonstrated that they are qualified, experienced, and able to conduct this lawsuit, complaining about the need for "sworn affidavits" regarding Plaintiffs' counsel's bona fides. Defs.' Opp. at 13–15 (Dkt. 99). Nonsense. The State does not cite any authority providing that sworn affidavits are necessary, and they are not. For example, Plaintiffs' counsel efforts thus far in this litigation alone are "sufficient to demonstrate counsel's adequacy to represent a class[.]" *See Northside Chiropractic, Inc. v. Yellowbrook, Inc.*, No. 09 CV 04468, 2012 U.S. Dist. LEXIS 122827, at *28 (N.D. Ill. 2012) (finding Plaintiff's counsel's "extensive effort" and the filings were sufficient to satisfy the adequacy prerequisite). Moreover, as Plaintiffs noted in their initial brief, "[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. 177, 222 (N.D. Ill. 2015). Because the State points to no case holding that Plaintiffs' counsel must submit affidavits as proof that they are qualified, willing, and able, that should be the end of the matter unless the State is actually challenging the adequacy of counsel—which it cannot credibly do. Indeed, the Court may take judicial notice of the qualifications and expertise of Winston & Strawn LLP,[2] the National Association of

[2] https://www.winston.com/en/what-we-do/services/litigation/index.html#!/en/what-we-do/services/litigation/class-actions.html?aj=ov&parent=3377&idx=5; https://www.winston.com/en/who-we-are/firm-profile/pro-bono.html

Criminal Defense Lawyers,[3] the Wisconsin Association of Criminal Defense Lawyers,[4] the NYU Center on Race Inequality & the Law,[5] and Birdsall Obear & Associates LLC.[6]

Nevertheless, to put the issue to rest, Plaintiffs have provided a declaration of class counsel's qualifications and experiences.[7] Briefly summarized, Lisa M. Wayne and Bonnie Hoffman of the National Association of Criminal Defense Lawyers and Jason D. Williamson and Tasleemah Tolulope Lawal 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. 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.*

E. Defendants' conduct affects the class as a whole.

Plaintiffs' proposed class action may be maintained under Section 803.08(2)(b), which "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) (applying Fed. R. Civ. P. 23(b)(2), the federal equivalent to Wis. Stat. § 803.08(2)(b)). Section 803.08(2)(b) requires the defendant to have engaged in conduct that "appl[ies] 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)(b). As the State

[3] https://www.nacdl.org/Landing/Mission-and-Vision; https://www.nacdl.org/Landing/NACDL-Litigation
[4] https://www.wacdl.org/about
[5] https://www.law.nyu.edu/centers/race-inequality-law/leadership; https://www.law.nyu.edu/centers/race-inequality-law/our-work;
[6] https://www.birdsall-law.com/practice-areas
[7] The State improperly relies on *Bilda v. Cnty. of Milwaukee*, 2006 WI APP 57, ¶ 20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 for the proposition that Plaintiffs cannot provide additional evidence on reply. *Bilda* provides that a party cannot introduce new *arguments*. Plaintiffs have already argued that class counsel possess sufficient qualifications and experiences to satisfy the adequacy prerequisite.

notes, "[t]he key . . . is the 'indivisible nature'" of the requested injunction or declaratory judgment. *Dukes*, 564 U.S. at 360. The remedy must "provide relief to each member of the class." *Id.*

Plaintiffs seek a declaratory judgment that the delays of 14, 30, 60, and/or 120 days or more in the provision of appointed counsel are categorically unreasonable and violate their and the class's constitutional rights, and thus, Wisconsin's public defense system is unconstitutional as applied to them. Pls.' Am. Compl. at 11–12 (Dkt. 48). Plaintiffs also seek an injunction preventing Defendants from administering Wisconsin's public defense system insofar as it violates their rights and directing Defendants to establish a constitutional system. *Id.* Thus, Plaintiffs are seeking an injunction and a declaratory judgment that applies equally to all class members not "different injunction or declaratory judgments" for each class member. Accordingly, Section 803.08(2)(b) is satisfied.

The State's argument that class-wide equitable relief is impossible in this case rests on the same misunderstanding that scuttles the State's commonality argument. In essence, the State argues that the Court cannot issue a class-wide injunction or declaratory judgment because the fact-specific nature of the reasonableness analysis means that the class's claims will not rise or fall together and thus some class members will be entitled to relief while others will not. But again, considering the extreme lengths of the delays and the fact that they are due to Wisconsin's deficient public defense system, Plaintiffs' theory is that the delays are *categorically* unreasonable. As result, the class's claims will necessarily rise or fall together. If the Court agrees that the delays are categorically unreasonable—which will not be determined until the merits stage—then the indivisible injunction and declaratory judgment that Plaintiffs seek will be appropriate, and such relief will affect the class as a whole.

II. In the alternative, Plaintiffs request class certification discovery.

If the Court concludes that Plaintiffs have not satisfied the class certification requirements, Plaintiffs request leave to conduct class certification discovery. Courts routinely permit class discovery "where there is a need to determine whether Rule 23 requirements are met and whether the action fits

in one of the Rule 23(b) categories." *Loy v. Motorola, Inc.*, No. 03-C-50519, 2004 U.S. Dist. LEXIS 23753, at *11 (N.D. Ill. Nov. 22, 2004). While Plaintiffs believe that class discovery is not necessary and will cause additional delay in addressing this ongoing constitutional crisis, Plaintiffs are prepared to further develop the record in this matter. Indeed, Plaintiffs discovery from the State over six months ago, including on issues relevant to class certification. After Plaintiffs served written discovery requests on September 30, 2022, the State chose not to respond, citing the stay triggered by their Motion to Dismiss. The State now argues, however, that Plaintiffs have not produced enough evidence for a class to be certified. The State cannot have it both ways. Because discovery about the class would enable Plaintiffs to further demonstrate that the statutory prerequisites are met, class certification discovery would be appropriate here.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification.

Dated: April 17, 2023

By: */s/ Sean H. Suber*

LISA M. WAYNE*
BONNIE HOFFMAN*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street NW, #1200
Washington, D.C. 20036
(202) 872-8600
LWayne@nacdl.org
BHoffman@nacdl.org
JOHN A. BIRDSALL (Bar No. 1017786)

BIRDSALL OBEAR & ASSOCIATES LLC
WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1219 North Cass Street
Milwaukee, WI 53202
(414) 831-5465
John@birdsallobear.com

MICHAEL P. MAYER (Bar No. 1036105)
LINDA T. COBERLY*
SEAN H. SUBER*
KATHERINE L. KYMAN*
JAMES W. RANDALL*
ANNIE R. STEINER*
SOPHIE R. LACAVA*
ELAYNA R. NAPOLI*
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600
IndigentDefenseTeam@winston.com

HENRY R. SCHULTZ (Bar No. 1003451)
SCHULTZ LAW OFFICE
WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
P.O. Box 42
Crandon, WI 5452
(715) 804-4559
Schultz.Hank@gmail.com

JASON D. WILLIAMSON*
TASLEEMAH TOLULOPE LAWAL*
CENTER ON RACE, INEQUALITY, AND THE LAW, NEW YORK UNIVERSITY SCHOOL OF LAW
139 MacDougal Street
New York, NY 10012
(212) 998-6452
Jason.Williamson@nyu.edu

Attorneys for Plaintiffs and the Putative Class
*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Reply 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: April 17, 2023

/s/ Sean H. Suber
SEAN H. SUBER