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**Clerk of Circuit Court**  
**Brown County, WI**  
**2022CV001027**

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY  
BRANCH 2

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ANTRELL THOMAS, et al.,

Plaintiffs,

v.

Case No. 22-CV-1027

ANTHONY S. EVERS, in his official  
capacity as the Governor of Wisconsin, et al.,

Defendants.

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**DEFENDANTS' BRIEF DISCUSSING  
THE IMPACT OF THE 2023–25 BIENNIAL BUDGET ON THIS CASE**

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**INTRODUCTION**

On July 12, 2023, this Court filed an order requiring the parties to brief the impact of the 2023–25 biennial budget on this case. (Doc. 111.) The budget was signed on July 5 and published the next day. 2023 Wis. Act 19.

Undeniably, the fiscal landscape for the Office of the State Public Defender (SPD) has changed since this case was filed, and for the better. After the enactment of the biennial budget, SPD will be able to pay assistant state public defenders more, which will help SPD recruit and retain its talented staff. SPD will also be able to pay appointed counsel a higher hourly rate, increasing the availability of counsel and the speed with which counsel can be appointed. It is too early to measure specific outcomes regarding appointment times, but they will likely be shortened.

While the recent budget is a welcome step in the right direction for SPD, its staff, and SPD-appointed counsel, the budget does not change the legal analysis as to the pending motions to dismiss the amended complaint and for class certification. Dismissal should be granted and class certification denied. The motion to dismiss is based upon the allegations in Plaintiffs' amended complaint, which fails to state a claim "upon which relief can be granted." Wis. Stat. § 802.06(2)(a)6. In other words, Plaintiffs' claim that SPD must appoint counsel within 14 days of an initial appearance fails as a matter of law. And the class-certification motion fails for the reasons argued. Defendants' arguments supporting dismissal of this case and denial of class certification will not be repeated.

Separate from those arguments, the budget's passage highlights why Plaintiffs' claims are not justiciable. The increased funding shows why the underlying dispute is best left to the political process and how Defendants are unable to effect meaningful improvements without the Legislature's participation. In terms of legal doctrine, Plaintiffs' case fails the familiar four-prong justiciability test for a declaratory-judgment action, in addition to failing to state a claim upon which relief can be granted. Regardless of how the Court approaches the legal issue, Plaintiffs' claims fail and should be dismissed because they are not justiciable. This Court should grant Defendants' motion to dismiss the amended complaint and deny class certification.

## BACKGROUND

2023 Wis. Act 19, the 2023–25 biennial budget, was enacted on July 5, 2023, and published on July 6. The relevant sections of Act 19 for purposes of this case are 471, 472, and 9101(1)(b). First, 2023 Wis. Act 19, § 471 amended Wis. Stat. § 977.08(4m)(d) to read as follows (added language underlined):

Unless otherwise provided by a rule promulgated under s. 977.02(7r) or by a contract authorized under sub. (3)(f), for cases assigned on or after January 1, 2020, and before July 1, 2023, private local attorneys shall be paid \$70 per hour for time spent related to a case, excluding travel, and \$25 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

2023 Wis. Act 19, § 471.

Second, 2023 Wis. Act 19, § 472 created Wis. Stat. § 977.08(4m)(e), which states:

Unless otherwise provided by a rule promulgated under s. 977.02(7r) or by a contract authorized under sub. (3)(f), for cases assigned on or after July 1, 2023, private local attorneys shall be paid \$100 per hour for time spent related to a case, excluding travel. For cases assigned on or after July 1, 2023, private local attorneys shall be paid \$50 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

2023 Wis. Act 19, § 472. Considering these provisions together, after July 1, 2023, the hourly rate for appointed counsel increased from \$70 to \$100 for time spent related to a case, excluding travel, and from \$25 to \$50 per hour for case-related travel.

Third, 2023 Wis. Act 19, § 9101(1)(b) is a non-statutory provision that impacts salaries for assistant state public defenders. Specifically, it states:

(b) *Assistant state public defenders.* Notwithstanding s. 230.12(11)(a) and (c), during the 2023–24 fiscal year, all of the following apply:

1. Beginning with the first pay period that occurs on or after July 1, 2023, each individual employed as an assistant state public defender on July 1, 2023, shall receive a salary adjustment increase of \$8.76 per hour.

2. Beginning with the first pay period that occurs on or after July 1, 2023, the first step of the 17 step pay progression plan under s. 230.12(11)(a) is \$36 per hour.

3. A salary adjustment under s. 230.12(11)(c) for an assistant state public defender may exceed 10 percent of the assistant state public defender's base pay.

4. An assistant state public defender does not need to have served the state as an assistant state public defender for a continuous period of 12 months to be eligible for a salary adjustment under s. 230.12(11)(c).

5. A salary adjustment under s. 230.12(11)(c) may result in an hourly salary that is higher than the highest hourly salary for the salary range for the position, as contained in the 2021–23 or 2023–25 compensation plan, whichever is applicable.

(c) *2023–25 state compensation plan.* If, on the effective date of this paragraph, the compensation plan under s. 230.12 has been adopted for the 2023–25 biennium and the compensation plan does not include progression plans under s. 230.12(10) and (11) that comply with pars. (a)2. and (b)2., by no later than 30 days after the effective date of this paragraph, the administrator of the division of personnel management in the department of administration shall propose an amendment under s. 230.12(3)(c) to comply with pars. (a)2. and (b)2. in the compensation plan for the 2023–25 biennium.

2023 Wis. Act 19, § 9101(1)(b), (c).

## ARGUMENT

Plaintiffs ultimately ask this Court to answer to this question: does the state or federal constitution require that all indigent criminal defendants be appointed counsel within 14 days of their initial appearances? (*See* Doc. 48 ¶¶ 28, 30.a., 72, 107, 125, 129, 132.) As a matter of law, the answer is “no,” so the amended complaint should be dismissed for failure to state a viable claim. Answering the question presented does not depend upon the level of funding the 2023–25 biennial budget provides for SPD.

That said, the fiscal landscape for SPD has changed since this case was filed, perhaps dramatically. While the extent of the new budget’s impact may not be felt for months, there are two points this Court should consider that directly affect the justiciability of Plaintiffs’ claims for declaratory and related injunctive relief.

First, assistant state public defenders—the in-house lawyers at SPD—will be paid more. Meaningfully more. The budget provides a raise of \$8.76 per hour, amounting to more than \$18,000 per year in additional salary. 2023 Wis. Act 19, § 9101(1)(b)1. The first step in 17-step pay progression for these attorneys is now \$36 per hour. 2023 Wis. Act 19, § 9101(1)(b)2.

Plaintiffs' amended complaint highlighted the attrition at SPD, with nearly 20% turnover recently. (Doc. 48 ¶ 91; *see also* Doc. 48 ¶¶ 88–92.) The budget's increasing assistant state public defender salaries is an important step toward recruiting and retaining these talented attorneys. Economist Adam Smith explained long ago that the demand for labor cannot increase except in proportion to the increase in funds destined for the payment of wages. *See wages-fund theory*, Britannica.com, <https://www.britannica.com/topic/wages-fund-theory>. In the context of recruiting and retaining SPD attorneys, better salaries are sure to attract and keep more and better candidates. And as State Public Defender Kelli Thompson recently explained, “[f]unding to recruit and retain attorneys to provide constitutionally required representation not only benefits our clients by protecting their most critical rights such as due process and individual liberty, but ultimately public safety in communities across the state.” Press Release, Wisconsin State Pub. Def., State Public Defender Statement on Budget Signing, [https://www.wheelerbilltracking.com/upload/files/frontpage/doc\\_56512612264a59ef5242b85.20056397.pdf](https://www.wheelerbilltracking.com/upload/files/frontpage/doc_56512612264a59ef5242b85.20056397.pdf) (last visited July 31, 2023). These game-changing investments in SPD's staff will mean easier recruiting, better retention, and more opportunities for assistant state public defenders to handle cases.

Reduced turnover will lead to fewer mid-case withdrawals of counsel, which necessitate reappointments.

Second, counsel that SPD appoints will be paid more. Meaningfully more. After July 1, 2023, the hourly rate for appointed counsel increased from \$70 to \$100 for time spent related to a case, excluding travel, and from \$25 to \$50 per hour for case-related travel. 2023 Wis. Act 19, §§ 471–72. Plaintiffs’ amended complaint bemoaned the 2020 rate increase to \$70 per hour as “too little, too late.” (Doc. 48 ¶ 94; *see also* Doc. 48 ¶¶ 101–04.) The recent increase to \$100 per hour will logically help alleviate Plaintiffs’ concerns. At the very least, more money will mean more counsel interested in taking appointments, and that means faster appointments.

Related to these points, the \$100 hourly rate for appointed counsel will mean that some county-appointed counsel can now become SPD-appointed without taking a financial hit. In Brown County, for example, the \$100 hourly rate is on par with the county’s appointed-counsel rate, and SPD has informed its managers and appointments staff that county appointments can be converted to SPD appointments. Memorandum from Katie York, Deputy State Pub. Def., Wisconsin State Pub. Def., to SPD Managers and Appointments Staff (May 31, 2023), [https://www.wisspd.gov/\\_files/ugd/a08528\\_d3a11b0d8b1a48f98678afb70328d664.pdf](https://www.wisspd.gov/_files/ugd/a08528_d3a11b0d8b1a48f98678afb70328d664.pdf). In addition, SPD decided that the rate for private-bar attorneys to

reimburse investigators and paralegals increased to \$50 and \$35 per hour, respectively, after July 1, 2023. *See* Memorandum from Kelli Thompson, State Pub. Def., Wisconsin State Pub. Def., to Kathy Pakes, Assigned Counsel Division Director & Andrea Eilers, Budget Director (June 2, 2023), [https://www.wispd.gov/\\_files/ugd/a08528\\_92cb1493eafe405f95d65d13cafc2b2.pdf](https://www.wispd.gov/_files/ugd/a08528_92cb1493eafe405f95d65d13cafc2b2.pdf). These changes will help alleviate delays in appointing counsel, who will be more likely to take appointments based upon better reimbursement rates for their staff and hired investigators.

How do these dollars-and-cents changes to SPD's budget translate into the legal framework of this case? In terms of doctrine, Defendants have argued that this case is moot (and is therefore not justiciable), that Plaintiffs' amended complaint fails to state a claim upon which relief can be granted (and is therefore not justiciable), and that class certification would be inappropriate based upon the relevant factors. (*See* Doc. 58; 98; 99.) In addition to those legal arguments, the recent passage of the budget highlights, practically, why Plaintiffs' claim for a declaratory judgment is not justiciable under the basic factors for such claims. This is an independent ground for dismissal.

A declaratory judgment is governed by Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, which allows a court to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). A court must be presented with a



justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d 211. And “[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” Wis. Stat. § 806.04(6).

For a claim to be justiciable, four elements must be met: (1) “[a] controversy in which a claim of right is asserted against one who has an interest in contesting it”; (2) “[t]he controversy must be between persons whose interests are adverse”; (3) “[t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest”; and (4) “[t]he issue involved in the controversy must be ripe for judicial determination.” *Olson*, 309 Wis. 2d 365, ¶ 29 (citations omitted). Plaintiffs have not met the factors, which the passage of the biennial budget makes clear.

First, Plaintiffs do not satisfy the first condition—a claim of right against one with an interest in contesting it. *See id.* “To satisfy the first condition . . . the claim must assert ‘present and fixed rights’ rather than ‘hypothetical or future rights.’” *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856 (quoting *Tooley v. O’Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977)). Here, Plaintiffs’ claims are moot because

they have already received appointed counsel. (*See* Doc. 58:9–10, 27–46; 98:2–7.) Their claims are therefore merely conjectural, hypothetical, and non-justiciable.

Second, and related, Plaintiffs lack a legal interest in the controversy and have no legally protectible interest at stake. *See Olson*, 309 Wis. 2d 365, ¶ 29. Again, their claims are moot because they have already received appointed counsel. (*See* Doc. 58:9–10, 27–46; 98:2–7.) And after the passage of the budget, the likelihood that Plaintiffs will be (1) again charged with crimes, (2) in need of SPD-appointed counsel, and (3) unable to obtain counsel in a timely fashion, is significantly lessened. With the appointed-counsel rate increased to \$100 per hour, SPD can more easily find attorneys to do this work. Plaintiffs have no legally protectible interest when their claims are currently moot and are not likely to be revived.

Third, the issue involved in the controversy is not ripe for judicial determination. *See Olson*, 309 Wis. 2d 365, ¶ 29. A plaintiff may seek a declaratory judgment prior to suffering an injury as long as “the facts [are] sufficiently developed to allow a conclusive adjudication.” *Putnam v. Time Warner Cable of Se. Wis. Ltd. P’ship*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626. The recent passage of the budget—which significantly alters the fiscal landscape for SPD—shows why Plaintiffs’ issue is better addressed

by the political branches of government, specifically when the facts on the ground are now significantly different than when this case was filed. *See Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 39, 382 Wis. 2d 1, 913 N.W.2d 131 (“Legislative determination[s] of public policy questions [do] not raise justiciable issues of fact or law.”) (alteration in original) (citations omitted). While the impact of increased funding for SPD cannot yet be measured (the budget was passed only weeks ago), it will undoubtedly be positive and increase the speed with which counsel are appointed. Since Plaintiffs’ claims are based upon their perception that SPD appoints counsel too slowly, the claims are not ripe when the new budget has (1) altered the fiscal landscape for SPD in a positive way, and (2) will improve the speed of SPD’s appointments, alleviating many of Plaintiffs’ concerns.

Ultimately, regardless of the lens through which the Court views the legal issue—mootness, failure to state a claim, or justiciability—Plaintiffs’ claims fail as a matter of law and should be dismissed.

## CONCLUSION

This Court should grant Defendants' motion to dismiss the amended complaint and deny class certification.

Dated this 31st day of July 2023.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendants' Brief Discussing the Impact of the 2023–25 Biennial Budget on this Case 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.

Dated this 31st day of July 2023.

Electronically signed by:

Clayton P. Kawski

CLAYTON P. KAWSKI

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