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' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 1

Background 5

Legal Standard 6

Argument 7

I. Plaintiffs have stated claims upon which relief can be granted. 7

II. Plaintiffs have also stated a claim against Governor Evers, and the suit against him is not barred by the doctrine of sovereign immunity 11

III. This § 1983 class action is the proper—indeed, preferred—vehicle for these claims seeking injunctive and declaratory relief, which are valid claims 13

IV. Plaintiffs' claims are not moot. But even if they were, mootness exceptions apply. 16

A. The named Plaintiffs' claims are not moot because there is a case and controversy about whether Defendants violated Plaintiffs' rights. 16

B. Even under Defendants' theory, mootness exceptions would warrant reaching the critical issues presented. 18

V. Plaintiffs satisfied the service requirements under the Uniform Declaratory Judgments Act, Wis. Stat. §806.04(11), and this Court is competent to proceed. 23

Conclusion 25

TABLE OF AUTHORITIES

Page(s)

Cases

Argersinger v. Hamlin,
407 U.S. 25 (1972) 20

Austin v. Smith,
No. 15-cv-00525 2017 WL 945105 (W.D. Wis. Mar. 9, 2017) 22

Back v. Bayh,
933 F. Supp. 738 (N.D. Ind. 1996) 12

Bernegger v. Thompson,
2015 AP2546, 2016 WL 8607446 (Wis. Ct. App. July 21, 2016) 24

Burnett v. Grattan,
468 U.S. 42 (1984) 14

Casteel v. Vaade,
167 Wis. 2d 1 (1992) 14

Cattau v. National Ins. Servs.,
2019 WI 46, 386 Wis. 2d 515, 926 N.W.2d 756 ..... 6, 7

Claussen v. Pence,
No. 15-cv-00052, 2015 WL 7864571 (N.D. Ind. Dec. 2, 2015), *aff'd*, 826 F.3d 381
(7th Cir. 2016) 3, 12

David v. Missouri,
Case No. 20AC-CC00093 (Cole Cnty. Cr. Ct., Feb. 6, 2023) 9, 15, 20

Deida v. City of Milwaukee,
192 F. Supp. 2d 899 (E.D. Wis. 2002) 12

Farrow v. Lipetzky,
637 F. App'x 986 (9th Cir. 2016) (§ 1983 class action) 2, 7, 8, 9

Felder v. Casey,
487 U.S. 131 (1988) 13, 14, 15

Matter of G.S.,
118 Wis. 2d 803 (1984) 18, 19

In re Gault,
387 U.S. 1 (1967) 20

Gerstein v. Pugh,
420 U.S. 103 (1975) 21

Gideon v. Wainwright,
372 U.S. 335 (1963) 2, 3, 20

Hamilton v. Alabama,
368 U.S. 52 (1961) 9

Harwood v. Wheaton Franciscan Servs., Inc.,
2019 WI App 53, 388 Wis. 2d 546, 933 N.W.2d 654 ..... 3, 4, 13

Hogan v. Musolf,
163 Wis. 2d 1, 471 N.W.2d 216 (1991) 4, 13, 14, 15

In re J.W.K.,
2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509 20

Jamison v. McClendon,
476 F. Supp. 3d 386 (S.D. Miss. 2020) 15

Jones v. State,
37 Wis. 2d 56, 154 N.W.2d 278 (1967) 1, 11

Kaczmarek v. State,
38 Wis. 2d 71, 155 N.W.2d 813 (1968) 3, 11

Kirk v. Credit Acceptance Corp.,
2013 WI App 32 21

Kress v. United States,
382 F. Supp. 3d 820 (E.D. Wis. 2019) 1

State ex rel. La Crosse Trib. v. Cir. Ct. for La Crosse Cnty.,
115 Wis. 2d 220, 340 N.W.2d 460 (1983) 20

Lister v. Bd. of Regents of Univ. Wisconsin Sys.,
72 Wis. 2d 282, 240 N.W.2d 610 (1976) 11, 17, 18

Los Angeles Cnty. Bar Ass'n v. Eu,
979 F.2d 697 (9th Cir. 1992) 12

Love v. Pence,
47 F. Supp. 3d 805 (S.D. Ind. 2014) 12

Marbury v. Madison,
5 U.S. 137 (1803) 3

Martinez v. Ryan,
566 U.S. 1 (2012) 20

Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs for City of Milwaukee,
No.2020AP1770, 2023 WL 1113259 (Wis. Ct. App. Jan. 31, 2023) 16, 18

Mitchum v. Foster,
407 U.S. 225 (1972) 4, 15

Olson v. Brown,
594 F.3d 577 (7th Cir. 2010) 4, 17, 21, 22

State ex rel. Olson v. Litscher,
2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425 20

Olson v. Town of Cottage Grove,
2008 WI 51, 309 Wis. 2d 365, 749 N.W.2d 211 16

PRN Assocs. LLC v. State Dep't of Admin.,
2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559 11

Ripley v. Brown,
143 Wis. 2d 686, 422 N.W.2d 608 (1988) 5, 24

Rothgery v. Gillespie Cnty.,
554 U.S. 191 (2008) 2, 7, 8, 10

In re S.A.M.,
2022 WI 46, 402 Wis. 2d 379, 975 N.W.2d 162 17

S.R v. Circuit Court of Winnebago Cnty.,
2015 WI APP 98, 366 Wis. 2d, 876 N.W.2d 147 ..... 24, 25

State v. Fitzgerald,
2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165 19

State v. Lee,
2021 WI App 12, 396 Wis. 2d, 955 N.W.2d 424 ..... 9, 14

State v. Pultz,
206 Wis. 2d 112, 556 N.W.2d 708 (1996) 1

State v. Sarnowski,
2005 WI App 48 280 Wis. 2d 243, 694 N.W.2d 498 1

Strid v. Converse,
111 Wis. 2d 418, 331 N.W.2d 350 (1983) 6, 8

Strong v. Wisconsin State Pub. Def.,
No. 17-cv-00981, 2017 WL 4712223 (E.D. Wis. Oct. 18, 2017) 2, 7, 8

Tavern League of Wisconsin, Inc. v. Palm,
2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261 19

Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue,
2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 3

Tomczak v. Bailey,
218 Wis. 2d 245, 578 N.W.2d 166 (1988) 23, 24, 25

Town of Eagle v. Christensen,
191 Wis. 2d 301, 529 N.W.2d 245 (1995) 11

Town of Walworth v. Vill. of Fontana-on-Geneva Lake,
85 Wis. 2d 432, 270 N.W.2d 442 (Ct. App. 1978) 24

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 21

United States v. Cronic,
466 U.S. 648 (1984) 20

United States v. Govey,
284 F. Supp. 3d 1054 (C.D. Cal. 2018) 2

United States v. Wade,
388 U.S. 218 (1967) 9

State ex rel. Watts v. Combined Cmty. Servs. Bd. of Milwaukee Cnty.,
122 Wis. 2d 65, 362 N.W.2d 104 (1985) 4, 18, 19

Wolke v. Rudd,
32 Wis. 2d 516, 145 N.W.2d 786 (1966) 11

Statutes

42 U.S.C. § 1983 ..... *passim*

Wis. Stat. § 757.19 (2)(g) 24

Wis. Stat. § 801.02(1) 24

Wis. Stat. § 802.02(1)(a) 6

Wis. Stat. § 806.04 16

Wis. Stat. § 806.04(6) 18

Wis. Stat. § 806.04(11) 23, 24, 25

Wis. Stat. § 902.01 21

Wis. Stat. § 977 17

Other Authorities

Newberg on Class Actions § 25:18 (4th ed. 2002) 13

U.S. Const. amend. VI 20

Wis. Const. art. I, § 7 20

> *"The strain is significant – the human impact, the emotional, the mental health part of this is significant. I mean, to get those calls from your client, to go see your client and to know that they're struggling because they don't have information or their case isn't moving forward or they don't know what's going on.*" – Defendant Kelli Thompson (Ex. A, Nathan Denzin, Why Wisconsin courts need more prosecutors, public defenders, PBS WISCONSIN (Jan. 12, 2023))[1]
>
> *"It's really a problem that has reached a constitutional crisis . . . . Smaller counties were having difficulty finding attorneys to take cases, at times having to go three or four counties removed to find public defender appointments or public defender availability for people who have a constitutional right to representation"* – Hon. Guy Dutcher, Waushara Cty. Cir. Ct. (*Id.*)

INTRODUCTION

The State of Wisconsin is constitutionally obligated to provide an attorney to a qualifying indigent criminal defendant. The Wisconsin Supreme Court has said that the law calls for a "prompt" appointment "at th[e] time" of an indigent defendant's initial appearance. *See State v. Pultz*, 206 Wis. 2d 112, 127 n.10, 556 N.W.2d 708 (1996); *Jones v. State*, 37 Wis. 2d 56, 69, 154 N.W.2d 278 (1967). Even so, Defendants (who are charged with funding and administering the public defense system) have systematically failed to promptly provide attorneys to Plaintiffs and putative class members after their initial appearances, causing them to suffer repressive and unconscionable delays in receiving appointed counsel—delays lasting many weeks, months, and, in some cases, *more than a year*.

Defendants have little to say about their failure to promptly appoint counsel. All they do is note briefly in passing their view that the constitutional requirement of "promptly appointing counsel is" just "the goal" that Defendants "work[] diligently towards" even if they do not meet it. *See* Br. 1.

Defendants' stance towards the constitutional rights of indigent criminal defendants highlights why this case must proceed. To Defendants, the right to counsel is just an aspirational "goal" to achieve because they say that the State Public Defender (SPD) "often" has conflicts and "[i]t takes

[1] This Court can take judicial notice of the articles herein because "[t]rial courts may take judicial notice . . . [of] 'fact[s] generally known within the territorial jurisdiction of the trial court,' or 'fact[s] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *State v. Sarnowski*, 2005 WI App 48, ¶ 13 280 Wis. 2d 243, 694 N.W.2d 498 (citation omitted); *Kress v. United States*, 382 F. Supp. 3d 820, 830 (E.D. Wis. 2019) (same principle to take judicial notice of "newspaper[s] and online articles"").

effort and time to locate private counsel willing to accept representation of an indigent defendant." Br. 4. Not so. "The Sixth Amendment to the United States Constitution demands that every defendant be given," among other rights, "the right to effective counsel," and, importantly, "*[t]hese constitutional rights are not aspirational*" goals. *See United States v. Govey*, 284 F. Supp. 3d 1054, 1064 (C.D. Cal. 2018) (emphasis added). The Sixth Amendment demands that Plaintiffs and the putative classes be appointed counsel in a reasonable time. *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008).

Because Defendants will not promptly appoint counsel, Plaintiffs seek relief to secure their rights and the Court should reject each of the Defendants' five arguments for dismissing this case.

I. First, this Court should deny Defendants' motion to dismiss because courts have already addressed this issue and "held that plaintiffs facing similar delays could state a Sixth Amendment claim" because "[t]he Sixth Amendment requires that counsel be appointed within a reasonable time . . . ." *Strong v. Wisconsin State Pub. Def.*, No. 17-cv-00981, 2017 WL 4712223, at *2 (E.D. Wis. Oct. 18, 2017) (citing *Farrow v. Lipetzky*, 637 F. App'x 986, 988 (9th Cir. 2016) (§ 1983 class action)).

While the Parties agree that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself" (Br. 13–14 (quoting *Rothgery*, 554 U.S. at 212)), the Parties disagree about "how soon after the Sixth Amendment right attaches must counsel be appointed, and at what point does delay become constitutionally significant?" *Strong*, 2017 WL 4712223, at *2 (citations omitted).

That is the controversy here. On one hand, Plaintiffs seek a simple declaration that a 14-day delay for the appointment of counsel is unreasonable—which should come as no surprise given that, in 1968—just five years after the United States Supreme Court's landmark decision in *Gideon v. Wainwright*— the Wisconsin Supreme Court (1) balked at delays of 10 to 14 days for the appointment of counsel in several cases; (2) "adopted a rule" "that at an indigent defendant's initial appearance before a court or magistrate" counsel should "be appointed *at that time*"; and (3) stated that those cases with

long delays in 1968 should have been "the last of the cases in which lengthy time lags between initial appearances in court and appointment of counsel need be explained or excused." *Kaczmarek v. State*, 38 Wis. 2d 71, 78–79, 155 N.W.2d 813 (1968). On the other hand, Defendants—60 years after *Gideon* and its progeny established the right to counsel for indigent defendants at the State's expense—ask the Court to find that promptly providing attorneys is just a "goal" and that Defendants have *no* definitive deadline to provide counsel because they say there is no "per se rule that counsel must be appointed within two weeks after the initial appearance"—or even 30, 60, or 120 days. *See* Br. 14.

Given this clear and important controversy, this case must proceed because this Court has the power, province, and duty to delineate the scope of the reasonableness of Defendants' delays under the Constitution and "to say what the law is." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 914 N.W.2d 21 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

II. Second, there is a proper claim against Defendant Evers and the suit against him is not barred by the doctrine of sovereign immunity because he is responsible for appointing members to the SPD Board and is empowered to modify the SPD's proposed budget before submitting it to the legislature. *See* Am. Compl. at ¶¶ 55-63, 77-78. The governor ultimately bears the responsibility for "ensuring that qualified defendants timely receive appointed counsel." *Id.* at ¶ 79. This is more than enough to state a claim against him. *Claussen v. Pence,* No. 15-cv-00052, 2015 WL 7864571, at *2 (N.D. Ind. Dec. 2, 2015), *aff'd*, 826 F.3d 381 (7th Cir. 2016) ("Governor Pence alone holds the power to appoint and remove State Board of Accounts examiners… [this] connection to the statute, though indirect, seems sufficient for Eleventh Amendment and *Ex Parte Young* purposes.").

III. Third, a class action is also the proper vehicle to assert these claims. In Wisconsin, "it is considered to be in the public interest as declared by the legislature to permit class actions when the prerequisites are satisfied" given "the interest of simplifying the lawsuit and avoiding a multiplicity of litigation." *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 54, 388 Wis. 2d 546, 933

N.W.2d 654. Defendants argue that *unrepresented* indigent defendants should attempt to exhaust their own rights in their individual criminal proceedings against the very parties that are *supposed* to be providing them counsel. This position would undermine the public interest, as "the case law is clear that public policy favors class actions especially where . . . the wronged party is unlikely ever to obtain judicial review of the alleged violation without a class action." *Id.* ¶ 58. Wisconsin also has a "rule that the states cannot impose an exhaustion requirement on plaintiffs who assert sec. 1983 claims in state courts." *Hogan v. Musolf*, 163 Wis. 2d 1, 13, 471 N.W.2d 216 (1991) (citation omitted). Thus, the Court should not shut the courthouse doors on these Plaintiffs. *Cf. Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was . . . to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'") (citation omitted).

IV. Fourth, this case is not moot because, as discussed, there is a justiciable controversy about whether Defendants violated (and are violating) Plaintiffs' and the putative classes' right to counsel. But even if the case were moot (it is not), several mootness exceptions would apply. Under Wisconsin law, this case would fall within the exceptions for issues "of great public importance" and questions "capable and likely of repetition and yet evad[ing] review." *State ex rel. Watts v. Combined Cmty. Servs. Bd. of Milwaukee Cnty.*, 122 Wis. 2d 65, 71, 362 N.W.2d 104 (1985). In addition, under federal law the "inherently transitory" exception would apply because, among other things, the State can appoint counsel at any time—and has done so for many named Plaintiffs after this case was filed—so there is a mootness exception because, otherwise, no "member of the class would maintain a live controversy long enough for a judge to certify a class." *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010).

V. Fifth, no dismissal is warranted based on any temporary service defect because, on February 8, 2023, Plaintiffs satisfied the service requirements under the Uniform Declaratory Judgments Act. *See Ripley v. Brown*, 143 Wis. 2d 686, 689 n.3, 422 N.W.2d 608 (1988).

For these reasons, the Court should deny Defendants' motion to dismiss in its entirety.

BACKGROUND

The United States and the Wisconsin Constitutions require the State of Wisconsin to appoint counsel for qualified defendants who 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 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, in part, 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 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 violated their rights to counsel. *Id.* at ¶¶ 28–29. Plaintiffs also allege that because 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.

Based on these constitutional deprivations, Plaintiffs seek to certify 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—or sub-classes of individuals who did not receive counsel within 30, 60, or 120 days, respectively. *Id.* at ¶¶ 106–110. Among other things, Plaintiffs seek a declaration that the delays they and the Class have experienced are unreasonable, that their 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).

LEGAL STANDARD

Wisconsin has a liberal pleading standard, requiring courts to "liberally construe[]" allegations from a Complaint "to do substantial justice between the parties[.]" *Strid v. Converse*, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983). To adequately assert a claim, a plaintiff need only to set forth "[a] short and plain statement of the claim, identifying the transaction or occurrence . . . out of which the claim arises and showing that the pleader is entitled to relief." Wis. Stat. § 802.02(1)(a). And in determining whether a claim has been properly pled, "courts must accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Cattau v. National Ins. Servs.*, 2019 WI 46, ¶ 4, 386 Wis. 2d 515, 926 N.W.2d 756; "If the facts reveal an apparent right to recover under *any* legal theory, they are sufficient as a cause of action." *Id.* (emphasis added); *see also Strid*, 111 Wis. 2d at 422 (holding that a claim "should be dismissed . . . *only* if it appears *to a certainty* that no relief can be granted under *any set of facts*") (emphases added).

ARGUMENT

I. Plaintiffs have stated claims upon which relief can be granted.

To start, the Court should reject Defendants' argument that Plaintiffs have failed to state a claim. *See* Br. § II. Defendants say Plaintiffs have no claim because "courts have declined to create a categorical rule" "relating to the delay of appointment under either the constitution or Wisconsin statutes." Br. 16. They argue that "Plaintiffs' desire for a categorial rule runs against longstanding Wisconsin case law." *Id.* The basis of this argument is Defendants' suggestion that there is some categorical rule that courts must "consider[] the facts and circumstances of each case." *Id.* This is wrong.

This Court should deny Defendants' motion, as other courts considering § 1983 class actions like this one have done when they "held that plaintiffs facing [these] delays could state a Sixth Amendment claim" because, "[t]he Sixth Amendment requires that counsel be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Strong v. Wisconsin State Pub. Def.*, 2017 WL 4712223, at *2 (E.D. Wis. Oct. 18, 2017) (citing *Farrow v. Lipetzky*, 637 F. App'x 986, 988–89 (9th Cir. 2016), which reversed the dismissal of a case like this one after finding that the trial court "did err in dismissing plaintiffs' Sixth Amendment claim" because the court needed "to consider whether appointing counsel five to thirteen days and 'sometimes longer' after the right attaches complies with the 'reasonable time' requirement articulated in *Rothgery*.").

Given Wisconsin's permissive pleading standard, and Plaintiffs' detailed allegations, Plaintiffs have stated claims upon which relief can be granted. "The sufficiency of a complaint depends on the substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Cattau*, 2019 WI 46, ¶ 6. As Defendants acknowledge, the U.S. and Wisconsin Constitutions require the State of Wisconsin to appoint public defense counsel "within a reasonable time" after the prosecution begins "to allow for adequate representation at any critical stage" in the proceedings. *See* Br. 13–14 (citing *Rothgery*, 554 U.S. at 212). And, here, Plaintiffs allege (1) Defendants failed

to provide them with public defense counsel within 14 days of their initial appearances, (2) such delays were due to Wisconsin's deficient public defense system (which Defendants administer), and (3) these delays were therefore unreasonable. Thus, Plaintiffs have stated a claim upon which relief can be granted. *Accord Strong*, 2017 WL 4712223, at *1 (plaintiff stated a claim because, as here, the "Plaintiff allege[d] that, as a result of systemic deficiencies at the Wisconsin State Public Defender's Office, Defendants failed to timely secure counsel for him" and that was all that was needed "[t]o proceed under 42 U.S.C. § 1983"). Indeed, trial courts have been reversed for preemptively dismissing "plaintiffs' Sixth Amendment claim" without first taking the time "to consider whether appointing counsel five to thirteen days and 'sometimes longer' after the right attaches complies with the 'reasonable time' requirement articulated in *Rothgery*." *Farrow*, 637 F. App'x 986 at 988–89.

Contrary to what Defendants suggest, this Court need not determine the contours of reasonableness at this exact moment because this is simply the pleading stage, no discovery has taken place, and, in Wisconsin, a claim "should be dismissed . . . *only* if it appears *to a certainty* that no relief can be granted under *any set of facts*." *Strid*, 111 Wis. 2d at 422 (emphases added). The prudent approach is to permit discovery so the Court can evaluate the evidence and determine at what point, if any, the delays to the Plaintiffs and the class became constitutionally significant, which the Court cannot determine "based only on the allegations before it" (*Strong*, 2017 WL 4712223, at *2) without discovery to see the records, patterns, trends, studies, communications, and testimony from Defendants about the delays experienced by indigent defendants.

Perhaps recognizing as much, Defendants incorrectly suggest that this Court *cannot* make a reasonableness determination because they argue that whether a delay in the provision of public defense counsel is reasonable "depends upon the facts of each case." Br. 11. They argue that the exemplary cases referenced in Plaintiffs' Complaint do not establish a right to receive public defense counsel within fourteen days of a defendant's initial appearance, and instead argue that this Court must find

actual prejudice from their clear constitutional violations. Br. 11–13. To support this argument, they rely on *State v. Lee* to argue that claims based on delays in the provision of public defense counsel require courts to consider the reasons for the delays in determining the validity of the claims. Br. 14–16. All these arguments are vastly overstated, misplaced, or both.

The problem with Defendants' arguments is that they incorrectly suggest that this Court's inquiry will turn on whether each Plaintiff can show actual prejudice in their case when it is the *potential* for prejudice that is the proper inquiry here. *See, e.g.*, *United States v. Wade,* 388 U.S. 218, 225, 236–37 (1967) (finding a Sixth Amendment violation based on the "grave potential for prejudice"); *Hamilton v. Alabama,* 368 U.S. 52, 54 (1961) (finding a Sixth Amendment violation where the absence of counsel "*may* affect the whole trial") (emphasis added). It would be error to require actual prejudice. *See Farrow*, 637 F. App'x at 988 (explaining its reversal of a trial court with the following explanation: "Instead of addressing whether the delay in appointing counsel was unreasonable, the district court considered only whether the delay 'impacted [plaintiff's] representation at subsequent critical stages of his proceedings.' By framing the question in that way, the district court erroneously required the plaintiffs to allege actual prejudice."). Indeed, Defendants discuss the decision in *Lee* extensively but fail to note that the Court in *Lee* also explained several times that when conducting the Sixth Amendment inquiry, "a circuit court must consider the *potential* for prejudice" and "should consider *potential* prejudice arising from one or more delays, including," among other things, "the possibility that the delay *could* compromise the defense or result in lost evidence, to the defendant's detriment." *State v. Lee*, 2021 WI App 12, ¶ 58, 396 Wis. 2d, 955 N.W.2d 424 (emphases added) (footnote omitted).

As a court in Missouri recently explained in *David v. Missouri*, when finding that Missouri's failure to provide counsel to indigent defendants within two weeks of their arraignments violates the right to counsel, "no prejudice need be shown . . . ." Ex. B, Case No. 20AC-CC00093 (Cole Cnty. Cr. Ct., Feb. 6, 2023). As that court aptly explained, relying on *Rothgery*, "the State is required to furnish

counsel 'within a reasonable time after attachment to allow for adequate representation'" and to "provide 'adequate representation' at trial, the lawyer must investigate the facts, and must do so while the facts are still available" because "[i]nvestigating facts and communicating with the defendant in the days after the defendant's first court appearance provide the foundation upon which the defense of a case is built." *Id.* at 13 (emphasis added). As the court pointed out, once the delay in appointment has occurred, it will cause lasting harm even after counsel is appointed because, "[i]f evidence is not discovered and preserved when it is available, it affects the whole trial, and a belated appointment after the dissipation of evidence does not allow for 'adequate representation' at trial. This is so regardless of the advocate's zeal once finally appointed." *Id.* The prejudice already occurred from the delay.

After discovery, Plaintiffs will present evidence showing that Defendants' systematic and pervasive conduct are creating at least a *potential* for prejudice that violates all of Plaintiffs' and the class members' rights under the Sixth Amendment. Indeed, Defendant Thompson recently explained the prejudice herself without discovery, stating as follows: "When we put one person in jail, even pre-trial for 48 hours, we've destabilized their lives. When we destabilize their lives we destabilize their families. When we destabilize our families, we've destabilized our communities." *See*, Ex. C, Nathan Denzin, State Public Defender Kelli Thompson on incarceration cycles, PBS WISCONSIN (Jan. 18, 2023).

Defendants identify no authority that a delay of 14 days or longer, given the state's failure to provide a functional public defense system, cannot be considered unreasonable. The exemplary cases cited in the Amended Complaint highlight when the Wisconsin Supreme Court has looked at objective factors and explained that similar delays in the appointment of defense counsel are "regrettable" and "troublesome" and noted that they "should be minimized" and "avoided in properly administered system of justice"—so much so that they held that an accused "is entitled to counsel" at the initial appearance so that no occasion should arise where "lengthy time lags between initial appearances in

court and appointment of counsel need be explained or excused." *Cf. Wolke v. Rudd*, 32 Wis. 2d 516, 521–22, 145 N.W.2d 786 (1966); *Jones v. State*, 37 Wis. 2d 56, 69 (1967); *Kaczmarek*, 38 Wis. 2d at 78.

Defendants may disagree, but Plaintiffs have stated a clear case of alleged constitutional violations under the Sixth Amendment and should be permitted to prove their claims.

II. Plaintiffs have also stated a claim against Governor Evers, and the suit against him is not barred by the doctrine of sovereign immunity.

Defendants also argue that the Amended Complaint "does not 'plausibly suggest [Plaintiffs] are entitled to relief" against Defendant Evers. *See* Br. 22 and § IV. They argue that sovereign immunity prevents Defendant Evers from being a party because they say that "the Governor has no role in appointing counsel to criminal defendants and therefore there is no plausible allegation that he is acting beyond his authority." Br. at 22. These arguments fail.

The Wisconsin Supreme Court has held that "[a] general exception to the rule of state immunity for agencies or arms of the state [] is that courts may entertain suits to enjoin state officers and state agencies from acting beyond their constitutional or jurisdictional authority. These suits are permitted because they are suits against individuals acting in excess of their authority." *PRN Assocs. LLC v. State Dep't of Admin.,* 2009 WI 53, ¶ 45, 317 Wis. 2d 656, 766 N.W.2d 559. *See also Town of Eagle v. Christensen,* 191 Wis. 2d 301, 319, 529 N.W.2d 245 (1995) ("Nonetheless, suit will lie against state officials and agencies alleged to be acting unconstitutionally."); *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976) ("[A] suit against a state officer or agency is not a suit against the state when it is based on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority."). Here, Plaintiffs state a claim against Defendant Evers and sovereign immunity does not bar the suit against Defendant Evers because the Complaint alleges that Defendants Evers is acting unconstitutionally. *See* Am. Compl. at ¶¶ 4, 7, 53, 55-63, 77-79. This independently is enough to maintain a suit against Governor Evers.

Defendants rely on *Deida v. City of Milwaukee*, where the Court dismissed the suit against the governor because he had no connection to the enforcement of the statute at issue beyond his "general duty to enforce the laws." 192 F. Supp. 2d 899 (E.D. Wis. 2002). However, this reliance is misplaced. *Deida* analyzed sovereign immunity in the context of the *Ex Parte Young* doctrine, which applies to suits brought in Federal Court. Even assuming *Ex Parte Young* applies here, which is unlikely, *Deida* stands for the proposition that sovereign immunity won't bar a suit against a state official named as a defendant so long as the defendant has "some connection" to the challenged law. *Id.* at 914. In *Deida*, the Court dismissed the governor because he had no connection to the enforcement of the statute at issue than his "general duty to enforce the laws." *Id.* at 917. Here, Defendant Evers has more than just a general duty connecting him to Wisconsin's public defense system. Among other things, he is responsible for appointing members to the Wisconsin Public Defender Board, and he is empowered to modify the SPD's proposed budget before submitting it to the Wisconsin legislature. *See* Am. Compl. at ¶¶ 55-63, 77-78. Ultimately, he bears the responsibility for "ensuring that qualified defendants timely receive appointed counsel." *Id.* at ¶ 79. This is more than enough to state a claim against him. *Claussen v. Pence,* 2015 WL 7864571, at *2 (N.D. Ind. Dec. 2, 2015), *aff'd*, 826 F.3d 381 (7th Cir. 2016) ("Governor Pence alone holds the power to appoint and remove State Board of Accounts examiners… [this] connection to the statute, though indirect, seems sufficient for Eleventh Amendment and *Ex Parte Young* purposes."). *See also Back v. Bayh*, 933 F. Supp. 738, 752 (N.D. Ind. 1996) (holding that the governor had "some connection" to enforcing the challenged law where he "completes the process of judicial appointment by selecting one of the nominees submitted to him by the [Judicial Nominating] Commission."); *Los Angeles Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992) (holding that the governor had "some connection" to enforcing the challenged law where he had a "duty to appoint judges to any newly-created judicial positions."); *Love v. Pence*, 47 F. Supp. 3d 805, 808–09

(S.D. Ind. 2014) (holding that the governor had "some connection" to enforcing a state law where the governor "issu[ed] instructions to state agencies" on compliance).

III. This § 1983 class action is the proper—indeed, preferred—vehicle for these claims seeking injunctive and declaratory relief, which are valid claims.

Defendants also argue that this case should be dismissed because Plaintiffs "are using an inappropriate procedural vehicle" and "are attempting an end-run around established criminal procedures to raise right-to-counsel claims." Br. § III. They are mistaken. This is a § 1983 class action to vindicate the rights of Plaintiffs and the putative class. And, indeed, 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.").

In Wisconsin, "it is considered to be in the public interest as declared by the legislature to permit class actions when the prerequisites are satisfied" given "the interest of simplifying the lawsuit and avoiding a multiplicity of litigation." *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 54. It would undermine the public interest to make the Plaintiffs proceed in a piecemeal fashion in their individual criminal cases, as class actions were created to prevent such inefficiencies—indeed, "the case law is clear that public policy favors class actions especially where . . . the wronged party is unlikely ever to obtain judicial review of the alleged violation without a class action." *Id.* ¶ 58.

Defendants cite no authority which says that would limit an individual's right to bring a § 1983 claim in state court just because, according to Defendants, "Plaintiffs' criminal proceedings provide an adequate and proper remedy for their claims." Br. 17. That is because there is no such authority requiring §1983 plaintiffs to exhaust all legal remedies in criminal court prior to suing.

As the Wisconsin Supreme Court has recognized, the Supreme Court of the United States established "a general rule that the states cannot impose an exhaustion requirement on plaintiffs who assert sec. 1983 claims in state courts." *Hogan v. Musolf*, 163 Wis. 2d 1, 13 (1991) (citing *Felder v. Casey*,

487 U.S. 131 (1988)). The courts have recognized "that exhaustion requirements are disfavored because 'the notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action in state court' is 'utterly inconsistent with the remedial purposes ...' of sec. 1983" and "sec. 1983 causes of action 'exist independent of any other legal . . . relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*.'" *Hogan*, 163 Wis. 2d at 13 (quoting *Felder*, 108 S.Ct. at 2312 (quoting *Burnett v. Grattan,* 468 U.S. 42, 50 (1984)). The Wisconsin Supreme Court has clarified this rule for prisoners bringing federal civil rights suits under § 1983. *See Casteel v. Vaade*, 167 Wis. 2d 1, 5 (1992).

This only makes sense. Criminal procedures like the ones Defendants cite have little practical effect as far as remedying the harms suffered from the delay in appointment of counsel. The case of *State v. Lee* is illustrative. *See* 2021 WI App 12, 396 Wis. 2d 136, 955 N.W.2d 424. Mr. Lee spent over 100 days in jail in Marathon County before being appointed an attorney; upon such appointment, his attorney promptly moved to dismiss the case due to the violation of Mr. Lee's constitutional rights. *See*, Ex. D, Karen Madden, *Public Defender Shortage In Spotlight; Case Challenges Delay In Appointing Attorney*, MILWAUKEE J. SENTINEL, Feb. 28, 2022, at A3. Ultimately, the Wisconsin Supreme Court allowed the appeals court decision to stand—the result being that while the charges against Mr. Lee could be dismissed, prosecutors could then refile them. Ex. E, Karen Madden, *Justices Reject Plea to Drop Charges in Unresolved Case; Inmate Has Been Jailed Years Without Conviction*, MILWAUKEE J. SENTINEL, May 26, 2022, at A3. "Relief" like this does nothing to remedy the legal harms suffered by Mr. Lee or so many others from the delay in appointing counsel.[2]

[2] Defendants also do not consider the devastating personal harms suffered by individuals in custody awaiting the appointment of an attorney, who may "lose their jobs, lose opportunities for future employment, and be separated from their families and loved ones while their criminal cases are paused indefinitely." Am. Compl. ¶ 85. Travis Bell of Wausau County, for example, waited 58 days in custody before receiving an attorney, at which point the judge lowered Mr. Bell's bond from $10k to a $9k signature bond and just $1k cash. *See* Ex. H, Karen Madden, *Attorney Shortage Hardest On Poor; Defendants Relying on Public Defense Remain Jailed as Cases Stall*, SHEBOYGAN PRESS, Aug. 27, 2019, at A1. While Mr. Bell still could not afford the $1k cash bond, this illustrated

Plaintiffs' federal rights should not be foreclosed just because Defendants think *unrepresented* indigent defendants should be the parties singlehandedly attempting to vindicate their own rights in their own criminal proceedings against the very parties that are *supposed* to be providing them counsel. As Defendants note, the courts also have authority to appoint counsel but often fail to do so. *See* Br. 4. The entire system is failing indigent criminal defendants. And that is why this federal right is "judicially enforceable *in the first instance*." *Hogan*, 163 Wis. 2d at 13 (citation omitted). Section 1983 was passed so that no matter how upside down a state criminal justice system became, "the doors to the courthouse were opened to 'any person who ha[d] been deprived of her federally protected rights . . .'" *Jamison v. McClendon*, 476 F. Supp. 3d 386, 400 (S.D. Miss. 2020) (collecting authority). Through its passage, it represented a "vast transformation from the concepts of federalism that had prevailed in the late 18th century." *Mitchum*, 407 U.S. at 242. Indeed, the law's "mandate was expansive" and "reflected Congress's recognition that – to borrow the words of today's abolitionists – 'the whole damn system [was] guilty as hell.'" *Jamison*, 476 F. Supp. 3d at 400. Accordingly, this Court should not shut the courthouse doors on Plaintiffs in favor of making them avail themselves to a system that they are arguing is unconstitutional. Defendants' request for this Court to do so is "utterly inconsistent with the remedial purposes ...' of sec. 1983." *Hogan*, 163 Wis. 2d at 13 (quoting *Felder*, 108 S. Ct. at 2312).

Finally, as touched on above, Plaintiffs' claims would not require individualized determinations of fact, as their "constitutional claims would turn on whether they have been denied counsel at 'critical stages' of the case. . . ." Br. 18. The state's duty to provide counsel extends beyond that. As the *David* court noted, "it is not enough for the State to furnish counsel at all critical stages"—the inquiry is whether Defendants "furnish counsel 'within a reasonable time.'" Case No. 20AC-CC00093 at 13. It is the state's failure to provide counsel "within a reasonable time" that is the issue here. Accordingly,

for Mr. Bell that his case could have moved more quickly and efficiently had he been promptly appointed an attorney—he would "have been home by Mother's Day." *Id.* That is time Mr. Bell, and hundreds of others like him, cannot get back through any criminal procedure.

Plaintiffs will demonstrate that these delays are entirely unreasonable, and that there are no individualized determinations of fact that could justify such delays.

Based on all of the above, the Court should not dismiss Plaintiffs' claims for attempting to "end-run around criminal procedures," as this argument is unsupported and contrary to the law.

IV. Plaintiffs' claims are not moot. But even if they were, mootness exceptions apply.

Defendants' mootness argument (Br. § I) fails to engage with the substance of Plaintiffs' complaint, disregards that a named Plaintiff was unrepresented when Plaintiffs filed for class certification and ignores applicable mootness exceptions. Plaintiffs' claims are not moot. But even if this Court disagrees, it should deny Defendants' motion to dismiss because multiple mootness exceptions allow courts to hear issues of critical public importance like those presented here.

A. The named Plaintiffs' claims are not moot because there is a case and controversy about whether Defendants violated Plaintiffs' rights.

Though the Plaintiffs now have counsel, this case is not moot because Plaintiffs seek a declaratory judgment resolving, among other things, whether "the delays in receiving appointed counsel experienced by Plaintiffs and the Class are unreasonable"; "Defendants have violated Plaintiffs' and the Class's rights to counsel under the United States Constitution and Wisconsin Constitution"; and "Wisconsin's public defense system is unconstitutional as to Plaintiffs and the class." Am. Compl. at Prayer ¶¶ b–d). Thus, the resolution of this case will not turn on the status of any named Plaintiff.

"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.'" *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs for City of Milwaukee*, No.2020AP1770, 2023 WL 1113259, ¶ 11 (Wis. Ct. App. Jan. 31, 2023). "A court must be presented with a justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d

211. If the Court is presented with a justiciable controversy, the Court is "empowered to grant declaratory relief 'whether or not further relief is or could be claimed.'" *Lister*, 72 Wis. 2d 282 at 307.

This case is justiciable under the four factors to determine whether a conflict is justiciable. *See Olson,* 2008 WI, ¶ 29. First, there is a "controversy in which a claim of right is asserted against one who has an interest in contesting it." *Id.* Plaintiffs have claimed that Defendants are implementing a public defense system that is unconstitutional as to Plaintiffs and the Class—a claim against Defendants' interest. Second, there is a controversy "between persons whose interests are adverse." *Id.* Plaintiffs and Defendants interests are not aligned. Third, "[t]he party seeking declaratory relief [] ha[s] a legal interest in the controversy—that is to say, a legally protectible interest." *Id.* Plaintiffs have a legally protectible interest in securing a declaration of unconstitutionality, which, as Defendants note, each Plaintiff can use to support any claim of unconstitutionality in their individual cases. Br. 17; *cf. In re S.A.M.*, 2022 WI 46, ¶ 19, 402 Wis. 2d 379, 975 N.W.2d 162 (case not moot where resolution of the issue would practically affect direct or collateral consequences of the controversy). And fourth, "[t]he issue involved in the controversy . . . [is] ripe for judicial determination." *Olson*, 2008 WI, ¶ 29. Here, this issue is ripe because "the nature of this controversy is precisely the type to be resolved by a declaratory judgment" insofar as the purpose of declaratory judgments is to permit those "whose rights, statutes or other legal relations are affected by a statute"—here, Plaintiffs vis a vis Wis. Stat. § 977 *et seq.*— to have "determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." *Id.* ¶ 41.

For these reasons, this case is not moot. Declaratory relief "is to be liberally construed and administered to achieve a remedial purpose" and "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Id.* ¶ 42. Plaintiffs are meaningfully prejudiced by delayed appointment of counsel, even if counsel is ultimately provided. Am. Compl. ¶ 8, 82–85. Such prejudice inflicts harm not only on Plaintiffs' criminal cases, but also on their lives and

families. *Id.* Plaintiffs and the classes continue to suffer these harms, such that the requested relief would prevent continuing future harm and would provide necessary clarity to the "uncertainty" surrounding the ongoing constitutional violations at the center of this case. Wis. Stat. § 806.04(6).

Thus, this Court should reject the notion that Defendants' ability to finally appoint counsel for the named Plaintiffs—weeks after they filed suit—somehow makes this case moot. There is a justiciable dispute, so this Court can and should decide a "request to declare the proper interpretation" of the law because "declaratory relief is appropriate wherever it will serve a useful purpose." *Milwaukee Police Ass'n*, 2023 WL 1113259, ¶ 8 (quoting *Lister*, 72 Wis. 2d at 307).

B. Even under Defendants' theory, mootness exceptions would warrant reaching the critical issues presented.

Even if this Court finds that these claims are moot (and they are not), the Court should still find that several mootness exceptions apply in this case.

First, this case would fall under Wisconsin's mootness exceptions for issues of great public importance and for issues capable of repetition, yet evading review. This is a class action and Plaintiffs are not just seeking a declaratory judgment to vindicate their own rights; they are also seeking declaratory prospective relief to prevent future harm, obtain an injunction, and vindicate the rights of others who have yet to be appointed counsel. They seek to represent the rights of "[a]ll 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 fourteen days of their initial appearances." Am. Compl. ¶ 107. The same is true for the subclasses of 30, 60, and 120 days. *See id.* ¶¶ 108–110.

In *State ex rel. Watts v. Combined Cmty. Servs. Bd. of Milwaukee Cnty.*, the Supreme Court of Wisconsin confirmed that such a case would be "within the exception to the rule that this court does not consider moot issues." *See* 122 Wis. 2d 65, 71, 362 N.W.2d 104 (1985) (citing *Matter of G.S.*, 118 Wis. 2d 803, 805 (1984)). In *Watts*, as here, the defendants argued that the case was moot because the petitioners, who were involuntarily detained by a mental health center but were not presently being

detained by a mental health center when the case was filed, had been subsequently released. *See id.* The Wisconsin Supreme Court found this irrelevant because the petitioners were bringing "class actions seeking declaratory judgments" and the Court noted that (1) the "issues are of great public concern with regular recurrence and due to the limited period of confinement" such that "a limited opportunity exists to bring the issues before the courts" and (2), "by the time the issues are scheduled before trial courts, the petitioners similarly situated are likely no longer to be detained for diagnosis or treatment." *Id.* For that reason, the Court noted that the case was "within the exception to the rule that this court does not consider moot issues," relying on the rule it established in *Matter of G.S.* for times when, among other things, "the issues are of great public importance," "the constitutionality of a statute is involved," and "a question is capable and likely of repetition and yet evades review":

> This court has consistently adhered to the rule that a case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy. . . . It is generally thought to be in the interest of judicial economy to avoid litigating issues that will not affect real parties to an existing controversy. . . . However, this court has carved out certain exceptions to this general rule where: the issues are of great public importance; the constitutionality of a statute is involved; the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts; the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or, a question is capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.

Id. (quoting 118 Wis. 2d 803, 805). The facts of this case are just like those in *Watts* and *Matter of G.S.*

The mootness exception should apply here because the central issue—namely, whether indigent defendants in Wisconsin are being deprived of their constitutional right to counsel—is "of great public importance." *State v. Fitzgerald*, 2019 WI 69, ¶ 22, 387 Wis. 2d 384, 929 N.W.2d 165; *see also Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, ¶ 16, 396 Wis. 2d 434, 957 N.W.2d 261 (applying exception and deciding case involving an expired emergency order issued in response to the COVID-19 pandemic). Even a cursory review of precedent surrounding the importance of the right to counsel, which is "a bedrock principle in our justice system," leaves no doubt that this case presents such an

issue. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The United States Constitution and Wisconsin Constitution both safeguard the right to counsel. *See* U.S. Const. amend. VI; Wis. Const. art. I, § 7. The Sixth Amendment requires that states provide a lawyer for criminal defendants who cannot afford one. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that the right to counsel applies to any offense for which imprisonment would be imposed); *In re Gault*, 387 U.S. 1, 36–37 (1967) (holding that assistance of counsel is "essential" in juvenile delinquency proceedings). It is "an obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344; *see also United States v. Cronic*, 466 U.S. 648, 653 (1984) ("Without counsel, the right to a trial itself would be 'of little avail'"). Thus, whether Wisconsin is failing to provide a fundamental right, *necessary to assure a fair trial*, to members of the proposed class, is an issue of great public import. *See David*, 20AC-CC00093, at 24 (holding that the use of waiting lists for legal representation in violation of defendants' right to counsel raised an issue "of general public interest and importance").

This is also a case "where a question was capable and likely of repetition and yet evades review. . . ." *State ex rel. La Crosse Trib. v. Cir. Ct. for La Crosse Cnty.*, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983); *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 4, 233 Wis. 2d 685, 608 N.W.2d 425 (applying exception to habeas petition challenging petitioner's detention past his mandatory release date). This mootness exception applies when there is "a reasonable expectation that the *same* complaining party would be subjected to the *same* action again." *In re J.W.K.*, 2019 WI 54, ¶ 30, 386 Wis. 2d 672, 927 N.W.2d 509. The suitability of this exception here is clear. For example, at least two Plaintiffs have had counsel appointed after the initiation of this case withdraw, leaving them again unrepresented and facing indefinite delays. Plaintiff Lowe had appointed counsel withdraw on January 27, 2023, forcing him to wait 27 more days to receive new counsel—after having already spent 101 days without counsel

after his first "adjourned" initial appearance. *See* Ex. F, W. Lowe CCAP sheet.[3] Plaintiff Moore also had appointed counsel withdraw on October 4, 2022, and did not receive appointed counsel again until November 17, 2022. *See* Ex. G, D. Moore CCAP sheet. Plaintiff Moore waited 35 days from his initial appearance to be appointed counsel, and then waited another 44 days without counsel after his first attorney withdrew. These incidents of counsel withdrawing, leaving Plaintiffs to wait, unrepresented, for unknown periods of time until counsel is reappointed, show that the issue is capable of repetition between the parties. And, as explained below, the issue is otherwise likely to evade review if Defendants are permitted to moot Plaintiffs' claims through appointing counsel.

Finally, Plaintiffs' claims fit within the "inherently transitory" mootness exception recognized by the Supreme Court of the United States, which is an exception to the mootness doctrine in class actions for claims that are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). The Seventh Circuit has framed this by noting that this exception to the mootness doctrine applies in prisoner's class actions when a claim is "so 'inherently transitory' that it is uncertain that any member of the class would maintain a live controversy long enough for a judge to certify a class." *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010). The exception applies when, as here, "(1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint." *Id.* at 582 (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)).

The Seventh Circuit's decision in *Olson* is instructive. The court reversed the district court's conclusion that a case involving jail inmates was moot given a plaintiff's transfer, concluding that the

[3] As Defendants concede, the Court can take judicial notice of Wisconsin CCAP records. Br. at 5 (citing Wis. Stat. § 902.01 & *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1).

facts related to the length of an inmate's stay in the jail, as well as the likelihood of a "constant class of persons suffering the deprivation," made the plaintiff's claim fall under the exception. *Id.* at 582–83. Federal courts in Wisconsin have taken the same approach. In *Austin v. Smith*, for example, the defendants argued that a class action by a prisoner who was released from prison was moot, but the court found that "the fact that [the named Plaintiff] has been released from prison does not bar the class from pursuing injunctive relief" because of the inherently transitory exception and because the prison officials could "transfer inmates in and out of [the prison] at any time," such that "an individual inmate's length of incarceration cannot be determined at the outset, but there will be a constant class of inmates . . . ." No. 15-cv-00525 2017 WL 945105, at *3 (W.D. Wis. Mar. 9, 2017) (citation omitted).

Here, the inherently transitory exception should similarly apply. First, as shown by the rate at which named Plaintiffs were appointed counsel upon filing this action—after they experienced significant delays in receiving counsel prior to initiating the case—it is uncertain that any potential named plaintiff will have a live claim long enough for the Court to certify a class.[4] Second, as detailed throughout the Complaint, there is a staggering number of individuals that fit within the proposed class because of the ongoing constitutional crisis plaguing Wisconsin's public defense system. *See, e.g.*, Compl. ¶¶ 17, 86–87, 88, 95–98, 100. And at least one named Plaintiff had a live interest in the claims when Plaintiffs filed for class certification. *Olson*, 594 F.3d at 580. Defendants' representation that "[a]s of [the Motion to Dismiss] filing, and as a matter of public record, each Plaintiff has received appointed counsel" is wrong. Br. at 5. Plaintiff Lowe was without counsel on January 30, 2023, when Defendants

[4] Of note, the initial complaint 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, many of whom had been waiting months for legal representation. Again, just after that, these new named plaintiffs began receiving attorneys. And again, within a month of the Amended Complaint's filing, all but one had received public defense counsel. Defendants then filed this current motion to dismiss, again arguing mootness, and Plaintiffs later moved for class certification, which is pending.

moved to dismiss, and on February 1, 2023, when Plaintiffs filed for class certification. *See* Ex. F, W. Lowe CCAP sheet. He had been appointed counsel on December 22, 2022—101 days after his first "adjourned" initial appearance. Br. at 6; Compl. ¶ 48. But his appointed counsel withdrew on January 27, 2023, three days before Defendants moved to dismiss and five days before Plaintiffs filed for class certification. Ex. F.[5] Thus, Mr. Lowe had a live interest in the case when Plaintiffs filed for class certification, and this case fits within the inherently transitory mootness exception.

For these reasons, this case should not be dismissed as moot.

V. Plaintiffs satisfied the service requirements under the Uniform Declaratory Judgments Act, Wis. Stat. §806.04(11), and this Court is competent to proceed.

Finally, this Court is competent to proceed and should not dismiss this case on the grounds that Plaintiffs failed to meet Wis. Stat. § 806.04(11). This is because, on February 8, 2023, Plaintiffs satisfied the service requirements under the Uniform Declaratory Judgments Act, which states that "[i]f a statute, ordinance, or franchise is alleged to be unconstitutional . . . the attorney general shall also be served with a copy of the proceeding and be entitled to be heard." Wis. Stat. Ann. § 806.04(11) (West). In 2018, the legislature amended the statute, adding that "[i]f a statute is alleged to be unconstitutional. . . the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding, and the assembly, the senate, and the state legislature are entitled to be heard." *Id.*

While the law interpreting the requirement to serve the attorney general applies to legislative officials, this case should not be dismissed because Plaintiffs did not strictly comply with Wis. Stat. §806.04(11). Br. 20–21. For one, even if Defendants did not satisfy the requirements of Wis. Stat. §806.04(11) by serving the required legislative officials on February 8, 2023, only partial dismissal would be necessary; not dismissal of the entire suit. In *Tomczak v. Bailey*, for example, the Wisconsin

[5] According to CCAP, Mr. Lowe was appointed counsel again on February 23, 2023, after spending another 27 days without counsel. Ex. F.

Supreme Court noted that the circuit court did not rule on the constitutional issue due to the lack of compliance with Wis. Stat. §806.04(11) but proceeded to consider and reject the plaintiff's continuing tort allegations, implying that dismissal of the entire case was not warranted. *See* 218 Wis. 2d 245, 249 n.2, 578 N.W.2d 166 (1998). And in *Bernegger v. Thompson*, the court of appeals declined to consider a constitutional challenge to a subsection of the recusal statute, Wis. Stat. § 757.19 (2)(g), because the appellant did not attempt to provide notice until two days before briefing on appeal was concluded, functionally meaning that the attorney general did not receive notice before briefing was concluded in the case. *See* 2015 AP2546, 2016 WL 8607446 (Wis. Ct. App. July 21, 2016). None of these situations are analogous here; everyone has been served. But even in those extreme instances, no court has taken the drastic and unprecedented step of dismissing the entire case as Defendants request here.

The service requirements are intended to ensure that the state and the legislature have a chance to be heard. *See S.R v. Circuit Court of Winnebago Cnty.,* 2015 WI APP 98, ¶ 14, 366 Wis. 2d, 876 N.W.2d 147; *Town of Walworth v. Vill. of Fontana-on-Geneva Lake*, 85 Wis. 2d 432, 436, 270 N.W.2d 442 (Ct. App. 1978). Wisconsin Stat. § 806.04(11) does not require that the attorney general or legislative officials are made parties to the litigation. *Town of Walworth*, 85 Wis. 2d at 436. Thus, the requirement that service be made upon a defendant within 90 days after filing under Wis. Stat. §801.02(1) does not apply when a Plaintiff serves the attorney general and legislative officials under Wis. Stat. §806.04(11). *Id.* This Court need not dismiss the case based on any temporary service defect. *See Ripley v. Brown*, 143 Wis. 2d 686, 689 n.3, 422 N.W.2d 608 (1988) (describing the trial court's decision to adjourn the action because the Plaintiff failed to serve notice on the Wisconsin Attorney General and resume after the Attorney General was notified as a "procedural delay"); *Tomczak v. Bailey*, 218 Wis. 2d 245, 249 n.2, 578 N.W.2d 166 (1988) (explaining that the trial court did not rule on the constitutional challenge pending compliance with Wis. Stat. §806.04(11) and that the Plaintiff complied with the statute after being directed to do so by the court of appeals).

Further, any such service defect can be cured. In *Tomczak*, for example, the court explained that the Plaintiff violated the Uniform Declaratory Judgments Act before trial, but that "any jurisdictional defect caused by the [Plaintiffs'] failure to comply with the notification requirement during the circuit court proceedings 'was cured by virtue of the subsequent invitation to the attorney general to participate in the court of appeals' proceedings.'" *Tomczak*, 218 Wis.2d 245, 249 n.2 (citations omitted).

Here, the appropriate legislative officials have been "served and afforded an opportunity to be heard." *S.R.*, 2015 WI APP 98, ¶ 14. Speaker Robin Vos, Senate President Chris Kapenga, and Senate Majority Leader Devin LeMahieu were served with a copy of the proceedings on February 8, 2023. *See* Proof of Service, Doc. # 74. If providing notice of appellate proceedings was determined sufficient by the Wisconsin Supreme Court, *Tomczak*, 218 Wis.2d 245, 249 n.2., then serving a copy of the proceedings a mere 54 days after filing the amended complaint is ample opportunity for the legislative officials to be heard. As in *Tomczak,* any jurisdictional defect has been cured. This court is competent to proceed, and dismissal based on failure to comply with §806.04(11) would be improper.

CONCLUSION

For these reasons, the Court should deny Defendants' motion to dismiss in its entirety.

Dated: March 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

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

LINDA T. COBERLY **
MICHAEL P. MAYER (Bar No. 1036105)
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

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

* Pro hac vice
** Pro hac vice pending

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Plaintiffs' Opposition to Defendants' Motion to Dismiss 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: March 17, 2023

Electronically signed by:

/s/ Sean H. Suber
SEAN H. SUBER