STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 2

ANTRELL THOMAS, *et al.*,

Plaintiffs,

v. Case No. 2022-CV-1027

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

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

INTRODUCTION

This Court should deny Plaintiffs' class-certification motion.

To begin, this case is moot because Plaintiffs received appointed counsel in their criminal cases, as Defendants argued in support of dismissal and Plaintiffs conceded. (Doc. 58:5–6, 9–10, 27–46 (appointment orders); 37:5–6, 9–10, 27–36 (appointment orders); 66:4 ("all had received public defense counsel").) Because they received appointed counsel, Plaintiffs cannot represent a putative class of criminal defendants whose claims are based upon *lacking* appointed counsel.

That is only one of the problems with Plaintiffs' motion for class certification. First, Plaintiffs have not met their burden to show that their case

satisfies the prerequisites for class treatment under Wis. Stat. § 803.08(1). They have not demonstrated commonality, typicality, adequacy of representation, or numerosity. The only evidence that they filed in support of their motion is an attorney "declaration," not an affidavit, with exhibits. The exhibits they rely upon are not evidence like responses to requests to admit, interrogatories, deposition transcripts, or affidavits, and they are insufficient to meet the prerequisites. Plaintiffs have not met any of the prerequisites for certification under section 803.08(1), so this Court should deny certification.

Second, Plaintiffs have not shown that their putative class or sub-classes satisfy Wis. Stat. § 803.08(2). They rely on section 803.08(2)(b), which provides, in part, "that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Here, the unique circumstances of every putative class member make class-wide injunctive or declaratory relief impossible. Class treatment is inappropriate because whether there has been a constitutional violation due to a delayed counsel appointment is necessarily case specific and not amenable to a one-size-fits-all remedy.

This Court should deny Plaintiffs' class-certification motion.

BACKGROUND

Plaintiffs press federal and state constitutional claims that indigent criminal defendants must be appointed counsel by the State Public Defender (SPD) within a "reasonable" time, but no more than 14 days after their initial

appearances in criminal court. (Doc. 48 ¶¶ 119–33.) Their claims turn on whether the timing of SPD's appointments "was unreasonable and violated their and the Class's rights." (Doc. 66:12–13; *see also* 66:2; 48 ¶¶ 2, 6, 28, 30, 69, 71–73, 115, 122, 128, 131.) Defendants moved to dismiss the amended complaint, and that motion will be fully briefed upon the filing of Defendants' reply. (Doc. 57; 58.)

Plaintiffs move this Court to certify a class of "[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." (Doc. 64:1; 66:10.) They also seek certification of sub-classes of defendants who requested and were not appointed counsel within 30, 60, or 120 days of their initial appearances. (Doc. 64:2; 66:10.)

Plaintiffs filed a memorandum of law and the "Declaration of Sean H. Suber in Support of Plaintiffs' Motion for Class Certification," with exhibits A through H. (Doc. 65; 66.) At the February 8, 2023, scheduling conference, Plaintiffs' counsel stated that Plaintiffs no longer intend to rely upon a report prepared by Court Data Technologies, LLC (by Barry J. Widera), which is Exhibit D to the Suber Declaration. (Doc. 75:25 ("we will proceed without relying on that expert report").)

LEGAL STANDARD

Wisconsin Stat. § 803.08 governs class certification.

First, a putative class must meet four prerequisites. "One or more members of a class may sue . . . as representative parties on behalf of all members only if the court finds all of the following:" "(a) The class is so numerous that joinder of all members is impracticable"; "(b) There are questions of law or fact common to the class"; "(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class"; and "(d) The representative parties will fairly and adequately protect the interests of the class." Wis. Stat. § 803.08(1)(a)–(d).

Second, "[a] class action may be maintained if [Wis. Stat. § 803.08](1) is satisfied and if the court finds that any of the following are satisfied:" Wis. Stat. § 803.08(2). Plaintiffs argue the putative class and sub-classes meet Wis. Stat. § 803.08(2)(b), which states: "The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." (Doc. 66:2, 12–13.)

Wisconsin courts are to look to federal case law for guidance on class certification. *See Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 5, 388 Wis. 2d 546, 933 N.W.2d 654. The Supreme Court has held that a plaintiff seeking certification of a class "must affirmatively demonstrate his

compliance with the [class-certification] Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "Failure to meet any of the [class-certification] Rule's requirements precludes class certification." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008).

A court reviewing a class-certification motion must engage in a "rigorous analysis" of the prerequisites. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). "If the court finds that the action should be maintained as a class action, it shall certify the action accordingly on the basis of a written decision setting forth all reasons why the action may be maintained and describing all evidence in support of the determination." Wis. Stat. § 803.08(11)(a).

ARGUMENT

This Court should deny certification because Plaintiffs have not shown that the putative class or sub-classes meet Wis. Stat. § 803.08(1) and (2).

I. The putative class and sub-classes do not meet Wis. Stat. § 803.08(1)'s prerequisites.

First, Plaintiffs have not met the prerequisites in Wis. Stat. § 803.08(1): commonality, typicality, adequacy of representation, and numerosity.

A. Commonality is not satisfied because each putative class member's case involves disparate facts and circumstances.

Plaintiffs have not demonstrated commonality. Wis. Stat. § 803.08(1)(b); *see Dukes*, 564 U.S. at 350. Commonality requires that "each class member's claim could be determined in a single case and would involve common issues of proof." *Cruz v. All Saints Healthcare Sys., Inc.*, 2001 WI App 67, ¶ 16, 242 Wis. 2d 432, 625 N.W.2d 344. "What matters" is "the capacity . . . to generate common answers," and "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 564 U.S. at 350 (citation omitted).

In *Allen v. Edwards*, the Louisiana appellate court concluded that commonality was not met and reversed class certification in a case challenging "structural limitations" on Louisiana's public-defense system. 322 So.3d 800, 811 (La. App. 1st Cir. 2021). The court explained that "any inquiry into alleged constitutional defectiveness of an individual defendant's representation, particularly based on alleged constitutional defectiveness through insufficient funding and resources of court-appointed counsel, should be decided on a 'case-by-case' basis and with a 'detailed examination of the specific facts and circumstances of the representation provided by counsel to the individual defendant.'" *Id.* (citation omitted).

As in *Allen*, a lack of commonality forecloses certification here. First, each Plaintiff (and putative class member) has different circumstances in his or her underlying criminal case that might lead to delays in appointing counsel, so claims cannot "be determined in a single case" and do not "involve common issues of proof." *Cruz*, 242 Wis. 2d 432, ¶ 16. Plaintiffs' individual circumstances are markedly different and would need to be addressed, which makes their claims about unconstitutional delays too different from one another to be determined as a class.

The reasons why a counsel appointment might be delayed vary from case to case. For example, some Plaintiffs are charged with crimes in less-populous counties that have fewer attorneys available for appointments. (*See, e.g.*, Doc. 48 ¶ 39 (Kelsie McGeshick, Forest County), ¶ 51 (Donald Jueck, Langlade County).) Data from the State Bar of Wisconsin shows that more-populous counties like Dane and Milwaukee have thousands of attorneys and more attorneys per capita; whereas less-populous counties have few attorneys per capita. (Kawski Aff. Exs. A, B.) Dane County has one attorney per 158 people; Forest County has only one attorney per 912 people. (*Id.* Ex. A:8–9.) Milwaukee County has one attorney per 186 people; Langlade County has only one attorney per 1,151 people. (*Id.*) As of 2023, Dane and Milwaukee Counties have 3,779 and 5,293 attorneys, respectively; Florence, Forest, Langlade, Marathon, Oneida, and Vilas Counties have only 443 attorneys *combined*. (*Id.* Ex. B:1–2.)

Thus, the relative unavailability of counsel in less-populous counties makes evaluating the constitutionality of a delay in an appointment necessarily a case-specific inquiry that differs from evaluating a delayed appointment in a more-populous county. This differing calculus for each individual case makes the claims much too different to treat as a class.

In addition to a dearth of counsel in some counties or regions of the state, the relative severity of the criminal charges can impact the timing of an appointment. An attorney accepting an appointment in a serious felony case should have the experience to competently handle it. That is why SPD's administrative rules require that counsel meet certain criteria to be eligible for appointments in serious felony cases. Wis. Admin. Code SPD § 1.04 (3)(b)–(d) (describing the criteria and experience necessary to receive appointments in class A through F felony cases).

Here, some Plaintiffs have serious felony charges that limit the pool of counsel who are competent to handle their cases. (*See, e.g.*, Doc. 37:31 (Chance Kratochvil, charged with class D felonies of possession of child pornography); 37:36 (Dwight Moore, charged with a class C felony of armed robbery, party to a crime); 58:27 (Sebastian Popovich, charged with a class C felony of first-degree reckless homicide/delivery of drugs); 58:42 (Davadae Bobbitt, charged with a class C felony of second-degree sexual assault with use of force).) The more serious the charges, the more difficult it is to appoint qualified counsel.

The need for experienced counsel alters the calculus to evaluate the constitutionality of delays in appointments in serious cases, making it impossible to "generate common answers" across all members of the putative class. *Dukes*, 564 U.S. at 350 (citation omitted). In other words, what delay is constitutionally acceptable in a serious felony case will depend upon the availability of experienced, competent counsel, which is different than what delay might be constitutionally acceptable in a less-serious misdemeanor case, where competent counsel may be more-readily available.

In support of commonality, Plaintiffs argue that their case is like *Ross v. Gossett*, 33 F.4th 433 (7th Cir. 2022). (Doc. 66:8.) But *Ross* involved an important distinction that actually undercuts finding commonality here.

In *Ross*, the Seventh Circuit affirmed an order certifying a class of inmates at four Illinois prisons who alleged that "tactical team leaders of the [Illinois Department of Corrections] conducted institution-wide shakedowns of inmates' cells . . . pursuant to a common policy or practice implemented, overseen, and encouraged by Department supervisors." 33 F.4th at 435. Addressing the commonality prerequisite for certification, the district court "held that the plaintiffs satisfied that requirement because they alleged that the defendants acted pursuant to a common policy and implemented the same or similar procedures at each of the four institutions, and that the challenge was to the constitutionality of that common plan as enacted." *Id.* at 437.

The Seventh Circuit affirmed based on the fact that it was "undisputed" that "the shakedowns were conducted according to a uniform plan created and implemented by the appellants, and that the plan was executed in a uniform manner under their supervision." *Id.* at 438. There was "no need for the plaintiffs to provide 'significant proof' of the existence of a uniform policy precisely because its existence [was] conceded," and the only dispute was over "the content of that uniform policy." *Id.* The "issue as to the constitutionality of the policy is capable of a common answer applicable to all of the defendants" and "resolution of the question will provide a common answer as to the claims of the putative class that the shakedown policy created and implemented by the supervisors violated their constitutional rights." *Id.* at 439.

Ross is distinguishable and undercuts Plaintiffs' argument. Importantly, Plaintiffs have not alleged—and Defendants have not conceded—that SPD has a "uniform policy" of not appointing counsel within 14 days of defendants' initial appearances (or some other predetermined time period). *See Ross*, 33 F.4th at 438. The "uniform policy" in *Ross* was amenable to class treatment because it was a general practice that did not take into consideration the facts or circumstances of *any* class member; all prisoners at the four prisons were searched. *See id.* at 436–37.

Here, the unique circumstances of each putative class member's case are important to SPD's appointing competent counsel. Likewise, the availability of

competent counsel will contribute directly to how rapidly SPD is able to make an appointment—and the class member's unique circumstances will determine whether the timing was constitutionally infirm. To be sure, SPD appoints counsel as rapidly as it can; it does not "plan" to wait 14 days. Instead, each putative class member has a unique constellation of facts and circumstances that give rise to their "claim" of an unconstitutional delay in the appointment of counsel. *Cf. State v. Lee*, 2021 WI App 12, ¶¶ 53–58, 396 Wis. 2d 136, 955 N.W.2d 424 (discussing how claims based on alleged delays in appointment of counsel require a fact-specific inquiry). These "[d]issimilarities within the proposed class" would "impede the generation of common answers" and make certification inappropriate. *Dukes*, 564 U.S. at 350 (citation omitted). Plaintiffs have not shown commonality.

B. Typicality is not satisfied because no Plaintiff could serve as a class representative when they received appointed counsel and the facts of their cases are too disparate.

Plaintiffs also have not met the typicality prerequisite. Wis. Stat. § 803.08(1)(c); *see Dukes*, 564 U.S. at 350. For typicality, this Court must find that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Wis. Stat. 803.08(1)(c). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Dukes*, 564 U.S. at 348–49 (citation omitted).

"A 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 . . . her claims are based on the same legal theory.'" *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (citation omitted). This "requirement is meant to ensure that the named representative's claims" possess "the same essential characteristics" as the claims of the whole class. *Id.* (citation omitted). In *Allen*, the Louisiana appellate court found that typicality was not met where an "individualized analysis" was required for indigent defendants' claims relating to counsel appointments. 322 So.3d at 811.

Here, a lack of typicality also forecloses certification. First, each Plaintiff already received appointed counsel, so they cannot logically represent a class of people who *lack* appointed counsel. Plaintiffs do not possess "the same essential characteristics" of the putative class members, specifically, because they already have counsel. *Oshana*, 472 F.3d at 514 (citation omitted).

Second, as argued above regarding the commonality prerequisite, each Plaintiff has completely different circumstances that could lead to justifiable delays in appointing counsel, so their claims do not "arise[] from the same event or practice or course of conduct," *Oshana*, 472 F.3d at 514 (citation omitted), as the other class members. Each class member "presents fundamentally unique circumstances," *McFields v. Dart*, 982 F.3d 511, 518

(7th Cir. 2020), to judge the timing of SPD's appointment of counsel, which prevents a finding of typicality.

This Court should find that Plaintiffs have not met the typicality prerequisite under Wis. Stat. § 803.08(1)(c).

C. Adequacy of representation is not satisfied, as Plaintiffs filed insufficient evidence in support of this prerequisite.

Plaintiffs have not met the adequacy-of-representation prerequisite. Wis. Stat. § 803.08(1)(d); *see Dukes*, 564 U.S. at 350. "In determining adequacy of representation, the primary criteria are: (1) whether the plaintiffs or counsel have interests antagonistic to those of absent class members; and (2) whether class counsel are qualified, experienced and generally able to conduct the proposed litigation." *Hammetter v. Verisma Sys., Inc.*, 2021 WI App 53, ¶ 21, 399 Wis. 2d 211, 963 N.W.2d 874 (citation omitted).

Regarding the first criterion, Defendants contest that it is met because, as argued above, the named Plaintiffs received appointed counsel. They are not even part of the putative class and sub-classes, who are individuals *lacking* appointed counsel. *See Dukes*, 564 U.S. at 348 ("must be part of the class") (citation omitted). Plaintiffs have no ongoing interest in this Court ordering relief as to them because they have the desired relief already.

Regarding the second criterion, as to class counsel's qualifications, Plaintiffs have submitted no evidence in support of this factor to meet their

burden. Apart from their motion and legal memorandum, Plaintiffs filed the "Declaration of Sean H. Suber in Support of Plaintiffs' Motion for Class Certification" with exhibits. (Doc. 65). The "declaration"—which is not a sworn affidavit—includes nothing about Attorney Suber's or his co-counsels' qualifications, experience, or abilities litigating class actions.

Nor do any of the exhibits support the adequacy prerequisite. Plaintiffs argue that Lisa Wayne, Bonnie Hoffman, Jason Williamson, John Birdsall, Henry Schultz, and attorneys with the Winston & Strawn LLP firm in Chicago, will provide adequate representation and cite only "Suber Decl., **Ex. G**" in support. (Doc. 66:11.) But Exhibit G says nothing about Plaintiffs' counsel's qualifications, experience, or abilities. Instead, Exhibit G is a December 8, 2022, WEAU NBC 13 article that does not mention Plaintiffs' counsel whatsoever. (Doc. 65:43–45.) There is no specific evidence in the record on which to base a finding that Plaintiffs' counsel is qualified.

Plaintiffs' presentation as to adequacy of representation is deficient and does not meet their burden under Wis. Stat. § 803.08(1)(d). *Dukes*, 564 U.S. at 350 (must "affirmatively demonstrate" the class prerequisites). Plaintiffs could have filed sworn affidavits from one or more of the nine counsel listed in their class-certification motion (Doc. 64:2–3), to explain their qualifications, experience with class actions, and abilities litigating similar cases. They did not do so and cannot remedy the deficiency on reply. *Cf. Bilda v. County of*

Milwaukee, 2006 WI App 57, ¶ 20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). Adequacy of representation is not met.

D. Numerosity is not satisfied because Plaintiffs have not filed evidence sufficient to meet their burden.

This Court should not find numerosity because Plaintiffs' evidence in support is insufficient. *See* Wis. Stat. § 803.08(1)(a); *see Dukes*, 564 U.S. at 350. For numerosity, this Court must find that "[t]he class is so numerous that joinder of all class members is impracticable." Wis. Stat. § 803.08(1)(a). In *Harwood*, the court of appeals held that forty-two class members was sufficient to satisfy the numerosity prerequisite. 388 Wis. 2d 546, ¶ 55. "[A] forty-member class is often regarded as sufficient to meet the numerosity requirement." *Orr v. Schicker*, 953 F.3d 490, 498 (7th Cir. 2020) (citation omitted).

Plaintiffs argue that "numerosity is easily satisfied" and that "Wisconsin public officials—including those who are defendants here—have repeatedly admitted that there is an enormous backlog of defendants waiting for the SPD to appoint public defense counsel on their behalf." (Doc. 66:11.) The exhibits to the Suber Declaration that Plaintiffs rely upon do not support that contention.

In their legal memorandum, Plaintiffs rely on Exhibits A, B, C, and D to the Suber Declaration to argue for a numerosity finding. (Doc. 66:11–12.) Regarding Exhibit A, it is minutes of a March 17, 2021, meeting of the Public

Safety Committee of the Brown County Board of Supervisors, along with a "Resolution Requesting the State of Wisconsin Take Action to Address the Public Defender Crisis in Brown County." (Doc. 65:7–21.) The minutes state that: "*Currently* the SPD needs to appoint on 350 cases in Brown County." (Doc. 65:9 (emphasis added).) They also state that "*[a]s of January 28, 2021*, approximately 17 defendants have been in custody over 100 days and approximately 27 defendants have been in custody between 30 – 100 days." (Doc. 65:10 (emphasis added).)

This information is stale; it is more than two years old and specific to a single county. Plaintiffs are not relying upon current data in support of certification. Exhibit A is insufficient evidence for this Court to make a finding that Plaintiffs' putative class or sub-classes meet the numerosity requirement.

Exhibit B also does not support a finding of numerosity. It is a March 15, 2022, press release from the Office of Governor Tony Evers, which committed to "nearly $19 million for local and tribal law enforcement agencies as well as funding to help alleviate the pandemic-related backlog of criminal cases through additional public defender and assistant district attorney support." (Doc. 65:23.) Exhibit B includes no data or statistics regarding how many people are in the putative class or sub-classes. (Doc. 65:23–24.) The exhibit does not support finding numerosity.

Regarding Exhibit C, it is a summation of an April 17, 2022, interview that State Public Defender Kelli Thompson gave on the television program *Upfront* in which she explained that SPD has "seen a backlog of about 35,000 cases." (Doc. 65:28.) Per the interview, clearing the backlog "will take several years" and is due in part to "a shortage of public defenders." (Doc. 65:26.) SPD is "currently down 17–20% of its typical attorneys." (Doc. 65:26.)

Exhibit C includes no data or statistics regarding how many people are in the putative class or sub-classes because they meet the class definition. (Doc. 65:26–29.) Plaintiffs misconstrue the interview. The "backlog" that Public Defender Thompson referenced is not a backlog of people awaiting counsel appointments from SPD but instead a backlog of cases that must be decided in the criminal justice system. The exhibit does not support finding numerosity.

Plaintiffs no longer rely upon Exhibit D, as they disavowed reliance upon it at the February 8, 2023, scheduling conference. (Doc. 75:25 ("we will proceed without relying on that expert report").) Since Plaintiffs no longer rely upon it, Exhibit D should not be considered, and this Court should disregard Plaintiffs' arguments in their memorandum that are based upon it. (Doc. 66:6–7.)

Lastly, Plaintiffs cite Exhibit A to the amended complaint in support of a numerosity finding. (Doc. 66:6.) It is entitled "Number of Unrepresented Defendants by Length of Time without Counsel in Total and by County as of December 11, 2022." (Doc. 54:2.) It purports to be based upon a data set that

was "extracted from" CCAP by Court Data Technologies, LLC "utilizing CCAP's Representational State Transfer ('REST') interface." (Doc. 54:2 n.1.) It is impossible to tell from the exhibit which criminal cases on CCAP fall into the listed categories. Exhibit A is hearsay, is not sworn to by any witness or otherwise verified or even signed, and is therefore not reliable evidence. This Court should find that numerosity is not met under Wis. Stat. § 803.08(1)(a).

II. The putative class and sub-classes do not meet Wis. Stat. § 803.08(2)(b).

Finally, Plaintiffs argue that the putative class and sub-classes satisfy Wis. Stat. § 803.08(2)(b). (Doc. 66:2, 12–13.) In raising only subsection (2)(b), Plaintiffs have waived any argument for certification under (2)(a) or (2)(c). *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 ("waiver is the intentional relinquishment or abandonment of a known right." (citation omitted)). They cannot on reply argue for a (2)(a) or (2)(c) class. *See Bilda*, 292 Wis. 2d 212, ¶ 20 n.7.

The putative class and sub-classes do not satisfy Wis. Stat. § 803.08(2)(b). In addressing Federal Rule of Civil Procedure 23(b)(2)—the equivalent to Wis. Stat. § 803.08(2)(b)—the Supreme Court explained that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to

none of them.'" *Dukes*, 564 U.S. at 360 (citation omitted). "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* "It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id.*

This type of class "operates under the presumption that the interests of the class members are cohesive and homogenous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000). "Although Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder still must be cohesive." *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *see also Lemon*, 216 F.3d at 580. "[I]f redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, 'the suit could become unmanageable and little value would be gained in proceeding as a class action.'" *Shook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (citation omitted).

Here, Plaintiffs' putative class and sub-classes do not meet Wis. Stat. § 803.08(2)(b) because the unique circumstances of each Plaintiff and member must be considered to judge their constitutional claims, making class-wide

injunctive or declaratory relief impossible. *See Lemon*, 216 F.3d at 580; *Shook*, 543 F.3d at 604. Whether there has been a constitutional violation caused by a delayed counsel appointment is inherently case specific and not amenable to a one-size-fits-all remedy. *See Dukes*, 564 U.S. at 360. A two-week wait for an appointment for one Plaintiff may be reasonable; whereas a shorter wait for an appointment for another may be unreasonable. A universal injunction or declaration will not suffice. *See id.*

Plaintiffs' and class members' constitutional claims ultimately turn on whether the timing of appointments "was *unreasonable* and violated their and the Class's rights." (Doc. 66:12–13 (emphasis added).) What is "reasonable" is not amenable to a categorical rule but is instead "a fact-intensive inquiry, measured in objective terms, by examining the totality of the circumstances." *State v. Crone*, 2021 WI App 29, ¶ 14, 398 Wis. 2d 244, 961 N.W.2d 97 (evaluating the reasonableness of a Fourth Amendment detention).

Because their claims are not susceptible to a single remedy, they do not meet Wis. Stat. § 803.08(2)(b), and this Court should deny class certification.

CONCLUSION

This Court should deny Plaintiffs' class-certification motion.

Dated this 29th day of March 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 in Opposition to 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.

Dated this 29th day of March 2023.

Electronically signed by:

Clayton P. Kawski
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