IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE

Plaintiffs hereby submit their opposition to the State's motions *in limine* 1) to strike portions of the December 10, 2015, expert report of Barry C. Burden and to exclude certain evidence; 2) to exclude the expert report, analysis and testimony of Dr. Yair Ghitza; and 3) to introduce evidence that Plaintiff David Walker and Plaintiff David Aponte were convicted of felonies. For the reasons explained below, each of these motions should be denied. Dr. Burden's "Senate factor" analysis is directly relevant to the "totality of the circumstances" required by the text of the Voting Rights Act of 1965, 52 U.S.C. § 10301(b). Dr. Ghitza's race-identifications for Wisconsin's voters are eminently reliable and Dr. Ghitza disclosed everything the State needed to test the accuracy of his results. Finally, evidence of Mr. Walker's and Mr. Aponte's prior criminal convictions is irrelevant and would only serve to harass and intimidate them in their efforts to obtain a voter ID.

I. Dr. Barry C. Burden

The State seeks to exclude the portions of Dr. Burden's analysis concerning his application of the so-called Senate factors to Plaintiffs' claim under Section 2 of the Voting

Rights Act of 1965, 52 U.S.C. § 10301 ("VRA"). Failing that, the State seeks to exclude Dr. Burden's analysis under Senate factor 5 and evidence of private discrimination or discrimination by Wisconsin's political subdivisions, which the State claims are not its responsibility. The State's argument here overlaps heavily with the argument it made in its summary judgment motion.

For the reasons explained below, the State's effort to exclude Dr. Burden's Senate factors analysis must fail. First, his Senate factors' analysis is not only probative of Plaintiffs' Section 2 claim, but is equally probative of Plaintiffs' intentional discrimination claims under the 14th- and 15th-Amendments, and is therefore admissible regardless of whether the State is right in what it says about Section 2 (which it is not). Second, and as explained in detail in Plaintiffs' opposition to the State's summary judgment motion, the State's contention that the Senate factors are not relevant to vote-denial claims such as this is incorrect. Third, the State's effort to distinguish between discrimination by the State and non-State discrimination (be it by private individuals or its local political subdivisions) rests on a misunderstanding both of the case law and the evidence Dr. Burden will provide. The State's political subdivisions *are* the State for purposes of Plaintiffs' Section 2 and constitutional claims, and Dr. Burden's report discusses at length the role the State has played in created racial inequality.

A. Dr. Burden's Senate Factors Analysis is Relevant Both to Plaintiffs' 14th and 15th Amendment Claims and the Section 2 Claim.

Dr. Burden's Senate factors analysis is equally probative of Plaintiffs' 14th- and 15th-Amendment discrimination claims as their claim under Section 2 of the VRA. Indeed, the Senate factors were borrowed from earlier Equal Protection Clause jurisprudence that continues to govern Plaintiffs' intentional discrimination claims. *See White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc). The *White/Zimmer* factors were

incorporated into Section 2 in 1982 when Congress amended the VRA to clarify that a violation could be shown with evidence of discriminatory effects alone without a showing of discriminatory intent.

As the Supreme Court explained in *Thornburg v. Gingles*, the 1982 amendment to Section 2 "was largely a response to this Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." 478 U.S. 30, 35 (1986). "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by th[e Supreme] Court in *White*[.]" In so doing, it articulated nine factors—the Senate factors—which it "derived from the analytical framework of *White*, as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen*[.]" 478 U.S. at 36 n. 4. For this reason, the Senate factors are sometimes simply called the "*Zimmer* factors." *See, e.g.*, *Cano v. Davis*, 211 F. Supp. 2d 1208, 1232 (C.D. Cal. 2002) ("Those factors, frequently called the 'Senate factors' or the 'Zimmer factors,' owing to their origin in *Zimmer*[.]"); *Turner v. State of Ark.*, 784 F. Supp. 553, 567 (E.D. Ark. 1991) ("Those factors, listed in the Senate Report to the 1982 amendment, are often called the "Senate factors' or the 'Zimmer factors,' since they were first mentioned in *Zimmer*[.]").

The Supreme Court has reaffirmed that the *Zimmer* factors remain probative of discriminatory intent even after *Bolden*, *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). As explained in *Rogers v. Lodge*, "the evidentiary factors outlined in *Zimmer* [are] important

considerations in arriving at the ultimate conclusion of discriminatory intent" even after the decisions mentioned above. 458 U.S. 613, 621 (1982). Put simply, the Senate factors used to evaluate a Section 2 claim call for the same evidence used to evaluate a claim of intentional racial discrimination.[1] Thus, the evidence the State seeks to exclude here is admissible in connection with Plaintiffs' intentional discrimination claims irrespective of whether it relevant to Plaintiffs' Section 2 vote-denial claim, and the State has not sought to exclude this evidence from the Court's consideration of the intentional discrimination claims. Thus, the State is asking the Court to rule on a motion *in limine* that will have no impact on the nature or scope of evidence admitted at trial.

[1] *Compare Zimmer*, 485 F.2d at 1304–05 ("The Supreme Court has identified a panoply of factors . . . . [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the [law], or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made."), *with Gingles*, 478 U.S. at 36-37 ("[T]he circumstances that might be probative of a § 2 violation are: 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction; . . . [8.]whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; . . . [and 9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." (quoting S. Rep., at 28–29, U.S. Code Cong. & Admin. News 1982, pp. 206–207)).

The State also is wrong about the relevance of the Senate factors analysis to Plaintiffs' Section 2 claim here. As discussed at greater length in Plaintiffs' opposition to the State's summary judgment motion (*see* Pls.' MSJ Opp at 70-78 (Dkt. 99)), *Frank* is unclear as to the role the Senate factors (as opposed to redistricting cases such as *Gingles*) should play in a Section 2 vote-denial claim. With respect to redistricting or "vote-dilution" cases, the *Frank* decision says "[t]he Fourth Circuit and the Sixth Circuit . . . found *Gingles* unhelpful in voter-qualification cases (as do we)." *Frank*, 768 F.3d at 754 (citing *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 551 (6th Cir. 2014), *vacated sub nom. Ohio State Conference of N.A.A.C.P. v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), and *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 239 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)). However, to interpret *Frank* as the State does, i.e., to have excluded the Senate factors analysis from vote-denial cases altogether, would render that opinion self-contradictory. Even a cursory reading of these Fourth and Sixth Circuit opinions cited by *Frank* demonstrates the extent to which they relied on the Senate factors to assess vote-denial claims. *See League of Women Voters*, 769 F.3d at 240 (holding that the Senate factors "shed light on whether the two elements of a Section 2 claim are met"); *NAACP*, 768 F.3d at 554-55 (holding that "we see no reason why the Senate factors cannot be considered in assessing the 'totality of the circumstances' in a vote denial claim," and explaining that "[a]ll of the factors . . . can still provide helpful background context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process."). Thus, the only intelligible reading of *Frank* on this point is that it was referring generally to redistricting case law as being unhelpful, not the Senate factors.

The State's arguments about the applicability of the Senate factors to this case fail for yet another reason: The plain statutory language of Section 2 provides that a voting law violates the VRA "if, *based on the totality of the circumstances*, it is shown that the political processes . . . in the State . . . are not equally open to participation by members of" a particular racial group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). The "totality of the circumstances" framework was originally established in vote-denial cases. *See Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997). And, the U.S. Supreme Court has held that "the Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and quotations omitted). Numerous other appellate courts have emphasized that the Senate factors inform the statutory "totality of the circumstances" inquiry in vote-denial claims such as this, including the Fourth and Sixth Circuit decision cited above. *See also Veasey v. Abbott*, 796 F.3d 487, 505 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016) (discussing the Senate factors and stating that, "[w]hile the State argues that these factors are inapposite in the 'vote denial' context, we disagree"); *Gonzalez v. Arizon*a, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc) (considering the Senate factors in evaluating a Section 2 challenge to Arizona's voter ID law), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, —— U.S. ——, 133 S. Ct. 2247 (2013); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (explaining that, in a vote denial claim, "courts consider a non-exclusive list of objective factors (the 'Senate factors')" as part of evaluating . . . the "totality of the circumstances"). In any event, whether organized according to the "Senate factors" or under the "totality of the circumstances," Dr. Burden's analysis is directly

relevant to understanding how the "the political processes . . . are not equally open to participation by" African Americans and Latinos in Wisconsin. 52 U.S.C. § 10301(b)

In sum, whether categorized under the statutory "totality of the circumstances," the Senate factors, or *Zimmer*'s intentional discrimination rubric, this evidence is relevant and probative of Plaintiffs' claims. It should be admitted.

B. Dr. Burden's Senate Factor 5 Analysis is Highly Probative of Plaintiffs' Claims.

Failing exclusion of all of Dr. Burden's Senate factors analysis, the State seeks to exclude his analysis under Senate factor 5, which examines "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." The State contends that this portion of Dr. Burden's opinion should be excluded because it discusses evidence of discrimination by private individuals and the State's political subdivisions. This argument is wrong as a matter of law, and it ignores the fact that Dr. Burden's factor 5 analysis explains how racial inequalities are the result of discriminatory acts and omissions by Wisconsin's public officials.

The State is simply wrong that discrimination by a state's political subdivisions is not evidence of discrimination by the state itself or that it is irrelevant to the "totality of the circumstances" inquiry required by the text of the VRA. As the Supreme Court explained in *Reynolds v. Sims*, "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities." 377 U.S. 533, 575 (1964). "Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.* "[T]hese governmental units are created as convenient agencies for exercising such of the governmental powers of the

state as may be entrusted to them, and the number, nature, and duration of the powers conferred upon (them) and the territory over which they shall be exercised rests in the absolute discretion of the state." *Id*. (quotation omitted); *see also City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.").

Because a state's political subdivisions are not sovereigns but agents of the state, courts have held that a state may be held responsible for violations of federal constitutional or statutory rights committed by its cities or counties. In *Flowers v. Webb*, 575 F. Supp. 1450, 1454 (E.D.N.Y. 1983), the court held that the State of New York could be held liable for New York City's discriminatory actions against a mentally disabled plaintiff despite the fact that the city maintained the health facility where the plaintiff was treated. Citing to *Reynolds*, the court dismissed the state's argument "that it bears no responsibility for the care and treatment of the plaintiff since she is residing in a City institution." *Id*. at 1453. "Because the State bears an affirmative obligation to provide adequate care to plaintiff and has chosen to delegate that function, the acts and omissions toward the plaintiff may be considered that of the State." *Id*. at 1454.

The same reasoning applies in the context of voting-rights litigation. For example, in Section 2 cases courts analyze local-government discrimination in claims against a state or its officers. In *Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983), African American plaintiffs sued Louisiana under the 13th, 14th, and 15th Amendments, and the Voting Rights Act, to invalidate the state's congressional districts. In invalidating the map, the Court examined the history of

discrimination in and around New Orleans. *Id.* at 328-29, 341. In *League of United Latin American Citizens (LULAC) v. Clement*s, 986 F.2d 728 (5th Cir. 1993), Latino voters challenged the state's method for electing district court judges under Section 2. In upholding the challenge, the court examined the history of discrimination by a few Texas counties and the socio-economic inequalities suffered by Hispanics and African Americans in those counties. *See id*. at 778, 781; *see also Johnson v. DeGrandy*, 512 U.S. 997 (1994) (discussing racial divisions in Dade County in VRA claim against the state).

If any doubt remains about the relevance of discrimination by Wisconsin's cities and counties here, Wisconsin state law eliminates it. Wisconsin's cities are created by and organized pursuant to state law and are subject to state constitutional and legislative limitations. *See* Wis. Const. art. XI § 3. Their powers derive from the State. *See, e.g.*, *Madison Teachers, Inc. v. Walker*, 358 Wis.2d 1,62 (2014) ("Cities . . . have no inherent right of self-government beyond the powers expressly granted to them"); *Van Gilder v. City of Madison*, 222 Wis. 58, 73, 268 N.W. 108, 109 (1936) ("[I]t has been consistently held that municipal corporations have only such powers as were conferred upon them by statute or those necessarily implied therefrom."). They are not sovereign entities. *See Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533 (1982) ("Cities . . . are not recognized as independent sovereigns."). They are *agents* of the State created for the purpose administering the *State*'s powers. *See Zawerschnik v. Jt. Cty. School Comm. of Milwaukee and Madison*, 271 Wis. 416, 429 (1955) ("Municipal corporations are . . . created as convenient agencies for exercising such of the governmental powers of the state . . . the state is supreme.") (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)).

In particular, municipalities are agents of the State for purposes of administering elections, a fact demonstrated by the State's role in controlling its municipalities' administration

of elections in ways that bear directly on the claims in this case. For example, until outlawed by the Help America Vote Act, 42 U.S.C. § 15438(a), Wisconsin only required voters to register if they lived in municipalities with more than 5,000 residents, with the result that African Americans and Latinos, who are concentrated in Wisconsin's larger cities, were disproportionately impacted by the State's voter-registration laws. Similarly, the Government Accountability Board's staff advises municipalities not to offer ballots in any language other than English unless required by law. *See* Kennedy Dep. at 261:15-24, 265:2-12 (Dkt. 94). For this reason, the only city that provides Spanish ballots in Wisconsin in Milwaukee, which was compelled to do so under federal law. See Burden Rpt. at 10 (Dkt. 72). State law also prohibits municipalities from having more than one in-person absentee voting location, despite the disproportionate burdens that places on voters in more-populous cities and the fact that Milwaukee has specifically requested the permission to open more locations. *See* Albrecht Decl. ¶¶11, 13-15, 17-20 (Dkt. 100). And, the State has reduced the number of days and hours municipalities may provide for in-person absentee voting. *Id.* As the foregoing demonstrates, the State is directly involved in controlling its municipalities, both in general and with respect to voting in particular. For these reasons, the State's effort to abdicate responsibility for the actions of its political subdivisions and to exclude this evidence must fail.

Finally, contrary to the State's contention, nothing in *Frank* supports this argument. *Frank* discussed the distinction between private and official discrimination. *Frank*, 768 F.3d at 753 ("The judge did not conclude that the state of Wisconsin has discriminated in any of these respects. That's important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination. Section 2(a) forbids discrimination by 'race or color' but does not require states to overcome societal effects

of *private discrimination* that affect the income or wealth of potential voters." (emphasis added)). It did not address the distinction between Wisconsin and its political subdivisions, and to read it as the State does would put it in direct contradiction with the U.S. Supreme Court's decisions in *Reynolds*, *City of Trenton*, and *Hunter*. For these reasons, Dr. Burden's discussion of discrimination by the State's political subdivisions is relevant and admissible.

The State's effort to exclude evidence of private discrimination must likewise fail. The State's reading of *Frank* on this point is, like its reading of *Frank* with respect to the Senate factors more generally, strained. *Frank* noted that "[t]he [district] judge did not conclude that the state of Wisconsin has discriminated in any of these respects" and reasoned that Section 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Frank*, 768 F.3d at 753. However, the most that can be drawn from this statement is that the court thought that private discrimination standing alone could not be enough to make out a Section 2 claim. It does not follow that evidence of socio-economic inequalities resulting from private discrimination are *irrelevant* to this inquiry, particularly here where the private-sector inequalities are at least partially attributable to the State's acts and omissions.

The socio-economic disparities that form the subject of Senate factor 5 are meant to provide a background against which to understand the disparate impact a state election law has on its minorities. The point is not, as the State claims, to make the State "responsible for rectifying the discrimination of private parties or non-State units of government." Dfs. Mot. at 5. The point of factor 5 is to enable the fact finder to assess how an facially-neutral law imposes disparate burdens on minorities because of socio-economic inequalities. This, in turn, is just one component of the "totality of the circumstances" that bear on the Section 2 analysis. For this

reason, courts routinely consider private discrimination in Section 2 claims. *See, e.g.*, *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 831-32 (S.D. Ohio) (examining socio-economic inequalities resulting from private discrimination in areas such as employment and income), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *vacated sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), *and vacated sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Major*, 574 F.Supp. at 341 ("As a consequence of this history, separate white and black societies developed in Orleans Parish. Segregation was the norm in the private sector, as reflected in the parish's monochromatic neighborhoods, churches, businesses and clubs. Discrimination in employment was widespread.").

In any event, Dr. Burden's analysis under Senate factor 5 is replete with examples of official discrimination that have caused or contributed to racial disparities in areas such as education, employment, health, education, and income. For example, Wisconsin is one of the most segregated states in the Union. Burden Rpt. at 11-13 (Dkt. 72). Some of this is the result of "white flight." But, Wisconsin actively facilitated this process. Wisconsin did not outlaw restrictive housing covenants until 1951, three years after the U.S. Supreme Court had ruled such covenants unlawful in *Shelley v. Kraemer*, 334 U.S. 1 (1948). *See* Burden Rpt. at 12 (Dkt. 72). Municipalities in the Milwaukee area, which, again, are agents of the State, used exclusionary zoning laws to encourage and reinforce racial segregation. *See id.* at 11. As one federal court found, the result was a situation in which "[r]ace is a factor of almost transcendent significance and Negro home buyers or lessees wishing to leave the inner city are faced with barriers of

discrimination which few have been able to overcome." *Otey v. Common Council of City of Milwaukee*, 281 F. Supp. 264, 270 (E.D. Wis. 1968).

Indeed, the *Otey* case provides a clear example of Wisconsin's role in fostering what the State here labels "private" discrimination. In the 1960's, Milwaukee's Common Council repeatedly proposed "open housing" ordinances that expressly allowed for racial discrimination in housing. *Id*.[2] In enjoining the enactment of one such ordinance, the court explained "that the Fourteenth Amendment does not prohibit private discrimination nor require a State to assume other than a neutral position with respect thereto. What it does proscribe is discrimination by the State (and, of course, by any political subdivision thereof) or *significant State involvement in, State encouragement of, or State authorization of private discrimination*." *Id*. at 268 (emphasis added). As a result, the court found the proposed ordinance "palpably unconstitutional." *Id*. at 274. This is precisely the type of evidence Dr. Burden provides in his Senate factor 5 analysis, and to exclude such evidence on the grounds that segregation in Wisconsin is merely the result of "private" discrimination for which the State bears no responsibility would be in error. *See* Burden Rpt. at 11-12 (Dkt. 72).

The same is true for Dr. Burden's analysis of racial inequalities in education. For example, almost a quarter of a century after *Brown v. Board of Education*, a federal court found "that segregation exists in the Milwaukee public schools and that this segregation was intentionally created and maintained by the [Board of School Directors of Milwaukee]."*Amos v. Bd. of School Directors of City of Milwaukee*, 408 F. Supp. 765, 792-93 (E.D. Wis. 1976), *aff'd sub nom. Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), *rev'd*, 433 U.S. 672 (1977), *on*

[2] Such ordinances provided, for example: "That the Common Council of the City of Milwaukee SHALL NOT enact any ordinance which in any manner restricts the right of owners of real estate to sell, lease or rent private property." *Otey*, 281 F. Supp. at 267.

remand, *Armstrong v. O'Connell*, 451 F. Supp. 817, 827 (E.D. Wis. 1978). And, not to belabor the point, this discrimination by Milwaukee officials is discrimination by the State. *See, e.g.*, *Zawerschnik*, 271 Wis. at 429, 73 N.W.2d at 573 ("A school district is a quasi-municipal corporation. It is an agent of the state for the purpose of administering the state's system of public education."). Moreover, official discrimination in education and housing has contributed directly to racial disparities in private sector employment and income. *See, e.g.*, *Rogers*, 458 U.S. at 626 (noting that the "depressed socio-economic status of blacks results in part from the lingering effects of past discrimination" in areas such as education).

Similarly, a lack of responsiveness by public health officials and the State legislature has contributed to racial disparities in health indicators such as infant mortality rates. Burden Rpt. at 16 (Dkt. 72). Racial discrimination in traffic stops has, along with these other inequalities, contributed to Wisconsin having the highest rate of African American incarceration in the country, which has the additional consequence of making it even more difficult for African Americans to obtain jobs. *Id*. at 14-16. At every turn, the State bears at least some responsibility for the racial inequalities in housing, education, employment, income, health, and criminal justice, as Dr. Burden's report demonstrates.

In sum, *the State's* history of racial animus and neglect is part and parcel of Dr. Burden's analysis of Senate factor 5. Sometimes this has been direct, as in the case of segregated schools, and at other times it has taken the form of official encouragement or toleration of private discrimination. Thus, even if the State were correct that private discrimination is irrelevant to a Section 2 claim, which it is not for the reasons explained above, Dr. Burden's analysis under Senate factor 5 would nevertheless be relevant and admissible. Moreover, the prevalence of private discrimination is, at least in part, the consequence of the State's official policies, as in the

case of "open housing" ordinances and segregated housing. And, inequalities in private sector employment and income are at least partly attributable to the lingering effects of official discrimination in areas such as education, health, and criminal justice. For these reasons, the State's motion to exclude Dr. Burden's Senate factor 5 analysis and to exclude any evidence of discrimination by private persons or Wisconsin's political subdivisions should be denied.

II. Dr. Yair Ghitza

The State seeks to exclude the expert report and testimony of Dr. Yair Ghitza, the Chief Scientist at Catalist, LLC. Dr. Ghitza used a standard and widely accepted methodology to determine the race and partisan affiliation of approximately 3.4 million Wisconsin voters. Dr. Ghitza then provided his race- and partisanship-assignments of these voters to Dr. Mayer, who used them to assess the disparate impact the challenged laws have had on Wisconsin voters. *Id.*[3]

As explained in his report and deposition testimony, Dr. Ghitza's methodology consisted of 1) standardizing the voter addresses in the file, 2) "geocoding" those addresses by assigning to them latitude and longitude coordinates, 3) using those geocodes to locate each address within geographical units drawn by the U.S. Census department, 4) assigning race probabilities to each voter utilizing a proprietary algorithm written by Dr. Ghitza, 5) matching the records in the file with other databases maintained by Catalist, and 6) using another proprietary algorithm to estimate the partisan affiliation of each voter based on the data maintained internally at Catalist. Ghitza Rpt. at 3 (Dkt. 73); Ghitza Dep. Tr. at 49:1 - 56:7 (Dkt. 158). The State complains that it was not provided with the geocoding software Dr. Ghitza used at step two of this process or the proprietary algorithm he used at step four.

[3] Dr. Mayer did not utilize the partisanship estimates in his analysis, however.

Catalist uses geocoding services provided by third-party vendors. It uses multiple vendors to maximize the number of addresses with a known geocode. Declaration of Dr. Yair Ghitza ¶ 1. ("Ghitza Decl.") (Dkt. 164). The software that assigns geocodes belongs to the vendors and is not owned by Catalist. For this reason, Catalist cannot disclose the geocoding software. Ghitza Decl. ¶ 3 (Dkt. 164). Geocoding is a widely accepted method of determining the latitude and longitude of a street address that is used in a wide of array of marketing applications, social-science research, and political campaigns. *See, e.g., Veasey v. Perry*, 71 F. Supp. 3d 627, 661 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016); *Am. Honda Motor Co. v. Bernardi's Inc.*, 188 F. Supp. 2d 27, 32 (D. Mass.) ("[G]eocoding sales data is an acceptable and the preferable method for determining relevant market area[.]"). Moreover, the State's experts have used this type of application in previous litigation, and the State could have done its own geocoding analysis if it had wished to do so. 4/14/2016 McCarty Dep. Tr. at 143:2 - 144:1 (Dkt. 163).

Dr. Ghitza's proprietary algorithm assigns various weights to variables such as a voter's name, age, and where the voter lives to determine the relative probabilities that that voter is one of six races. Ghitza Rpt. at 3 (Dkt. 73); Ghitza Dep. Tr. at 52:5 - 54:14 (Dkt. 158); *id.* at 71:10 - 72:15. This algorithm and the weights it attaches to the various categories of voter information are unique to Catalist. Ghitza Dep. Tr. at 62:3 - 62:15 (Dkt. 158). The general methodology and the process of geocoding addresses to link them with the Census map are not.

The State claims that Plaintiffs were required to disclose both the geocoding software and Dr. Ghitza's proprietary algorithm under Rule 26(a) and in response to a subpoena it served on Dr. Ghitza. According to the State, the failure to provide these materials results in "automatic

and mandatory exclusion from trial" and prevents the Court from assessing Dr. Ghitza's reliability as an expert under *Daubert*. Dfs.' Mot. at 10. Both contentions are in error and irrelevant to the issue here—the State's ability to prepare a challenge to Dr. Ghitza's analysis and the Court's ability to assess the accuracy of Dr. Ghitza's race identifications.

A. The State's *Daubert* Challenge is Without Merit

The State's contention that it is "impossible" to assess the reliability of Dr. Ghitza's methodology is false. To assess reliability, the court looks to factors including "(1) whether the scientific theory can be or has been tested; (2) whether the theory has been subjected to peer review and publication; and (3) whether the theory has been generally accepted in the relevant scientific, technical, or professional community." *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010).[4] As explained below, this standard is easily satisfied here.

To begin, Judge Adelman rejected virtually the same challenge to the use of proprietary algorithms to determine voters' race in the *Frank/LULAC* voter ID litigation—a ruling of which the State, as a party to that litigation, is surely well aware. In *Frank/LULAC*, the plaintiffs used a firm called Ethnic Technologies to identify the race of voters who did not appear in the Division of Motor Vehicles ("DMV") database, which, unlike the SVRS, contains individual race information. *Frank v. Walker*, 17 F. Supp. 3d 837, 887 (E.D. Wis.), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015). Similar to Dr. Ghitza's work at Catalist, Ethnic Technologies used a combination of name analysis and geocoding to determine voters' likely race. As it does here, the State argued that Ethnic Technologies' methodology could not be tested because it was a "secret" and "a mystery, black box." *See* Dfs.' Post-Trial Br. at 43, *LULAC v. Walker*, 2:12-cv-00185-LA (E.D. Wis. Dec. 20, 2013) (Dkt. 111).

[4] The State does not challenge Dr. Ghitza's qualifications.

In rejecting this argument, Judge Adelman explained that "even though we do not know the precise details surrounding Ethnic Technologies' software, there is ample evidence in the record indicating that Ethnic Technologies' software is reliable enough for the purposes it was used in this case, which is to estimate the racial makeup of a population." *Frank*, 17 F. Supp. 3d at 889. This evidence included "a consensus in the academic literature [regarding] the general principles employed by Ethnic Technologies" and the fact that "[m]arketers would not continue to hire Ethnic Technologies to estimate the race and ethnicity of their target audiences if its software were unreliable." *Id*. at 889-90. Nevertheless, the State recycles the same failed argument here without mentioning, much less responding to, Judge Adelman's analysis.

Other courts have not only approved of this general methodology, but have specifically found Catalist's and Dr. Ghitza's data reliable and admissible. The federal court in a Texas voter ID suit expressly found that "Catalist data on ethnicity estimates are widely used in academic research and are considered highly reliable" and relied on Dr. Ghitza's testimony extensively. *Veasey*, 71 F. Supp. 3d at 661 (S.D. Tex. 2014). More recently, Dr. Ghitza's analysis was admitted into evidence in a challenge to Virginia's voter ID law. *See* 2/22/2016 Trial Transcript at 4-5, *Lee v. Va. St. Bd. Of Elections*, No. 15-357 (E.D. Va. Feb. 22, 2016).

Like the evidence in these cases, the evidence here amply demonstrates the reliability of Dr. Ghitza's data under *Daubert*. First, Plaintiffs have produced a great deal of evidence regarding the testing and verification of Dr. Ghitza's methodology, done both internally by Catalist and independently by Dr. Mayer. Catalist verifies and refines its results in two ways. In states where race is included in the state voter file, it verifies its estimates by comparing them to the state's voter registration records. Ghitza Dep. Tr. at 62:16 - 63:13 (Dkt. 158). In states such

as Wisconsin where race is not included in the state voter file, it polls people to verify their race and matches the polling data with its estimates. Ghitza Dep. Tr. at 68:8 - 71:7 (Dkt. 158).

This process detects and accounts for any errors in either its algorithms or in the geocoding process. *Id*. The rates of these errors are then reflected in the probabilistic confidence scores Catalist assigns to its identifications. *See id.* at 75:10-76:4. Catalist's internal verification process determined that its race assignments were 96 percent accurate in Wisconsin. Ghitza Decl. ¶ 4 (Dkt. 164).

The State was fully aware of Catalist's verification process, and it is simply untrue for the State to claim that Dr. Ghitza "cannot say why he believes the error rate to be acceptable." Dfs.' Mot. at 10. Similarly, Dr. Ghitza explained in some detail how he knows the geocoding process to be accurate, yet the State lifts a three-word response from his explanation covering several transcript pages to suggest that he was unfamiliar with a software that he uses as a daily part of his job. Dfs.' Mot. at 7. As the full exchange shows, he explained the accuracy of this process in great detail. *See* Ghitza Dep. Tr. at 75:10-76:4 (Dkt. 158) ("So to answer your question directly, I don't know the exact process that was used to estimate the error rate on the geocodes, but the reason I jumped ahead was because they were most relevant for the probabilistic race estimates, and despite not knowing that level of detail, it is already accounted for in the race estimates in the way I've described."); *see also id.* at 74:15 - 77:24.

The State also omits the fact that Dr. Mayer performed his own verification of the race estimates provided by Dr. Ghitza. As Dr. Mayer explained in his expert report, he compared Dr. Ghitza's estimates with the DMV's records, which, unlike the SVRS, do contain race data on individuals in the file. Dr. Mayer's independent evaluation came to the same conclusion as Catalist—a 95.7 percent accuracy rate in Wisconsin. *See* Mayer Rpt. at 13 (Dkt. 71). Thus, two

independent verifications using different methods determined the same level of accuracy for Catalist's estimates in Wisconsin. Yet, the State mentioned neither of them in its motion and claimed that it was impossible to determine the reliability of Dr. Ghitza's analysis.

Moreover, Dr. Mayer found that to the extent there were errors, the errors favor the State because this method sometime identifies African Americans as white, but not vice versa, thus producing results that *underestimate* racial disparities. Declaration of Dr. Kenneth Mayer ¶ 2 ("Mayer Decl.") (Dkt. 165). This phenomenon has been noted by other courts relying on this type of methodology. *Frank*, 17 F. Supp. at 890 ("It is true that the software misidentified a large number of self-identified Black individuals as white, but . . . [this] indicates that the disparity in possession rates is even greater, as it implies that many of the unmatched voters whom Ethnic Technologies identified as white are actually Black."); *Veasey*, 71 F. Supp. 3d at 662 ("It's well known in statistics that if you have measurement error in a classification variable such as race it will bias toward finding no effect, bias toward finding nothing, no difference across groups.").

The State's omissions do not stop with its failure to mention that Catalist's methodology has twice been found to have an extremely high accuracy rate in Wisconsin. The State's own experts have contradicted its claim that verification was "impossible." Dr. Hood acknowledged he could have checked Catalist's estimates against the DMV data like Dr. Mayer did, but did not do so. 4/24/2016 Hood Dep. Tr. at 129:16 - 129:21 (Dkt. 162) ("Q. But you could have tested by looking at the people who did match the DMV database, right? A. That would have been a possibility. Yes. Q. Okay. So you don't know how accurate their estimates were for people whose race we do know based on self-identification? A. That's fair; I don't."). Dr. McCarty conceded the same. *See* 4/14/2016 McCarty Dep. Tr. at 143:2 - 143:23 (Dkt. 163) ("Q. [A]ren't there certain external ways you could do at least some checking to see if Catalist was getting

voters' race right? I mean, you know the race of some Wisconsin voters, don't you? A. Yes. In principle, I could have done some spot checks like that, but I did not.").

The State's decision not to attempt to verify Dr. Ghitza's results is perplexing. It insists that it should have been provided with the tools to reconstruct Dr. Ghitza's analysis, but running his process a second time would only duplicate his results. It would not tell the State or this Court whether those results were accurate. Only by verifying those results with some independent method, such as those used by Catalist or by Dr. Mayer, could the State assess the accuracy of his data. In any event, using these methods to verify Dr. Ghitza's results would have confirmed their reliability—and perhaps allowed the parties and the Court to avoid this meritless *Daubert* challenge.

Second, as the court in *Veasey* found, "Catalist data on ethnicity estimates are widely used in academic research and are considered highly reliable." *Veasey*, 71 F. Supp. 3d at 661. Indeed, the consensus regarding Catalist's reliability has only grown since that decision with an increasing number of peer-reviewed articles, law review pieces, and scientific papers citing and relying upon Catalist's data.[5]

[5] *See, e.g.*, Ariel White, *When Threat Mobilizes: Immigration Enforcement and Latino Vote Turnout*, Pol. Behav. 28:355-382 (2016); Bernard Fraga, *Candidates or Districts: Reevaluating the Role of Race in Voter Turnout*, Am. J. of Pol. Sci. 60:97-122 (2016); Brendan Nyhan, Christoher Skovron, and Rocio Titunik, *Differential Registration Bias in Voter File Data: A Sensitivity Analysis Approach*, Dartmouth U. (2016); Avidit Acharya, et al., *A Culture of Disenfranchisement: How American Slavery Continues to Affect Voting Behavior*, Harv. (2015); Bernard Fraga & Julie Lee Merseth, *Examining the Causal Impact of the Voting Rights Act Language Minority Provisions*, J. of Race, Ethnicity, and Politics, forthcoming. (2015); Daron Shaw, et al., *A Brief Yet Practical Guide to Reforming U.S. Vote Registration Systems*, Election L. J. 14:26-31 (2015); Eitan Hersh and Clayton Nall, *The Primacy of Race in the Geography of Income-Based Voting: New Evidence from Public Voting Records*, Am. J. of Pol. Sci. 60:289-303 (2015); David Nickerson & Todd Rogers, *Political Campaigns and Big Data*, The J. of Econ. Persp. 28:51-73 (2014); Luke Keele & Rocio Titiunik, *Geographic Boundaries as Regression Discontinuities*, Pol. Analysis 24:1-29 (2014); Charles Stewart, III, *Voter ID: Who Has Them; Who Shows Them*, Okla. L. Rev. 66:21-52 (2013); Stephen Ansolabehere & Eitan

Third, Catalist's reliability, like that of Ethnic Technologies in *Frank*, is demonstrated by the fact that providing accurate identifications of an individual's race forms the core of its business. It would not survive if its race-assignments were not accurate. *See Frank*, 17 F. Supp. at 890. This fact also demonstrates the flaw in the State's argument that Catalist's work with progressive organizations gives it "an obvious incentive to skew its number-crunching to produce outcomes favorable to those clients." Dfs.' Mot. at 11. Skewing its "number-crunching" would be fatal to its ability to retain clients, because Catalist's clients rely on accurate data to conduct political campaigns, implement marketing strategies, and perform analyses such as those conducted by Dr. Mayer. Indeed, accuracy and reliability is Catalist's stock in trade and competitive advantage. And, like the State's other claims in this motion, this argument has already been refuted by its own experts. When asked whether Catalist's work with progressive groups could be taken "to imply that the Catalist data was false in any way," Dr. McCarty responded "No, no, no." 4/14/2016 McCarty Dep. Tr. at 142:21 - 142:23 (Dkt. 163).

Indeed, it is hard to see how Dr. Ghitza could have skewed the data. He did not analyze the impact of the challenged laws on Wisconsin's voters, and to skew the data he would have had to know which individuals were impacted by the challenged laws and then manually categorize those individuals as a minority. The State's claim that Dr. Ghitza might have manipulated the data in this way before providing it to Dr. Mayer is fanciful, at best.

Hersh, *Validation: What Big Data Reveal About Survey Misreporting and the Real Electorate*, Pol. Analysis 24:1-23 (2012); Elizabeth Bennion & David Nickerson, *The Cost of Convenience: An Experiment Showing E-Mail Outreach Decreases Voter Registration*, Pol. Res. Q. 64:858-869 (2011); Stephen Ansolabehere & Eitan Hersh, *The Quality of Voter Registration Records: A State by State Analysis*, Caltech/MIT Voting Technology Project (2010); Allison Dale & Aaron Strauss, *Don't Forget to Vote: Text Message Reminders as a Mobilization Tool*, Am. J. of Pol. Sci. 53:787-804 (2009). These citations were provided to Plaintiffs' counsel by Dr. Mayer. Mayer Decl. ¶ 5 (Dkt. 165).

Finally, the overwhelming majority of Dr. Ghitza's race identifications are based on very high probabilities. For approximately 3.2 of the 3.4 million records he analyzed, or 94.7 percent, his race assignments had a confidence score greater than 75 percent. Ghitza Decl. ¶ 6 (Dkt. 164). Despite the fact that the state was provided with this information, it creates a red herring by noting that some voters had a confidence score lower than 50 percent. Dfs.' Mot. at 12. What the State did not tell the Court, however, is that only 12,915 records had a confidence score below 50 percent, which is less than 0.4% of the records Dr. Ghitza analyzed, a figure the State could have determined by looking at the data Dr. Ghitza disclosed. Ghitza Decl. ¶ 7 (Dkt. 164). Moreover, this is truly a non-issue, because Dr. Mayer excluded voters with confidence scores below 50 percent from his disparate impact analysis. Mayer Decl. ¶ 4 (Dkt. 165).

In sum, Plaintiffs have produced ample evidence demonstrating the reliability of Dr. Ghitza's race-assignments. The State, despite having had the ability to conduct its own test of the reliability of Catalist's results, has provided nothing to rebut this evidence. The State made no effort to test the accuracy of this data, despite its ability to do so. Yet the State now seeks to use its self-imposed uncertainty regarding Dr. Ghitza's conclusions to provide a patina of plausibility to its challenge to the reliability of his data. For these reasons the State's *Daubert* challenge to Dr. Ghitza's opinions should be denied.

B. Dr. Ghitza's Disclosures Complied with Rule 26(a)

Like its *Daubert* challenge, the State's complaint that the geocoding software and Dr. Ghitza's proprietary algorithm were not disclosed is without merit. Indeed, the State never complained about not having either the software or the algorithm until filing this motion on the eve of trial. For the following reasons, Dr. Ghitza's expert disclosures were adequate and

complete, and, even if the Court were to find them deficient, any non-disclosure was both justified and harmless to the State.[6]

"The expert witness discovery rules are designed to aid the court in its fact-finding mission by allowing both sides to prepare their cases adequately and efficiently and to prevent the tactic of surprise from affecting the outcome of the case." *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000) (holding that district court abused its discretion in excluding expert testimony inadequately disclosed under Rule 26(a)); Fed.R.Civ.P. 26(a)(2) advisory committee's note (expert disclosure rule intended to give opposing parties "reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses."). Plaintiffs provided the State with the voter file analyzed by Dr. Ghitza, a detailed explanation of how he analyzed it, and the "output file" containing his assignments of each voter's likely race. As explained above, the State had a number of tools available to it to probe this data, but did not utilize them.

Moreover, one of the State's experts, Dr. Nolan McCarty, has used geocoding applications to determine voters' race as an expert in prior litigation. 4/14/2016 McCarty Dep Tr. at 143:2 - 143:23 (Dkt. 163). However, when asked why he did not do that here, he testified that he did not think it necessary or important to question the accuracy of Dr. Ghitza's analysis and that he would not have reduplicated his analysis even if he had had the materials the State now complains were not disclosed. *Id.* at 143:20 - 143:23 ("So even if I could or had time to do it, I

[6] The State baldly misstates the law regarding the penalties for non-disclosure by selectively misquoting *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 825 (7th Cir. 2010). Exclusion for failure to disclose is not "automatic and mandatory." Exclusion is appropriate only if non-disclosure was unjustified or prejudicial. *Compare Happel v. Walmart Stores, Inc.*, 602 F.3d at 825 ("The sanction for failure to comply with this rule is the automatic and mandatory exclusion from trial of the omitted evidence, *unless non-disclosure was justified or harmless*." (emphasis added) (quotation omitted)), *with* Dfs.' Mot. at 10 ("The consequence is 'automatic and mandatory' exclusion from trial." (quoting *Happel*)).

thought it was probably just better just to not get into debates about the imputation of race[.]"). The State's Rule 26 objections should fail for this fact alone.

Similarly, the State cites no authority for the proposition that a proprietary algorithm such as that at issue here constitutes "facts or data" of the type required to be disclosed by Rule 26(a)(2)(B)(ii). Nor could it. The issue here is the accuracy of Dr. Ghitza's race estimates, not the inner workings of the proprietary software and algorithms used in making those estimations, a point about which Judge Adelman made the State fully aware in *Frank/LULAC*. *Frank*, 17 F. Supp. 3d at 889 ("The defendants point out that . . . no witness gave precise details about the algorithm on which that software is based. However, the general principles underlying the software are known[.]").

For these reasons, Dr. Ghitza disclosed everything the State needed to perform its own analysis and to "to prepare [its] case[] adequately and efficiently." *Sherrod*, 223 F.3d at 613. As a result, the State's challenge to the adequacy of Dr. Ghitza's disclosures must fail. *See Blakes v. Ill. Bell Tel. Co.*, 2013 WL 6662831, at *6 (N.D. Ill. Dec. 17, 2013) (rejecting challenge to expert opinion under Rule 26 for failure to provide algorithms used to produce data where expert's report explained the data sources and data was produced prior to deposition).

Furthermore, the fact that the State never specifically requested Catalist's geocoding software or Dr. Ghitza's proprietary algorithm further demonstrates the adequacy of his expert disclosures. The State has been fully aware that Dr. Ghitza utilized geocoding software and his own proprietary algorithm since he submitted his expert report on December 10, 2015. The State was also aware that Plaintiffs had provided neither when they made their Rule 26(a) disclosures on December 18, 2015. And, the State was aware that Plaintiffs were not providing this information when they provided their responses and objections to the State's subpoena on Dr.

Ghitza on March 22, 2016.[7] Nevertheless, in the six months since Plaintiffs submitted their expert disclosures, the State has not once complained to Plaintiffs' counsel about the adequacy of what was provided or moved to compel production of these materials.

The State's failure to avail itself of the available discovery procedures to try to obtain this material forecloses its efforts to exclude Dr. Ghitza's opinions and conclusions from evidence. *See Broad. Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (refusing to impose sanctions under Rule 37 where requesting party never moved to compel); *Harbor Ins. Co. v. Cont'l Bank Corp.*, No. 85 C 7081, 1991 WL 222260, at *8 (N.D. Ill. Oct. 25, 1991) ("Having failed to utilize the methods provided by the Federal Rules to compel discovery, the insurance companies may not now seek to exclude Balotti's testimony on these grounds."); *Droughn v. FMC Corp.*, 74 F.R.D. 639, 642 (E.D. Pa. 1977) (denying motion where Plaintiff failed to "avail herself of the procedures provided in the Federal Rules of Civil Procedure to compel discovery" and "plaintiff waited until discovery was closed and then filed a motion").

Moreover, exclusion of Dr. Ghitza's conclusions would be inappropriate even if the Court were to find that Plaintiffs' disclosures were inadequate, a finding Plaintiffs maintain would be in error for the reasons explained above. Contrary to the State's representations about the law on this issue, exclusion is only appropriate where the non-disclosure lacked justification and resulted in prejudice to the requesting party. *Happel*, 602 F.3d at 825. "The determination of

[7] The State did not ask specifically for these materials in its subpoena. It asked generally for "All documents related to facts or data that you relied upon in forming opinions related to the Lawsuit, including but not limited to, facts and data given to you by the Plaintiffs or the attorneys for Plaintiffs, except that documents already provided to the defendants, do not need to be produced again." Dr. Ghitza's response specifically objected "to this request to the extent it calls for confidential, sensitive, proprietary, trade-secret, and/or business information, including without limitation research, development and commercial information belonging to Plaintiffs' Expert." The State did not complain about the adequacy of this response.

whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court." *Mid-Am. Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996).

Here, the alleged non-disclosures were both justified and harmless. First, Catalist does not own the geocoding software and cannot produce it; it is owned by the third-party vendors with which it contracts. Ghitza Decl. ¶ 3 (Dkt. 164). And, Dr. Ghitza's proprietary algorithm is highly confidential business information that would harm Catalist's operations if disclosed. Resisting disclosure was therefore a justifiable position for Catalist to take. It was also justified for the additional fact that Catalist's data has been admitted into evidence in other lawsuits without disclosing either the vendors' geocoding software or its internal algorithms.

Moreover, the State has made no attempt to explain how it was prejudiced by the lack of the geocoding software or Catalist's proprietary algorithm. Nor could it. As explained above, the State did not to attempt to determine the accuracy of the Catalist data by comparing Dr. Ghitza's race-assignments to the race information in its DMV records, despite the fact its experts could have done this just as easily as Dr. Mayer. And, Dr. McCarty testified that he did not think there was a need to question Dr. Ghitza's "imputation of race" and that he would not have reduplicated Dr. Ghitza's analysis even if he could have. 4/14/2016 McCarty Dep Tr. at 143:20 - 143:23 (Dkt. 163). The State can hardly demonstrate prejudice when its own expert denied its need for this material. *See Mid-Am. Tablewares, Inc.*, 100 F.3d at 1363 (holding that failure to make timely expert disclosures did not bar expert testimony where there was "no basis for concluding that the delay materially impacted on [opposing expert's] ability to formulate his opinions in this case").

Finally, exclusion of this evidence would be an inappropriate remedy even if the State had been prejudiced. "[T]he sanction must be one that a reasonable jurist, apprised of all the

circumstances, would have chosen as proportionate to the infraction." *Mid-Am. Tablewares, Inc.*, 100 F.3d at 1363. Dr. Ghitza's race-assignments are key both to the Court's fact-finding mission and to Plaintiffs' ability to prosecute this case. Excluding them here, in circumstances where the State has not made any attempt to rebut the accuracy of this data despite its ability to do so and where the State's own expert denied that he would have used these materials, would be a disproportionate response to any inadequacy the Court might find in Plaintiffs' Rule 26(a) expert disclosures. For this reason and those set forth above, the State's motion *in limine* to exclude the report, opinions, and testimony of Dr. Yair Ghitza should be denied.

III. David Aponte and David Walker

Mr. Walker and Mr. Aponte are two of the recently added "IDPP Plaintiffs"—citizens who have been forced to "enter" the DMV's so-called "extraordinary proof" ID petition process ("IDPP") in search of the voter IDs they now need to vote in Wisconsin. Both men are presently eligible to vote in Wisconsin, have previously voted here, and were barred from voting in the April 2016 primary because of the voter ID law. Under current law, neither man will be allowed to vote for President in November or in any future election (unless they move somewhere out of Wisconsin). That is the definition of "disenfranchisement," and it is unconstitutional.

Rather than being allowed to vote, each of these citizens was required to spend *nine months* in the IDPP going through what the DMV calls an "adjudication" of his right to receive a voter ID. Mr. Walker, who is African American, was born in Missouri in 1951; Mr. Aponte, who is Latino, was born in West Chester, Pennsylvania in 1958. Their births either were never officially recorded or the records have disappeared. Both of these men submitted a variety of alternative proofs that they are United States citizens and are who they say they are. Mr. Aponte's elderly mother even called twice from Florida to vouch for her son's identity and citizenship, but the DMV would not take her word (orally or in a sworn statement). Instead,

DMV sent form letters to Mr. Walker and Mr. Aponte advising that their "extraordinary proof" submissions were not "deemed acceptable," and that "[p]ursuant to this lack of required documentation, your application for a free Wisconsin Identification Card for voting is denied." *See* Second Amended Complaint ¶¶ 19, 21 (Dkt. 141); PX 349, 351.[8] The form denial letters advised these voters that they were welcome to "submit a new application for a free Wisconsin identification card for voting," but only if they could track down "any new or additional information to assist the DMV in verifying proof of your name and date of birth and/or citizenship." *Id.*[9]

[8] Citations to "PX" are to Plaintiffs' proposed trial exhibits listed on the exhibit list they shortly will be filing with the Court.

[9] As the Court will hear about in detail at trial, DMV's ID Petition Process has been riddled with errors, inconsistencies, a pervasive lack of objective standards, instances of favorable treatment in response to legislative inquiries, and failure of the Bureau of Field Services ("BFS")—the frontline in helping "customers" get their voter IDs—to administer the voter ID law in a constitutionally permissible manner. Among other things, internal audits have repeatedly shown that the BFS performance in helping to administer the voter ID petition process has been running at a staggering 26-27% error rate for over a year now, with no plan in sight to clean up that error rate in time for the 2016 general election. *See* PX321-23, PX 337. Courts have issued voting rights injunctions on proof of substantially lower error rates. Indeed, a 26-27% error rate may be unprecedented in the history of voting rights litigation. *Compare Black v. McGuffage,* 209 F. Supp. 2d 889, 893 (N.D. Ill. 2002) (Section 2 claim stated where optical scan ballots had "average residual vote rate" of less than 1%, whereas "punch card ballots"—used disproportionately in minority areas—had error rate of over 4%); *see also Stewart v. Blackwell*, 444 F.3d 843, 877-79 (6th Cir. 2006) (Section 2 violated by disparate use of faulty punch card technology in minority voting areas, resulting in minority voters being "disproportionately denied the right to have their ballots counted properly").

As became clear during his recent deposition, Mr. Aponte has himself been the victim of the DMV's error-ridden field operations. He testified that he paid for and obtained certified copies of his baptismal certificate and early elementary school records, two of the forms of "secondary evidence" that are supposed to be sufficient to receive a voter ID. Mr. Aponte and his brother-in-law took these documents to their local DMV "customer service office" on at least two occasions but were turned away. Not only did the field office personnel refuse to accept these proofs, contrary to law, they also apparently failed to make copies of these records for the IDPP official files and central office review, contrary to required operating procedures, as evidenced by the absence of those records from his official file. The central DMV office and Wisconsin Department of Justice apparently were not aware of these proofs prior to Mr.

It takes a great deal of courage for an ordinary citizen to come forward publicly and challenge the State of Wisconsin. It takes even more courage for citizens living on the margins and in the shadows of our society. The State should be filing a formal public apology to Mr. Walker and Mr. Aponte, and serving them with their long-delayed voter IDs forthwith.

Instead, the State has responded with a motion *in limine* seeking to introduce evidence of two remote criminal convictions—one of Mr. Walker nearly *eighteen years ago* (in July 1998) and one of Mr. Aponte nearly *seventeen years ago* (in May 1999). *See* Dfs.' Mot. at 12-16. The State's pretextual argument for splashing this information on the public record (along with full copies of these gentlemen's WILEnet Department of Corrections files, *see* Dkt. 159, Exs. A and B) is specious. The State claims to be using this evidence to establish that Mr. Walker "was not eligible to vote in Wisconsin from 1998 through 2007" and that Mr. Aponte "was not eligible to vote in Wisconsin from 1999 through 2002." Dfs.' Mot. at 12.

The State argues this old information is of crucial relevance to the issues in this case, even though these men fully served their sentences (including probation and parole) long before the 2011 voter ID law was even *enacted*, let alone before it began to be *enforced* against presently eligible voters like Mr. Walker and Mr. Aponte. These remote 20th century convictions are relevant *now* because, we are told:

> These Plaintiffs' voting histories, along with the full extent of their eligibility to vote in Wisconsin, are *relevant to their claims that failure to obtain a qualifying form of ID substantially burdened, denied, and/or abridged their right to vote*. And this information appears largely uncontested. … [E]vidence that Walker

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Aponte's production of them in discovery; these documents apparently were never properly received or passed along through DMV bureaucratic channels. In any event, now that DMV and DOJ know of this evidence and have copies of these certified ancient records, Mr. Aponte should receive his "free" voter ID *now*, without further delay. Given the proofs the State clearly now has in its possession (regardless of the repeated earlier BFS errors), the State should not force Mr. Aponte to go through a federal trial just to receive the voter ID to which he clearly is entitled. It should be issued forthwith, together with an apology.

> was not eligible to vote in Wisconsin from 1998 through 2007, and that Aponte was not eligible to vote from 1999 through 2002 because of prior felony convictions, is *probative of their ability and propensity to vote*, which is relevant to the issues in this case.

Id. at 14-15 (emphasis added). "*[P]robative of their ability and propensity to vote*?" With respect to a 2011 voter ID law that is in effect *now* and disenfranchising voters like Mr. Walker and Mr. Aponte *now* and into perpetuity?

The State's actual goal here is transparent. And it is consistent with what the State said several weeks ago it would do if individual disenfranchised voters joined this litigation, as they now have been allowed to do: seek to conduct "*mini-trials of the new plaintiffs*." Dfs.' Mot. for a More Definite Statement in Response to Plaintiffs' Second Amended Complaint at 9 (Dkt. 145) (emphasis added). But this is not a trial "*of the new plaintiffs*." It is a trial *of the State*'s voting rights discrimination in violation of federal law.

The State's motion to introduce these remote convictions is revealing in many ways: Its claim that these 1990s convictions are somehow relevant to *present* eligibility to vote in the 2016 elections is of a piece with the State's whole theory of the ID Petition Process—that "each ID determination is *highly fact specific*" and "necessarily the result of [each petitioner's] *individual circumstances*." Dkt. 146 at 5 (emphases added).[10] As Plaintiffs previously have demonstrated,

[10] As one disturbing example of the DMV's expansive and intrusive view of its entitlement to engage in a freewheeling investigation into the "highly fact-specific … individual circumstances" of every Wisconsin citizen who "enters" the IDPP, the DMV apparently obtains information regarding many if not most IDPP petitioners' residential address history, vehicle ownership history, property ownership and deed transfers, UCC filings, civil liens and judgments, "possible associates," "work affiliations," utility services, foreclosures, criminal records (arrests, convictions, incarcerations, and "possible infractions"), bankruptcies, marriages and divorces, lawsuits, and other matters having nothing to do with a citizen's eligibility to vote. *See* the "National Comprehensive Report Plus Associates" reports for three of the individual IDPP plaintiffs, PXs 349, 351, and 367. The dozens of "Case Activity Reports" ("CARs") that Plaintiffs will lodge with this Court are filled with citations to these so-called "CLEAR" reports. *See* PXs 346-427.

these are precisely the kinds of vague and indeterminate voting standards and qualifications that are prohibited by the Fourteenth and Fifteenth Amendments, that were the hallmark of the Jim Crow voter suppression regime, and that are themselves evidence of purposeful and intentional race discrimination in voting.[11]

The State's motion *in limine* also sends a blunt message to anyone thinking about coming forward as a plaintiff or witness to testify about their experiences in "petitioning" the Wisconsin DMV for permission to exercise their federally protected right to vote: challenge your disenfranchisement and you will be publicly attacked—even on the thinnest of reeds. But to reiterate, Mr. Walker, Mr. Aponte, and the other individual IDPP plaintiffs and witnesses who have been disenfranchised are not on trial here; they simply want to vote.

The blackletter legal response to the State's *in limine* motion is easy: The Seventh Circuit calls the kinds of past criminal histories of parties and witnesses that the State is seeking to introduce "remote convictions, that is, convictions for which 'more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later.'" *United States v. Rucker*, 738 F.3d 878, 883 (7th Cir. 2013) (quoting Fed. R. Evid. 609(b)). Rule 609(b) "creates, in effect, a rebuttable presumption that convictions over ten years old are more prejudicial than helpful and should be excluded." *Lenard v. Argento*, 699 F.2d 874, 895 (7th Cir. 1983) (internal quotation marks and citation omitted). "Remote convictions are to 'be admitted

[11] *See, e.g.*, *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (re "understanding test"); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959) (re literacy tests); *Schnell v. Davis*, 336 U.S. 933 (1949) (*per curiam*), *affirming* 81 F. Supp. 872, 877-78 (S.D. Ala. 1949) (three-judge district court) (re "understand and explain" test); *see also* Dkt. 131 at 25-26; Second Am. Compl. ¶¶ 205-06 (Dkt. 141).

very rarely and only in exceptional circumstances.'" *Rucker*, 738 F.3d at 883 (quoting *United States v. Redditt*, 381 F.3d 597, 601 (7th Cir. 2004)).[12]

Contrary to the State's arguments, Rule 609(b) clearly governs this *in limine* motion. The Seventh Circuit has "defined both the starting and ending points for the calculation of Rule 609(b)'s ten-year time limit." *United States v. Rodgers*, 542 F.3d 197, 201 (7th 2008). "The clock starts at the witness's release from any physical confinement," not from the end of any period of probation or parole. *Id.* For Mr. Walker, that date was January 24, 2006; for Mr. Aponte, September 25, 2000—*nearly sixteen years ago*. *See* Dfs.' Mot. at 13.

Nor is this one of the "rare" and "exceptional" cases warranting the admission of "remote convictions." The State's theory that these earlier periods of two Plaintiffs' incarcerations and paroles are somehow "probative of their ability and propensity to vote" *now*, in 2016, long after they went "off paper," simply makes no sense and cannot be taken seriously. In any event, the State clearly has failed to carry its heavy burden of demonstrating that the "probative value" of this tendered evidence, "*supported by specific facts and circumstances*, substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b) (emphasis added).

Judge Posner has described Rule 609(b) as a partial embodiment of "the most elementary conception of the rule of law—what Aristotle called 'corrective justice,' which means judging the case rather than the parties." *Schumude v. Tricam Industries, Inc.*, 556 F.3d 624, 627 (7th Cir. 2009). The State's motion flouts that conception—this case is about the State's *current* administration of the voter ID law, not about the long-past criminal histories of two citizens entitled to vote *now*.

[12] The "very rarely and only in exceptional circumstances" standard traces back to the Senate Judiciary Committee's Report on Rule 609. *See* S. Rep. No. 93-1277, 1974 U.S.C.C.A.N. 7051, 7062.

The State's argument that "[t]here is no jury in this case, and it would be most surprising if such potential prejudice had any significance in a bench trial," Dfs.' Mot. at 15 (citation omitted), proves far too much. If this were the only relevant measure of "prejudice" under Rule 609(b) in a bench trial, litigants in such cases could fill the public dockets with evidence and innuendo about their opponents' long-past transgressions, failings, and other embarrassments. Citizens of Wisconsin who have been denied their right to vote should be able to seek judicial redress without having long-past mistakes and transgressions splayed across the *public record.*

The State has filed full copies of Mr. Walker and Mr. Aponte's WILEnet Department of Corrections files on the Court's public docket. The State's reassurance that it has "redacted" these men's "days" of birth (but not the months and years of their birth) in order to protect their "privacy" is laughable. If the State cared at all about the "privacy" rights of Mr. Walker and Mr. Aponte, it would have filed these DOC records under seal while the Court was considering their relevance and admissibility, just like Plaintiffs have done with so much of the individual personal evidence produced by the DMV in this case.

CONCLUSION

For the reasons set forth above, the State's motions *in limine* should be denied in their entirety.

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Respectfully submitted,

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