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.

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL REINSTATEMENT OF VOTER ID CLAIMS IN COUNTS ONE AND TWO OF FIRST AMENDED COMPLAINT DUE TO DISCOVERY OF ADDITIONAL EVIDENCE AND NEW DEVELOPMENTS

I. Introduction and Summary of the Argument

Plaintiffs have moved to reinstate the voter ID portions of Counts I and II of their Amended Complaint (Dkt. 19), which this Court dismissed by agreement of the parties two months ago as barred by the Seventh Circuit panel decision in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *rehearing en banc denied by an equally divided court,* 773 F.3d 783 (7th Cir. 2014), *cert. denied,* 135 S. Ct. 1551 (2015). *See One Wisconsin Institute, Inc. v. Nichol*, No. 15-cv-324-jdp, 2015 WL 9239014, *1 (W.D. Wis. Dec. 17, 2015) (emphasizing Plaintiffs "preserve[d] their right to argue for reversal of *Frank*" on appeal).

The reason for this motion to reinstate is straightforward and compelling: As documented in this brief, evidence has emerged through discovery (especially the recent Rule 30(b)(6) deposition of the Wisconsin Department of Transportation, Division of Motor Vehicles ("DMV") and the follow-up production of additional DMV files) that the State has implemented

and is presently administering the "free ID petition process" in an arbitrary, capricious, abusive, and racially discriminatory manner that only further exacerbates the disproportionate impacts of the voter ID law on people of color, students, senior citizens, the poor, and other populations targeted by the voter ID law and the other voting restrictions at issue in this litigation.

This is significant because the Seventh Circuit panel in *Frank* expressly relied on the promised reforms of the free ID petition process in upholding Act 23's voter ID provisions from *facial* challenge. The panel emphasized its understanding that these new petition safeguards would ameliorate Act 23's severe impacts on certain target populations in "hardship" cases and "alleviat[e] difficulties that some persons encounter in getting photo IDs." 768 F.3d at 747, 755. The *Frank* panel further emphasized that its decision did not preclude future as-applied claims if evidence emerges that the State is abusing its discretion in the actual implementation and administration of these promised reforms. *See id.* at 747 n.1 ("Whether that discretion will be properly exercised is not part of the current record, however, and *could be the subject of a separate suit if a problem can be demonstrated*.") (emphasis added); *see also id.* at 753 (as-applied challenges can be made if Wisconsin makes it "needlessly hard to get photo ID").

It is a cruel understatement to say the State is making it "needlessly hard" for citizens in "hardship" cases to get permission to vote. *Id.* at 747, 753. Indeed, it is making it "needlessly" *impossible* for many citizens to vote. As documented in Part II-C of this brief, several dozen DMV officials exercise standardless discretion whether to grant "hardship" exemptions without requiring voters to go through the formal ID petition process. (We will refer to that formal process by its DMV acronym, the "IDPP.") The IDPP is governed by no written standards or guidelines, and has often resulted in the imposition of arbitrary and capricious requirements having nothing to do with eligibility to vote. The IDPP also has resulted in the outright

disenfranchisement of many eligible voters simply because of minor discrepancies in the spellings of their names or uncertainties about their exact dates of birth—*even though DMV acknowledges it has no doubts these disenfranchised voters are U.S. citizens*.

In rebutting the claims made by the State's expert last month about how well the IDPP is supposedly working, Plaintiffs' expert Dr. Allan J. Lichtman, Distinguished Professor of History at American University and a nationally recognized authority on voting discrimination, has examined the Rule 30(b)(6) DMV deposition transcript, aggregate DMV data on the IDPP, and all individual files that the Wisconsin DMV had produced as of February 16. (The agency produced additional individual petition files this week, which are currently being reviewed.) Nineteen of the 30 individual records examined by Dr. Lichtman resulted in official denial letters from the State of Wisconsin to these voters. Dr. Lichtman concludes:

> Although 19 outright denials may seem like a small number, as far as I know it represents *the first time since the era of the literacy test* that state officials have told eligible voters that they cannot exercise their fundamental right to vote – not in the next election, probably not ever. … I am *unaware in the post-voting rights era of other examples* of state officials telling eligible citizens of their state that they cannot vote because they fail to meet an external criteria established by the state–unrelated to age, residency or other objective qualifications for voting.

Feb. 16, 2016 Expert Rebuttal Report of Allan J. Lichtman, at 15-16 (emphases added).[1] Plaintiffs believe the DMV's files ultimately will yield more examples of "outright denials," as well as many other instances in which citizens have given up struggling to deal with multiple bureaucracies and long delays simply to get permission to vote. That is shameful.

DMV data also reveal that the entire "free ID" process is imposed in a strikingly disproportionate manner on voters of color. The State's own expert has reported that *forty-four*

[1] Dr. Lichtman's Rebuttal Report and the voluminous appendix attached to that report are being filed today together with this brief, redacted as necessary to protect individuals' confidential information.

percent of all voters required to obtain free IDs are either African-American or Hispanic. *See* pp. 19-20 *infra*. And of the first 30 individual IDPP files produced as of February 16, *84 percent* of petitioners with race identified are voters of color, nearly *80 percent* live in Milwaukee, and the overwhelming majority were born in the South, in Cook County, Illinois, or in Puerto Rico. *See* pp. 20-22 *infra*; *see also* the chart attached as Appendix C to this brief summarizing and annotating the 30 individual records produced by the DMV as of February 16.

Assuming that the "reinstatement" of Counts I and II of the Amended Complaint is governed by Fed. R. Civ. P. 15(a)(2)—which makes sense—Plaintiffs demonstrate below that all relevant Rule 15 criteria support reinstatement of the voter ID portions of these counts:

- The State would suffer no undue prejudice from this reinstatement. The voter ID issues involved in Count I (which rests on Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301(a)) and Count II (the so-called *Anderson/Burdick* claim[2]) closely overlap with the voter ID issues in Counts IV, V, and VI, which raise additional challenges to Act 23's voter ID provisions under the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments—challenges that have *not* been dismissed and that will be tried along with the other challenged registration and voting restrictions at trial. *No* new factual discovery or expert testimony will be required to try the reinstated voter ID claims in Counts I and II, because the *same* factual and expert issues already are being tried under Counts IV, V, and VI. Reinstatement will simply allow this Court to consider whether the State's implementation of the free voter ID program is also violating Section 2 of the Voting

[2] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi,* 504 U.S. 428 (1992); *see also Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 189-203 (2008) (Stevens, J., controlling opinion) (applying *Anderson/Burdick* analysis to challenged Indiana voter ID law).

Rights Act or is unconstitutional under the *Anderson/Burdick* analysis. Granting reinstatement will thus promote judicial economy and also conserve the resources of all parties—who otherwise will have to prosecute and defend these claims in a wholly separate lawsuit, based on evidence that already will be before this Court in this litigation.

- For the same reasons, reinstatement will not delay the pretrial or trial schedules. The reinstated claims involve the *same* discovery, *same* fact and expert testimony, and *same* issues as are already being litigated under the voter ID challenges in Counts IV, V, and VI. There would be no need to delay the May 16 trial date, which Plaintiffs believe must be preserved in order to ensure effective judicial relief in time for the November 2016 general federal and state elections.

- Plaintiffs have not unduly delayed in moving to reinstate, but rather have moved with reasonable dispatch in response to the revelations in the recent DMV deposition, the recent State expert report, and the ongoing DMV document production.

- Reinstatement would not be futile. Far from being barred by the decision in *Frank*—the State's sole ground for moving to dismiss last July—these claims involving the ID petition process were *expressly reserved and invited* by Judge Easterbrook's decision for the panel in *Frank*. *See* 768 F.3d at 747 at 747 n.1 (such claims "could be the subject of a separate suit if a problem were demonstrated," including for abuse of discretion in administering the IDPP).

- Justice requires that this Court be given the opportunity to consider this new evidence—which it is going to hear one way or the other—under the Section 2 and

Anderson/Burdick theories as well as the other constitutional claims already set to be tried in May.

Because Plaintiffs are seeking to reinstate two claims in an Amended Complaint that already is on file, and because of the liberal pleading standards of Fed. R. Civ. P. 8, Plaintiffs do not believe it is necessary to file another amended pleading. Rather, they seek the Court's order reinstating the voter ID claims in Counts I and II to the extent they fall within the exceptions expressly recognized in the *Frank* panel decision—that is, claims that the State is abusing its discretion in administering the IDPP safeguard for "hardship" cases along with other "as applied" challenges to the specific application, enforcement, and impacts of the voter ID provisions (as opposed to the "facial" claims involved in *Frank*).[3]

Plaintiffs emphatically seek no delay in the May 16 trial date, nor do they believe any such delay would be necessary or appropriate as a result of this proposed reinstatement. But if this Court were to disagree and believe the choice was between granting reinstatement *or* proceeding with trial on May 16, Plaintiffs reluctantly would choose to keep the May 16 trial date and pursue the Section 2 and *Anderson/Burdick* voter ID claims in a separate lawsuit. It is important that, if this Court ultimately concludes that one or more of the registration and voting restrictions challenged in this litigation are illegal, it enter appropriate relief as soon as possible prior to the November 8 general federal and state elections.[4]

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[3] As discussed in Part II-C *infra*, several additional developments warrant reinstatement of the Section 2 and *Anderson/Burdick* challenges to Act 23's voter ID provisions, including the State's refusal to undertake an adequate public education campaign about the voter ID requirements in advance of the 2016 elections as well as the dismemberment of the Government Accountability Board ("GAB"), the agency that is supposed to be ensuring the fair implementation and administration of the voter ID law, in the midst of a Presidential election year. *See* pp. 22-24 *infra.* below.

[4] *See, e.g., Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006) (*per curiam*) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

But such a false choice is unnecessary. The voter ID claims can be tried in the upcoming May 16 trial under Section 2 and *Anderson/Burdick* as well as under the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments without any undue prejudice to the State. If the Court disagrees, Plaintiffs respectfully request in the alternative that the Court grant this motion, set a separate trial date for the reinstated Section 2 and *Anderson/Burdick* voter ID claims for later this year, and treat the May 16 trial on the merits of the other claims as a preliminary injunction hearing on the reinstated claims. That would eliminate any potential for undue prejudice to the State while at the same time maximizing judicial economy and the public interest in avoiding having elections go forward under rules that have been found by the courts to be discriminatory and illegal.

II. Background

A. The Importance of the Voter ID "Extraordinary Proof" Petition Process To the Outcomes of Prior State and Federal Challenges To Act 23.

The state and federal courts ultimately upheld Act 23's voter ID provisions in 2014 only because of special safeguards imposed by the Wisconsin Supreme Court to ameliorate the harsh impacts of the law on some vulnerable groups, including voters of color. Specifically, now-Chief Justice Roggensack's opinion for the Wisconsin Supreme Court concluded that Act 23, as construed and enforced by the State over the 38-month period between June 2011 and August 2014, had imposed a "*severe burden*" on the right to vote. *Milwaukee Branch NAACP v. Walker*, 2014 WI 98, ¶¶ 7 & n. 5, 60, 851 N.W.2d 262, 266 & n.5, 277 (2014) (emphasis added); *see also id*. ¶¶ 4-7, 50-65, 78-80, 851 N.W.2d at 265-66, 274-78, 280-81. The Court held that the State had unconstitutionally required voters to pay for the official documents that must be obtained in

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consequent initiative to remain away from the polls. As an election draws closer, that risk will increase."); *see also Veasey v. Perry,* 135 S. Ct. 9, 10 (2014) (Ginsberg, J. dissenting) (discussing Supreme Court reluctance "to upset a State's electoral apparatus close to an election").

order to receive so-called "free" voter IDs, a practice the Court repeatedly called a "*de facto* poll tax." *Id.* ¶¶ 50, 54-55, 57, 851 N.W.2d at 274-76. The Wisconsin Supreme Court's analysis of the monetary burdens involved in seeking a "free" voter ID was consistent with Judge Adelman's detailed findings of fact regarding the burdens of seeking birth certificates and other ancient records necessary to obtain a Wisconsin voter ID—findings the Seventh Circuit panel did not question.[5]

The Wisconsin Supreme Court nevertheless upheld Act 23 on a prospective basis by adopting a newly fashioned "saving construction," not of Act 23 itself, but of Wis. Admin. Code Trans. § 102.15(5m), which provides an "extraordinary proof" petition process for voters unable to comply with Act 23's rigid documentation requirements—the IDPP discussed in Part I above. (A copy of this regulation, as amended to incorporate the Wisconsin Supreme Court's instructions, is attached as Exhibit A to this brief.) The state court held that the DMV must henceforth exercise its "discretion" during the IDPP process so that voters can obtain exemptions from having to pay for birth certificates and other government records needed to obtain a voter ID. 2014 WI 98, ¶¶ 66-70, 851 N.W.2d at 278-79.

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[5] *See Frank v. Walker,* 17 F. Supp. 3d 837, 853-62, 870-79 (E.D. Wis.), *rev'd on other grounds,* 768 F.3d 744 (7th Cir. 2014), *cert. denied,* 135 S. Ct. 1551 (2015). Judge Adelman's findings document, among other things, the costs of obtaining birth records in Wisconsin and elsewhere; the large number of Wisconsin voters who were born out of state who "find that there is no birth certificate on file for them in the states where they were born"; the frequency of "errors or discrepancies in the documents needed to obtain an ID"; the time and expense in "[a]mending a birth certificate"; the frequent instances in which voters have been able to get DMV officials to excuse minor errors and omissions only by having public officials intercede on their behalf; and the "additional hurdles that Blacks and Latinos who lack IDs are more likely to have to overcome than whites who lack them," including "never having had an official birth certificate in the first place." *Id.* at 858 n.17, 859, 860 n.19, 861, 875, 876 n.36. The State did not dispute any of these findings on appeal, nor did the Seventh Circuit panel question their accuracy.

The Seventh Circuit relied heavily on this "saving construction" and the State's promised remedial measures in staying and then overturning the district court injunction:

> After the district court's decision, the Supreme Court of Wisconsin revised the procedures to make it easier for persons who have difficulty affording any fees to obtain the birth certificate or other documentation needed under the law, *or to have the need for documentation waived*. … This reduces the likelihood of irreparable injury, and it also changes the balance of equities and thus the propriety of federal injunctive relief.

Frank v. Walker, 766 F.3d 755, 756 (7th Cir.) (emphasis added), *reh'g en banc denied by an equally divided court*, 769 F.3d 494 (7th Cir.), *vacated*, 135 S. Ct. 7 (2014); *see also Frank v. Walker*, 768 F.3d at 747 ("Wisconsin recently issued regulations requiring officials to get birth certificates (or other qualifying documents) themselves for persons who ask for that accommodation on the basis of hardship.").

The panel decision expressed hope that the State's newly adopted procedures for "hardship" cases would make it easier for Wisconsin voters to "scrounge up" their birth certificates and other ancient records needed to obtain voter IDs. 768 F.3d at 748; *but see id*. at 796-808 (Posner, J., dissenting from denial of rehearing en banc by an equally divided court) (disputing panel's "suggestion that 'scrounging' up a birth certificate is no big deal," and attaching a documentary supplement titled "APPENDIX: SCROUNGING FOR YOUR BIRTH CERTIFICATE IN WISCONSIN").

The Seventh Circuit concluded that the DMV should be given an opportunity to implement its new "hardship" procedures and to show they "alleviat[e] difficulties that some persons encounter in getting photo IDs." 768 F.3d at 747, 755. The panel decision also emphasized that Act 23's voter ID provisions could be challenged again on an as-applied basis if the State abused its discretion in implementing the amended process. The new procedures

> leave much to the discretion of the employees at the Department of Motor Vehicles who decide whether a given person has an adequate claim for assistance or dispensing with the need for a birth certificate. *Whether that discretion will be properly exercised is not part of the current record, however, and could be the subject of a separate suit if a problem can be demonstrated.*

767 F.3d at 747 n.1 (emphasis added). The Seventh Circuit emphasized that it was only upholding Act 23 on its face, and that future as-applied challenges could be brought based on the "*results*" rather than "*predictions*" of how the law would work. *Id.* at 747 (emphasis added); *see also id.* ("This case, like *Crawford,* therefore is a challenge to Act 23 as written ('on its face'), rather than to its effects ('as applied').").

B. Proceedings in This Case

Plaintiffs' Amended Complaint challenges a broad array of registration and voting restrictions enacted by the State of Wisconsin since 2011, including the voter ID provisions adopted pursuant to 2011 Wis. Act 23 and its implementing regulations. *See* Amd. Compl. ¶¶ 143-53.[6] Plaintiffs have challenged Wisconsin's voter ID law through five distinct claims: (1) Section 2 of the Voting Rights Act of 1965 (Count I); (2) the First and Fourteenth Amendments' prohibition of undue burdens on the right to vote—the so-called *Anderson/Burdick* claim, *see* n.2 *supra* (Count II); (3) the First and Fourteenth Amendments' prohibition of "partisan fencing" (Count IV); (4) the Fourteenth and Fifteenth Amendments' prohibition of purposeful race discrimination in voting restrictions and practices (Count V); and (5) the Twenty-Sixth Amendment's prohibition of purposeful discrimination against young voters (Count VI). *See* Amd. Compl. ¶¶ 154-63, 170-81.

Defendants moved last July "to dismiss Count I (Voting Rights Act) and Count II (Undue Burden on the Right to Vote) as they relate to Wisconsin's voter ID law" on the ground that the

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[6] Plaintiffs also challenge a rule that was adopted before 2011 that limits in-person absentee voting to a single location per municipality. *See* Amd. Compl. ¶¶ 64-77.

Seventh Circuit had rejected "identical" claims in *Frank v. Walker*. *See* Dkt. 21 (motion), Dkt. 22 at 1-7 (brief in support emphasizing that the two cases involve "the same factual and legal allegations" and "identical" challenges). Defendants did *not*, however, move to dismiss the same voter ID allegations as they relate to the "partisan fencing" claim, the Fourteenth and Fifteenth Amendment race discrimination in voting claims, or the Twenty-Sixth Amendment age discrimination in voting claim. Plaintiffs conceded that, based on evidence known as of August 2015, their Section 2 and *Anderson/Burdick* challenges to the voter ID law were barred by the *Frank* panel's controversial decision,[7] which remains controlling authority unless and until overturned by the Seventh Circuit sitting *en banc* or by the Supreme Court. *See* Dkt. 28 at 2.

Plaintiffs emphasized that their stipulation to this limited dismissal was subject to the understanding that (1) they could continue to litigate the voter ID issues through Counts IV, V, and VI of their Amended Complaint (their partisan fencing and Fourteenth, Fifteenth, and Twenty-Six Amendment claims), which were not challenged in Defendants' motion to dismiss; and (2) "they expressly reserve[d] the right to make these arguments on appeal and to argue on appeal that *Frank v. Walker* … should be overruled." *Id.* at 2 & n.1, 10. This Court dismissed the voter ID claims in Counts I and II subject to this understanding, noting that Plaintiffs

[7] The panel decision avoided *en banc* reconsideration on a 5-5 tie vote, and was the subject of a blistering critique by Judge Posner speaking for himself and four colleagues. *See Frank v. Walker*, 773 F.3d 783, 792-93, 795-97 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing *en banc*) (calling the panel decision a "serious mistake," "riven with weakness," based on "common misconception[s]," "piles error on error," "is not troubled by the absence of evidence" supporting its conclusions, "mentions none of the pertinent academic and journalistic literature," and "conjures up a fact-free cocoon in which to lodge the federal judiciary"). *See also Veasey v. Abbott*, 796 F.3d 487, 504 n.17 (5th Cir. 2015) (questioning but not deciding "whether the Seventh Circuit's standard is the proper one to apply in this context"); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 461 (2015) ("As Rick Hasen has noted, [the *Frank* panel decision] recalls Anatole France's sardonic reminder that the law in its 'majestic equality' prohibits both the rich and poor from sleeping under bridges.") (citing a Hasen critique titled *A Quick Reaction to the 7th Circuit Wisconsin Voter ID Decision: Horrendous*, *see id.* n.172).

"preserve[d] their right to argue for reversal of *Frank*." *One Wisconsin Institute, Inc. v. Nichol*, 2015 WL 9239014, *1.

Since the Court granted this limited stipulated dismissal two months ago, the parties have engaged in extensive fact discovery, exchanged expert reports, and briefed Defendants' motion for summary judgment.[8] Plaintiffs have focused much attention on the continuing voter ID claims in their fact discovery and expert analyses to date. Plaintiffs have obtained extensive discovery from the Government Accountability Board ("GAB") and DMV regarding the present administration and impacts of the voter ID provisions of Act 23, and they have submitted expert reports analyzing in granular detail the number of voters who currently lack ID and the demographics of that group; the deterrent impacts of the voter ID restrictions on turnout, especially among students, voters of color, and the poor, as measured through "individual level analysis" as well as "aggregate data"; the "Senate Factors" analysis; the sequence of events and motivation leading to the adoption of Act 23's voter ID restrictions; and the State's justifications for the voter ID requirements. *See* Expert Reports of Dr. Kenneth Mayer at 4-33 (Dkt. 71), Dr. Barry C. Burden at 8-22 (Dkt. 72), Dr. Allan J. Lichtman at 5-14, 20-38, 51-58 (Dkt. 75), Dr. Lorraine C. Minnite (Dkt. 74), and Dr. Yair Ghitza (Dkt. 73).

The State, through its experts, has responded to these critiques of Act 23's voter ID provisions. Dr. M.V. Hood III's January 11, 2016 expert report also has put the DMV's "Free

[8] As part of their summary judgment motion, Defendants have moved for summary judgment on the voter ID aspects of Counts IV, V, and VI, *see* Dkt. 77 at 56-64, and Plaintiffs have opposed defendants' motion in full, *see* Dkt. 99 at 60-66, 94-95, 115-16. Plaintiffs' counsel conducted their Rule 30(b)(6) deposition of the DMV on Friday, January 29, and filed their brief in opposition to Defendants' motion for summary judgment early the following week. Plaintiffs relied on the DMV Rule 30(b)(6) deposition and exhibits from that deposition in their summary judgment opposition. See Dkt. 99 at 63-66, 94-95, 116. Plaintiffs also gave notice in that February 3 brief that they intended to seek partial reinstatement of their voter ID claims under Counts I and II, given the DMV's revelations regarding the ID Petition Process. See Dkt. 99 at 6-7 & n.1.

ID Program" front and center in the voter ID portion of this litigation, contending that it is "*mitigating any negative effects of Act 23*." Dkt. 86 at 31 (emphasis added). And he singled out the Form DOT MV 3012 "extraordinary proof" petition process as "*another point of mitigation* to the State's ID law." *Id.* at 32 (emphasis added).

In response to Professor Hood's claims about the DMV's "Free ID Program," Plaintiffs have analyzed DMV documentation thus far produced, taken the Rule 30(b)(6) deposition of a DMV-designated spokesperson, and obtained additional documents from DMV. Plaintiffs' investigation is continuing, as is the State's production of individual ID petition files. In particular, as of the date of Dr. Lichtman's Rebuttal Expert Report discussed above, the DMV appears to have produced only 30 individual files from among the 1,062 voters who have been forced to go through the "DOT MV3012 ID Petition Process." Plaintiffs have asked the DMV to produce all of the individual petitioners' files, subject to the confidentiality provisions of the Protective Order (Dkts. 67-68) in order to guard individuals' privacy. *See* Wis. Stats. §§ 85.103, 343.235, and 343.50(8). The State produced additional individual ID petition records on February 22, which Plaintiffs are currently evaluating.

The preliminary results of Plaintiffs' investigations to date are summarized in the following section.

C. Emerging Evidence of the State's Multiple Abuses of Discretion in Implementing the Voter ID "Extraordinary Proof" Petition Process

Stunning evidence has emerged in discovery over the past several weeks that the State is indeed abusing its discretion in implementing the new "extraordinary proof" petition procedures. According to DMV records, between September 2014 (when the new petition procedures went into effect) and the end of 2015, 1,062 Form DOT MV2012 petitions have been filed by voters seeking a "hardship" exemption due to "extraordinary" circumstances. *See* Lichtman Rebuttal at

23. A majority of these petitions eventually resulted in the issuance of a "free" voter ID, though often only after long delays, red tape, errors, and enormous voter persistence. Many of these approvals took place only after the voter had gone through an IDPP "adjudication" proceeding. *See id.*; DMV Dep. at 10; Lichtman Rebuttal, App. A at Exs. 17-21. Of the other petitions, DMV listed 16 denials as of the end of 2015 (there have been more since), 61 "cancelled" by the "customer," 66 "suspended," and 55 still "pending." Lichtman Rebuttal at 23. From an examination of the individual files that DMV thus far has produced, it appears that many of the "suspensions" resulted when DMV told a petitioning voter, after several unsuccessful attempts, to keep searching for additional proofs of his name, birthdate, and "identity," and the voter simply gave up and was never heard from again; many of the "withdrawals" resulted when the voter *told* the DMV that he was giving up in anger and frustration. There is evidence this has repeatedly happened.[9]

Even without formally entering the "extraordinary proof" petition process, voters can seek an "exception" to the strict voter ID proof requirements from one or more of several dozen DMV supervisors, "team leaders," and regional managers. The DMV Rule 30(b)(6) representative revealed in her January 29 deposition that, notwithstanding the Seventh Circuit's admonition about potential abuses of discretion, this process is guided by no written policies, is subject to no internal review to ensure fair and uniform standards, and is left entirely to the discretion of the individual employees making the decision. According to the DMV designee, "[i]f they [one of the several dozen DMV employees] feel comfortable based on the

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[9] *See, e.g.,* the Case Activity Reports, IDPP adjudication reports, and DMV official action letters collected in Lichtman Rebuttal, Appendix A; *see also* DMV Dep. at 32, 58, 79-80; DMV Dep., Exs. 117, 132.

documentation presented authorizing the exception, they can do that independently." DMV Dep. at 104; *see also id.* at 52-53, 74, 103-08; Lichtman Rebuttal at 16-17.

For those turned away by one or more of the dozens of supervisors, "team leaders," or regional managers, the next step is to "enter"—that is the DMV's word—the "extraordinary proof" petition process by filing Form DOT MV3012 ("Unavailable Documentation"), attached as Ex. B to this brief. The petition is then investigated by agents with the DMV's Compliance, Audit and Fraud Unit ("CAFU"). The agents may contact other jurisdictions' vital records agencies on the petitioners' behalf; the other jurisdictions sometimes cooperate, sometimes refuse to help, and other times simply ignore CAFU's inquiries. The agents also may consult various databases and public records, as well as encourage the petitioners to search for other ancient records. Family members are sometimes questioned for further information. *See* DMV Dep. at 14-15, 18-23, 39-40; Lichtman Rebuttal, App. A at Exs. 3, 6, 13-16, 19-30.

CAFU's investigative findings are then set forth in "Case Activity Reports" that are forwarded to a small group of senior DMV officials, dubbed "the Triad" by some staffers, who make the final call as to whether the individual will be allowed to vote. *See* DMV Dep., Ex. 116. Here again there are no written policies or guidelines to guide "the Triad's" discretion. *See* DMV Dep. at 21, 73-74.

DMV's files are replete with evidence of customer complaints about receiving inaccurate and misleading information, complaints from agency personnel about the lack of any standards or guidance, and audits showing sub-par agency performance in administering the IDPP. A 2015 CAFU audit revealed an astounding 27% error rate in petitions processed between March and

August 2015. *See* DMV Dep. at 30, 50-51, 80-81, 90-102; DMV Dep., Exs. 117, 135-39; Lichtman Rebuttal at 17.[10]

DMV expects increased demand for voter IDs in this Presidential election year, but it has taken no steps to prepare for that increased demand. It already has a backlog of dozens of "open" petitions, has cut back on staff, and has no extra staff or budget allocated to deal with the expected increased demand. *See* DMV Dep. at 59-66; Lichtman Rebuttal at 19-20.

The DMV has denied the petitions of many eligible voters because of minor discrepancies in the spellings of their names or uncertainties about their exact dates of birth—even though DMV acknowledges it has no doubts these disenfranchised voters are U.S. citizens. In one denial after another—sometimes coming after months-long investigations involving dozens of separate bureaucratic steps—DMV has insisted that voters must correct their name-and-birthdate discrepancies either though court proceedings or by changing their Social Security records so as to achieve consistency between those records and a petitioner's other proof documents. As DMV admits, *these burdens are imposed even where there is no doubt whatsoever that a petitioner is a U.S. citizen*. *See* DMV Dep. at 34, 36-37, 43-44, 56; *see* the chart attached as Appendix C to this brief summarizing and annotating the 30 individual records produced by the DMV as of February 16.

The evidence thus far produced reveals numerous instances in which voters seeking the State's permission to continue voting have been officially "denied" because of inconsequential

[10] For a small sampling of internal DMV complaints about the IDPP, *see, e.g.*, DMV Dep. Ex. 135 ("We seem to really be struggling with a process that should not be that difficult."); *id.* Ex. 137 ("This is a costly process when all goes correctly and gets worse when our processors miss things."); *id.* Ex. 138 ("The process is very cumbersome. When you need a full page checklist to get it right, there's a problem. But with that being said, they have a checklist as well as other tools, so it shouldn't be that hard to get it right. … I keep trying to come up with a smoother process, but to be honest, I do not have a clue what that would be at this point."); *see also* DMV Dep. at 88-98.

issues with their official records, refusals by other states to provide information without charging a fee, and other assorted problems not caused by the voters:

- State investigators often contact vital records offices and hospitals in other States, which tell them that they will only release requested information for a fee, after which CAFU contacts the petitioning voters and tells them they will either have to pay to get their birth information or else come up with some other acceptable substitute proofs. *See* Lichtman Rebuttal, App. A at Exs. 1, 15, 19, 23, 25, 27. As DMV concluded in one such case, "[t]hrough no fault of the petitioner, we cannot verify [her] birth, so we cannot … issue a voter ID card." *Id.*, Ex. 15. In other instances, the birth states advise they have no record of the petitioner's birth, after which CAFU encourages the petitioner to search for more information such as family Bibles, school records, and other relatives' birth records. *Id.*, Exs. 12-14, 24, 26.
- Even where another jurisdiction confirms the voter's birth, DMV will not grant permission to vote if the name on the birth record does not "agree with the name on your Social Security account," in which case the voter must either change his Social Security records or go to court to change his name. *See id.*, Ex. 9; *see also* DMV Dep. at 27-28, 33-35, 42-43, 47-48, 71-72.
- One senior citizen who was "turned away" by DMV had been "born in a concentration camp in Germany," and his German birth certificate and other family records had been lost in a fire. He eventually obtained permission to vote only after an extensive investigation into his genealogy and his parents' immigration records. *See* Lichtman Rebuttal, App. A at Ex. 17.

- DMV in several instances has required voters who were adopted and lacked information about the precise circumstances of their births to search for that information before being allowed to vote. *See id.* at Exs. 21-22, 27. In at least one instance, DMV directed the petitioner to an out-of-state "Post Adoption Services" bureau to seek help in tracking down her "adoption paperwork," even though DMV had no reason to doubt the woman was a U.S. citizen. *See* DMV Dep. at 45-48; DMV Dep., Ex. 122; Lichtman Rebuttal, App. A at Ex. 21. DMV keeps track of such "interesting cases" where "we were able to connect people with their birth record through the petition process." *See* DMV Dep. at 23-25; DMV Dep., Ex. 116.
- One senior citizen, a white voter who ultimately prevailed in the IDPP, had a healthcare worker who had "tried eight different times to give [the voter's] baptism certificate to the DMV" as substitute proof of "identity," without success. Senior DMV officials ultimately accepted the baptism certificate along with proof that the voter's parents are buried in Wisconsin as sufficient evidence to allow him to continue voting. *See* Lichtman Rebuttal, App. A at Ex. 18; *see also* DMV Dep. at 49-52.
- Another Milwaukee voter—a 70 year old Latina woman born in Puerto Rico—was told that her American birth had been confirmed but that the Wisconsin Department of Health Services "said she's deceased," even though federal government records show she is "definitely not deceased." The voter presented herself to prove she is alive, but was told by DMV that she "will have to sort out her status with the certifier of record before we can issue voter ID." Lichtman Rebuttal, App. A at Ex. 4.

- The files reveal several instances of relatives—parents, siblings, children, and grandchildren—vouching for the petitioner's status, but being ignored in the absence of ancient records corroborating their testimony. *See id.*, Exs. 3, 8, 22, 30. And not just any ancient records: One petitioner who could find no other early records submitted his 9th grade high school transcript, but was instructed that "school transcripts must be from early childhood." *Id.*, Ex. 27. Another petitioner who did submit such "early childhood" records, from 1st through 7th grades, was denied because his birthdate in those school records differed by six months from the birthdate reflected in his Social Security records. *See id.*, Ex. 8.

Far from providing an "accommodation on the basis of hardship" that will "make it easier" to obtain a voter ID—as the Seventh Circuit expected would occur, *see Frank v. Walker,* 768 F.3d at 747; 766 F.3d at 756—the IDPP has simply compounded the arbitrary, capricious, and abusive nature of the voter ID regime in Wisconsin. It is simply outrageous for a citizen's right to vote to turn on the unguided, unchecked discretion of mid-level DMV personnel and a "Triad" of senior agency officials, and for that right to be denied based on irrelevant and trivial discrepancies in names, spellings, and exact birthdates, especially where *it is conceded that the people seeking to vote are U.S. citizens*.

The State's implementation efforts not only have been arbitrary and capricious—they have had strikingly disproportionate racial impacts as well. For example, Professor Hood revealed in his January 11, 2016 expert report that, according to his analysis of DMV data, *44% of all voters who have had to obtain "free" voter ID in Wisconsin are either African-American or Hispanic*. *See* Dkt. 86 at 31-32 & Table 11 (reproduced below):

Table 11. Racial/Ethnic Breakdown for No-Fee State ID Cards Issued by Wisconsin DMV

Race/Ethnicity	Frequency	Percentage
White	139,696	52.0%
Black	95,677	35.6%
Hispanic	22,273	8.3%
Asian	4,457	1.7%
American Indian	6,740	2.5%
Total	268,843	100%

Source: Wisconsin Department of Transportation state identification card database.

Although African-Americans make up 5.6% of the voting age population in Wisconsin, they make up 35.6% of the group that has been forced to secure "free" ID in order to continue voting. And although Hispanics represent 3.3% of the voting age population, they make of 8.3% of the group that has had to obtain voter ID. *See id.* at 32. As Dr. Lichtman emphasizes, this is powerful, direct "confirmation" of Act 23's racially disproportionate impacts. Lichtman Rebuttal at 12.[11]

Moreover, although DMV had produced individual Case Activity Reports and related documents for only 30 voters required to "enter" the IDPP as of February 16, an analysis of those files demonstrates staggeringly disproportionate impacts by race. Plaintiffs are pushing DMV to produce all such individual files, which will provide a much broader database of how the IDPP works and who it burdens, but of the 30 individual files produced as of February 16:

- *Fully 84 percent of petitioners with race identified are black or Latino voters.*

  Moreover, only one of these voters of color succeeded in getting the DMV's

[11] As Dr. Lichtman also observes of Dr. Hood's reliance on these racial data, "[a] social scientist cannot simultaneously affirm the substantively contradictory positions that there were no racial disparities in acceptable ID possession when Wisconsin adopted Act 23 and that the vast disproportion of African Americans and Hispanics obtaining free IDs demonstrates that the free ID program was alleviating earlier (non-existent?) racial disparities." Lichtman Rebuttal at 12.

permission to vote, whereas all white petitioners were granted approval. *See* Lichtman Rebuttal at 19; *see* chart at Ex. C to this brief.

- Of petitioners whose residence is identified, *nearly 80 percent live in Milwaukee. Id.*; *see also* Lichtman Rebuttal at 15, Table 8.

- The overwhelming majority of petitioners whose places of birth are identified were born either in one of the States of the former Confederacy (including Mississippi, Arkansas, South Carolina, Louisiana, and Tennessee);[12] in Cook County, Illinois;[13] or in Puerto Rico (whose official birth registry is in notorious disarray[14]). *Id.* As summarized in the chart attached as Exhibit C to this brief, and as documented in the individual case files included as Appendix A to Dr. Lichtman's Rebuttal Report, DMV has denied many Form DOT MV 3012 petitions from these voters, resulting in the complete denial of their right to vote, based on trivial discrepancies in names, spellings of names, and birthdates among their accumulated proof documents, even while acknowledging *there are no doubts these petitioners are U.S. citizens*. *See*

[12] "Missing birth certificates are also a common problem for older African American voters who were born at home in the South because midwives did not issue birth certificates." *Frank v. Walker,* 17 F. Supp. 3d at 858 n.17; *see also id.* at 876 n.36 ("Many older voters of color face the additional problem of never having had an official birth certificate in the first place. As late as 1950, nearly a quarter of nonwhite births in rural areas in the United States went unregistered, as opposed to 10% of white births in rural areas of the United States.") (citation omitted).

[13] In July 2015, James Miller, the DMV's Director of the Bureau of Field Services, wrote in an email approving a denial letter to one of many Wisconsin voters born in Cook County, Illinois: "Denial approved. Is it interesting to you the number of mixed up births coming out of Cook County? I am assuming most, if not all, of these are not trying to commit fraud and most are not elderly people." DMV Dep. at 57-58 & Ex. 127.

[14] "Many Latino voters who were born in Puerto Rico will have trouble obtaining their birth certificates because the Puerto Rican government annulled all birth certificates of individuals born there prior to 2010. To obtain a new birth certificate, a person must either travel to Puerto Rico or pay a 'hefty charge' to obtain a new birth certificate by mail." *Frank v. Walker,* 17 F. Supp. 3d at 876 n.37.

DMV Dep. at 27, 34, 36-37, 43-44, 56; Lichtman Rebuttal, App. A at Exs. 1, 3, 5-6, 8, 12, 16, 19-30.

Dr. Lichtman's February 16, 2016 Rebuttal Expert Report puts the significance of the DMV's IDPP revelations thus far into their broader historical context:

> Although 19 outright denials may seem like a small number, as far as I know it represents *the first time since the since the era of the literacy test that state officials have told eligible voters that they cannot exercise their fundamental right to vote – not in the next election, probably not ever*. All of these persons could have voted in [other jurisdictions with voter ID laws].
>
> Backers of voter ID often ask opponents to "name the names" of persons disenfranchised by a state's voter ID law. In Wisconsin it is possible to name such persons: for example, **[NAMES REDACTED AT STATE'S DIRECTION]**. … After a typically protracted back and forth process, in which each person made extraordinary efforts to gain their ID, state officials who never questioned their eligibility to vote denied their application for a free ID, in effect, telling them "you cannot vote in Wisconsin." *I am unaware in the post-voting rights era of other examples of state officials telling eligible citizens of their state that they cannot vote because they fail to meet an external criteria established by the state – unrelated to age, residency or other objective qualifications for voting.*

Lichtman Rebuttal at 15-16 (emphasis added).

The IDPP's standardless discretion is not the only "abuse of discretion" in implementing Act 23's voter ID provisions that Plaintiffs seek to challenge under Section 2 and the *Anderson-Burdick* standard, in addition to the other constitutional claims before the Court. As discussed above, the State has failed to provide sufficient staff and funding to enable the CAFU and DMV senior officials to carry out the agency's responsibilities in screening those citizens who may vote and those who may not. According to the DMV's own records, the IDPP is understaffed and underfunded, the subject of scathing internal performance reviews, and has a growing backlog. *See* pp. 15-16 & n.10 *supra.*

Those who control the State's purse strings have similarly choked off the GAB's budget for educating and assisting the public in adapting to the voter ID regime. The GAB has a

statutory duty to "[e]ngage in outreach to identify and contact groups of electors who may need assistance in obtaining or renewing a document that constitutes proof of identification for voting … and provide assistance to the electors in obtaining or renewing that document." 2011 Wisconsin Act 23, § 95 (creating Wis. Stats. § 7.08(12)). In addition, "[i]n conjunction with the first regularly scheduled primary and election at which the voter identification requirements of this act initially apply, the government accountability board shall conduct a public informational campaign for the purpose of informing prospective voters of the voter identification requirements of this act." *Id.* § 144 ("Nonstatutory provisions") (emphasis added). Yet the Wisconsin Legislature has refused GAB's repeated funding requests to carry out these duties. *See* GAB 30(b)(6) Dep. at 87-93 (Dkt. 92); K. Kennedy Dep. at 213-14 (Dkt. 94); M. Haas Dep. at 155-57 (Dkt. No. 93).[15]

Indeed, the Legislature has recently voted to dismantle the GAB itself and redistribute its functions to two newly created partisan Commissions, an election-year disruption that the GAB's Director has warned is "all wrong," "not a prudent approach," "irresponsible, if not reckless," "will create significant problems for the conduct of elections in the upcoming presidential election year," and could cause "unnecessary and potentially catastrophic delay" in the implementation and administration of voter ID. K. Kennedy Dep. at 64, 66, 68; Kennedy Dep., Exs. 102, 103 at 2; *see also* A. Kaminski Decl. ¶29 (Dkt. 101) (elimination of GAB during

[15] After the voter ID law was first enacted, GAB engaged in extensive public outreach efforts to educate citizens about the law, including the airing of public service announcements. GAB 30(b)(6) Dep. at 89-90 (Dkt. 92); K. Kennedy Dep. at 212-13 (Dkt. 94); M. Haas Dep. at 144 (Dkt. 93). Since the law was reinstated in April 2015, however, GAB has been unable to air public service announcements relating to the voter ID law because of a lack of funding, despite repeated requests to the Legislature to provide the funds necessary to educate the public about the law. GAB has made various informational materials and videos available to others who want to try to educate voters, but it is not engaging in anything remotely like the campaign it undertook in 2011 and 2012. *See* GAB 30(b)(6) Dep. at 89-90; K. Kennedy Dep. at 213-14, 218-19; Haas Dep. at 144-45.

election year is "unconscionable"). Among other things, GAB's elimination will deprive municipal clerks of a source of objective, authoritative guidance on how to implement the law. This will result in less effective election administration and exacerbate the problem of voter confusion. GAB 30(b)(6) Dep. at 67-69; A. Kaminski Decl. ¶¶27-29.

The State of Wisconsin is thus two months into the 2016 presidential election year without an effective voter ID public education program in place, with the agency that oversees the implementation of the voter ID regime in the process of being dismantled, and with a DMV ID petition process for alleviating "hardship" cases that is understaffed, underfunded, standardless, and imposing additional arbitrary and irrelevant voting conditions on people the State *admits* are United States citizens.

III. Standard of Decision

The August 13, 2015 Preliminary Pretrial Conference Order in this case does not include a fixed deadline for motions to amend the pleadings, but instead provides: "Amendments to the Pleadings: By Leave of Court." Dkt. 29 at 1. This is significant because "[w]here, as here, there is no Rule 16(b) scheduling order limiting the time to amend pleadings, a proposed amendment should be analyzed under Rule 15(a)." *Carlson v. Northrup Grumman Corp.*, No. 13 C 2635, 2014 WL 5334038, *2 (N.D. Ill. Oct. 20, 2014). Where there is no fixed date for amendment in the pretrial scheduling order, granting leave to amend requires no amendment of the scheduling order itself, and thus Rule 16(b)(4) is not triggered. *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 848 n.1 (7th Cir. 2002) (citations omitted); *see also Hollinger Int'l, Inc. v.*

Hollinger Inc., No. 04 C 698, 2007 WL 1029089, *1 (N.D. Ill. Mar. 29, 2007) (collecting additional authorities).[16]

Under Rule 15, "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "Courts are to use their discretion under Rule 15(a) to liberally grant permission to amend pleadings so long as there is not undue prejudice to the opposing party or undue delay, bad faith or dilatory motive on the part of the movant." *Sides v. City of Champaign,* 496 F.3d 820,825 (7th Cir. 2007); *see also Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 848 n.1 (7th Cir. 2002) (citations omitted) (leave to amend should be denied only if "the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile"); *Boulet v. Nat'l Presto Indus., Inc.,* No. 11-cv-840-slc, 2013 WL 4014982, **2-3 (W.D. Wis. Aug. 6, 2013). Leave to amend is especially appropriate where "the amended pleading involve[s] substantially the same issues and theories as the original pleading," so that little if any additional discovery is required to try the amended claims. *Liu v. T&H Mach., Inc.,* 191 F.3d 790, 794 (7th Cir. 1999).

IV. Argument

Whether the voter ID issues are tried pursuant to three claims (Counts IV, V, and VI) or if this motion to reinstate is granted and they are tried pursuant to five (Counts I, II, IV, V, and VI), the State's adoption, implementation, and administration of Act 23's voter ID restrictions,

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[16] Where, on the other hand, a party seeks to amend its pleadings after the passage of a fixed deadline in the scheduling order for doing so, it bears a two-step burden: *First*, it must establish "good cause" to modify the pretrial scheduling order itself to allow for the proposed amendment. Fed. R. Civ. P. 16(b)(4). *Second*, it must establish that "justice … requires" leave to amend the pleadings pursuant to the more "liberal" standards of Rule 15(a)(2). *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011); *see also Trustmark Ins. Co. v. General & Cologne Life Re of America*, 424 F.3d 542, 553 (7th Cir. 2005). As discussed below, Plaintiffs are entitled to reinstate the voter ID elements of Counts I and II of their First Amended Complaint under either Rule 15's "liberal" criteria or Rule 16's "good cause" standard. *See* pp. 29-30 & n.19 *infra.*

including the IDPP, will be the subject of the exact same scope of continuing discovery and substantial fact and expert testimony at trial. The Fifteenth Amendment forbids voting qualifications that vest "great discretion" in state or local officials because they "may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 53 (1959) (*re* literacy tests); *see also Veasey v. Abbott*, 796 F.3d 487, 507 n.22 (5th Cir. 2015) (discriminatory purpose can be inferred where voting laws delegate "too much discretion to local officials"); *Davis v. Schnell*, 81 F. Supp. 872, 877-78 (S.D. Ala.) (three-judge district court) ("understand and explain" provisions were "so ambiguous, uncertain, and indefinite in meaning" that they conferred unchecked discretion on government officials to determine "those who may vote and those who may not"—a "'naked and arbitrary power to give or withhold consent'") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886)), *aff'd,* 336 U.S. 933 (1949); Deuel Rossa1, *Pouring Old Poison Into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests,* 45 Colum. Hum. Rts. L. Rev. 362 (2014).[17]

Plaintiffs respectfully submit that justice requires the partial reinstatement of the voter ID claims in Counts I and II to the extent those claims grow out of the State's abuses of its discretion in implementing and administering the voter ID process, including the ID petition

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[17] One of the "key disfranchising factors" of the Jim Crow-era voter suppression laws was "the amount of discretion granted to registrars." J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, at 48 (1974); *see also id.* at 59 ("When asked whether Christ could register under the good character clause, a leader of the Alabama convention replied, 'That would depend entirely on which way he was going to vote.'"); Michael Perman, *The Struggle For Mastery: Disfranchisement in the South, 1888-1908*, at 29 (2001) ("registrars were given almost unlimited discretion in interpreting and administering the qualifying tests"), Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 1325 n.34 (1944) ("I can keep the President of the United States from registering, if I want to. God, Himself, couldn't understand that sentence. I, myself, am the judge").

procedures for seeking "accommodation on the basis of hardship," as expressly permitted by footnote 1 of the Seventh Circuit panel's decision in *Frank*, 768 F.3d at 747 & n.1. All of the Rule 15(a)(2) criteria for "amending" the pleadings through partial reinstatement of Counts I and II are met here: Defendants would not suffer "undue prejudice," and the trial schedule would not be jeopardized; there has been no "undue delay, bad faith or dilatory motive" on Plaintiffs' part; and such a reinstatement clearly would not be "futile"—the *Frank* panel emphasized the State could be sued again if it abuses its discretion in dealing with "hardship" cases. *Sides v. City of Champaign,* 496 F.3d at 825; *Campania Mgmt. Co.*, 290 F.3d at 848 n.1. We examine these criteria in turn.

A. Partial Reinstatement Would Not Cause "Undue Prejudice" to the State.

An "[a]mendment may be prejudicial when, among other things, it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay the resolution of the dispute." *AEP Energy Servs. Gas Holding Co. v. Bank of America, N.A.*, 626 F.3d 699, 725 (2d Cir. 2010). "A trial court may deny leave to amend when the amendment would cause the opposing party to bear additional discovery costs litigating a new issue" or the amendment might delay the scheduled trial of the matter. *Compania Management*, 290 F.3d at 850.

None of those harms would result from partially reinstating the voter ID issues in Counts I and II. Reinstatement would require no new discovery, factual testimony, or expert analysis, nor would it require any adjustment of the pretrial schedule or the May 16, 2016 trial date.[18] The

[18] As discussed above, if the Court disagrees and believes that trying the voter ID claims in Counts I and II together with those in Counts IV, V, and VI would require a postponement of the May 16 trial date, Plaintiffs ask the Court to proceed with the May 16 trial date, hold the voter ID claims in Counts I and II for trial at a later date, and consider using the May 16 trial as

same voter ID issues involved in Counts I and II are already being litigated pursuant to Counts IV, V, and VI. As shown above, the claims involve the same factual evidence. All required expert analyses of voter ID already have been undertaken in connection with other counts of the Amended Complaint, including the "Senate Factors" analysis under Section 2. A defendant does not suffer "undue prejudice" where "the amended pleading involve[s] substantially the same issues and theories as the original pleading." *Liu v. T&H Machine, Inc.*, 191 F.3d at 794; *see also Pacific Scientific Energetic Materials Co. (Arizona) LLC v. Ensign-Bickford Aerospace & Defense Co.,* 281 F.R.D. 358, 363 (D. Ariz. 2012) ("the plaintiffs are not prejudiced because the counterclaim raises issues identical to those in the plaintiffs' claims" and "do[es] not expand the scope of the suit"); *Perfect Pearl Co., Inc. v. Majestic Pearl & Stone,* 889 F. Supp. 2d 453, 461 (S.D.N.Y. 2012) (granting motion to amend where defendant "has not identified any additional discovery it would need to defend against the new claims"); *Burns v. Hale and Dorr LLP*, 242 F.R.D. 170, 174 (D. Mass. 2007) ("[T]he claims which the plaintiff seeks to add, while technically separate causes of action, are related to the core allegations in the case.").

B. Plaintiffs Have Not "Unduly Delayed" In Seeking Partial Reinstatement.

Plaintiffs did not believe last summer that they had an objectively reasonable basis for opposing the State's motion to dismiss the Section 2 and *Anderson/Burdick* voter ID claims, the same claims that had been rejected by the Seventh Circuit panel in *Frank v. Walker.* Counsel did not want to waste time, money, or their credibility with this Court in arguing otherwise. But the revelations about the DMV's implementation and administration of Act 23's voter ID provisions that have emerged in recent weeks—especially in the January 29 DMV Rule 30(b)(6) deposition

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an opportunity to hold a preliminary injunction hearing with respect to the voter ID provisions of Counts I and II. *See* pp. 6-7 *supra.*

and follow-on document production—have substantially altered the voter ID issues in this case. Plaintiffs have moved to amend with reasonable dispatch in response to these revelations.

This is not a case where the party moving to amend waited for many months to act after discovering the new information. *See Sides v. City of Champaign*, 496 F.3d 820, 825-26 (7th Cir. 2007) (denying leave to amend where party had waited over seven months after discovery of new information and until the close of discovery before moving to amend). Plaintiffs are filing this motion to reinstate less than a month after taking the DMV Rule 30(b)(6) deposition on January 29. *See* Dkts. 113-1, 120. "A one-month gap is hardly a delay, much less an undue delay." *Carlson v. Northrop Grumman Corp.*, 2014 WL 5334038, *3; *see also Bayerische Landesbank v. Aladdin Capital Mgt. LLC*, 289 F.R.D. 401 (S.D.N.Y. 2013) (moving to amend within a month of discovering key evidence "was sufficiently diligent").

Even courts applying Rule 16's more stringent "good cause" standard for amending pretrial scheduling orders have repeatedly held that a party should be allowed to amend its pleadings, even relatively late in the litigation, where it uncovers new evidence in the course of discovery that provides a basis for making a claim or argument that the party did not believe it had sufficient grounds for making earlier in the litigation. *See, e.g.*, *Soroof Trading Dev. Co., Ltd. v. GE Microgen, Inc.*, 283 F.R.D. 142, 148-49 (S.D.N.Y. 2012) (finding "good cause" for amendment where plaintiff "learned the bulk of the facts it uses to support its [new] theory of liability" during discovery, "particularly" in a recent deposition; plaintiff had "acted diligently" and "moved with adequate dispatch in its quest to amend"); *George v. City of Buffalo*, 789 F. Supp. 2d 417, 427, 431 (W.D.N.Y. 2011) (finding "good cause" for amendment where plaintiff did not previously believe it "could in good faith have asserted a plausible basis" for raising a

claim of "politically influenced municipal hiring," but subsequently found grounds to raise such a claim through discovery).[19]

C. Plaintiffs' Proposed Partial Reinstatement Would Not Be Futile.

Reinstatement of the voter ID claims in Counts I and II would not be futile. Far from being barred by the decision in *Frank*—the State's sole ground for moving to dismiss these claims last summer—the claims involving the ID petition process were *expressly reserved and invited* by Judge Easterbrook's decision for the panel in *Frank*. *See* 768 F.3d at 747 n.1 (emphasizing that such claims "could be the subject of a separate suit if a problem were demonstrated," such as abuse of the DMV's discretion in granting waivers from the strict proof requirements of Act 23). Claims cannot be "futile" under *Frank* if *Frank* expressly said they could be brought. The panel decision emphasized that it did not foreclose "as applied" challenges based on demonstrated "effects" and "results," as opposed to "predictions." *Id.* at 747.

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[19] *See also Avenet, Inc. v. Motio, Inc.*, No. 12 C 2100, 2015 WL 425442, *2 (N.D. Ill. Jan. 30, 2015) (finding "good cause" for amendment where "critically important" evidence was not produced and subjected to "forensic analysis" until after deadline for amendment had passed); *Pacific Scientific Energetic Materials*, 281 F.R.D. at 362-63 (finding "good cause" for amendment where plaintiff did not believe it had a reasonable good-faith basis for pressing certain counterclaims until after it had taken additional discovery); *Tawwaab v. Virginia Linen Service, Inc.*, 729 F. Supp. 2d 757, 768-70 (D. Md. 2010) (finding "good cause" for amendment where plaintiff did not believe it had a sufficient evidentiary basis for making a claim until after new facts emerged in a key deposition); *Hood v. Hartford Life & Acc. Ins. Co.*, 567 F. Supp. 2d 1221, 1125 (E.D. Cal. 2008) (finding "good cause" for amendment to include new claim where plaintiff did not discover facts supporting that claim until "recent depositions," and plaintiff "diligently" sought amendment following the depositions); *Burns v. Hale and Dorr LLP*, 242 F.R.D. at 174 (finding "good cause" for amendment where new claims "are based on facts which were only discovered during the course of discovery"); *Safeway, Inc. v. Sugarloaf Partnership, Inc.*, 423 F. Supp. 2d at 539 (finding "good cause" for proposed amendments that "arise from new circumstances that have developed during litigation" and "new information revealed in discovery").

As documented above and in the supporting submissions, Wisconsin claims the "naked and arbitrary power to give or withhold consent" in administering the "extraordinary proof" voter ID petition process. *Davis v. Schnell*, 81 F. Supp. 872, 877-78. This "ambiguous, uncertain, and indefinite" exemption process, and the "arbitrary power" it confers on DMV officials and supervisors to determine "those who may vote and those who may not," is reason enough to find the "abuse of discretion" that Judge Easterbrook's opinion held open for future litigation. *Id.*; *see* 768 F.3d at 747 n.1; pp. 25-26 *supra*.

D. Justice Requires Partial Reinstatement To Reflect New Evidence and New Developments.

"Courts are to use their discretion under Rule 15(a) to liberally grant permission to amend pleadings" when, in the words of the rule, "justice so requires." *Sides v. City of Champaign,* 496 F.3d at 825. Justice requires that this Court be given the option to consider this newly emerging as-applied evidence—which the Court is going to be hearing one way or the other—under Section 2 and the *Anderson/Burdick* standards as well as the Fourteenth, Fifteenth, and Twenty-Sixth Amendment claims already set to be tried in May. Justice favors granting leave to plaintiffs to reinstate the voter ID claims in Counts I and II "to reflect [their] newfound knowledge and to better reflect the dispute as it has now been refined" and has "evolved through discovery," especially since this new knowledge is not a surprise to the State, but based on the State's own records that have been produced to plaintiffs (and are still in the process of being produced). *Safeway, Inc. v. Sugarloaf Partnership, LLC*, 423 F. Supp. 2d 531, 539 (D. Md. 2006).

V. Conclusion

For the reasons set forth above, this Court should partially reinstate the voter ID claims in Counts I and II of the Amended Complaint pursuant to Rule 15(a)(2), to the extent that Plaintiffs

(1) seek to demonstrate the State is abusing its discretion in implementing and enforcing Act 23's voter ID provisions and its implementing regulations, or (2) seek to make other as-applied challenges to the actual effects and results of the implementation and enforcement of those provisions. *See Frank*, 768 F.3d at 747 & n.1. Plaintiffs respectfully believe there is no need to submit a proposed Second Amended Complaint since plaintiffs' motion only seeks to reinstate the original voter ID allegations in Counts I and II of the Amended Complaint (*see* Dkt. 19), and then only to the extent permitted by the *Frank* panel decision, but Plaintiffs of course stand ready to submit a new pleading if the Court believes that is appropriate.

Dated this 24th day of February, 2016.

Respectfully submitted,

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