Nos. 16-3083, 16-3091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellees,
Cross-Appellants,

v.

MARK L. THOMSEN, *et al.*,

Defendants-Appellants,
Cross-Appellees.

On Appeal From The United States District Court
For The Western District of Wisconsin, Case No. 3:15-cv-324
The Honorable Judge James D. Peterson, Presiding

PLAINTIFFS-APPELLEES-CROSS-APPELLANTS' REPLY BRIEF

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I. The Challenged Provisions Were Enacted with Discriminatory Intent

A. In response to the overwhelming evidence of intentional discrimination in this case, the State has steadfastly refused to engage with the record. The State does not and cannot dispute the following: The Republican majority that enacted the challenged provisions had a powerful motive to suppress minority and youth voting, and it was clear the challenged provisions would do so. Pls.' Opening Brief ("Br.") 3-5, 12-14. The number of restrictive voting measures enacted in Wisconsin from 2011 to 2014 was unprecedented nationwide, and there was limited public input and debate regarding those measures. Br.15, 18. Further, although there initially "wasn't a lot of enthusiasm" for Act 23 at the final Senate Republican Caucus meeting regarding that bill, SA.932; R.209 at 95, Senator Lazich, the Chair of the Senate Committee on Transportation and Elections, "got up out of her chair and … said 'Hey, we've got to think about what this could mean for the neighborhoods around Milwaukee and the college campuses across this state.'" SA.932; A.89. The State also has not explained how the challenged provisions served "the Republican majority's partisan interests"—a conclusion the district court found "nearly inescapable," A.79—through any means other than the suppression of minority and youth voting. Br.11.

Similarly, in attempting to explain the challenged provisions, the State primarily identifies justifications on which the Legislature *could have* relied, rather than pointing to record evidence regarding the rationales on which the Legislature *actually* relied. Defs.' Reply & Response Brief ("Resp.") 37, 40, 43, 45. To assess

discriminatory intent, however, "courts must scrutinize the Legislature's *actual* non-racial motivations to determine whether they *alone* can justify the Legislature's choices." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016). And, as the district court found, "the stated rationales for many provisions of Act 23, and for the election laws that followed it, were meager." A.79; *see* Br.16.

B. Where the State engages the record, its efforts fail. The State attempts to sanitize the direct evidence of discriminatory intent regarding Act 23 by referring to that evidence, incredibly, as "a couple vague, non-racial statements from legislators regarding Act 23 generally, such as one wondering what it 'could mean' for Milwaukee and 'college campuses across the state.'" Resp.40. Obviously, Senator Lazich was not naively "wondering" what Act 23 might "mean for the neighborhoods around Milwaukee and the college campuses across this state,'" SA.932; A.89—where minority and young voters are heavily concentrated. She was responding to the initial lack of enthusiasm for Act 23 among her Republican colleagues by emphasizing the electoral benefits of that law, SA.932; R.209 at 95—that is, "insist[ing] that Republicans get in line to support the bill because it was important to future Republican electoral success." A.77; A.64, 89. And the reaction of the other senators confirms Senator Lazich's statement was not an idle query but rather a call to suppress minority and youth voting for partisan gain. SA.934-35 (Assistant Majority Leader Grothman's statement that "[w]hat I'm concerned about here is winning and that's what really matters here"; some senators were "clearly disturbed," but the general "tone of the room [wa]s one of giddiness and happiness").

The State's effort to cast the challenged provisions as "banal," Resp.17, 18, 35, also fails. "[T]hese many laws, some with multiple provisions, comprised the largest set of restrictive electoral measures enacted anywhere in America in recent years." A.224. The district court found that they "transformed Wisconsin's election system." A.44, 50, 75. True, some of the challenged provisions impact more voters than others do; they run the gamut. But the fact that the Legislature so thoroughly mined even the minutiae of the election code is not a defense; rather, it provides powerful confirmation that the Legislature was doing *everything* in its power to find ways to make it harder to vote, particularly for young and minority voters. *See also* SA.645 (statement of Republican Senator Dale Schultz that legislators should stop "mucking around in the mechanics and making it more confrontational at our voting sites … and trying to suppress the vote").

C. The State's claim that there is insufficient evidence of discriminatory effect, *see, e.g.*, Resp.35-36, 39, 41-43, fails even cursory scrutiny. The record is brimming with such evidence.

The requirement that dorm lists used for voter registration contain a certification of citizenship, the elimination of the requirement that SRDs be appointed at high schools, and the onerous requirements for using student IDs to vote all directly target students. Br.14, 17, 47, 48; *see also* R.210 at 316; PX436-010; PX433-050-51; PX435-062; PX263-002. The State's decision to overrule Madison's ordinance requiring landlords to provide voter-registration applications to new renters also effectively targeted young voters. Br.17; PX053 (18-29 year olds make

up 16.21% of Wisconsin's population, 22.44% of Milwaukee's, and 30.67% of Madison's); PX051.

Other challenged provisions impose disparate burdens on minority and/or young voters. *See* Br.17. The district court found that, at the time the voter ID law was passed, "the potential for a voter ID requirement to have a racially disparate impact had long been recognized," A.80; "Democrats, private citizens, and the GAB repeatedly raised these types of concerns to the Legislature," *id.*; "the evidence here shows that patterns of ID possession are racially disparate, and that is likely to have a racially disparate effect on turnout," A.75; 67.9% of voters who have had to turn to the IDPP are minorities, *id.*; and the IDPP "has disenfranchised a number of citizens who are unquestionably qualified to vote, and these disenfranchised citizens are overwhelmingly African American and Latino." A.71; *see infra* p.23; Br.5, 24, 57-58.

Students are also more likely than other voters to lack qualifying ID and to be burdened by the voter ID law. *E.g.*, PX089-003 (testimony of GAB director to Senate committee that "[m]any students do not carry a driver license"); PX436-023; PX429-001, 005 (in April 2016, voter ID "had a significant impact at sites with large student populations"; long lines were "most apparent at polling sites that served student voters," with waits "reported to be up to 2 to 3 hours long"); R.200 at 16-17 (Madison, and campus wards especially, had high rates of no-ID provisional ballots in April 2016 election).

In addition, several studies demonstrate that voter ID laws disparately burden minority and young voters. DX004-003 (2012 study by defense expert stating that "[a] growing body of scholarly research indicates that those more likely to be adversely affected by the adoption of photo ID requirements include minorities" and "the poor"); PX072-048-52 (2014 GAO study finding strict voter ID laws in two states reduced turnout, particularly among African-American and young voters); PX076-013 (study of Texas congressional district finding "Latino non-voters were significantly more likely than Anglo non-voters to strongly agree or agree that a lack of photo ID was a reason that they did not cast a ballot in the 2014 general election"); PX083-016 (finding "substantial drops in turnout for minorities under strict voter ID laws"); Br.58.

The district court also found that "the in-person absentee voting provisions disparately burden African Americans and Latinos," A.145, and "because Milwaukee has a predominantly minority population, the one-location rule was all but guaranteed to have a disparate impact." A.84; *see* Br.7-8, 39-41, 52-53, 56; R.215 at 68-69, 75, 78, 92-93 (testimony of director of Milwaukee Election Commission).[1] Because the burdens from these restrictions fall largely on the disproportionately young populations of Milwaukee and Madison, Br.41-42, the in-person absentee

[1] The State's claim that total absentee voting rates increased by as much or more among blacks and Hispanics as among whites from 2010 to 2014, Resp.28-29, is misleading. The data it cites shows that from 2010 to 2014, absentee voting increased among white registrants by 5.1 percentage points (from 6.1% to 11.2%), among black registrants by 3.8 percentage points (from 3.8% to 7.6%), and among Hispanic registrants by only 1.9 percentage points (from 2.1% to 4.0%). RA.127. Also, due to the defense expert's use of a weighting system, the numbers "don't exactly correspond to the GAB's numbers for absentee ballots cast." RA.126-27, 139.

voting restrictions disparately burden young voters as well. Notably, from the 2012 general election to the 2016 general election (for which the district court's injunction was in effect), total absentee voting (in-person and by-mail) increased by 20.9% statewide but by 27.4% in Milwaukee County and 63.7% in Dane County, which includes Madison.[2]

Discussing the elimination of corroboration, expanded documentary proof-of-residence requirement, elimination of statewide SRDs, increased residency requirement, change in the location where observers are located, and elimination of straight-ticket voting, the district court explained that "the extra burdens" these regulations "impose would fall on anyone who is poorer, less educated, or more transient, regardless of race." A.83.[3] But because those groups *are* disproportionately comprised of minority and/or young voters, Br.44, 54-55; PX037-022, it follows that these provisions impose disparate burdens too. *See also* A.144 (increased residency requirement); Br.49 (corroboration and documentary proof of

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[2] *See* http://elections.wi.gov/node/4414; http://elections.wi.gov/sites/default/files/publication/65/20121106_gab190_summarystats_pdf_14962.pdf; http://elections.wi.gov/sites/default/files/publication/65/20121106_gab190_statistics_xls_14031.xls.

[3] *See also* R.215 at 77-78 (corroboration valuable for people in poverty and transient situations); R.211 at 88 (elimination of corroboration burdens homeless voters); *id.* at 66 (students living with parents disparately lack necessary documentation and benefit from corroboration); R.210 at 313-14; PX049-005 ("[p]roviding proof of residence is a major obstacle, particularly for students, women, and the poor"); PX436-042-45 (375 of the first 565 by-mail registrations in Milwaukee after expansion of documentary proof-of-residence requirement did not include proof of residence); Br.8 (observers); R.215 at 82-83 ("for a person who is possibly challenged with their literacy, which a lot of people again in the city of Milwaukee are, … [straight-ticket voting] presented a very positive voting experience for them not to be intimidated by the complexity of a ballot").

residence); A.89 ("As a class, younger voters are poorer and less established. They are therefore less likely to have a driver license and documentary proof of residence. They are also more transient, and thus will likely face the burden of registration more often.").

More broadly, the district court found that "[n]one" of the "election reforms … passed between 2011 and 2014 … made registration or voting easier for anyone, but they had only minimal effect on less transient, wealthier voters." A.78-79. In other words, the burdens from the challenged provisions fall disparately on more transient, poorer voters—and thus on minority and young voters. *See also* R.210 at 83 ("The fact that whites have more resources in every one of these [socioeconomic] domains indicates that they would be better able to pay those costs [of voting] and that blacks and Latinos will be more hindered by the new restrictions …."); PX037-004-05 ("*removing* options consistently reduces participation, especially among those with fewer resources to navigate the disruption," and "[r]esearch has demonstrated how costs of voting depress turnout especially for racial and ethnic minorities"). Indeed, the likelihood that an African-American voter (as compared to the average voter) in Wisconsin would cast a ballot declined from 2010 to 2014. Br.17; *see* Br.9-10. Thus the evidence that the challenged provisions impose disparate burdens by race and age is overwhelming.

D. The State also misapprehends the pertinent law in two critical respects. *First*, it contends the challenged provisions must be considered individually and not within the context of the full legislative program at issue. Resp.35-36. But

"[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Further, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals *a series of official actions taken for invidious purposes*," and "[t]he specific sequence of events leading up [to] the challenged decision also may shed some light on the decisionmaker's purposes." *Id.* at 267 (emphasis added).

McCrory illustrates the point. The Fourth Circuit considered several voting restrictions collectively and concluded that the district court "seems to have missed the forest in carefully surveying the many trees," 831 F.3d at 214—precisely as the State asks the Court to do here. *See also id.* at 233 ("In large part, [the district court's] error resulted from the court's consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*."); *id.* at 231 ("[C]umulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually."). The State attempts to distinguish *McCrory* because it "involved a challenge to a single omnibus law." Resp.36 n.19. But this overlooks that many of the restrictions challenged in this litigation were bundled together in the "omnibus" Act 23. Br.4-5. Moreover, the provisions at issue in *McCrory* would be no more constitutional if they had been enacted seriatim, as the above-quoted language from *Arlington Heights* makes clear. And, the *McCrory* court considered a number of

provisions in addition to the ones at issue in making its finding of intentional discrimination. 831 F.3d at 223-25; *see id.* at 225 ("a holding that a Legislature impermissibly relied on race certainly provides relevant evidence as to whether race motivated other election legislation passed by the same Legislature"); *cf. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) ("[a] panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition").

Second, the State is wrong about the significance of a finding that provisions were enacted to discriminate based on partisan affiliation or viewpoint. While the State selectively quotes Justice Kennedy's concurrence in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), *see* Resp.49-50, it ignores one of the opinion's central conclusions: The inquiry under the First Amendment is "whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring); *see Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015); *cf. Elrod v. Burns*, 427 U.S. 347, 359 (1976) (government cannot deny *benefit* if doing so infringes speech interests). Under that test, the record in this case—which demonstrates the challenged provisions were enacted to achieve partisan gain through voter suppression—establishes a First Amendment violation.

II. The Challenged Provisions Fail *Anderson-Burdick* Review

Plaintiffs have cross-appealed on two *Anderson-Burdick* claims. *First*, Plaintiffs cross-appeal from the district court's IDPP injunction because its modest relief falls far short of what is needed to remedy the State's continuing constitutional violations in its design and administration of the IDPP "safety net." *Frank v. Walker*, 819 F.3d 384, 387 (7th Cir. 2016) ("*Frank II*"). *Second*, Plaintiffs cross-appeal the rejection of their challenge to the elimination of corroboration and expansion of the documentary proof-of-residence requirement.

A. The District Court Failed To Impose Sufficient Relief for the State's "Manifestly Unconstitutional" IDPP

1. Plaintiffs demonstrated in their opening brief that the State repeatedly violated its assurances to this Court in *Frank v. Walker* that the newly created IDPP would cover the costs of obtaining any vital records, "requir[e] officials to get [records] themselves for persons who ask for that accommodation," and avoid making it "*needlessly* hard to get photo ID." 768 F.3d 744, 747 & n.1, 753 (7th Cir. 2014) ("*Frank*"); Br.23-28. As the district court found, DMV did not pay for a *single* vital record until "*during the second week of trial in this case*." A.69 (emphasis added); *see* A.68. The district court also found that DMV's administration of the IDPP from September 2014 through May 2016 (*not* "*pre*-2016," as the State repeatedly mischaracterizes) was a voting-rights "disaster" and "wretched failure." A.46, 71. The IDPP repeatedly has caused "real incidents of disenfranchisement" where the State admits it has no reason to doubt a voter's qualifications but nevertheless denies the "petition" for the credential required to vote. A.46, 68. And

these burdens have been imposed in a shockingly disproportionate manner on African Americans and Latinos, who make up over 2/3 of IDPP petitioners and *85%* of voters formally "denied" an ID. A.64, 75.

The State dismisses the district court's detailed findings as an "overly harsh critique" of the "*pre*-2016 IDPP," not the "2016 IDPP" as it supposedly now operates under the "salutary adjustments" DMV "voluntarily" adopted—on the eve of trial. Resp.11. The State claims the court "was able to identify only two alleged infirmities" in the IDPP that remain unresolved. Resp.10-11.

These are frivolous caricatures of the actual course of events and the district court's findings in its July 29 opinion, August 11 stay denial, and October 12-13 enforcement orders. Those decisions all include detailed findings explaining why the IDPP under the May 2016 Emergency Rule *continues* to impose unconstitutional burdens that "far exceed[] what *Crawford* and *Frank* contemplate" and to require "long term reform" and a "permanent solution." SA.287, 291-93, 1224-46; *see* A.47, 70, 132; *see generally* A.43-47, 63-71, 131-32, 147, 153. The State has not even acknowledged these extensive findings about the *current* IDPP, let alone demonstrated clear error in them. The district court emphasized as recently as October 13 that the IDPP remains "a wretched failure and what we're doing here is to patch it up … to get us to the November election, recognizing that it will have to

really be fundamentally reformed" after the election and that "close court supervision of the reform process is going to be necessary." SA.1245.[4]

2. The State does not dispute that DMV "commonly" obtains "background reports" containing "a substantial amount of deeply personal information" about IDPP petitioners. A.67 n.5; *see* SA.150-221. The State argues these undisclosed intrusions "impose[] no burden on anyone's right to vote," Resp.13, without even acknowledging the district court's contrary holding that this practice "imposes a *substantial* burden on the right to vote." A.67 n.5 (emphasis added). The State has not tried to show why this determination should be set aside.[5]

3. Plaintiffs demonstrated that DMV will not issue a "free" ID for voting unless the name and birthdate on an applicant's vital records or secondary proofs "match" his precise name and birthdate in his SSA records. Br.29. The State argues this imposes no burden on voting because the responsibility for determining *whether* there is a "match" "is imposed entirely upon DMV, which conducts the

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[4] The State claims that no petition for an ID for voting has been denied since the May 2016 Emergency Rule. Resp.12. But that's because the Wisconsin Department of Justice has "directed" DMV "to not deny any petitions until further notice" while this litigation remains pending, and instead to hold those petitions in the "suspended" category indefinitely. FA.19. Moreover, Plaintiffs have asked the State about continuing reports of problems in the administration of the IDPP, but the State has refused any further disclosures to Plaintiffs pending resolution of this appeal.

[5] Plaintiffs advocated the use of such background reports in October 2016, Resp.12-13, as an emergency means of locating voters whose petitions had been denied by DMV and who had *not* received the Temporary Receipts needed to vote because their addresses on file with DMV had expired. FA.24. Through the measures ordered by the district court on October 26, at least 19 voters who would have been disenfranchised received the Temporary Receipts needed to vote in November. FA.31.

verification process." Resp.13. But this ignores that, if the DMV's "verification process" reveals any discrepancy between a voter's vital records and his SSA records, DMV requires the *voter* to change his SSA records as an additional condition to obtaining the ID needed to vote. The State has failed entirely to respond to Plaintiffs' demonstration that this *substantive* "matching" requirement imposes a significant and unconstitutional additional burden on the right to vote, especially given the DMV's many exceptions to this requirement in other contexts. Br.29.

4. The district court found the IDPP is a "complicated beast of a system" that often is heavily dependent on jurisdictions that "have systematic deficiencies in their vital records systems" and frequently are "unable to confirm [Wisconsin voters'] identities under the DMV's standards." A.68; SA.1245. The State responds that any such problems do not burden ID applicants themselves because (1) "DMV conducts the entire investigation," (2) an applicant receives Temporary Receipts every 60 days "for however long the investigation takes," and (3) "[t]he *only* step an IDPP applicant must take is to respond to DMV inquiries once every half a year, which helps the investigation move forward." Resp.13-14.

The State badly mischaracterizes the nature and scope of the continuing burdens imposed on IDPP petitioners. DMV's own representatives testified at trial that "the customer needs to participate in the verification process," including by checking in with DMV, signing and submitting additional forms as directed, and "talk[ing] to their family and see[ing] what the family can provide." SA.990-91;

FA.35-36. And DMV's IDPP processing guidelines identify numerous ways in which petitioners must assist in the "investigations" to determine whether they may vote:

- Responding to investigators' inquiries about their family genealogy and potential alternative names. SA.915-16; FA.12-13. The district court found that, "on average, it takes five communications with the DMV after the initial application to get an ID," and often many more. A.46.
- Searching for "alternative form[s] of proof of identity" such as baptismal certificates or early school records if their information does not "match" available public records, and bringing those proofs to DMV for verification and scanning. SA.916; FA.12-13.
- Providing additional information and signing additional forms if they seek to have the State pay for any vital records. SA.919; FA.15-16.
- Executing a "Common Law Name Change" ("CLNC") Affidavit if DMV so instructs, which requires return visits to have DMV witness their signatures. FA.12-13.
- Giving written notice of all address changes during the ongoing "investigations" into their identities. FA.13-14.

Nor do IDPP petitioners receive Temporary Receipts indefinitely. They are instructed that, after 180 days, additional Temporary Receipts will be provided *only* if "you exercise reasonable efforts" to assist in the DMV investigation and "provide new information." FA.1. DMV's Administrator emphasized at trial that additional Temporary Receipts after 180 days are available only to petitioners who "come

forward with *new* leads or *new* information to allow us to continue to investigate with information that wasn't provided previously. … *But it has to be new information*." FA.35 (emphases added).

The State claims the astounding 26-27% error rate in DMV field offices' handling of IDPP petitions "*involved errors largely committed by petitioners, not DMV*." Resp.14 n.11 (emphasis added). That too is flatly false. According to DMV-internal reports, the "most common error types" are "Petition not sent to central office correctly" and various failures to scan documents and create "envelopes" for internal processing—errors having nothing to do with the "customer." SA.698-703; *see* FA.38 ("[m]ost of them are the errors on the part of the processor"). Moreover, DMV witnesses conceded that many "customer errors" involved mistakes that should have been caught by counter personnel, who are supposed to review completed forms for accuracy and, unlike the petitioners, have training on the IDPP application process. FA.39. Plaintiffs' opening brief pointed to a broad range of additional serious DMV errors and omissions in administering the IDPP, some of which have led to outright disenfranchisements; the State does not attempt to respond to this evidence. Br.31.

5. The experience of Plaintiff Johnny Martin Randle, discussed in Plaintiffs' opening brief, illustrates many of the most fundamental flaws of the IDPP. The DMV Administrator conceded Mr. Randle unquestionably is entitled to vote in Wisconsin. SA.1090-91; PX431-009-12, 014. Yet DMV *to this day* refuses to give Mr. Randle a *permanent* ID for voting because his certified Mississippi birth certificate

reads "Johnnie Marten Randall" rather than "Johnny Martin Randle." Mr. Randle's voluminous Case Activity Report recounts dozens of bureaucratic steps and administrative hurdles over the past 18 months, SA.139-223; we know from the State's exhaustive 71-page background investigation everything about Mr. Randle dating back to the 1940s. Yet DMV now is insisting that he execute an affidavit swearing he has "changed" his "old name" to a new name and "no longer use[s] [his] old name." SA.148.

The State disparages Mr. Randle's concerns that his SSA disability payments could be interrupted and that he is being asked to sign a false affidavit ("Johnnie Marton Randall" *never* was his "old name" and he has "changed" nothing), Br.33; SA.148-49,[6] as "subjective worr[ies]" and stands by its insistence that Mr. Randle will not be given the "free" ID he needs to vote unless he signs the CLNC Affidavit. Resp.14. But the State forgets that, "[h]owever slight [a] burden [on voting] may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.) (citation and internal quotation marks omitted). Given the State's concession that Mr. Randle is eligible to vote, forcing him to "change" his "old name" serves no "relevant" or "legitimate state interest" whatsoever.

The State dismisses Plaintiffs' criticisms of the bizarre "one-letter rule" as "invective[]" against a "modest administrative accommodation for one-letter name

[6] The CLNC Affidavit warns "it is a crime to sign this if [you] know it to be untrue," subject to fine and/or imprisonment. SA.148-49.

mismatches, *which burdens no one*." Resp.14 n.12 (emphasis added). To the contrary, this rule demonstrates the arbitrariness of the State's refusal to provide permanent IDs to (and the resulting burdens on) voters who, like Mr. Randle, have "name mismatches" with their vital records and SSA files involving *more* than a single-letter error. Those voters with only "one-letter name mismatches" may receive a voter ID on the spot at their local DMVs. But voters with equally trivial "name mismatches" involving *two or more letters* must (1) go through the full IDPP, (2) file a CLNC Affidavit, and/or (3) conform their vital records to their SSA files. SA.905-06. A voter ID system resting on rules like these is asking the wrong questions, setting the wrong standards of proof, and serving no legitimate purpose.

6. Plaintiffs demonstrated that many IDPP petitions have been denied because of conflicting birthdates in the petitioners' vital records and secondary documentation. Plaintiffs cited to the case studies of Mr. Boyd and four other IDPP petitioners with such problems. Br.35. The State's only response is to claim—inaccurately—that "Plaintiffs cite no record evidence of *any* voter being denied a free ID based upon a particular birth date issue." Resp.15.

Nor does the State acknowledge the district court's concerns about the conflicting birthdate issues faced by Mr. Boyd and similarly situated petitioners: "[H]ow on earth can [Boyd] ever fix this problem, because he's got these records with three different dates?" SA.997. CAFU's Supervisor *agreed* with the district court's concern, described the issue as "the saddest part of this whole process," and conceded that "I don't know what the answer is to that." *Id.*

7. This Court's August 26 *en banc* order denied Plaintiffs' motion for an initial hearing *en banc* based on the State's representations that it was providing free temporary IDs to anyone who made a single trip to a DMV and complying with the district court's order to publicize that voters need only make a single trip to a DMV office to obtain such a credential. Doc. 39 at 3-4. The State's opening brief represented that "*every eligible voter"* was now receiving "a free ID after making one trip to DMV." Defs.' Opening Brief ("State Br.") 4.

The State violated all of these representations, as spelled out in detail in the October 12, 2016 emergency evidentiary hearing record and the district court's rulings from the bench and in writing. Br.27, 36; SA.298-307, 1224-27, 1229-39, 1243-46. The State says these matters "are not properly before this Court" because they "arose after the parties filed their appeals." Resp.15. But the State repeatedly has filed post-trial documents with this Court including new DMV policies and procedures when attempting to demonstrate that all problems have now been resolved, and made sweeping claims in its opening brief that "*every eligible voter"* was now receiving required voting credentials. State Br.4; *see* RA.1-47; *see also* State's Supp. App'x at 1-75, Doc. 60, *Frank v. Walker*, No. 16-3003 (7th Cir. Oct. 31, 2016). The State cannot have it both ways.

The State criticizes the district court's numerous enforcement orders as "*entirely unnecessary as a legal matter*, given DMV's proactive approach" in "quickly and voluntarily" addressing any problems called to its attention. Resp.15-16. The State claims that DMV resolved all problems "*before any judicial intervention*." *Id.*

(emphases added). Wrong again. The record plainly shows that DMV's supposedly "voluntary" corrective actions all occurred *after* the district court issued a show-cause order on September 30, 2016, requiring DMV to investigate media reports of continuing disenfranchisements and report back to the court by October 7. SA.298-99. The State's claims that the measures it took between the September 30 show-cause order and the October 12 evidentiary hearing were "on its own," Resp.16, and not in response to the district court's intervention strain credulity.[7]

8. The district court plans on remand to supervise "[t]he long-term reform of the IDPP … to remedy its constitutional flaws." SA.293; SA.1245. But three times over the past 27 months (the September 2014 Emergency Rule, May 2016 Emergency Rule, and August 2016 representations in its briefing to avoid initial *en banc* review) the State has represented that it finally had an effective safety net in place, and each time the updated version of the IDPP was subsequently adjudicated to be egregiously inadequate and demonstrated to have abridged *and actually denied* the voting rights of many citizens.

Consistent with its emphasis on the importance of a well-functioning "safety net," *Frank II*, 819 F.3d at 387, this Court should enjoin the voter ID law unless and

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[7] The State denies there is any requirement to publicize voter ID "accommodation[s]" like the IDPP. Resp.15. But the cases cited by Plaintiffs stand precisely for that proposition. Br.36; *see also South Carolina v. United States*, 898 F. Supp. 2d 30, 49-51 (D.D.C. 2012); *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1347-48 (N.D. Ga. 2006). And the Carter-Baker Commission Report, which the State elsewhere embraces, State Br.37, emphasizes the critical importance of robust public education and government outreach to vulnerable citizens. Commission on Federal Election Reform, Building Confidence in U.S. Elections §§ 2.5, 4.1 (Sept. 2005), http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF.

until it is fundamentally reformed and the State can demonstrate that it has a well-functioning, voter-friendly safety net in place—not simply the promise of one. As D.C. Circuit Judge Kavanaugh has explained, the "proper and smooth functioning" of the State's chosen safety net is "vital" to the legality of any voter ID requirement, and "there is too much of a risk" of voting denials and abridgements in the absence of such a safeguard "to roll the dice in such a fashion." *South Carolina v. United States*, 898 F. Supp. 2d at 50. Sadly for those who have already been told they cannot vote, this case proves Judge Kavanaugh's point.

B. The District Court Erred in Not Invalidating Wisconsin's Registration Restrictions

Plaintiffs demonstrated in their opening brief that the district court should have struck down under *Anderson-Burdick* the State's elimination of corroboration and its new requirement that voters produce documentary proof of residence regardless of when they register. Br.49. The State's principal response is to invoke the same bogus "default" argument it makes about all of the *Anderson-Burdick* claims—that "facial invalidation" of a challenged law is permissible only where that law is harmful in its "'broad application to *all* [of a state's] voters.'" Resp.9 (quoting *Crawford*); State Br.22-23. Thus, while Plaintiffs demonstrated that the challenged registration restrictions fall heavily on students, the elderly, and the poor, Br.49, the State's response is that these requirements may not be invalidated "simply because [they] allegedly burden[]" these groups. Resp.9. According to the State, Plaintiffs' failure "to argue that the facial-invalidity standard has been satisfied here" constitutes a "default on the issue of facial validity." Resp.8-9.

No, it does not. There is no such "dispositive principle," and no more of a "default" on this *Anderson-Burdick* challenge than on any of the others. Resp.8. The State conflates rules about facial and as-applied *relief* and the substantive elements of a *claim* under *Anderson-Burdick*. "[T]he distinction between facial and as-applied challenges … goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint" or proved at trial. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) ("The substantive rule of law is the same for both [facial and as-applied] challenges."). And contrary to the State's fixation on "facial" as opposed to "as-applied" claims, "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Claims often have "characteristics of both." *Id.*; *see* Nihal Patel, *Weighty Considerations: Facial Challenges and the Right to Vote,* 104 Nw. U. L. Rev. 741, 742, 748-49 (2010).

Plaintiffs' *Anderson-Burdick* challenges in this case are "facial" in nature because they seek to "reach beyond the particular circumstances of these plaintiffs." *Doe,* 561 U.S. at 194. Plaintiffs "must therefore satisfy [the] standards for a facial challenge *to the extent of that reach*." *Id.* (emphasis added); *see Center for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012). Nothing in the facial/as-applied distinction requires Plaintiffs here to prove that the new restrictions burden a certain number or percentage of voters.

With respect to the substantive *Anderson-Burdick* standard, *Crawford* stands for precisely the opposite of what the State claims. *See* Br.22-23. The controlling

opinion identified "[t]he burdens that are relevant to the issue before us" as "those imposed on persons who are eligible to vote but do not possess a current photo identification," rather than all eligible voters. *Crawford,* 553 U.S. at 198. "The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save [a voter ID law that] required voters to pay a tax or a fee to obtain a new photo identification." *Id*. The Court thus evaluated the constitutionality of Indiana's ID law based on the burdens imposed on those most impacted by it and rejected the challenge because the plaintiffs had failed to produce evidence of those burdens. *Id.* at 199-202 & n.20. This failure of proof—and not any requirement for an aggregate, statewide analysis of the burdens—left the Court to consider "only the statute's broad application to all Indiana voters." *Id*. at 202-03. Numerous courts have confirmed this understanding of *Crawford*, Br.23, 46, and this Court should likewise look to the burdens upon voters for whom the challenged provisions pose the greatest difficulties.

III. The Voter ID Law Violates Section 2 of the Voting Rights Act

Plaintiffs demonstrated in their opening brief that *Frank*'s reasoning *supports* the conclusion that the voter ID law violates the Voting Rights Act ("VRA"). Br.56-59. The State argues in response that the record does not show that substantial numbers of voters have been disenfranchised by the voter ID law and that obtaining an ID is easier now than it was when *Frank* was decided. Resp.31. But this simply ignores that the voter ID law has formally disenfranchised scores of voters and that many more have been unduly burdened and/or deterred from voting. Br.57-58. Likewise, the State fails to address the evidence demonstrating (in

a way the record in *Frank* did not) that for many voters—far more than will ever commit in-person voter-impersonation fraud in Wisconsin—the process of obtaining an ID is more bureaucratic odyssey than minimally burdensome detour. *See supra* Section II.A.

The State also makes no effort to respond substantively to the scholarship demonstrating that strict voter ID laws suppress turnout, particularly for minority voters. Br.58; *supra* p.5. It instead makes the risible point that "there was no discernible 'overall … negative' effect on turnout" from the voter ID law in the spring 2016 *primary* election. Resp.31. This conflation of causation and correlation provides little basis—indeed, less basis than the decline in presidential *general* election turnout in Wisconsin from 2012 to 2016[8]—for drawing any conclusions about the impact of the voter ID law.

The State has no response at all to the point that, unlike in *Frank*, the record here shows that disparities in ID possession persist even though blacks and Latinos are far *more* likely than whites to *use* the opportunities available to attempt to obtain IDs. Br.57; A.81 (minorities make up the majority of voters who have obtained free IDs to vote, 2/3 of IDPP petitioners, and 85% of IDPP denials). And, while the State contends that discrimination by Wisconsin's political subdivisions is irrelevant under the VRA, Resp.29-30—an argument previously addressed, Br.55—

[8] *See* http://elections.wi.gov/sites/default/files/page/voter_turnout_partisan_nonpartisan_xlsx_13632.xlsx; http://elections.wi.gov/sites/default/files/Statewide%20Report-all%20offices.pdf; http://host.madison.com/ct/news/local/govt-and-politics/election-matters/why-did-wisconsin-see-its-lowest-presidential-election-voter-turnout/article_6dd2887f-e1fc-5ed8-a454-284d37204669.html.

it does not dispute that Milwaukee has for decades been called the Selma of the North and is one of the most segregated cities in the country, or that Wisconsin arguably has the country's most extreme socioeconomic disparities by race. Br.54-56. The State has failed to rebut the showing that *Frank* supports invalidation of the voter ID law and its IDPP safety net under the VRA.

IV. This Court Should Overrule *Frank*

For the reasons discussed in Plaintiffs' opening brief and above, *Frank* should be overruled and the voter ID law should be permanently enjoined. The State argues this would violate principles of *stare decisis*, relying primarily on *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), a case that applied a "superpowered form of *stare decisis*" to precedent involving patents and licensing agreements (and did not involve constitutional or civil rights). *Id.* at 2410; Resp.32. Outside of the property/contract realm, "even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience." *Johnson v. United States,* 135 S. Ct. 2551, 2562 (2015); *see Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (reviewing numerous "prudential and pragmatic considerations" that can justify overruling a prior decision, including how the decision has worked in practice, whether important facts have changed "or come to be seen … differently," and whether developments in the law have undermined the earlier decision); *United States v. Sykes*, 598 F.3d 334, 338 (7th Cir. 2010).

All of these considerations are present here.

1. *Frank* either conflicts or is in tension with several other Circuits' decisions. Br.61-62; *see also* Br.23. Although that does not compel any change, this Court has emphasized that "we carefully and respectfully consider the opinions of our sister circuits" in deciding whether to revisit precedent. *Sykes*, 598 F.3d at 337-38 (citations omitted). *Frank* also has drawn broad scholarly criticism on many grounds.[9] And five judges of this Court have already concluded that *Frank* was wrongly decided in multiple respects. 773 F.3d 783, 783-84, 796-97 (7th Cir. 2014) (Posner, J., dissenting).

2. *Frank*'s deference to "legislative facts" cannot be reconciled with *Whole Woman's Health v. Hellerstedt*, which held that federal courts "retain[] an independent constitutional duty to review [legislative] factual findings where constitutional rights are at stake." 136 S. Ct. 2292, 2310 (2016), *as revised* (June 27, 2016) (citation omitted). *Frank* thus does not qualify for *stare decisis* because its "doctrinal underpinnings" have been "eroded" by "subsequent legal developments." *Marvel Entertainment*, 135 S. Ct. at 2410.

3. Wisconsin's experience in the two years since *Frank* shows that its version of voter ID is "unworkable in practice." *Sykes*, 598 F.3d at 338. While the trial

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[9] *E.g.,* Ellen D. Katz, *What the Marriage Equality Cases Tell us About Voter ID*, 2015 U. Chi. Legal F. 211, 213, 221, 238; Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 460-61 (2015); Franita Tolson, *What is Abridgment? A Critique of Two Section Twos*, 67 Ala. L. Rev. 433, 480, 483 (2015); Matthew R. Pikor, *Voter ID in Wisconsin: A Better Approach to Anderson/Burdick Balancing*, 10 Seventh Cir. Rev. 465, 490-91, 495 (2015); Charles Stewart III et al., *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 Stan. L. Rev. 1455, 1457-58 & nn.5-9 (2016).

record yet again confirms that "impersonation fraud is a truly isolated phenomenon" that "has not posed a significant threat to" electoral integrity, "[t]he same cannot be said for Wisconsin's voter ID law," which "has disenfranchised more citizens than have ever been shown to have committed impersonation fraud." A.63-64; *accord* A.46 ("The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement …."). And experience shows that the law has "undermine[d] rather than enhance[d] confidence in elections, particularly in minority communities," A.46, where voters (correctly) perceive the law as a tool of voter suppression.

4. Plaintiffs' opening brief demonstrated several legal errors in *Frank*. Br.60-62. The State's responses largely focus on strawmen arguments and supposed distinctions between vote-denial and vote-dilution cases that make no sense. And Plaintiffs' "abridgement" critique of *Frank* is not a matter of semantics, Resp.33, but points to a substantive flaw that has drawn widespread scholarly concern. *See supra* p.25 n.9.

5. *Frank*'s approach to the VRA allows Wisconsin to impose a voter ID regime that falls disproportionately on minorities born in jurisdictions with abysmal vital-records systems—places like Cook County, the States of the old Jim Crow South, and Puerto Rico. A.152-53; *see* Br.31-32. The State's argument that this result "necessarily" follows from a supposed distinction between vote-denial and vote-dilution cases, Resp.34, is senseless. There is no reason why a history of out-of-state discrimination should be relevant in one context but irrelevant in the other.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the district court with respect to the rulings that Plaintiffs have cross-appealed.

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Respectfully submitted,

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Dated this 7th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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