No. 15-3582

In the
United States Court of Appeals
for the Seventh Circuit

RUTHELLE FRANK, et al.,

Plaintiffs-Appellants,

v.

SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 2:11-cv-01128-LA.
The Honorable **Lynn Adelman**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS

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Attorneys for Plaintiffs-Appellants

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-3582

Short Caption: Frank v. Walker

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not applicable

Attorney's Signature: s/ Sean J. Young Date: December 8, 2015

Attorney's Printed Name: Sean J. Young

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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E-Mail Address: syoung@aclu.org; dale.ho@aclu.org; mrugg@aclu.org

(cont'd from previous page) Samantha Meszaros, Steve Kvasnicka, Sarah Lahti, Domonique Whitehurst, Edward Hogan, Anthony Judd, and Anthony Sharp

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Attorney's Signature: s/ Dale E. Ho Date: December 8, 2015

Attorney's Printed Name: Dale E. Ho

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Attorney's Signature: s/ Sophia Lin Lakin Date: December 8, 2015

Attorney's Printed Name: Sophia Lin Lakin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Karyn L. Rotker Date: December 8, 2015

Attorney's Printed Name: Karyn L. Rotker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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Attorney's Signature: s/ Laurence J. Dupuis Date: December 8, 2015

Attorney's Printed Name: Laurence J. Dupuis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ M. Laughlin McDonald Date: December 8, 2015

Attorney's Printed Name: M. Laughlin McDonald

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Attorney's Signature: s/ Neil A. Steiner Date: December 8, 2015

Attorney's Printed Name: Neil A. Steiner

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Attorney's Signature: s/ Craig G. Falls Date: December 8, 2015

Attorney's Printed Name: Craig G. Falls

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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E-Mail Address: craig.falls@dechert.com

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Attorney's Signature: s/ Angela M. Liu Date: December 8, 2015

Attorney's Printed Name: Angela M. Liu

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Tristia Bauman Date: December 8, 2015

Attorney's Printed Name: Tristia Bauman

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JURISDICTIONAL STATEMENT

The United States District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3)-(4) and 52 U.S.C. § 10101(d) over this action brought pursuant to 42 U.S.C. § 1983 for alleged violations of the Fourteenth and Twenty-Fourth Amendments to the United States Constitution and Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Plaintiffs are natural persons and United States citizens, and no party is a private corporation.

The United States Court of Appeals for the Seventh Circuit has jurisdiction pursuant to 28 U.S.C. § 1291 over this direct appeal of the district court's October 19, 2015 Decision and Order, Short Appendix ("A.")01-20, and November 5, 2015 Judgment, A.21, denying Plaintiffs' March 26, 2015 Motion for a Permanent Injunction, Class Certification, and Judgment on Remaining As-Applied Claims, Dkt. #222,[1] and dismissing Plaintiffs' claims. Plaintiffs timely filed a notice of appeal on November 17, 2015. Fed. R. App. P. 4(a)(1)(A).

There are no claims that remain for disposition in the district court.

STATEMENT OF THE ISSUES

1. Does the prior appeal decision, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"), preclude Plaintiffs' claim that the burdens imposed by Act 23 upon a narrow class of voters are not justified under the *Anderson-Burdick* balancing analysis, as well as consideration of Plaintiffs' motion to certify that class?

[1] Unless otherwise stated, "Dkt." refers to the docket entries in the district court proceedings.

2. Does Act 23's exclusion of identification cards issued by the U.S. Department of Veterans' Affairs ("VA IDs") for voting purposes violate the Equal Protection Clause, when Defendants concede that VA IDs are materially identical to Wisconsin-issued IDs for purposes of confirming a voter's identity?

STATEMENT OF THE CASE

This is a successive appeal involving Plaintiffs' challenge to 2011 Wisconsin Act 23 (hereinafter "Act 23"), a strict "voter ID" law that requires eligible Wisconsin voters to provide one of a limited group of photographic identifications in order to exercise their fundamental right to vote, most commonly a Wisconsin driver's license or state ID card issued by the Division of Motor Vehicles ("DMV") (hereinafter "ID" or "Wisconsin-issued ID"). Wis. Stat. §§ 6.79(2), 5.02(6m). In the prior appeal, this Court held that Plaintiffs could not demonstrate that the burdens imposed by Act 23 on the "'vast majority'" of Wisconsin voters were sufficiently significant and widespread to justify the total invalidation of Act 23 under the *Anderson-Burdick* balancing test, which governs challenges to voting restrictions under the Fourteenth Amendment. *See Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014) (hereinafter "*Frank I*") (citation omitted); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

This appeal concerns Plaintiffs' far narrower challenge to Act 23, which does not seek to invalidate the law *en toto*, but seeks to enjoin Act 23 only with respect to a narrow and discrete class of voters who lack both ID and an underlying document needed to obtain ID, and who face particularly difficult obstacles to obtaining ID.

The district court erroneously concluded that the prior ruling precluded this narrow challenge. Plaintiffs therefore ask that this Court direct the district court to consider, in the first instance, Plaintiffs' narrower challenge, including Plaintiffs' underlying motion for class certification. If Plaintiffs' requested relief is granted, the remedy would still leave Act 23 in place for the vast majority of voters.

Plaintiffs also challenge, under the Equal Protection Clause, Act 23's irrational exclusion of identification cards issued by the U.S. Department of Veterans' Affairs ("VA IDs") from its list of acceptable forms of photo identification, which makes Wisconsin the only state in the nation that refuses to accept VA IDs for purposes of confirming a voter's identity.

I. The Prior Appeal

On December 13, 2011, Plaintiffs filed a Complaint, followed by an Amended Complaint on March 2, 2012, which challenged Act 23 under several legal theories, including individual and class claims that Act 23 imposed an undue burden on the right to vote in violation of the Fourteenth Amendment. Dkt. #1; Dkt. #31, ¶¶ 133-142. Under the principles of *Anderson*, 460 U.S. at 788-89, and *Burdick*, 504 U.S. at 434, it is a violation of the Fourteenth Amendment for a State to impose burdens on the right to vote that are not sufficiently justified by the State's interests; the weightier the burden, the stronger the state's justification must be (hereinafter the "*Anderson-Burdick* test"). Plaintiffs further claimed, *inter alia*, that Act 23's exclusion of VA IDs from the list of acceptable IDs violated the Equal Protection Clause. Dkt. #31, ¶¶ 157-162. Plaintiffs moved for class certification in early 2012,

Dkt. #63, but the motion was never ruled upon. A bench trial was held in November 2013.

On April 29, 2014, the district court entered judgment against Defendants, permanently enjoining them from "conditioning a person's access to a ballot, either in-person or absentee, on that person's presenting a form of photo identification." Dkt. #196. Its principal findings under the *Anderson-Burdick* balancing test were that "a substantial number of the 300,000 plus eligible voters who lack a photo ID are low-income individuals . . . who have encountered obstacles that have prevented or deterred them from obtaining a photo ID," *Frank v. Walker*, 17 F. Supp. 3d 837, 854 (E.D. Wis. 2014), and that these widespread burdens were not justified by the State's unsubstantiated interest in preventing in-person voter impersonation fraud, *id.* at 862.

In its decision, the district court declined to rule on Plaintiffs' pending motion for class certification, *id.* at 879-80, and it also declined to rule on the merits of Plaintiffs' Equal Protection claim regarding veterans' ID cards, reasoning that its order invalidating Act 23 in its entirety based on other claims made consideration of these issues unnecessary, *id.* at 842. In doing so, the court explicitly acknowledged that "by not addressing all constitutional claims, I am leaving the door open to successive appeals." *Id.* at 843.

On appeal, this Court reversed. *Frank I*, 768 F.3d 744. After analogizing Plaintiffs' claim to the challenge in *Crawford v. Marion County Election Board*, 553 U.S. 181, 198 (2008), where the Supreme Court upheld Indiana's voter ID law under

the *Anderson-Burdick* test, *Frank I*, 768 F.3d at 747, this Court found that, "'[f]or most voters who need [ID], the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . .' These observations hold for Wisconsin as well as for Indiana." *Frank I*, 768 F.3d at 745-46 (third alteration in original) (quoting *Crawford*, 553 U.S. at 198)). With respect to the State's interests, *Frank I* held that courts must accept that a voter ID law "deters [voter impersonation] fraud (so that a low frequency stays low); [] promotes accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct) [and] promotes voter confidence." *Frank I*, 768 F.3d at 749-50. It concluded that the minimal impact of Act 23 on the "'vast majority'" of Wisconsin voters was "'amply justified'" by these interests. *Id.* at 755 (quoting *Crawford*, 553 U.S. at 204). Importantly, however, *Frank I* did not hold that these state interests always justify whatever burdens a voter ID law might impose on any individual or discrete class of individuals. Nor did *Frank I* address Plaintiffs' claim that the exclusion of VA IDs as valid for voting violates the Equal Protection Clause.

Plaintiffs subsequently filed a petition for a writ of certiorari, which the Supreme Court denied. Order Denying Petition for Writ of Certiorari, *Frank v. Walker*, No. 14-2058 (7th Cir. Mar. 23, 2015), Dkt. #89.

II. The Proceedings Below

On March 25, 2015, the Seventh Circuit issued its mandate and remanded the case to the district court. Notice of Issuance of Mandate, *Frank v. Walker*, No.

14-2058 (7th Cir. Mar. 25, 2015), Dkt. #92-1. There, Plaintiffs asserted, *inter alia*, their claims that: (a) Act 23 ought to be enjoined with respect to a discrete class of voters who lack ID and underlying documents required to obtain ID, and who face special difficulties in obtaining ID; and (b) Act 23's irrational exclusion of VA IDs violates the Equal Protection Clause.

A. Plaintiffs' Class-Based *Anderson-Burdick* Claim

First, Plaintiffs advanced a narrower, class-based *Anderson-Burdick* claim that *Frank I* did not address or foreclose: that Act 23 imposed undue burdens on a narrow and discrete class of voters who lack underlying documents required to obtain ID and who also face special difficulties in obtaining ID. Specifically, Plaintiffs requested certification, pursuant to Fed. R. Civ. P. 23(b)(1) and (b)(2), of this class of voters, who fall into three discrete categories:

(1) Eligible Wisconsin voters who have name mismatches or other errors in a document needed to obtain ID (hereinafter "underlying document");

(2) Eligible Wisconsin voters who have to obtain an underlying document from an agency other than the DMV (*e.g.*, a Social Security card) in order to obtain ID; and

(3) Eligible Wisconsin voters for whom one or more underlying document(s) necessary to obtain ID do not exist.

In support of this request, Plaintiffs showed that this proposed narrow class satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) of the Federal Rules of Civil Procedure. *See* Dkt. #223 at 17-18; Dkt. #237 at 10-29.

On the merits, Plaintiffs demonstrated that when applying the *Anderson-Burdick* framework solely with respect to this class, the enhanced burdens that Act 23 specifically imposed on the class outweighed the State's interests, and warranted a remedy that would apply only to that class. *See* Dkt. #223 at 16-18; Dkt. #237 at 10-14, 29-30. Unlike "most voters who need [ID]," this narrow class of voters faces special burdens in obtaining ID and suffer much more than "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph." *Frank I*, 768 F.3d at 745 (second alteration in original) (quoting *Crawford*, 553 U.S. at 198); *see* Dkt. #223 at 16-18; Dkt. #237 at 10-11. For example, the trial record demonstrated that, in order to obtain ID, members of this class faced significant burdens trying to obtain ID, such as having to spend more than $100 to correct erroneous underlying documents necessary to obtain ID, or having to locate and obtain 80 year-old elementary school records. Stipulated Joint Appendix ("JA.")12-20.

Next, Plaintiffs pointed out that *Frank I* did not foreclose this narrower claim. Although *Frank I* required the court to accept that Act 23 furthers the State's interest in deterring in-person voter impersonation fraud, *Frank I*, 768 F.3d at 750, this Court did *not* hold that this fixed weight on the state interests side of the *Anderson-Burdick* scale *always* outweighed whatever unique enhanced burdens were imposed on any one individual, or any class of individuals (however great or small), on the other side of the scale. Dkt. #237 at 11-14. Nor did *Frank I* hold that the State's interests categorically preclude the availability of relief for specific

individuals unreasonably harmed by Act 23. Because the State's interests do not justify the enhanced burdens imposed on the narrow class of individuals identified by Plaintiffs, Plaintiffs asked the district court to order relief solely for the members of that class. Plaintiffs proposed that the remedy include the use of an affidavit that would allow such voters to self-identify as members of this class by swearing, under penalty of perjury, that they fall into one of these three categories, and then to vote without having to show photo identification. Dkt. #223 at 18; Dkt. #237 at 29-30. Such a remedy would have left Act 23 intact for the vast majority of Wisconsin voters.

The district court, however, did not rule on Plaintiffs' motion for class certification or make any factual findings related to the application of the *Anderson-Burdick* test on this narrower claim. It believed, erroneously, that *Frank I* prevented it from doing so. A.01-04. Thus, at this stage, the district court has not made full factual findings on the specific issues relevant to Plaintiffs' class-based *Anderson-Burdick* claim.

B. Plaintiffs' Equal Protection Claim on Behalf of Veterans

Second, Plaintiffs renewed their claim that Act 23's exclusion of VA IDs violated the Equal Protection Clause for veterans who wished to vote with their VA IDs. VA IDs are issued by the United States government to veterans who are enrolled in the VA health care system, and are used to obtain health benefits. They bear the holder's name, his photograph, and an expiration date, and are a "salute to [veterans'] military service." Dkt. #238-14. Of the eight states in the country that impose strict photo identification requirements, *see* Dkt. #238-15 (National

Conference of State Legislatures' listing of "strict photo ID" states),[2] Wisconsin is the only state that does not allow VA IDs to be used for voting purposes:

- Georgia permits any "valid . . . federal government issued photo ID," Dkt. #238-16 at 1; Ga. Code Ann. § 21-2-417(a);
- Indiana permits identification "issued by . . . the United States Department of Veterans Affairs (or its predecessor, the Veterans Administration)," Ind. Code § 3-5-2-40.5(b); JA.42;
- Kansas permits an "identification document issued by a . . . federal government office or agency," Kan. Stat. Ann. § 25-2908(h)(1)(F); *see* Dkt. #238-16 at 4;
- Mississippi permits "[a]ny . . . photo ID issued by any branch, department, agency or entity of the United States government," Dkt. #238-16 at 7; *see* Miss. Code Ann. § 23-15-563(2)(d);
- Tennessee permits "United States Military photo ID, including a Veteran Identification Card," Dkt. #238-16 at 8; *see* Tenn. Code. Ann. § 2-7-112(c)(6);
- Texas permits "U.S. Military Identification Cards," including both "Uniformed Services ID Cards" and "Veterans Affairs ID Cards," Dkt. #238-16 at 10; *see* Tex. Elec. Code Ann. § 63.0101(2); and
- Virginia permits any "photo identification issued by . . . the United States" Va. Code Ann. § 24.2-643; *see* Dkt. #238-16 at 12.

Many veterans in Wisconsin are homeless or marginally housed, JA.45, and several veterans testified at trial about times in which they possessed VA ID but did not have another form of acceptable ID, JA.26-33 (homeless Plaintiff Carl Ellis had VA ID but had to spend two years trying to obtain Wisconsin ID, and personally knew at least 15-20 other veterans without acceptable ID); JA.35-37 (Sim Newcomb

[2] The National Conference of State Legislatures categorizes as "strict photo ID" states the eight states that require a form of photographic identification for voting purposes, without an exception available to all voters, such as an affidavit of identity. *Contra, e.g.*, Mich. Comp. Laws Ann. § 168.523(2) (voters without ID may vote with an affidavit in Michigan, which is a "non-strict" photo ID state).

had VA ID but had to take unpaid time off work to make two trips by bus to and from the DMV to try, unsuccessfully, to get Wisconsin ID); JA.21-22 (Rickey Davis had VA ID, but was unable to obtain Wisconsin ID because his birth certificate had been destroyed). Though Wisconsin's elections administration body at the time, the Wisconsin Government Accountability Board ("GAB"), had recommended *inter alia* that the law include VA IDs as a form of identification that could be used for voting, JA.02; JA.05; JA.42-43, the Wisconsin legislature rejected their recommendation, *see* Wis. Stat. § 5.02(6m).

Initially, Defendants argued that the Wisconsin legislature had a rational basis for excluding VA IDs because they supposedly "do not serve as a good proxy to confirm a voter's identity at the polls." Dkt. #176 at 123. Defendants asserted that VA IDs may not bear a "relatively current photograph" due to the fact that, at that time, VA IDs did not have expiration dates. *Id.* However, Defendants later abandoned this argument, conceding that Wisconsin driver's licenses or state IDs may also bear a relatively old photograph because photographs on Wisconsin-issued IDs need only be updated every 16 years. *See* Dkt. #228 at 19. And as of February 2014, VA IDs now *have* expiration dates. Dkt. #238-14. Thus, VA IDs are materially identical to Wisconsin-issued IDs for purposes of confirming that voters are who they say they are. *See also* JA.02 (GAB concluding that VA IDs also "provide reliable and accessible identification" compared to Wisconsin-issued IDs); JA.05 (same). The district court nonetheless rejected Plaintiffs' claim on the merits. A.13-20.

* * *

The above rulings were memorialized in a Decision and Order dated October 19, 2015. A.01-20. On November 5, 2015, the court entered judgment, *inter alia,* "on the merits . . . in favor [of] the defendants as to the claims of Ruthelle Frank and any other remaining 'Class 1' named plaintiffs," which refers to the class-based *Anderson-Burdick* claim, and "in favor of the defendants as to the claims of Sam Bulmer, Carl Ellis, and Rickie Lamont Harmon," *i.e.*, the Equal Protection claim asserted by veteran holders of VA ID. A.21.[3]

On November 17, 2015, Plaintiffs timely filed a notice of appeal as to the district court's October 19, 2015 Decision and Order and the November 5, 2015 Judgment with respect to these claims. Dkt. #256.

[3] In addition, the judgment provided "that the claim of Domonique Whitehurst is dismissed as unripe . . . ." A.21. This claim asserts that the exclusion of photo IDs issued by Wisconsin-accredited technical colleges violates the Equal Protection Clause, given that photo IDs issued by other Wisconsin-accredited colleges and universities are accepted under Act 23. Defendants did not dispute that this discrimination is unconstitutional, Dkt. #228 at 21, but the district court found that the claim was not ripe because there are emergency rules, in effect since May 15, 2015, that would allow technical college IDs to be used for voting purposes, *see* Wisconsin State Legislature, *Emergency Rule 1515*, http://docs.legis.wisconsin.gov/code/emergency_rules/all/emr1515, and the Wisconsin legislature has the opportunity to make the rule permanent through promulgation before the emergency rules expire, Wis. Stat. § 227.19; A.04-08. These emergency rules are now set to expire on February 8, 2016, and by law the deadline cannot be extended again. Wis. Stat. §§ 227.24(1)(c), (2)(a). Should the Wisconsin legislature fail to make the emergency rules permanent by that date, Plaintiffs reserve the right to seek leave to supplement the briefing to address the district court's dismissal of Whitehurst's claim on grounds of ripeness.

SUMMARY OF ARGUMENT

At the heart of this successive appeal lies the following question: Under this Court's previous ruling that Wisconsin's voter ID law does not significantly burden the vast majority of voters and therefore should not be struck down in its entirety, is the voter ID law forever shielded from narrower challenges based on the particular burdens that the law imposes on an individual voter, or a certified class of such voters, who seek limited relief only as to those who suffer direct and unreasonable burdens from the law?

Under the basic principle that the scope of an appellate court decision does not encompass issues that it simply "did not address," the answer is plainly no. *Moore v. Anderson*, 222 F.3d 280, 284 (7th Cir. 2000). *Crawford v. Marion County Election Board*, 553 U.S. 181, 199 (2008), clearly contemplated that under the *Anderson-Burdick* balancing test, which governs challenges to voting restrictions under the Fourteenth Amendment, *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983), *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), there can be two types of challenges to voter ID laws—a broad constitutional challenge, seeking total invalidation of the law, based on the impact that the law had on *voters generally*, and a narrower constitutional challenge based solely upon the impact that the law had on *an individual or discrete group of voters*, and seeking relief only for that group.

With respect to the Fourteenth Amendment challenge, this Court's ruling in the prior appeal, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"), solely addressed the first type of challenge, reversing the district court's broad

invalidation of Act 23 based on the impact that it has on Wisconsin voters generally. The district court nevertheless found, on remand, that *Frank I* completely foreclosed Plaintiffs' far narrower challenge to the law based on the impact that it has on a discrete class of voters who lack ID, lack a document needed to obtain ID, and face special difficulties in obtaining ID. The district court did not rule on Plaintiffs' motion to certify such a class, did not consider the application of the *Anderson-Burdick* test to Plaintiffs' class-based claim, and did not consider whether a narrow remedy that would apply only to that class would be appropriate. Its failure to do so was error, and the district court's dismissal of Plaintiffs' class-based *Anderson-Burdick* claim should be vacated with instructions to the district court to adjudicate Plaintiffs' class certification motion and make all other necessary findings in the first instance.

The district court's second legal error was its conclusion that Act 23's exclusion of identification cards issued by the U.S. Department of Veterans' Affairs ("VA IDs") for voting purposes—making Wisconsin the only strict voter ID state in the nation to prohibit veterans from using their VA IDs to vote—was justifiable under the Equal Protection Clause. The court did so even though Defendants *conceded* that VA IDs are materially identical to Wisconsin driver's licenses and state ID ("Wisconsin-issued ID") for purposes of confirming a voter's identity, *see* Dkt. #228 at 19, which is the primary purpose of Act 23 (as Defendants have long professed), *Frank I*, 768 F.3d at 749-50. There is thus no justifiable reason to exclude VA IDs.

The district court hypothesized that the Wisconsin legislature could rationally decide to allow active-duty military IDs and tribal IDs for voting purposes but not VA IDs, because active-duty military and tribal members might theoretically face difficulties obtaining Wisconsin-issued ID that veterans do not. A.17-18. But Plaintiffs do not argue that veterans deserve the same accommodation as military and tribal voters because of the burdens they face; they assert that there is no rational basis for differentiating between VA IDs and *Wisconsin-issued IDs* for purposes of confirming a voter's identity, and that therefore, excluding VA IDs does not harm the state's interest in preventing voter fraud. Furthermore, including VA IDs certainly does not harm the State's interest in helping military and tribal voters. The district court also asserted that excluding VA IDs generally serves the State's interest in administrative efficiency, but it is utterly unclear why it would be onerous to add VA IDs to the list of acceptable IDs that poll workers consult when presented with an unfamiliar form of ID. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 (1976) (rejecting administrative justification under rational basis review, where supposed administrative burden would not have been "onerous").

For these reasons, this Court should vacate the district court's judgment as to Plaintiffs' class-based *Anderson-Burdick* claim, and remand for the court to consider that claim in the first instance, including adjudication of Plaintiffs' class certification motion; and reverse the district court's judgment as to the veteran Plaintiffs' Equal Protection claim with instructions to enter judgment in favor of the veteran Plaintiffs.

ARGUMENT

The district court's judgment rests upon two legal errors. First, the district court erred in ruling that this Court's mandate following *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"), precluded Plaintiffs' narrower class-based *Anderson-Burdick* claim and consideration of Plaintiffs' motion for class certification, because *Frank I* simply did not address any of these latter issues. Second, the district court erred in concluding that Act 23's exclusion of VA IDs for voting purposes was justifiable under the Equal Protection Clause, when Defendants concede that VA IDs are materially identical to Wisconsin driver's licenses and state ID for purposes of confirming a voter's identity. A district court's legal rulings are reviewed *de novo*. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015).

I. *Frank I* Did Not Preclude Consideration of Individual- or Class-Based Relief Under the *Anderson-Burdick* Test

The district court erroneously believed that *Frank I*'s mandate required the dismissal of Plaintiffs' class-based *Anderson-Burdick* claim, which focuses solely on the burdens that Act 23 imposes on a narrow and discrete class of individuals proposed by Plaintiffs and seeks a narrow remedy solely for those individuals. A.02. Under the mandate rule (a corollary to the law of the case doctrine), "when a court of appeals has reversed a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court." *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000) (quoting *Waid v. Merrill Area Public Sch.*, 130 F.3d 1268, 1272 (7th Cir. 1997)). But the mandate rule "does not

extend to issues an appellate court did not address." *Id.*, at 284 (quoting *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991)).

As explained below: (a) Although *Frank I* held that Act 23 cannot be completely invalidated based upon the burdens that it imposes on the "'vast majority'" of voters, 768 F.3d at 755 (citation omitted), it simply "did not address" whether Act 23 is immune from a narrower constitutional challenge based upon the burdens that the law imposes on an individual voter, or a certified class of voters, who seek relief from the law only for themselves; (b) After *Frank I*'s mandate issued, Plaintiffs asserted precisely the type of narrower, class-based claim that *Frank I* left open; therefore, the district court erred in misconstruing the scope of *Frank I*'s mandate as requiring dismissal of Plaintiffs' narrower claim; and (c) Contrary to the district court's suggestion, the fact that *Frank I* did not specifically include the word "remand" is irrelevant to interpreting the scope of *Frank I*'s mandate, which is not limited to a set of magic words at the end of an opinion. Fed. R. App. P. 41(a).

For these reasons, the dismissal should be vacated so that the district court can, in the first instance, adjudicate Plaintiffs' class certification motion and make all other necessary factual findings concerning the merits of Plaintiffs' class-based *Anderson-Burdick* claim.

A. *Frank I* did not hold that Act 23 is immune from challenge regardless of the burdens imposed on any one individual or certified class of individuals

Frank I did not hold that Act 23 is immune to any *Anderson-Burdick* challenge based on the burdens that Act 23 imposes on an individual voter or

certified class of individual voters. Under the flexible *Anderson-Burdick* test, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The Supreme Court applied this rule in the context of a voter ID challenge in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008), and that decision makes clear that there are two types of voter ID challenges under the *Anderson-Burdick* test.

The first type of *Anderson-Burdick* challenge is premised on the theory that the burdens a voter ID law imposes on voters generally, or on the vast majority of voters, are so widespread and substantial that the law should be invalidated in its entirety. This was the type of challenge raised in *Crawford* itself. Justice Stevens's controlling plurality opinion, for instance, described the challenge as a "broad attack on the constitutionality of [the law], seeking relief that would invalidate the statute in all its applications," which imposes "a heavy burden of persuasion" on the plaintiffs. *Crawford*, 553 U.S. at 200. It concluded, based on the record in that case, that "[w]hen we consider *only* the statute's *broad application to all Indiana voters* we conclude that it imposes only a limited burden on voters' rights," *id.* at 202-03 (emphasis added; internal quotation marks omitted) (quoting *Burdick*, 504 U.S. at

439), and that "[t]he application of the [voter ID] statute to the vast majority of Indiana voters is amply justified," *Crawford*, 553 U.S. at 204.

That was also the type of challenge that *Frank I* addressed. Comparing Plaintiffs' claim to the one in *Crawford*, *Frank I*, 768 F.3d at 747, this Court found that the burdens imposed by Act 23 on the "'vast majority'" of Wisconsin voters was "'amply justified'" by the State's interests in deterring in-person voter impersonation fraud. *Id.* at 755 (quoting *Crawford*, 553 U.S. at 204)). Despite some differences in the factual record in this case, *Frank I* found those differences to be irrelevant, 768 F.3d at 745-47, concluding that *Crawford*'s central finding was controlling here: "'For most voters who need them, the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . .' These observations hold for Wisconsin as well as for Indiana." *Frank I*, 768 F.3d at 745 (alteration in original) (quoting *Crawford*, 553 U.S. at 198).

The second type of *Anderson-Burdick* challenge, however, is narrower. It is premised on the theory that the burdens imposed by a voter ID law *on any one individual, or discrete group of individuals,* are so great that the law should be enjoined with respect to that individual or discrete group of individuals. This narrower theory was not raised by the plaintiffs in *Crawford*, but Justice Stevens's controlling opinion left the door open to such a claim, noting that "the burden [imposed by a voter ID law] may not be justified as to a few voters," which could result in relief short of total invalidation of the law. *Crawford*, 553 U.S. at 199. It is

for that reason that Justice Scalia wrote a separate concurrence criticizing this view and arguing that an *Anderson-Burdick* claim must be limited to the first kind of challenge, which focuses solely on "*voters generally*." *Id.* at 206 (Scalia, J. concurring). But Justice Scalia's more sweeping concurrence is not the law. *See Marks v. United States*, 430 U.S. 188, 193 (1977). After *Crawford*, at least one other case in this circuit has involved a voter ID challenge based on the second, more narrow theory. *See, e.g.*, *Stewart v. Marion Cty.*, No. 1:08-CV-586-LJM-TAB, 2008 WL 4690984 (S.D. Ind. Oct. 21, 2008) (analyzing burdens imposed on individual voter).

Similarly, *Frank I* did not foreclose a challenge to Act 23 based on the burdens imposed upon an individual or a certified class. Though *Frank I* held that a court must accept that a voter ID law serves the State's interests in deterring in-person voter impersonation fraud, 768 F.3d at 750, it did *not* hold that these state interests *always* justify whatever burdens Act 23 might impose on any such individual voter or class of voters. Indeed, *Frank I* did not even "address" such narrower claims. *Moore*, 222 F.3d at 284. Construing *Frank I*'s mandate as forever foreclosing the second, more narrow type of *Anderson-Burdick* claim against Act 23 would suggest that *Frank I* embraced Justice Scalia's concurrence as the law of the circuit. This Court did no such thing.

B. The district court erroneously refused to consider Plaintiffs' narrower, class-based *Anderson-Burdick* claim

After *Frank I* returned the case to the district court, Plaintiffs asserted the second type of *Anderson-Burdick* challenge left open by *Frank I*: that Act 23

imposes undue burdens, not upon all voters generally, but upon a discrete class of voters who lack ID and various underlying documents required to obtain ID, and who face special difficulties in obtaining ID, warranting relief only for that class. And contrary to Defendants' contention, discussed below, recently-implemented procedures designed to help certain voters without birth certificates obtain ID do not meaningfully help the members of this class at all.

On remand, Plaintiffs' narrower *Anderson-Burdick* claim focused on a proposed class of voters who face especially significant burdens, falling into three discrete categories:

(1) Eligible Wisconsin voters who have name mismatches or other errors in a document needed to obtain ID (hereinafter "underlying document");

2) Eligible Wisconsin voters who have to obtain an underlying document from an agency other than the DMV, e.g., a Social Security card, in order to obtain ID; and

(3) Eligible Wisconsin voters for whom one or more underlying document(s) necessary to obtain ID do not exist.

Unlike "*most* voters who need [ID]," this narrow class of voters faces special burdens in obtaining ID and suffer much more than "'the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph.'" *Frank I*, 768 F.3d at 745 (second alteration in original; emphasis added) (quoting *Crawford*, 553 U.S. at 198). For instance, DMV refused to issue ID to Plaintiff Ruthelle Frank, who never in her life had a birth certificate, was told that her birth certificate did not exist, and then learned that it existed but was replete with errors that would cost up to $200 to correct. JA.07-09; JA.47-48.

DMV refused to issue ID to Plaintiff Eddie Lee Holloway, Jr., because his birth certificate erroneously listed "Junior" as his middle name; he consequently had to spend $180 and many hours to travel to multiple locations in Illinois in an unsuccessful attempt to comply with DMV's demand that he amend his birth certificate to obtain ID. JA.12-20. DMV would not issue ID to Plaintiff DeWayne Smith because he lacked a Social Security card, but Social Security told him he could not get a card without ID; he ultimately had to make three or four trips to Social Security, a trip to a hospital to obtain medical records to satisfy Social Security's documentation requirements to get a Social Security card, and two trips to the DMV, before he could obtain ID. JA.38-41. And DMV refused to issue ID to Melvin Robertson, whose birth certificate does not exist, and who was told that to get proof of birth (and thus an ID) he needed to locate 80-year-old elementary school records, something he was unable to do. JA.23-25.

The record below established that these are not the only registered voters who experienced these kinds of problems, but rather are examples of the profound, and often insurmountable, burdens faced by voters in Plaintiffs' proposed class. This class of voters is differently situated from other voters who currently lack ID but can obtain it without facing hurdles of this magnitude. And *Frank I*—which examined whether "'most voters'" without ID are sufficiently burdened so as to necessitate total invalidation of Act 23, 768 F.3d at 745 (citation omitted)—simply "did not address" whether the burdens imposed by Act 23 on this narrow class of

voters outweigh the State's interests, *Moore*, 222 F.3d at 284. Thus, its mandate did not preclude Plaintiffs' narrower claim.

Defendants have argued that these burdens no longer exist because of new procedures implemented after the district court's initial ruling, which were created purportedly to help voters without birth certificates obtain ID. *See* Dkt. #228 at 16; Wis. Admin. Code § Trans. 102.15(5m); Dkt. #229-1. But this argument is unavailing on this appeal. As an initial matter, because the district court ruled that Plaintiffs' class-based claims were barred by *Frank I*, it did not make findings on this issue, which should be considered by the district court on remand in the first instance. And, in any event, Defendants are incorrect. The new procedure, on its face, does not even apply to the first two categories of proposed class members. It contains no provision for voters who have mismatched documents and does not address the circumstances of voters lacking required documents other than birth certificates, such as Social Security cards or other proof of identity.

And while DMV's new processes purport to help voters in the third category for whom birth certificates do not exist, the relief they provide is illusory. The procedure does not provide any document valid for voting in an impending election at the time a voter using this procedure initially applies for ID,[4] and DMV does not accept secondary proof of birth (e.g., a baptismal certificate) at the time of initial application. Wis. Admin. Code § Trans. 102.15(5m)(b). After the initial application,

[4] In contrast, voters who do not need to use this alternative procedure to obtain ID are immediately given a receipt, valid for voting, at the time of application for ID. Wis. Stat. §§ 5.02(6m)(d), 343.50(1)(c). This allows such voters to cast a ballot in an imminent election before the Wisconsin-issued photo ID arrives in the mail.

whether and when the DMV is able to verify information and provide ID to the voter is completely dependent upon the bureaucratic processes of multiple governmental entities outside the voter's control. *See* Wis. Admin. Code § Trans. 102.15(5m)(b)2.;[5] *cf. Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597-98 (6th Cir. 2012) (unconstitutional to reject ballots based on government error).

When it is confirmed (after an indefinite period) that no birth certificate exists, the voter must make a second trip to the DMV and bring secondary proof of birth, Wis. Admin. Code § Trans. 102.15(5m)(b)3., but there is no provision for voters (like Robertson) who are unable to obtain such secondary proof of birth. And even if the applicant manages to provide secondary documentation, DMV staff *still* have unfettered discretion to reject it. *Id.* at 102.15(5m)(b)3.-4. (secondary documentation accepted only if "deemed acceptable to the administrator" or their subordinates). "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar," *Louisiana v. United States*, 380 U.S. 145, 153 (1965), much less a frontline DMV employee.[6]

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[5] *See also* Wisconsin Department of Transportation, *Document verification petition process for a Wisconsin Identification Card for voting purposes*, http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/petition-process.aspx (last visited Dec. 26, 2015) (DMV's public information regarding the "[d]ocument verification petition process for a Wisconsin Identification Card for voting purposes" specifically states that "[t]he DMV will attempt to process applications in less than seven business days, but completion time may be longer depending upon the responsiveness of the entities being contacted for verification.").

[6] Furthermore, the text of this new procedure is essentially identical to the previous rule that was in place at the time of trial, which the district court found did not meaningfully help voters. *Frank*, 17 F. Supp. 3d at 858 n.17.

Plaintiffs' class-based *Anderson-Burdick* claim thus remained viable and was fully ripe for adjudication after *Frank I*. The district court ought to have adjudicated Plaintiffs' motion for class certification, made the necessary factual findings to apply the *Anderson-Burdick* test with respect to this narrow class of voters, and then considered whether a remedy that would apply only to those voters (in the form of a self-identification affidavit)[7] would have been appropriate. The district court's premature dismissal of this claim was thus a clear misapplication of *Frank I*'s mandate. *See, e.g.*, *Lees v. Carthage Coll.*, 560 F. App'x 614, 615 (7th Cir. 2014) (mandate rule did not preclude summary judgment on alternative grounds, where "we did not rule on them. On remand the judge had the authority to rule on Carthage's other arguments."); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982) (Supreme Court mandate did not encompass question of actual malice even though issue of actual malice had been litigated in prior appeal, because "[w]hether or not actual malice had been proved below simply was not an issue before the Court" in the prior appeal); *United States v. Navajo Nation*, 556 U.S. 287, 296 (2009) (prior Supreme Court mandate did not "completely foreclose[]" an issue even though it was invoked "at the outset of the litigation," because it was left "unanalyzed" in the prior opinion).[8]

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[7] *See, e.g.*, *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 661-72 (7th Cir. 2015) (approving use of self-identification affidavit to ascertain a class and apply a class-based remedy); *cf., e.g.*, *Veasey v. Abbott*, 796 F.3d 487, 519 (5th Cir. 2015) (suggesting that remedy for illegal voter ID law could include use of an affidavit).

[8] Although the district court asserted that it had decided Plaintiffs' class-based *Anderson-Burdick* claim in the prior proceeding, A.02, this is simply incorrect. In the original district court opinion, no ruling on class certification was necessary—

C. The fact that *Frank I* did not expressly use the word "remand" is immaterial to the application of *Frank I*'s mandate

In construing the mandate, the district court thought it important that *Frank I*, while reversing the district court's prior judgment, did not explicitly use the word "remand" at the end of the opinion. A.02. But "the single word 'reversed' . . . [and] the omission of the words 'and remanded' . . . [does not] preclude[] any additional proceedings in the district court." *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998). That is because the appellate mandate is not limited to any magic words at the end of the opinion or even the appellate judgment, but includes both the judgment *and* the entirety of the underlying opinion's text (unless the appeals court orders otherwise, which it did not do here). *See* Fed. R. App. P. 41(a); Notice of Issuance of Mandate, *Frank v. Walker*, No. 14-2058 (7th Cir. Mar. 25, 2015), Dkt. #92-1. And as shown above, *Frank I* did not foreclose Plaintiffs' narrower claim, nor did it specifically instruct the district court to enter judgment in favor of Defendants on any class-based *Anderson-Burdick* claim. *Contra, e.g.*, *Stinson v. Gauger*, 799 F.3d 833, 845 (7th Cir. 2015) ("we reverse the judgment of the district court and remand with instructions to enter judgment in favor of the defendants"). The district court's reliance on the absence of the word "remand" was therefore misplaced. *See also United States v. Tranowski*, 702 F.2d 668, 670-71 (7th Cir. 1983) (prior panel's reversal of judgment of conviction without

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and none was made—because the court found Act 23's impact to be sufficiently widespread and significant to warrant total invalidation. *Frank*, 17 F. Supp. 3d at 879-80.

an express remand instruction did not preclude retrial on remand because there were no specific instructions to that effect).

For these reasons, this Court should vacate the district court's dismissal of Plaintiffs' narrower, class-based *Anderson-Burdick* claim, and remand so that the district court may consider, in the first instance, Plaintiffs' motion for class certification and the fact-specific merits of that claim.

D. To the extent *Frank I* is interpreted to preclude Plaintiffs' class-based *Anderson-Burdick* claim, it should be revisited

To the extent this Court finds that the district court was correct in holding that *Frank I* precludes consideration of Plaintiffs' class-based *Anderson-Burdick* claim, Plaintiffs respectfully request reconsideration of *Frank I* itself, because, as explained above, such a broad interpretation would go beyond the controlling opinion in *Crawford* and elevate Justice Scalia's non-controlling concurrence as the law of the circuit. *See United States v. Thomas*, 11 F.3d 732, 736 (7th Cir. 1993) (law of the case doctrine "allows some flexibility, permitting a court to revisit an issue if . . . some other special circumstance[] warrants reexamining the claim").

Reconsideration of *Frank I*, including its dismissal of Plaintiffs' claim under Section 2 of the Voting Rights Act, would also be warranted because of an intervening Fifth Circuit decision, *Veasey v. Abbott*, 796 F.3d 487, 504-13 (5th Cir. 2015). In that case, the Fifth Circuit affirmed a finding that Texas's strict voter ID law violated Section 2 on a factual record substantially similar to the record here. *See id.* The district courts in both cases found that racial minorities were about twice as likely to lack acceptable forms of ID; that racial minorities were more likely

to face difficulties obtaining ID; that socioeconomic disparities contributed to these racial disparities in ID possession; that making it harder to vote especially for lower-income people was likely to reduce turnout among that group; and that the States' justifications for the law were "tenuous." *See Frank*, 17 F. Supp. 3d at 871-79; *Veasey*, 796 F.3d at 504-13.

But unlike *Frank I*, the Fifth Circuit in *Veasey* found that these facts support a finding of Section 2 liability,[9] and indicated that a limited remedy short of total invalidation of the law—which is precisely what Plaintiffs request here—is appropriate. *Veasey*, 796 F.3d at 518-19 (suggesting limited remedies for illegal voter ID law). Reconsideration of *Frank I* would thus harmonize this case with the outcome in *Veasey*. *Cf. Bridger Coal Co. v. Dir., Office Workers' Comp. Programs*, 669 F.3d 1183, 1992 (10th Cir. 2012) ("development of a circuit split . . . is a legitimate reason for the Board to reconsider prior rulings"). In these circumstances,

[9] *Compare, e.g.*, *Frank I*, 768 F.3d at 753 (racially disparate ID ownership does "not show a 'denial' of anything by Wisconsin, as [Section 2] requires"), *with Veasey*, 796 F.3d at 506 n.21 (deferring to district court ruling that "racial disparity in voter ID possession" results in "'abridgment of the right . . . to vote'" (quoting Section 2)); *Frank I*, 768 F.3d at 752 n.3 (fact that racial minorities were twice as likely to lack ID was irrelevant because only 2.4% of whites, 4.5% of Blacks, and 5.9% of Latinos lack an ID and an underlying document), *with Veasey*, 796 F.3d at 509 (disagreeing with *Frank I* on this point); *Frank I*, 768 F.3d at 753 (racial disparities in socioeconomic status irrelevant), *with Veasey*, 796 F.3d at 507 (district court finding that the poor, who were disproportionately minorities, have a harder time obtaining ID was relevant to contextual Section 2 analysis); *Frank I*, 768 F.3d at 749-51 (rejecting district court's findings about the tenuousness of the State's justifications), *with Veasey*, 796 F.3d at 511-12 (accepting such findings); *Frank I*, 768 F.3d at 747 (disregarding district court's finding that those without ID are likely to be deterred from voting and finding that district court should have measured total voter turnout impact), *with Veasey*, 796 F.3d at 512 (deferring to district court finding that increasing cost of voting "decreases voter turnout—particularly among low-income individuals, as they are most cost sensitive").

the district court's judgment should be reversed with instructions to enter judgment in favor of Plaintiffs.

II. Act 23's Exclusion of Veterans' Photo Identification Violates The Equal Protection Clause

The district court committed a second legal error in upholding Act 23's irrational exclusion of photo ID cards issued by the United States Department of Veterans Affairs ("VA IDs") as valid ID for voting under the Equal Protection Clause. Among all the various strict voter ID states, Wisconsin stands *alone* in its exclusion of this important badge of honor, held by many veterans who face homelessness and difficulties obtaining ID. *See supra* Statement of the Case ("SOC") § II.B. As explained below, though a heightened standard of review is appropriate because the exclusion of VA IDs implicates the fundamental right to vote, the exclusion is unjustifiable even under rational basis review. *Cf. Carrington v. Rash*, 380 U.S. 89, 97 (1965) (state cannot transform "uniform of our country" into a "badge of disfranchisement").

The Equal Protection Clause of the Fourteenth Amendment prohibits the States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. However, because almost all laws treat certain classes of people differently from others on some level, the Supreme Court has held that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe ex*

rel. Doe, 509 U.S. 312, 319-20 (1993). But because Act 23 plainly "involv[es]" the fundamental right to vote, a heightened level of scrutiny is warranted. *Cf., e.g.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015) (statute that "curtails" a "constitutional right" "cannot survive challenge without evidence that the curtailment is justifiable by reference to the benefits conferred by the statute"). After all, while some "improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 U.S. 93, 97 (1979), that is not the case when the democratic process itself is infected by the law at issue.

Nonetheless, Act 23's exclusion of VA IDs cannot even survive rational basis review. Although plaintiffs challenging a law under rational basis review must "negative every . . . basis which might support" the law, and the law is upheld "if there is any reasonably conceivable state of facts" supporting the classification, *Heller*, 509 U.S. at 320 (citations & internal quotation marks omitted), "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation," *id.* at 321. The law must still "bear[] a rational relation to some legitimate end," *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)), and "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). As this Court recently observed, rational basis review is not rubber-stamp approval: "In *Vance*[, 440 U.S. at 111], an illustrative case in which the Supreme Court

accepted the government's rationale for discriminating on the basis of age, the majority opinion devoted 17 pages to analyzing whether Congress had had a 'reasonable basis' for the challenged discrimination (requiring foreign service officers but not ordinary civil servants to retire at the age of 60), before concluding that it did." *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014).

As discussed below: (a) There is no rational basis for the exclusion of VA IDs because Defendants concede that they are materially identical to Wisconsin driver's licenses and state IDs for purposes of confirming a voter's identity; (b) For that reason, the district court's comparison between veterans and active-duty military and tribal members (whose IDs are accepted) is irrelevant and fails to establish how including VA IDs harms the State's interest in helping military and tribal voters; and (c) The connection between excluding VA IDs and administrative efficiency is "so attenuated as to render the [discrimination] arbitrary or irrational," *Cleburne*, 473 U.S. at 446; it is not administratively onerous to add VA IDs to the list of acceptable IDs that poll workers consult when presented with an unfamiliar form of ID.

For these reasons, the district court's dismissal of this claim should be reversed with instructions to enter judgment in favor of Plaintiffs on this claim.

A. VA IDs are materially identical to Wisconsin driver's licenses and state IDs for purposes of confirming a voter's identity

First, there is no rational basis for excluding VA IDs from the list of acceptable forms of identification for voting purposes, because Defendants have conceded that VA IDs, no less than Wisconsin-issued IDs, satisfy the State's interest

in preventing voter impersonation fraud. Both forms of ID are issued by the government, and both contain a name and photograph among other identifying information. Dkt. #238-14; Wis. Stat. § 343.50. They are equally capable of confirming that voters are who they say they are.

Defendants initially argued that VA IDs "do not serve as a good proxy to confirm a voter's identity at the polls," because, in some cases, a VA ID might be relatively old and might not bear a "relatively current photograph," due to the fact that VA IDs did not have expiration dates. Dkt. #176 at 123. Yet Defendants later abandoned this argument, conceding that Wisconsin-issued IDs may similarly bear relatively old photographs, *see* Dkt. #228 at 19, due to the fact that photographs on Wisconsin-issued ID cards need not be updated for up to 16 years, Wis. Stat. §§ 343.50(5)(b), (6); JA.46 (ID cards valid for 8 years and can be renewed once without getting a new photograph);[10] *see also* JA.02 (VA IDs also "provide reliable and accessible identification" compared to Wisconsin-issued IDs); JA.05 (same).

Even without Defendants' concession, Defendants' original argument about VA IDs' supposed deficiency fails because, as of February 2014, VA IDs now include expiration dates just as Wisconsin-issued IDs do, and recipients are required to update their photographs to receive the new VA IDs. Dkt. #238-14 at 2. Furthermore, in contrast to the 16-year period which may elapse before the photograph on a Wisconsin-issued ID must be updated, the VA ID expiration period

[10] And starting February 1, 2016, with limited exceptions, IDs issued to a person 65 years of age or older *never* have to be renewed again. Wis. Stat. § 343.50(5)(d) (effective Feb. 1, 2016).

is only *10* years long, *see* Department of Veterans Affairs, *VHA Directive 1610*, § 2.a.(5) (Oct. 1, 2015);[11] *see, e.g.*, Dkt. #238-4 at 3 (10-year expiration date of 2024), ensuring that VA ID photographs are updated *more* frequently than the photographs on Wisconsin-issued IDs.

Beyond the expiration date issue—which Defendants have now conceded is irrelevant—Defendants did not point to any other distinguishing feature of VA IDs that makes them different from Wisconsin-issued IDs for purposes of confirming a voter's identity. Because VA IDs are just as reliable as Wisconsin driver's licenses and state ID cards when it comes to confirming a voter's identity, it is irrational to exclude unexpired VA IDs for any reason having to do with the State's interest in preventing in-person voter impersonation fraud. *See, e.g.*, *Ctr. for Inquiry, Inc. v. Marion Circuit Ct. Clerk*, 758 F.3d 869, 872-75 (7th Cir. 2014) (irrational to accept certain religious groups but exclude secular humanists from marriage solemnization statute, when both groups have "an organizational commitment to . . . marriage"); *Cleburne*, 473 U.S. at 449-50 (irrational to exclude group home for those with intellectual disabilities when same concerns related to flooding or population density apply to hospitals and other group homes that are permitted); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) ("the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits

[11] http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=3146.

presumptively available to the other denies the former the equal protection of the law" under rational basis review).[12]

B. Accommodating active-duty military and tribal voters does not justify the exclusion of VA IDs

The district court found that a legislature could rationally want "to expand the list of acceptable forms of ID to include military ID and tribal ID . . . but not expand the list to include veteran's ID." A.17. This proffered rationale refers to the fact that Act 23 allows the use of ID cards issued by a "U.S. uniformed service" (which can be held by active-duty military members and their families, as well as some military retirees) and ID cards issued by a "federally recognized Indian tribe." Wis. Stat. §§ 5.02(6m)(a)3, (6m)(e).

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[12] *See also, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (irrational to exempt pest controllers of bats, raccoons, squirrels and skunks from licensing requirements, when they were at least as likely to use dangerous pesticides as non-exempt pest controllers of other animals); *Doe v. Pa. Bd. of Probation & Parole*, 513 F.3d 95, 109-10 (3rd Cir. 2008) (irrational to allow in-state sex offenders to apply for exemption from community notification requirement but not out-of-state sex offenders, when "any concerns over the public's lack of information about out-of-state sexual offenders applies equally to in-state offenders"); *Craigmiles v. Giles*, 312 F.3d 220, 225-26 (6th Cir. 2002) (irrational to require independent casket retailers to obtain a funeral director license, when there was no evidence that caskets sold by funeral directors were safer than those sold by independent casket retailers); *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002-03 (D.C. Cir. 1998) (irrational for federal statute to prohibit provision of firearms to officers with domestic violence misdemeanors while allowing them for officers with domestic violence felonies, even if Congress reasonably, but incorrectly, thought that domestic violence felons were already consistently covered under state laws); *Bacon v. Toia*, 648 F.2d 801, 808-09 (2d Cir. 1981) ("Where there is an equal potential for fraud among those in each of two classes, it is not reasonable on this basis to treat those classes differently."); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 790 (7th Cir. 2013) (potential Equal Protection problem with regulating outpatient abortions while leaving other outpatient procedures "more likely to produce complications" unregulated).

The district court started with the hypothesis, made *sua sponte*, that because military IDs and tribal IDs can lack expiration dates, and because VA IDs (used to) lack expiration dates, these kinds of expiration-less ID are "less secure" than Wisconsin-issued ID—that is, less reliable in terms of confirming a voter's identity by being more susceptible to being used for impersonation. A.15-17, A.15 n.11. On the basis of that assumption, the district court reasoned that a legislature could decide to accommodate some of the "less secure" forms of ID, but only if the holders of such ID face special burdens in obtaining Wisconsin-issued ID. Building further on that premise, the district court found that a rational legislature could believe that military members and tribal members could need such an accommodation: active-duty military members might relocate more frequently, and tribal members live in quasi-sovereign jurisdictions where there is less of a need for a Wisconsin-issued driver's license or ID. *Id.* at 17-18. And finally, the district court concluded that a rational legislature could believe that veterans do not face similar burdens, and are thus not deserving of the same accommodation provided to holders of other "less secure" forms of ID like military and tribal IDs. *Id.*

This entire chain of reasoning, however, rests on the flawed assumption that VA IDs are "less secure" than Wisconsin-issued IDs. As discussed in the previous section, Defendants have *conceded* that VA IDs are no less dependable than Wisconsin driver's licenses and state IDs, and VA IDs now have expiration dates. Because VA IDs and Wisconsin-issued IDs are materially identical for purposes of confirming that a voter is who they say they are, the Equal Protection Clause

requires that VA IDs be treated the same as Wisconsin-issued IDs for voting purposes. The alleged differences between veterans and military or tribal voters relied upon by the district court are simply irrelevant to the inquiry. *See, e.g.*, *Ctr. for Inquiry*, 758 F.3d at 871, 873-75 (finding Equal Protection violation based on comparison between secular humanists and various religions authorized to solemnize marriages, without comparing secular humanists to judges and mayors who were also authorized to solemnize marriage).

The Supreme Court has cautioned against assuming that any alleged differences between groups who are excluded from a statute and groups who are included are automatically relevant. Rather, the question is whether any such alleged differences "would threaten legitimate interests of the [State] in a way that other permitted uses . . . would not." *Cleburne*, 473 U.S. at 448. Here, including VA IDs does not pose a threat to the State's legitimate interest in preventing in-person voter impersonation fraud any more than Wisconsin-issued IDs, as Defendants concede. And including VA IDs certainly poses no threat to the State's attempts to help military and tribal voters. *Cf. Baskin*, 766 F.3d at 655 ("the issue is not whether heterosexual marriage is a socially beneficial institution," but whether there is a valid basis for "discriminating against same-sex couples"). Because there is "[no] rational basis for believing that the" inclusion of VA IDs "would pose any special threat to [the State's] legitimate interests," its exclusion violates the Equal Protection Clause. *Cleburne*, 473 U.S. at 448.

C. The relationship between excluding VA IDs and administrative efficiency is so attenuated so as to be irrational

The district court also suggested that Act 23's exclusion of VA IDs rationally serves the State's interest in administrative efficiency. The court reasoned that it was rational for the State to limit the total number of acceptable IDs to a "manageable amount." A.16. Otherwise, "Act 23 would need to be periodically amended to include any new forms of ID that are 'just as secure' as the IDs that are already accepted. And poll workers would need frequent training on which IDs are acceptable. All of this would make it harder for the state to administer the law, and it is rational for the state to want to minimize this burden." A.17.

This elaborate justification cannot survive rational basis review. As a preliminary matter, the mere specter of having to amend Act 23 again to comply with the Equal Protection Clause at some point in the future cannot be a valid defense. Every State law must comply with the Equal Protection Clause. A law that irrationally excludes one class cannot be immune from constitutional challenge simply because it might also irrationally exclude another future class, or all laws would be forever immune to constitutional challenge under rational basis review.

For instance, in *Center for Inquiry*, this Court held that the Indiana marriage solemnization statute unconstitutionally excluded secular humanists under the Equal Protection Clause, even as it acknowledged that the statute's exclusion of Buddhists, Rastafarians, Jains, and "many other religions" not at issue in the case was also likely unconstitutional. *See id.*, 758 F.3d at 874-75. The district court sought to distinguish this case by observing that Indiana did not specifically argue

that including secular humanists would open the door to including other groups in the future. A.19. But it is difficult to fathom that such an argument would have defeated the secular humanists' meritorious challenge when this Court openly acknowledged the possibility, if not likelihood, that other groups not in the case were also unconstitutionally excluded. Indeed, when the Indiana statute was first enacted over a century ago in 1857, its list of religions that could solemnize a marriage was (unsurprisingly) considerably smaller. *Ctr. for Inquiry*, 758 F.3d at 875. But no one would argue that such a list could have justifiably been frozen for all time. The government cannot justify violating the Equal Protection Clause because obeying it is too much effort. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 n.48 (rejecting argument that correcting the irrational exclusion "would inevitably breed litigation [over future irrational exclusions] which in turn would enhance the administrative burden").

Putting aside the speculative and irrelevant concern over whether Act 23 also irrationally excludes other hypothetical types of ID not included in the factual record, the State is left with the generalized argument that merely including VA IDs in the list of acceptable IDs threatens administrative efficiency. But simply invoking "administrative efficiency" cannot protect against Equal Protection liability, because *any* inclusion of an unconstitutionally discriminated-against class will theoretically cause some administrative burden. "Governments almost always attempt to justify their conduct based on cost and administrative convenience, but the State's reliance on these factors is not necessarily rational . . . ." *Stewart v.*

Blackwell, 444 F.3d 843, 872 (6th Cir. 2006), *superseded on other grounds*, 473 F.3d 692 (6th Cir. 2007).

Rather, there must still be *some* rational connection between the exclusion and some meaningful or significant administrative benefit. *See Heller*, 509 U.S. at 321 ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation"). Thus, for example, in *Mow Sun Wong*, a suit that challenged the exclusion of noncitizens from applying for federal civil service, the Supreme Court rejected an administrative efficiency defense to an Equal Protection claim under rational basis review. The government had argued that because some sensitive federal jobs had to be limited to citizens, it was "administrative[ly] desirabl[e] [to have] one simple rule excluding all noncitizens" from all federal civil service positions. 426 U.S. at 115. The Supreme Court acknowledged the legitimate interest in having certain sensitive positions be limited to citizens, but, applying rational basis review, dismissed the significance of the administrative justification. Specifically, the Court found that it could not "reasonably infer that the administrative burden" of allowing noncitizens to apply for non-sensitive jobs "would be a particularly onerous task for an expert in personnel matters," and observed that "the Postal Service apparently encountered no particular difficulty in making such a classification." *Id.* at 115-16.

Similarly here, there has been no showing that adding VA IDs to the list of acceptable IDs that poll workers consult when presented with an unfamiliar form of ID "would be a particularly onerous task." *Mow Sun Wong*, 426 U.S. at 115. And

just as the Postal Service's inclusion of non-citizens for non-sensitive job postings undermined the government's defense of administrative efficiency in *Mow Sun Wong*, the fact that *all seven* of the other "strict" voter ID states have permitted VA ID without obvious difficulty, *see supra* SOC § II.B., belies Wisconsin's justification here. The connection between the exclusion of VA IDs and administrative efficiency is thus "so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446; *see also, e.g.*, *Copelin-Brown v. N.M. State Personnel Office*, 399 F.3d 1248, 1255 (10th Cir. 2005) (mere "allu[sion]" to administrative burdens without "any facts showing that the regulation in question eased administrative burdens" could not survive rational basis review); *Stewart*, 444 F.3d at 872-73 (administrative justification failed rational basis review where there was no indication that State "cannot manage the costs"); *Bacon*, 648 F.2d at 809 ("administrative efficiency [is not] sufficiently compelling to sustain the lines drawn by the statute" under the rational basis test).

Though the above is sufficient for this Court to reject the flimsy connection between excluding VA IDs and administrative efficiency, Plaintiffs note that it may actually be administratively *simpler* to include VA IDs than to exclude them. The trial record reveals instances of confusion among elections officials over whether VA IDs are considered "uniformed services" or "military" IDs accepted by the statute, and whether "military" IDs include VA IDs,[13] confusion that would be obviated if

[13] *See* JA.10 (confusion among Wisconsin elections officials over acceptability of military versus VA IDs); *see also* JA.28-30; JA.34 (inadvertently referring to "military ID" and "veteran ID" interchangeably).

VA IDs were just added to the list. In addition, strict voter ID states like Tennessee and Texas accept VA IDs without actually "adding" anything to the list because they treat VA IDs as falling within the broader umbrella of "military"-related ID cards. *See supra* SOC § II.B. Such an umbrella term, if employed by Wisconsin, could include both the uniformed services IDs already accepted by Act 23 *and* VA IDs. *Cf., e.g.*, *Ctr. for Inquiry*, 758 F.3d at 874 (marriage solemnization statute could have contained an umbrella term covering groups with an "organizational commitment . . . to marriage," but instead enumerated certain groups in this category while unconstitutionally excluding others).

* * *

As shown above, each of the State's proffered justifications fails rational basis review: (a) It is irrational to treat VA IDs and Wisconsin-issued IDs differently when Defendants concede that they are materially identical in terms of verifying voters' identity; (b) Including VA IDs does not threaten the State's interest in helping military and tribal voters; and (c) The connection between the exclusion of VA IDs and administrative efficiency is so incredibly weak so as to be irrational. *See, e.g.*, *Cleburne*, 473 U.S. at 448-50 (negating each one of the four proffered bases for challenged exclusion); *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982) (negating each one of three proffered bases for challenged exclusion). Act 23's exclusion of VA IDs needlessly makes it more difficult for veterans to exercise the very fundamental right which they have risked their lives to protect, with no appreciable benefits to the State. *Cf. Baskin*, 766 F.3d at 655-56. Such a pointless infringement on the

dignity of our veterans, many of whom routinely wrestle with difficult economic circumstances and other systemic mistreatment, *see supra* SOC § II.B., violates the Equal Protection Clause. The district court's dismissal of this claim should be reversed with instructions to enter judgment in favor of Plaintiffs.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment as to Plaintiffs' class-based *Anderson-Burdick* claim and remand for the court to consider that claim in the first instance; and reverse the district court's judgment as to the veteran Plaintiffs' Equal Protection claim with instructions to enter judgment in favor of the veteran Plaintiffs.

Dated this 28th day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Plaintiffs-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in 12 point Century Schoolbook font.

/s/ Sean J. Young

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Sean J. Young

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, the Brief of Plaintiffs-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The following participant in the case is a registered CM/ECF user and will be served by the appellate CM/ECF system:

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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al.,
Plaintiffs,

v. **Case No. 11-C-01128**

SCOTT WALKER, et al.,
Defendants.

DECISION AND ORDER

When the plaintiffs commenced this suit, they alleged that Wisconsin's law requiring voters to present photo identification at the polls, 2011 Wis. Act 23 ("Act 23"), violated the Constitution and Section 2 of the Voting Rights Act. Following a trial on the claims alleged in this and a companion case, I concluded that Act 23 placed an unjustified burden on the plaintiffs' voting rights and therefore violated the Fourteenth Amendment. I also concluded that Act 23 violated Section 2 of the Voting Rights Act. Having found these violations, I entered an injunction prohibiting the defendants from enforcing the photo ID requirement. Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014). The defendants appealed, and the Seventh Circuit reversed. Frank v. Walker, 768 F.3d 744 (7th Cir. 2014).

In my prior decision, I noted that I was leaving certain of the plaintiffs' constitutional claims unresolved. Frank, 17 F. Supp. 3d at 842–43. Those claims involved Act 23's failure to include certain forms of photo ID, such as veteran's ID cards, on the list of acceptable IDs, and its allegedly placing a poll tax on persons who would be required to surrender their out-of-state driver's licenses in order to obtain free ID cards to use for

voting. The plaintiffs now move for class certification and for relief on these unresolved claims. I address those claims below.

However, before I turn to the unresolved claims, I discuss the plaintiffs' request for class certification and for relief on behalf of persons they describe as "Class 1 voters," i.e., those voters "who lack photo ID and face systemic practical barriers to obtaining an ID." See Pls.' Br. at 16, ECF No. 223. The relief they seek in connection with this claim is an injunction allowing persons to vote at their polling place without presenting an ID but instead by signing an affidavit attesting to their identity and to the difficulties they would face in obtaining ID. Id. at 18. This "Class 1" claim is not a claim I left unresolved in my prior decision. It is the constitutional claim on which I granted relief: I found that Act 23 imposed unjustified burdens on voters who currently lack photo ID and will face heightened barriers to obtaining ID. Frank, 17 F. Supp. 3d at 862–63. I specifically considered the plaintiffs' proposed affidavit procedure and determined that an injunction against the law's enforcement was a more appropriate remedy for the violation of the plaintiffs' rights. Id. The Seventh Circuit reversed my decision and did not remand for further proceedings in connection with this claim. It did not, for example, vacate the injunction and remand with instructions to consider granting some other remedy, such as the plaintiffs' proposed affidavit procedure. Rather, it held that the plaintiffs' claim was no different than the claim the Supreme Court considered and rejected in Crawford v. Marion County Election Board, 553 U.S. 181 (2008). Frank, 768 F.3d at 751. I am not free to disregard this holding on remand. See, e.g., Kovacs v. United States, 739 F.3d 1020, 1024 (7th Cir. 2014) ("The lower court is bound, through the mandate rule, to the resolution of any points that the higher court has addressed.").

For two reasons, the plaintiffs contend that the Class 1 claim they are now pursuing is different than the claim the Seventh Circuit considered and rejected: (1) they seek relief on behalf of a narrower class of voters,[1] and (2) they seek relief that is somewhat narrower than the relief I previously granted.[2] But these facts do not change the claim such that it falls outside the Seventh Circuit's holding on appeal. The Seventh Circuit characterized the plaintiffs' claim as a "facial" challenge that was indistinguishable from the claim in Crawford because it was based on "predictions about the effects of requiring photo ID" rather than on "results." Frank, 768 F.3d at 747. The court implied that a constitutional claim that is not foreclosed by Crawford would be one based on proof that "substantial numbers of persons eligible to vote have tried to get a photo ID but been unable to do so," id. at 746, or on proof that the law has in fact significantly reduced voter turnout, id. at 747, 751. As I read the Seventh Circuit's opinion, it holds that Crawford disposes of any constitutional claim based on a "prediction" that barriers to obtaining photo ID will prevent

[1]In their reply brief, the plaintiffs contend that the members of Class 1 are limited to individuals who will face one of three barriers to obtaining ID: (1) having to deal with name mismatches or other errors in an underlying document needed to obtain ID; (2) having to obtain an underlying document from an agency other than the DMV; and (3) the person's underlying document does not exist. Pls.' Reply Br. at 10, ECF No. 237.

[2]I say "somewhat" narrower because the relief is not limited to identified members of the class. Under the plaintiffs' proposed affidavit procedure, any person who appeared at the polls would be allowed to vote without showing ID so long as he or she signed an affidavit in the required form. Thus, a person willing to commit voter-impersonation fraud could submit a false affidavit and then vote in someone else's name. Since that would undermine the law's purpose, which is to assure the public that voter-impersonation fraud will not occur, the proposed affidavit procedure seems little better than enjoining the law in its entirety. Of course, in-person voter-impersonation fraud is virtually nonexistent, but I am bound by the Seventh Circuit's interpretation of Crawford, under which photo-ID laws are deemed to confer "substantial benefits" because they promote "confidence in electoral integrity." Frank, 768 F.3d at 751.

a group of persons from voting. The plaintiffs' reformulated Class 1 claim fits this description. It seeks relief on behalf of a group of voters who have not yet tried to obtain ID,[3] based on the prediction that it will be hard for them to obtain ID, and that therefore they "are likely to be deterred from voting in future elections." Pls.' Br. at 18. This is precisely the claim that I previously resolved in the plaintiffs' favor and was reversed on. I continue to believe that my decision was correct and that the plaintiffs' claim is not foreclosed by Crawford, but the Seventh Circuit disagreed and I am bound by its decision. Therefore, I cannot reconsider the "Class 1" claim.

I. TECHNICAL COLLEGE ID

Plaintiff Domonique Whitehurst seeks to represent a class of "Wisconsin technical college students who have photo ID otherwise acceptable under the student ID provisions of Act 23." Pls.' Br. at 10, ECF No. 223. Under the student ID provisions of Act 23, such an ID may be used for voting if it is issued by a university or college in Wisconsin that is "accredited" (as defined by Wis. Stat. § 39.90(1)(d)), and meets certain other requirements. See Wis. Stat. § 5.02(6m)(f). The plaintiff contends that any refusal to accept technical college IDs as acceptable forms of ID for complying with Act 23 would violate the Equal Protection Clause, and she seeks an injunction requiring the defendants to accept such

[3]To be sure, some members of the class, including class representatives Ruthelle Frank and Eddie Lee Holloway, Jr., have tried and failed to obtain ID. However, the class definition is not limited to those who have tried and failed to obtain ID. Nor is the proposed relief tailored to those who have tried and failed to obtain ID. As noted, the plaintiffs' proposed affidavit procedure would be available to any person who shows up at the polls and is willing to sign an affidavit stating that it would be hard for him or her to obtain ID. A true "as applied" remedy for a person who has made a reasonable effort to obtain ID but been unable to do so would be an injunction requiring the state to issue that person an ID.

IDs so long as they are otherwise indistinguishable from the types of student ID already accepted under Act 23.

Act 23 does not expressly state that technical college IDs may not be used for voting, and since November 2011, the Government Accountability Board (which is the state agency charged with implementing Act 23) has interpreted Act 23 to mean that technical college IDs are acceptable. However, when in September 2011 the GAB first considered whether technical college IDs are acceptable, it concluded that the legislature "did not intend for technical college ID cards to be treated as equivalent to those issued by other universities and colleges." Defs.' Ex. 1049 at p. 2. It reached this conclusion after noting that the legislature had rejected amendments to Act 23 that would have explicitly included technical college IDs in the list of acceptable IDs. Id. But then the GAB reconsidered this conclusion at its meeting on November 9, 2011, and it decided "to allow technical college ID cards for voting purposes." Defs.' Ex. 1050, fifth page. At the November meeting, the GAB determined that the ordinary meaning of the word "college," as used in the statute, included technical colleges. Id.

A few days after the GAB interpreted Act 23 to allow the use of technical college IDs, the Wisconsin Legislature's Joint Committee for the Review of Administrative Rules directed the GAB to embody its interpretation of Act 23 in an emergency administrative rule. See Defs.' Ex. 1050, seventh page; Wis. Stat. § 227.26(2)(b). The GAB then created an emergency rule allowing the use of technical college IDs for voting. Shortly thereafter, the state courts enjoined the implementation of Act 23, and the GAB suspended its administrative rulemaking. See Decl. of Kevin Kennedy ¶ 8–9, ECF No. 230. In May 2015, following the reversal of the state-court injunctions and the injunction I issued in this case,

the GAB reissued the emergency rule, and Governor Scott Walker approved it. See ECF No. 235. The emergency rule has been in force ever since, and the GAB has taken steps to make that rule permanent. Kennedy Decl. ¶¶ 13–23. However, as of the date of this opinion, the permanent rule has not replaced the emergency rule.

The defendants contend that the GAB's interpretation of Act 23 and its rulemaking have rendered the plaintiff's equal-protection claim moot. However, although I agree that the plaintiff's claim is not justiciable at this time, I do so on the basis of ripeness rather than mootness. Mootness comes into play when it is too late to grant relief to the plaintiff; ripeness comes into play when it is too early to do so. See Capeheart v. Terrell, 695 F.3d 681, 648 (7th Cir. 2012). By the time the plaintiffs filed this suit, the GAB had interpreted Act 23 to allow the use of technical college IDs for voting. The plaintiffs nonetheless included a claim on behalf of technical college students in their complaint because they feared that at some point in the future either the GAB, the governor, or the state legislature would take some action to prevent the use of technical college IDs for voting. See Am. Compl. ¶¶ 47–48, ECF No. 31. The plaintiff's claim thus relates to future events that may or may not occur, which raises a question of ripeness rather than mootness. See Wis. Right to Life v. Barland, 664 F.3d 139, 148 (7th Cir. 2011) ("Ripeness concerns may arise when a case involves uncertain or contingent events that may not occur as anticipated, or not occur at all.").

Here, the plaintiff's claim is not ripe because too many contingent and unlikely events must occur before she and the proposed class members would be precluded from using technical college IDs at the polls. For nearly four years, the GAB has interpreted Act 23's student-ID provision as including technical college IDs, and it has issued both

emergency and proposed permanent rules that embody its interpretation. To date, neither the governor nor the legislature has disagreed with the GAB's interpretation, and these branches of state government have taken no action to block the GAB's rules. Even if the GAB's rules do not become permanent, the GAB could continue to interpret Act 23 the way it has and continue to instruct local election officials to accept technical college IDs at the polls. See Defs.' Ex. 1050 at 7–8 (noting that GAB instructed local election officials to accept technical college IDs even before the emergency rules went into effect). The plaintiff suggests that the legislature could enact a new statute explicitly forbidding the use of technical college IDs for voting, Am. Compl. ¶ 48, and at oral argument her lawyer pointed out that the legislature is considering a bill to eliminate the GAB altogether, which might result in the creation of a new agency responsible for administering the election laws, which agency, in turn, might interpret Act 23 as excluding technical college IDs, see Tr. of Oral Argument at 7. But these are highly speculative future events, and the chance that they will occur is too small to justify constitutional adjudication. See Bauer v. Shepard, 620 F.3d 704, 708–09 (7th Cir. 2010) (claim is unripe when it depends on the occurrence of "too many unlikely steps").

Moreover, should the events the plaintiff fears come to pass, she (or another technical college student) may commence a new suit at that time and seek a preliminary injunction. The suit would present a relatively straightforward legal question that could be resolved quickly, and if the plaintiff's claim has merit an injunction could likely be issued between the time the defendants announce their decision to exclude technical college IDs and the date of an election. Thus, withholding judicial review until after that decision has been made would not impose a hardship on the plaintiff or the proposed class members.

See Wis. Right to Life, 664 F.3d at 148 (explaining that case is unripe when plaintiff cannot show that delaying judicial review until feared events occur will cause hardship).

For these reasons, the plaintiff's motion for relief on behalf of technical college students will be denied, and her claim will be dismissed as unripe.

II. OUT-OF-STATE DRIVER'S LICENSES

Plaintiffs Samantha Meszaros and Matthew Dearing seek to represent a class of "all Wisconsin voters who are residents of Wisconsin for voting purposes, who lack any accepted photo ID, and who would be forced to surrender an out-of-state driver's license in order to obtain a free Wisconsin ID card for voting purposes." ECF No. 194 at 101. These plaintiffs contend that the photo ID requirement, as applied to members of the proposed class, amounts to a poll tax that violates both the 24th Amendment to the Constitution and the Equal Protection Clause of the Fourteenth Amendment. Their argument is that persons who possess an out-of-state license are faced with an impermissible choice: they must either pay a fee to obtain another form of Act 23-compliant ID (such as a passport) or surrender their driving privileges to obtain a free Wisconsin state ID card.[4] See Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Harman v. Forssenius, 380 U.S. 528 (1965).

An initial problem is that the claims of the class representatives are moot. Both Meszaros and Dearing testified at trial that they have obtained U.S. passports and that they did so for reasons other than to vote in Wisconsin. Tr. at 696, 977. Thus, assuming that

[4]Under Wisconsin law, a person may be issued a state ID card only if he or she surrenders any driver's license issued to that person by another jurisdiction. See Wis. Stat. § 343.50(1)(b); Wis. Admin. Code § Trans 102.14(2).

they are otherwise qualified Wisconsin voters,[5] Meszaros and Dearing may now vote in Wisconsin without obtaining a free Wisconsin state ID or surrendering their out-of-state driver's licenses. They therefore are no longer subject to the claimed poll tax, and their individual claims must be dismissed as moot.[6] It follows that I cannot certify a class in which Meszaros and Dearing are the class representatives. Weismueller v. Kosobocki, 513 F.3d 784, 786 (7th Cir. 2008) ("If . . . the named plaintiff's claim becomes moot before the class is certified, the suit must be dismissed because no one besides the plaintiff has a legally protected interest in the litigation.").

The plaintiffs contend that even if Meszaros and Dearing's claims are moot, another person, Brittney Frederick, is willing to serve as the class representative. Frederick filed a declaration stating that she is a student at Carthage College and does not currently possess any form of Act 23-compliant ID. See ECF No. 238-1. She does possess a student photo ID card issued by Carthage, but she is not sure whether that ID is acceptable for voting purposes. Frederick has an unexpired driver's license issued by Illinois, which is where she grew up and where her parents live. She states that she does not want to either pay for a Wisconsin driver's license or to surrender her Illinois driver's license.

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[5]At the time of trial, Dearing was not a Wisconsin resident and for that reason was not eligible to vote in Wisconsin. Tr. at 980. However, he stated that he hoped to return to Wisconsin. Id.

[6]Meszaros and Dearing contend that their claims are not moot because they are still prohibited from using their out-of-state driver's licenses to comply with Act 23. Reply Br. at 17–18, ECF No. 237. However, the plaintiffs' injuries were caused not by their inability to use their out-of-state licenses at the polls, but by their inability to obtain Act 23-compliant ID without choosing between either paying fees or surrendering their out-of-state driver's licenses. Now that the plaintiffs have obtained Act 23-compliant ID, they no longer face this allegedly impermissible choice. Thus, their claims are moot.

Frederick is not identified in the plaintiffs' most recent complaint, did not participate in discovery, and did not testify at the trial. The defendants have not conceded that the facts as alleged in her declaration are true.[7] Thus, before Frederick could represent a class, the plaintiffs would have to file a complaint identifying her as a plaintiff. The defendants would then be entitled to take discovery with respect to her claim, and a second trial might be required.

Moreover, the plaintiffs have not convinced me that there are a large number of persons in Wisconsin who do not possess Act 23-qualifying ID and who could not obtain such an ID without having to surrender an out-of-state driver's license. See Fed. R. Civ. P. 23(a)(1) (class may not be certified unless "the class is so numerous that joinder of all members is impractical"). In moving for class certification, the plaintiffs identified college students and "snowbirds"—individuals who live in Wisconsin during warmer months and who live in other states during the winter—as the types of individuals who will likely possess an out-of-state driver's license yet be eligible to vote in Wisconsin. However, most college students will possess student photo ID cards issued by their colleges, and the evidence presented does not convince me that student ID cards issued by colleges or universities in Wisconsin will fail to meet Act 23's requirements. Thus, at this point, I have no reason to think that college students in Wisconsin must surrender any out-of-state IDs in their possession in order to vote. As for snowbirds, none testified at trial. The only evidence in the record pertaining to them is the testimony of a GAB employee who stated

[7]The defendants have moved to strike Frederick's declaration on the ground that it was filed with the plaintiffs' reply brief. See ECF No. 240. Although I will not strike the declaration, neither will I assume that Frederick's statements are true.

that he had heard from approximately ten individuals who complained about having to surrender their out-of-state driver's licenses to obtain Wisconsin ID cards. Tr. at 1687–88. This testimony does not demonstrate that the number of individuals who cannot vote without surrendering an out-of-state driver's license is "so numerous that joinder of all the members is impractical." Fed. R. Civ. P. 23(a)(1). No details with respect to these ten individuals were offered at trial, and it is possible that they possess some form of qualifying ID. Even assuming that these individuals lack Act 23-qualifying ID and could not obtain such ID without surrendering an out-of-state driver's license, it is not impractical to join ten individuals to a suit.

More generally, I doubt that there are a large number of qualified Wisconsin voters who may legally drive in Wisconsin without possessing a valid Wisconsin driver's license. To vote in Wisconsin, a person must reside in Wisconsin. Wis. Stat. § 6.02(1). "Residence" is defined as "the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return." Wis. Stat. § 6.10(1).[8] It is illegal for a Wisconsin resident to operate a motor vehicle in this state unless that person possesses a valid operator's license issued by the Wisconsin Department of Transportation. Wis. Stat. § 343.05(3)(a). Nonresidents, however, may operate a motor vehicle in Wisconsin so long as they are at least 16 years old and have a valid license issued by the person's home jurisdiction. Wis. Stat. § 343.05(4)(b)1. Under the motor-vehicle code, a "resident" is defined as "an adult whose one home and

[8]Other subsections of Wis. Stat. § 6.02 provide additional standards for determining residence, but those standards do not alter the basic requirement that residence is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return.

customary and principal residence, to which the person has the intention of returning whenever he or she is absent, is in this state." Wis. Stat. § 343.01(2)(g). This definition has the same meaning as "residence" under the voting laws—both definitions define residence as meaning, essentially, a person's "domicile." See Black's Law Dictionary (10th ed. 2014) (defining "domicile" as "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."). It is thus difficult to envision a scenario in which an adult could be a resident of Wisconsin for purposes of the voting laws and not also be a resident of Wisconsin for purposes of the motor-vehicle code, such that the person could legally drive in Wisconsin without surrendering his or her out-of-state license. The plaintiffs have not offered an interpretation of these statutes that would permit such a result.

If a person who is qualified to vote in Wisconsin must be a resident of Wisconsin for driving purposes, then the only persons who could claim that having to surrender an out-of-state driver's license is a poll tax are persons who (a) are qualified to vote in Wisconsin, (b) never drive in Wisconsin, (c) possess a driver's license issued by another state, (d) occasionally drive in that other state, and (e) do not already possess a form of Act 23-qualifying ID. All other persons who are qualified to vote in Wisconsin and who wish to retain their driving privileges would be required to obtain a Wisconsin driver's license and surrender their out-of-state driver's license regardless of whether they intended to vote in Wisconsin. I doubt that there are many persons who would fit criteria (a) through (e), and the plaintiffs have not submitted evidence indicating that such persons exist. The students who testified at the trial admitted to driving in Wisconsin, and thus if they are residents for

voting purposes they are required to have Wisconsin driver's licenses regardless of whether they wish to vote. Tr. at 698, 980–81. As noted, no snowbirds testified at trial, but in any event I doubt that a person who lives in Wisconsin during its warmer months never drives while in Wisconsin but drives in the state in which that person lives for the remainder of the year. Thus, the plaintiffs have not demonstrated that their proposed class satisfies the numerosity requirement of Rule 23(a)(1).

For these reasons, the claims of the named class members, Meszaros and Dearing, will be dismissed as moot, and the plaintiffs' motion to certify a class in connection with their poll-tax claim will be denied.

III. VETERAN'S ID

Plaintiffs Sam Bulmer, Carl Ellis, and Rickie Lamont Harmon seek to represent a class of veterans who possess photo identification cards issued by U.S. Department of Veterans Affairs.[9] The specific ID card at issue is the Veteran Health Identification Card, which veterans use to obtain treatment at VA health facilities. See Young Decl. Ex. 17, ECF No. 238-14. Act 23 does not include such ID cards among the kinds of photo ID cards that may be used for voting. See Wis. Stat. § 5.02(6m). The plaintiffs contend that the exclusion of veteran's ID from the list of acceptable kinds of photo ID is arbitrary and therefore violates the Equal Protection Clause as applied to any person who possesses a veteran's ID.

[9]When the plaintiffs originally moved for class certification, they defined the class in a way that limited it to persons who possessed veteran's ID and no form of Act 23-qualifying ID. See ECF No. 64 at 21. However, they have since expanded the proposed class definition to include all persons who possess veteran's ID, regardless of whether they also possess Act 23-qualifying ID. See ECF No. 223 at 9; ECF No. 237 at 17–18.

The defendants argue that the claims of the proposed class representatives are moot because, during the pendency of this case, all of them were able to obtain a form of photo ID that is already accepted under Act 23. However, the injury for which the plaintiffs seek redress is their inability to use their veteran's ID for voting purposes. The plaintiffs' having obtained other IDs that they can use for voting purposes does not redress that injury. Although the inability to use a veteran's ID for voting purposes may seem like a minor injury in light of the plaintiffs' possession of another form of ID, it nonetheless is sufficient to give the plaintiffs "a direct stake in the outcome of the litigation." See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973). The plaintiffs wish to use their veteran's ID for voting purposes, but the defendants will not allow them to. An injunction requiring the defendants to accept the plaintiffs' veteran's IDs would redress their injuries. Thus, the named plaintiffs continue to have standing, and their claims are not moot.[10]

The defendants next argue that I may not certify the proposed class of veterans because the class would not satisfy the numerosity requirement of Rule 23(a)(1), because the claims of the named plaintiffs are not typical of the claims of the class, see Rule

[10]My conclusion that the claims of veterans who possess acceptable ID are not moot is consistent with my conclusion that the claims of those who possess both out-of-state ID and Act 23-qualifying ID are moot. This is because the claims of those with out-of-state ID relate to the process of obtaining acceptable ID—they claim they are injured because they cannot obtain Act 23-qualifying ID without paying a poll tax. If the plaintiffs have obtained Act 23-qualifying ID without paying a poll tax, then they are no longer suffering the claimed injury. In contrast, the veterans do not challenge the process of obtaining ID; they challenge what is, in their view, the arbitrary exclusion of veteran's ID from the list of Act 23-qualifying ID. Thus, the named plaintiffs who are veterans may challenge the continued refusal to accept veteran's ID even though they have obtained acceptable forms of photo ID.

23(a)(3), and because the named plaintiffs are not adequate class representatives, see Rule 23(a)(4). However, rather than addressing these issues, I will proceed to address the merits of the named plaintiffs' claims. I do this because, as I will discuss, those claims fail on the merits. Thus, certifying a class of veterans would not benefit the plaintiffs. Rather, it would benefit only the defendants by precluding unnamed veterans from bringing their own, separate claims. See Myrick v. WellPoint, Inc., 764 F.3d 662 (7th Cir. 2014). But the defendants oppose class certification and thus seem content to waive this benefit. Therefore, I will proceed to the merits. See Cowen v. Bank United of Tex., 70 F.3d 937, 941–42 (7th Cir. 1995).

The plaintiffs argue that it is arbitrary to exclude veteran's ID from the list of acceptable forms of ID when a veteran's ID is "just as secure" (i.e., just as likely to ensure that the person presenting it is who he or she claims to be) as other forms of Act 23-qualifying ID—namely, ID cards issued by a U.S. uniformed service ("military ID cards") and ID cards issued by federally recognized Indian tribes in Wisconsin ("tribal ID cards").[11] Wis. Stat. § 5.02(6m)(a)3 & (e). Therefore, argue the plaintiffs, Act 23 cannot survive rational-basis scrutiny.[12] Under such scrutiny, a statutory classification must be upheld "if

[11]The parties do not identify a comprehensive standard for judging the degree of "security" offered by a given form of ID. However, some forms of military and tribal ID cards apparently do not bear expiration dates. Tr. at 1965. At the time Act 23 was passed, veteran's ID cards did not bear expiration dates. See Def. Post-trial Br. at 123, ECF No. 176. (However, newly issued cards have expiration dates. See Young Decl. Exs. 4 & 8.) It is apparently the lack of expiration dates that makes some military ID cards, tribal ID cards, and veteran's ID cards "less secure" than other forms of ID, such as driver's licenses and passports.

[12]In a footnote, the plaintiffs suggest that the Anderson/Burdick balancing test, see Burdick v. Takushi, 504 U.S. 428 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983), rather than rational-basis scrutiny, might apply to the question of whether the defendants

there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

There is no dispute that veteran's ID is "just as secure" as some forms of military and tribal ID that are acceptable under Act 23. However, this does not make Wisconsin's decision to exclude veteran's ID arbitrary or irrational. The plaintiffs' argument implies that the state must accept all forms of photo ID that are "just as secure" as the least secure form of ID that is already on the list of accepted IDs. That would produce a very long list. The federal judiciary, for example, issues ID cards to its employees that contain the employee's name and photograph, as well as the date of issuance and an expiration date. Presumably, this card would be "just as secure" as a veteran's ID, tribal ID, or military ID. Moreover, many other federal, state, and local governmental agencies likely issue photo IDs to their employees that could be deemed "just as secure" as military IDs or tribal IDs. Under the plaintiffs' argument, those IDs would have to be accepted as well. Undoubtedly, many other forms of photo ID could be identified that are "just as secure" as the forms of ID already accepted under Act 23.

It is rational for Wisconsin to limit the number of acceptable IDs to a manageable amount, while at the same time accepting enough forms of ID to make it likely that most voters will already possess one of the accepted forms. If the state could not limit the number of IDs to a manageable amount, state officials would be required to compile a list

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may exclude veteran's ID. See Reply Br. at 3 n.2, ECF No. 237. However, the plaintiffs do not develop this argument, and it was raised for the first time in their reply brief. For these reasons, I will not consider the argument. See Bank of America, N.A. v. Veluchamy, 643 F.3d 185, 189–90 (7th Cir. 2011) (court is not required to consider undeveloped arguments); Gonzales v. Mize, 565 F.3d 373, 382 (7th Cir. 2009) (argument raised for the first time in a reply brief is waived).

of all forms of accepted ID that a Wisconsin voter might possess, make sure that the list was updated regularly, and identify all the forms of ID that are "just as secure" as the least secure form of ID that is already on the list of acceptable IDs. Act 23 would need to be periodically amended to include any new forms of ID that are "just as secure" as the IDs that are already accepted. And poll workers would need frequent training on which IDs are acceptable. All of this would make it harder for the state to administer the law, and it is rational for the state to want to minimize this burden.

To be sure, Wisconsin probably could have included veteran's ID on the list of Act 23-qualifying ID without significantly increasing its administrative burden. However, for the reasons just discussed, the state had to draw the line between acceptable and unacceptable forms of ID somewhere. Drawing such a line "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." Beach Communications, 508 U.S. at 315–16 (internal quotation marks omitted). Thus, Wisconsin's decision to exclude veteran's ID from the list of acceptable forms of ID is "virtually unreviewable." Id. at 316.

Moreover, one can conceive of reasons for wanting to expand the list of acceptable forms of ID to include military ID and tribal ID, even if they may be deemed "less secure" than some of the other forms of acceptable ID, but not expand the list to include veteran's ID. Military ID cards are issued to active-duty personnel and their family members (among others). These individuals tend to relocate more frequently than voters generally and for that reason may not reside in Wisconsin for long enough to find themselves in need of a

Wisconsin driver's license or state ID card. Thus, the state could rationally conclude that military voters should be able to use their military ID cards at the polls, even though they may be "less secure" than other forms of ID.[13] The same rationale would not apply to veterans, who are no more likely to relocate frequently than voters generally. Thus, the state had a rational basis for expanding the list of acceptable ID to include military ID but not veteran's ID.

As for tribal ID cards, they are issued by quasi-sovereign Indian tribes to their members. The state could rationally conclude that tribal ID cards hold the same status within the tribal community as Wisconsin state ID cards hold outside of it, and that therefore they should be treated the same as Wisconsin state ID cards for voting purposes, even if they could be deemed somewhat "less secure" than Wisconsin state ID cards because they do not have expiration dates. This rationale would not apply to veteran's ID cards, as obviously veterans do not comprise a quasi-sovereign community that issues its own form of citizen ID. Thus, the state had a rational basis for expanding the list of acceptable ID to include tribal ID cards but not veteran's ID cards.

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[13]The plaintiffs note that military ID cards are issued not just to active-duty personnel, but also to retirees and others who might not relocate as frequently as active-duty personnel. Although that may be true, it does not render the state's decision to accept military ID cards irrational. The plaintiffs have not shown that there is a form of military ID that is possessed only by active-duty personnel who are likely to relocate, such that the state could have limited its acceptance of military IDs to that form. But more importantly, under rational-basis scrutiny, the state is not required to draw its lines with precision. See Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 655–56 (7th Cir. 2013). Thus, even if the state could have limited its acceptance of military IDs to a form that it possessed only by active-duty personnel, the Equal Protection Clause would not have required it to do so. Id. at 656 (noting that court will not interfere with legislative line-drawing even when the lines drawn are overinclusive or underinclusive).

In their briefs and at oral argument, the plaintiffs relied heavily on Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir 2014). In that case, a group of secular humanists alleged that Indiana's marriage-solemnization statute violated the Religion Clauses of the First Amendment because it allowed solemnization by religious officials of certain religious groups but disallowed solemnization by equivalent officials of secular groups. The Seventh Circuit held that the statute violated the First Amendment by favoring religious groups over secular groups. But it also stated that the statute violated the Equal Protection Clause because it made irrational and absurd distinctions. Id. at 874–75. The plaintiffs contend that this case stands for the proposition that a state's desire for a finite list does not justify its exclusion of items from that list that otherwise could have been included. But that's not what the case says. Indiana did not defend its exclusion of secular humanists from its list of approved marriage celebrants on the ground that including them would open the door to an unmanageably long list. Indiana gave other reasons for excluding them. See id. at 874. Moreover, the reason the exclusion of humanists was irrational was that the statute "discriminated arbitrarily among religious and ethical beliefs." Id. at 875. The statute, for example, permitted officials of the Church of Satan, "whose high priestess avows that her powers derive from having sex with Satan," to solemnize marriages, yet precluded Buddhists, "who emphasize love an peace," from doing so. Id. As explained above, nothing like that is going on here. Wisconsin had a rational basis for including tribal and military IDs on the list of acceptable IDs yet excluding veteran's IDs.

Accordingly, the named plaintiffs are not entitled to an injunction requiring the state to accept veteran's ID cards for voting purposes. Their claims will be dismissed on the merits.

IV. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the plaintiffs' motion for permanent injunction, class certification, and judgment on remaining as-applied claims is **DENIED**.

IT IS FURTHER ORDERED that the defendants' motion to strike portions of the plaintiffs' reply brief and supporting materials is **DENIED**.

IT IS FURTHER ORDERED that the claim of Domonique Whitehurst is dismissed as unripe.

IT IS FURTHER ORDERED that the claims of Samantha Meszaros and Matthew Dearing are dismissed as moot.

IT IS FURTHER ORDERED that the claims of Sam Bulmer, Carl Ellis, and Rickie Lamont Harmon are dismissed on the merits.

Dated at Milwaukee, Wisconsin, this 19th day of October 2015.

s/ Lynn Adelman

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LYNN ADELMAN
District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

RUTHELLE FRANK, et al.,,
Plaintiffs

v.

CASE NUMBER: 11-C-1128

SCOTT WALKER, et al.,
Defendants

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment on the merits is entered in favor the defendants as to the claims of Ruthelle Frank and any other remaining "Class 1" named plaintiffs; that the claim of Domonique Whitehurst is dismissed as unripe; that the claims of Samantha Meszaros and Matthew Dearing are dismissed as moot; and that judgment on the merits is entered in favor of the defendants as to the claims of Sam Bulmer, Carl Ellis, and Rickie Lamont Harmon.

November 5, 2015
Date

Jon W. Sanfilippo
Clerk

s/ D. Monroe
(By) Deputy Clerk