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

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

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO THE STATE'S "MOTION FOR A MORE DEFINITE STATEMENT" (DKT. 145)

The State claims that Plaintiffs have not been sufficiently "definite" in their 210-paragraph, 71-page Second Amended Complaint (Dkt. 141), and that "*more* specificity is needed." Motion 9 (Dkt. 145) (hereafter "Mot.") (emphasis added). The State seeks a "more definite statement" under Fed. R. Civ. P. 12(e), which permits the Court to order more detailed allegations where the challenged pleading "is so vague or ambiguous that the [opposing] party cannot reasonably prepare a response."

Specifically, the State seeks a Rule 12(e) order "requiring the plaintiffs to clarify what relief they want," "who that relief would apply to," "what facts and legal theories they rely upon," and "anything else that the plaintiffs intend to rely upon at trial." Mot. 2-3. Remarkably, the State even asks the Court to order Plaintiffs "to disclose the law they are challenging." *Id.* at 4; *cf.* Second Amd. Cmpl. ("2d Am. Cmpl.") ¶¶ 74-177 (specifically citing to and describing each of the "challenged provisions"); *see also* Mot. 4, 7-8 (asking plaintiffs "to clarify what they want the remedy to be," whether they are asking this Court to decide questions of Wisconsin law

"better left to state courts," and whether plaintiffs are "potential[ly]" seeking "class-based relief").

The State asks twice—once in the introduction to its motion and again in the conclusion—for the Court to order Plaintiffs to file a *Third* Amended Complaint spelling out:

> "(a) The facial relief [Plaintiffs] are seeking";
>
> "(b) The identities of the 'all other similarly situated petitioners for Voter ID' mentioned in their prayer for relief";
>
> "(c) The law they believe requires issuance of ID cards to the four new plaintiffs and 'all other similarly situated petitioners for Voter ID.' For example, are they asking this Court to interpret the state regulations that govern issuance of IDs?"; and
>
> "(d) The ruling they think this Court could make with regard to Act 23 that is not controlled by the conclusion in the *Frank v. Walker* litigation, as well as any other claims and theories the plaintiffs may rely upon at trial."

Id. at 2, 9-10.

The Court should reject the State's latest attempt to avoid having to litigate the voter ID Petition Process ("IDPP") issues in the May 16th trial. Much of the State's latest motion is a *sub silentio* request to reconsider the Court's earlier ruling and attempts to relitigate issues already addressed during the March 18, 2016 telephone hearing. The new parties and allegations added to the Second Amended Complaint grow directly out of that hearing, and were added directly in response to the State's objections in order to eliminate unnecessary standing and other jurisdictional disputes. Plaintiffs will answer the four specific questions posed by the State in Part II of this brief. Plaintiffs first will summarize their more general responses and objections to the State's motion in Part I below.

I. General Responses and Objections

Pleading legal theories and nature of facial/as-applied relief. The State's motion

demands legal details that have never been required of a pleading. "If a defendant is uncertain about the scope of the plaintiff's theories, the proper response is to serve contention interrogatories, not move for a more definite statement under Fed. R. Civ. P. 12(e)." *Spacesaver Corp. v. Marvel Group, Inc.*, 621 F. Supp. 2d 659, 662 (W.D. Wis. 2009) (citation omitted). "[C]omplaints need not plead legal theories" at all. *Jogi v. Voges*, 480 F.3d 822, 826 (7th Cir. 2007). And, as discussed during the March 18th telephone hearing, the U.S. Supreme Court has emphasized that "the distinction between facial and as-applied challenges … goes to the breadth of the remedy employed by the Court, *not what must be pleaded in a complaint*." *Citizens United v. FEC*, 130 U.S. 876, 893 (2010) (emphasis added); *see* 3/18/2016 Hearing Tr. at 9-10 (Dkt. 140).[1]

Pleading all facts that Plaintiffs will rely on at trial. This request is spurious on its face. There is no such pleading requirement under Rules 8, 12, or 15, or any of the other Federal Rules of Civil Procedure. Moreover, the State is requesting factual details about the IDPP that are largely in the *State's* possession, not Plaintiffs'; and the parties have been engaged in intensive discovery and briefing about these factual details ever since the *State* first raised the IDPP as a *defense* to Plaintiffs' various constitutional challenges to Wisconsin's voter ID requirement back in January. *See* Jan. 11, 2015 Expert Report of State Expert Dr. M.V. Hood III at 31-32 (Dkt. 86) (claiming the State's "Free ID Program" is "mitigating any negative effects of Act 23," and that the Form DOT MV 3012 "extraordinary proof" ID Petition Process is "another point of mitigation to the State's ID law"). Just this past week, the parties took and defended

[1] *See also Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) ("The substantive rule of law is the same for both [facial and as-applied] challenges."); *American Federation of State, County and Municipal Employees Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) (considering potential as-applied relief where the complaint only sought facial relief did not require an amended pleading; "the Union was not stating a new claim, only clarifying the scope of its desired remedy").

multiple expert depositions in which the IDPP issues were discussed (Drs. Hood, Burden, and Mayer); both sides disclosed more witnesses they may call to testify at trial on the IDPP issues (many of whom already have been deposed); and the State turned over additional DMV files and other evidence involving the IDPP.[2] The State is asking for information about the IDPP and Plaintiffs' related claims that the State already knows, and that Plaintiffs have repeatedly briefed over the past 2-1/2 months—including in the summary judgment briefing in January and February.[3]

The State's asserted surprise and confusion. The State's brief raises many straw men that are without any basis in fact or law. For example:

- **Class representation issues.** The State repeatedly says that Plaintiffs are seeking to represent "an unidentified class of plaintiffs," and demands to know "the scope of the class they identify" and "who they purport to speak on behalf of." Mot. 1, 4, 6. Plaintiffs have never even remotely hinted that they seek to litigate their claims under Rule 23. They seek declaratory and injunctive relief that they hope will have broad impacts, but they seek no "class" treatment, and the State's suggestion to the contrary

[2] Plaintiffs received a new production shortly before the close of business on Friday, April 8, 2016, that includes documents demonstrating that the DMV has denied additional petitions submitted through the IDPP. Plaintiffs have not yet had the opportunity to conduct a thorough review and analysis of those materials, and the facts and figures regarding the IDPP discussed below do not incorporate this newly disclosed information.

[3] By our count, this is Plaintiffs' *fifth* major filing focusing on the ID Petition Process issues since early February. *See* Plaintiffs' Feb. 2, 2016 "Opposition to Defendants' Motion for Summary Judgment," Dkt. 99 at 60-66, 116; Proposed Findings of Fact on the IDPP issues, Dkt. 115 (UNDER SEAL); the Feb. 16, 2016 Rebuttal Expert Report of Dr. Allan D. Lichtman in response to Dr. Hood's Expert Report, Dkt. 129 at 12-20 & Appendix A, Exs. 1-30 (UNDER SEAL); the Feb. 16, 2016 Rebuttal Expert Report of Dr. Kenneth R. Mayer at 4-6 (attached hereto as Exhibit A); Plaintiffs' Feb. 24, 2016 "Motion for Partial Reinstatement of Voter ID Claims in Counts One and Two of First Amended Complaint Due to Discovery of Additional Evidence and New Developments," Dkt. 131.

is mistaken. Class treatment would unnecessarily delay and complicate this voting-rights challenge, and Plaintiffs seek no such treatment here.

- **Potential state law claims.** The State suggests that Plaintiffs might only be raising state law claims regarding whether the IDPP as it is currently being administered violates "the Wisconsin Supreme Court's decision in *Milwaukee Branch of the NAACP v. Walker* … and Wisconsin's administrative code." Mot. 5. The State asks: "Do the plaintiffs want this court to interpret the Wisconsin Supreme Court's view of state regulations from the *Milwaukee Branch* decision?" *Id.* at 7. The answer is obvious: Of course not. Plaintiffs are challenging the voter ID requirement and the IDPP under the federal Voting Rights Act and the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments, and have never remotely hinted at any state law claims. Plaintiffs raise *federal* statutory and constitutional voting rights claims that belong in *federal* court.
- **"Six new parties."** The State laments that "six new individual parties" have been added to the Second Amended Complaint. Mot. 1, 9. Only someone who did not participate in the March 18th telephone hearing could question the addition of these new parties. The State argued that the Court had no jurisdiction to order relief with respect to the IDPP issues because DMV officials were not then parties to this case. *See* Dkt. 137, at 7-8; 3/18/2016 Hearing Tr. at 11-17 (Dkt. 140). As discussed during the hearing, Plaintiffs strongly disagree with the State's jurisdictional argument and believe this Court has ample jurisdiction to order efficacious relief through an

injunction directed at GAB officials and their soon-to-be successors.[4] But to eliminate an unnecessary side issue and focus instead on what really matters, Plaintiffs have simply added two DMV officials in their official capacities. Similarly, the State previously argued that Plaintiffs could not challenge the IDPP because none of them had been through that "Petition Process" themselves. *See* Dkt. 137, at 6-7; 3/18/2016 Hearing Tr. at 17 (Dkt. 140). Here again, although Plaintiffs strongly disagree with the State's cramped interpretation of organizational and associational standing law, Plaintiffs have added four individual plaintiffs who have been forced to "enter" the Petition Process to protect their fundamental right to vote and, after extensive (and unjustifiable) proceedings, received denial letters from the DMV effectively disenfranchising them. These individuals were added to conserve judicial economy and the resources of the parties, by eliminating the State's standing objections and simplifying the trial of this case. There are no surprises here.

- **"Many new allegations."** The State complains there are "many new allegations" about the IDPP in the Second Amended Complaint. As the Court will see from the red-lined version of the Second Amended Complaint filed at Dkt. 141-1 Ex. A, Plaintiffs have indeed added detailed allegations about the origins, operation, and impacts of the IDPP. *See* 2d Am. Cmpl. ¶¶ 164-77, 181, 189-90, 205-06. But there is nothing "new" about those allegations. Many of them are literally cut-and-pasted

[4] As Plaintiffs' counsel discussed during the March 18th telephone hearing (*see* 3/18/2016 Hearing Tr. at 11-12 (Dkt. 140)), the GAB has the statutory authority and duty to interpret, administer, and enforce the voter ID requirement at the polls, including through rulemaking, supervision of election officials, enforcement actions, and voter education and assistance efforts. *See* Wis. Stat. §§ 5.02(6m), 5.05(1), 6.79(2), 7.08(12); 2011 Wisconsin Act 23 § 144 ("Public Education Campaign"). An order invalidating the voter ID law, either facially or as applied, would necessarily put an end to the DMV's "extraordinary proof" ID Petition Process, which exists only to implement the unconstitutional ID law.

from Plaintiffs' many earlier filings about the IDPP, dating back to Plaintiffs' February 2nd brief in opposition to the State's motion for summary judgment. *See* Dkt. 99 at 60-66, 110. Many of the other allegations come straight out of Plaintiffs' rebuttal expert reports filed nearly *two months ago* in response to the State expert's claims about the IDPP. *See, e.g.*, Dkt. 129 at 12-20 & App. A, Exs. 1-30 (Dr. Lichtman); Feb. 16, 2016 Rebuttal Expert Report of Dr. Kenneth R. Mayer at 4-6 (attached hereto as Exhibit A). And these allegations are *all* based on evidence and data *produced by the State*, not "new" evidence the State did not know about before now.

- **Confusion over "who th[e] relief would apply to."** The State even claims to be puzzled about "who th[e] relief would apply to." Mot. 3. The answer is "to the State," acting through the GAB and DMV officials sued in their official capacities who have been named in the Second Amended Complaint. If the State is suggesting a need to sue more public officials in order to ensure full state compliance with potential federal declaratory and injunctive relief, they are incorrect as a matter of law. "A suit against a state officer in his official capacity is, of course, a suit against the State." *Diamond v. Charles*, 476 U.S. 54, 57 (1986). For this reason, "causation and redressability will exist when a defendant has definite responsibilities relating to the application of the challenged law." *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 831 (S.D. Tex. 2012), *rev'd on other grounds and remanded sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (quotation omitted). Furthermore, the defendant need not have authority over every application of the challenged provision. *See Harkless v. Brunner*, 545 F.3d 445, 455 (6th Cir. 2008) (holding that

> Ohio Secretary of State was proper defendant under the National Voting Rights Act even though enforcement power was delegated to local officials); *United States v. Missouri*, 535 F.3d 844, 846 n. 1 (8th Cir.2008) (same). Instead, causation and redressability exist where "a declaration against a governmental defendant without enforcement power is reasonably likely to cause nonparties with enforcement power to obey the court's order." *Andrade*, 888 F. Supp. 2d at 831; *see also Franklin v. Massachusetts*, 505 U.S. 788, 790–91 (1992) (finding redressability prong satisfied where actors who were not parties to the lawsuit could be expected to amend their conduct in response to a court's declaration).

"Fact intensive" and "individual[istic]" determinations of voter ID eligibility. The State also argues that the Court is going to have to conduct four "*mini-trials of the new plaintiffs.*" Mot. 9 (emphasis added). Plaintiffs seek no such "mini-trials," and the State is not entitled to them. Plaintiffs are not on trial here; they simply want to vote and the State of Wisconsin refuses to permit them to do so—indefinitely.

The State's reasoning is revealing: It claims that "each ID determination is *highly fact specific*" and "necessarily the result of *[each petitioner's] individual circumstances*." *Id.* at 5 (emphasis added). As we already have briefed several times, and as is now pleaded in ¶ 205 of the Second Amended Complaint, these are precisely the kinds of vague and indeterminate voting standards and qualifications that are prohibited by the Fourteenth and Fifteenth Amendments, that were the hallmark of the Jim Crow voter suppression regime, and that are themselves evidence of purposeful and intentional discrimination.[5] The State's suggestion that eligible

[5] *See, e.g., Louisiana v. United States*, 380 U.S. 145, 153 (1965) (*re* "understanding test"); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959) (*re* literacy tests); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam), *affirming* 81 F. Supp. 872, 877-78

Wisconsin voters might have to go through mini-trials in order to be permitted by the State to exercise their fundamental right to vote is not evidence of a need for further clarification of Plaintiffs' claims; it is evidence that the State's voter ID regime is rotten to its core and must be invalidated.

The facial/as-applied distinction. The State claims Plaintiffs have made "a 180-degree shift" in their claims for relief, complaining that Plaintiffs are seeking "an entirely new category of as-applied relief" as well as "an ambiguous theory of alternative facial relief." Mot. 1; *see id.* at 3-4. This argument fails for many reasons. As noted above, the facial/as-applied issue "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United*, 558 U.S. at 331. Moreover, Plaintiffs have been consistent in their prayers for relief: From the outset of this litigation, they have sought declaratory and injunctive relief to stop Defendants from "implementing, enforcing, or giving effect to the challenged provisions." *See* Complaint at 54 (Dkt. 1). All that has changed is that Plaintiffs now have added that, if the Court does not invalidate the challenged provisions across the board, they seek to have the Court invalidate the application of those challenged provisions to as many voters as possible (including by issuing voter IDs to the newly added Plaintiffs). *See* 2d Am. Cmpl. at 2-3, 70.

Moreover, the State is demanding from Plaintiffs something that judges and legal scholars have been unable to provide—clarity regarding the differences between facial and as-applied challenges. One of the consistent themes in the case law and scholarly literature is that the distinction is confusing, "elusive," and often inconsistently applied. *See, e.g.*, Nihal Patel, *Weighty Considerations: Facial Challenges and the Right to Vote*, 104 Nw. U. L. Rev. 741, 742, 746, 773 (2010) (distinction is "elusive," "has often been criticized as a mere 'rhetorical

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(S.D. Ala. 1949) (three-judge district court) (*re* "understand and explain" test); *see also* Dkt. 131 at 25-26.

flourish,'" "represents an ad hoc approach rather than a defined doctrine," "'confuse[s] more than it illuminates,'" and "can be manipulated to achieve certain results"). Some judges and academics contend that "all constitutional challenges are facial challenges," while others insist that "all challenges to statutes are as-applied." *Id.* at 748-49. *Compare Crawford v. Marion County Election Board*, 553 U.S. 181, 185 (2008) (Stevens, J., for himself and two others), *with id.* at 204 (Scalia, J., for himself and two others, concurring in the judgment) (debating what distinguishes a "facial" from an "as-applied" voting rights claim).[6]

The frequently overlapping nature of facial and as-applied claims is illustrated in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), a challenge to the State of Washington's Public Records Act ("PRA"). Petitioners claimed the PRA (1) violated the First Amendment "as applied to referendum petitions," and (2) was "unconstitutional as applied to" a specific referendum petition. *Id.* at 194. Chief Justice Roberts' decision for the Court emphasized "[i]t is important at the outset to define the scope of the challenge before us." *Id.*

> The parties disagree about whether Count I is properly viewed as a facial or as-applied challenge. … It obviously has characteristics of both: The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

[6] *See also* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 Minn. L. Rev. 1644 (2009) ("[T]he categories of facial and as-applied challenges are not mutually exclusive. All statutory challenges actually fall somewhere along a continuum bookended by facial challenges that ask courts to invalidate entire statutes and 'pure' as-applied challenges that ask courts to invalidate fact-specific instances of enforcement."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321 (2000) ("There is no single distinctive category of facial, as-opposed to as-applied, litigation."). Professor Fallon's article was cited with favor by the Supreme Court in its discussion of facial vs. as-applied relief in *Citizens United*, 558 U.S. at 331.

Id. (emphasis added); *see also Center for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012) ("facial challenges and as-applied challenges can overlap conceptually").

As discussed during the March 18th telephone hearing, the Supreme Court's *Citizens United* decision further undermines the State's insistence that Plaintiffs get the facial vs. as-applied distinction "just right" at this stage, rather than after the Court has heard all the evidence and analyzed the parties' legal arguments on the appropriate scope of remedy. Citizens United had "stipulated to dismissing count 5 of its complaint, which raised a facial challenge to [McCain-Feingold's ban on independent corporate expenditures on electioneering communications], even though count 3 raised an as-applied challenge" regarding the application of that corporate expenditure ban to *Hillary: The Movie*. 558 U.S. at 329. The Court rejected arguments that Citizens United had thereby "waived" any relief striking down the expenditure ban on its face. So long as Citizens United had challenged the constitutionality of the ban, the Court could choose which remedy—facial or as-applied—was most appropriate under the circumstances. *See id.* at 330-33.

Alleged overlap with pending *Frank v. Walker* litigation. This is the first time in this litigation that the State has suggested the voter ID issues should be held in abeyance given the ongoing *Frank v. Walker* litigation. The *Frank* litigation had already been remanded to Judge Adelman at the time Plaintiffs brought this litigation last May, and Judge Adelman dismissed the remaining *Frank* claims nearly six months ago. *See Frank v. Walker*, No. 11-C-1128, 2015 WL 6142997 (E.D. Wis. Oct. 19, 2015), *appeal pending*, 7th Cir. No. 15-3582 (argued Apr. 7, 2016). For the first time, the State now warns that this Court should not "simultaneously litigate[]" issues supposedly pending before the Seventh Circuit. Mot. 8.

That will not be a problem. Plaintiffs here are litigating different claims than in *Frank*, on an entirely different and far more current record, are the *only* Plaintiffs presently challenging the IDPP itself, and seek no Rule 23 class certification or relief. The remaining plaintiffs in *Frank* are pursuing solely an *Anderson/Burdick* claim. Plaintiffs here are suing for race and age discrimination in voting in violation of the Voting Rights Act and several constitutional guarantees. The remaining plaintiffs in *Frank* pursue an as-applied challenge based on the massive litigation record compiled in the November 2013 bench trial before Judge Adelman. That record was assembled long before the Wisconsin Supreme Court's August 2014 "saving construction" that led to the current IDPP. The trial record in this case focuses on what is happening on the ground now, in real time, during this most extraordinary election year. And much of *Frank* remains tangled up in Rule 23 class and subclass certification issues that are not present here, because Plaintiffs seek no Rule 23 relief.

Of course, whenever the Seventh Circuit issues its decision in *Frank* regarding the "as-applied" *Anderson-Burdick* challenge based on the 2013, pre-IDPP trial record in that case, the parties and Court in *this* case will want to review that decision to determine its bearing, if any, on the issues in this litigation. But that is no reason to hold the voter ID issues here in abeyance, given that they involve race discrimination claims not present in *Frank*, an up-to-date record, and a focused challenge on the IDPP itself that is absent from *Frank* (given that *Frank* was tried before the new IDPP was put into effect). Moreover, while it is unclear when the Seventh Circuit will rule and how long it will be until the district court in *Frank* subsequently resolves that case, this case has a set trial date and offers the opportunity for full resolution of the voter ID and IDPP issues in this case in time for the voters whom the State has indefinitely disenfranchised—and who were unable to vote in the recent presidential primary—to have their

right to vote restored prior to, and to be able to cast a ballot in, the upcoming 2016 presidential general election.

Dilatory strategy. "Rule 12(e) motions are disfavored for their dilatory effect on the progress of litigation." *Potts v. Howard University*, 269 F.R.D. 40, 44 (D.D.C. 2010); *see also Kingsbury Int'l, Ltd. v. Trade the News*, No. 08 C 3110, 2008 WL 4853615, *2 (N.D. Ill. Oct. 28, 2008). Courts should "keep the case moving" rather than "lavishing attention on the complaint until the plaintiff gets it just right." *Scott v. City of Chicago*, 195 F.3d 950, (7th Cir. 1999). Here, the State's claims of confusion are not credible given that the parties have been engaged in document discovery, fact depositions, and expert analysis focused on these IDPP issues for the past several months. Indeed, in a filing made *the day after* it submitted its Motion for a More Definite Statement, the State contends that Plaintiffs have devoted too *much* attention to the IDPP in Plaintiffs' depositions. *See* Defs. Resp. to Mot. for Leave to Take Add'l Deps. at 2-3, 10-12 (Dkt. 146). Rather than fiddling with the pleadings, we should be focusing on the proposed trial findings, trial exhibits, and other pretrial submissions.

"Only" a few disenfranchised voters. The State is now trying to downplay the significance of the IDPP, arguing that it involves "only" a few thousand people and has resulted in the denial of "only" several dozen "petitioners." Dkt. 146 at 4, 10-11; *see id.* at 5, 10-11 (IDPP issues "affect a very small number of Wisconsin voters"). This argument falters on many grounds. Most obviously, "even one disenfranchised voter—let alone several thousand—is too many." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014).

Moreover, although the State says that "only" a few dozen people have been denied the right to vote where they have stuck it out all the way to the bitter end of the ID Petition Process, we know that many more people have been deterred—and will in the future be deterred—from

trying to get an ID through this obscenely cumbersome process. The number of voters who will need to use the process and are ultimately denied is also going to climb as time goes by, and there will almost certainly be a spike in the lead up to the 2016 general election—the first presidential general election in which ID is required. One DMV investigator (Becky Beck) disclosed in deposition last week that there has been a significant increase in Form MV 3012 "Extraordinary Proof" ID Petitions during the first quarter of 2016. Given that the Petition Process takes so long—in several cases it has taken a year or more, and the DMV admittedly lacks the resources to expedite even the requests that it already has waiting in a backlog—any number of voters will be denied their fundamental right to vote as they wait to find out if the DMV will decide whether they can successfully run this gamut. And the growing number of people who have withdrawn, been suspended from, or been outright "denied" in the ID Petition Process are not suffering a one-off injury. They are injured in every single election in which they cannot vote—potentially for the rest of their lives (at least as long as they live in this State). They are, in a word, disenfranchised.

The broader importance and context of the IDPP issues. The IDPP issues are also part and parcel of several much larger issues in this litigation. That is why defense expert Dr. M.V. Hood III injected these issues into the case in his expert report last January—because the IDPP is a purported means of alleviating the burdens of the ID law as a whole that Plaintiffs have been pressing as part of their First, Fourteenth, Fifteenth, and Twenty-Sixth Amendment claims since the outset of this litigation. As we previously have shown, the IDPP is the artifice on which the voter ID law—which the Wisconsin Supreme Court has ruled is a "*de facto* poll tax" without this process—is based. If the IDPP is rotten, the voter ID law is rotten to the core. Or to

use another analogy, if the safety valve is broken, the entire system is flawed and in danger of catastrophic failure.

Moreover, as Plaintiffs have explained, this process goes directly to the issue of intentional and purposeful race discrimination. The fact that Wisconsin has (per Dr. Lichtman) become the first State since the Jim Crow era to deny eligible citizens the right to vote based on some factor other than voting qualifications is an extraordinarily important fact in this case, and it is one that merits development.[7] Likewise, the IDPP goes directly to the question of whether the political process is "equally open" to minority voters—as required under Section 2 of the Voting Rights Act. 52 U.S.C. § 10301(b).

The evidence produced to date shows that 44% of Wisconsin voters thrown into the DMV's "free ID" process are African American or Latino; that about *two-thirds* of all Wisconsin voters thrown into the DMV's "extraordinary proof" ID petition process are either African American or Latino; and that virtually *every* "petitioner" who has been formally denied is African American or Latino.[8] These are the kinds of lopsided statistics that, in Justice

[7] To reiterate Dr. Lichtman's key conclusions: "Although 19 outright denials may seem like a small number, as far as I know it represents *the first time since the era of the literacy test that state officials have told eligible voters that they cannot exercise their fundamental right to vote—not in the next election, probably not ever. … I am unaware in the post-voting rights era of other examples of state officials telling eligible citizens of their state that they cannot vote* because they fail to meet an external criteria established by the state—unrelated to age, residency or other objective qualifications for voting." Feb. 16, 2016 Expert Rebuttal Report of Dr. Allan Lichtman at 15-16 (emphases added) (Dkt. 129) (UNDER SEAL).

[8] See Hood Expert Report at 31-32 & Tbl. 11 (Dkt. 86), reporting that 44% of all recipients of free ID have been African American and Latino, even though these groups make up only about 12% of Wisconsin residents. Plaintiffs have examined the files of about 800 petitioners, about 2/3 of whom identified themselves as African-American or Latino. And Plaintiffs are aware of 22 outright petition denials. Eighteen of these 22 voter ID petitioners who were barred from voting are self-identified as African American or Latino, and another three appear to be African American or Latino based on their names and residential addresses. Thus, as many as 95% of voting ID petitioners who are rejected by DMV are African-American or Latino—a staggeringly disproportionate impact.

Frankfurter's words, lead to the "irresistible" conclusion, "tantamount for all practical purposes to a mathematical demonstration," of *purposeful* race discrimination. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (regarding racial gerrymandering).[9] The only thing more striking than these grossly disproportionate racial impacts is the repeated testimony of state officials that they have not noticed any such disparity.

II. Responses to the State's Specific Questions

The State wants this Court to order Plaintiffs to answer the following questions. Had the State contacted Plaintiffs before filing its motion, Plaintiffs gladly would have supplied the answers. Instead, they do so here:

"(a) The facial relief [Plaintiffs] are seeking."

To repeat what Plaintiffs have explained several times, Plaintiffs are seeking the facial relief of a declaration and injunction prohibiting the enforcement of each of the challenged statutory provisions across the board. But if the Court believes any particular challenged provision cannot be invalidated in its entirety, Plaintiffs are requesting that the Court invalidate the law as applied in the unlawful circumstances. Under the facial/as-applied distinctions drawn in *Citizens United* and *John Doe No. 1 v. Reed*, this narrower scope of declaratory and injunctive relief is still "facial" in character. And the four new Plaintiffs who have received denial letters from the DMV seek a federal judicial order allowing them to vote, an "as-applied" remedy that might set a precedent benefiting thousands of other Wisconsin citizens. As discussed in Part I

[9] *See also Internat'l B'hood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (evidence of "gross disparity" in racial impacts "is often a telltale sign of purposeful discrimination"); *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) ("statistical showing" of a "substantial" racial disparity in impacts and burdens "ma[kes] out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case"); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (evidence that local ordinance that is neutral on its face but leads to "unequal and oppressive" racial disparities supports inference of intentional race discrimination).

above, the Supreme Court has recognized that a given claim can have elements of both a facial and an as-applied challenge. *See Doe,* 562 U.S. at 194. Nothing in any of Plaintiffs' pleadings over the past year has limited their claims to either facial or as-applied challenges.

"(b) The identities of the "all other similarly situated petitioners for Voter ID" mentioned in [Plaintiffs'] prayer for relief."

The State has much more information about the identities of these "similarly situated petitioners" than do Plaintiffs. According to the State's expert, 1,022 Wisconsin citizens had been forced to "enter" the MV 3012 IP Petition Process as of the end of November 2015. *See* Hood Expert Report at 33 (Dkt. 86). DMV witnesses have admitted that number has increased over the past five months, and that the frequency of such petitions is increasing as we get further into the election year. Based on what the DMV had produced prior to Friday, April 8, 2016, Plaintiffs believe they know the identities of roughly 800 of these "petitioners," about two-thirds of whom are self-identified as African-American and Latino. The State should stop pretending it does not know who these people are. The State is the party with this information; Plaintiffs are the ones who lack it.

But the MV 3012 statistics do not capture the universe of all "similarly situated" Wisconsin voters, because those statistics only reflect the number of voters who are told about the MV 3012 IDPP and actually submit a petition to the DMV. Many voters know nothing about this option and give up much earlier in the process. Others who learn about the IDPP do not have the time, resources, stamina, fortitude, or patience to participate in what can turn out to be a lengthy "adjudication" process that involves the expenditure of substantial money in chasing down ancient records that will "prove" one's "identity." As the growing volume of IDPP evidence demonstrates, pursuing a voter ID through the MV 3012 ID Petition Process can and has often become a prohibitively expensive ordeal.

> **"(c) The law [Plaintiffs] believe requires issuance of ID cards to the four new plaintiffs and 'all other similarly situated petitioners for Voter ID.' For example, are they asking this Court to interpret the state regulations that govern issuance of IDs?"**

Simply put: "The law[s] [Plaintiffs] believe require[] issuance of ID cards to the four new plaintiffs and 'all other similarly situated petitioners for Voter ID'" are Section 2 of the Voting Rights Act along with the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments, as spelled out in the six counts in Plaintiffs' original and amended complaints. Plaintiffs are most definitely *not* "asking this Court to interpret the state regulations that govern issuance of IDs," or determine whether the IDPP as actually administered and enforced is consistent with the Wisconsin Supreme Court's intent or with the governing DOT regulations. What Plaintiffs *are* requesting is declaratory and injunctive relief holding that the administration and enforcement of the IDPP is illegal under *federal* constitutional and statutory law.

> **"(d) The ruling [Plaintiffs] think this Court could make with regard to Act 23 that is not controlled by the conclusion in the *Frank v. Walker* litigation, as well as any other claims and theories the plaintiffs may rely upon at trial."**

Plaintiffs have repeatedly answered this question in their oral and written arguments over the past two months. Judge Easterbrook's panel decision expressly held open the possibility of future as-applied challenges. *See Frank v. Walker*, 768 F.3d 744, 747 n.1 (7th Cir. 2014), *rehearing en banc denied by an equally divided court*, 773 F.3d 783 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015). And it strongly suggested the possibility of a different outcome based on evidence of *actual* rather than "*predicted*" impacts. *Id.* at 747. Plaintiffs explained this point most recently in (1) their brief in support of their motion to reinstate, and (2) ¶ 181 of their Second Amended Complaint, and do not believe that further explanation is necessary, especially

with respect to the sufficiency of the pleadings in Plaintiffs' Second Amended Complaint. *See* Dkt. 131 at 9-10; 2d Am. Cmpl. ¶ 181 (Dkt. 141).[10]

Ultimately, of course, Plaintiffs and the State are never going to agree on what is and is not a permissible ruling under *Frank v. Walker*. That is something this Court will decide after it has heard all the relevant evidence and considered the parties' legal arguments. Trying to make that determination now, in order to fine tune the Second Amended Complaint to the State's satisfaction, hardly seems like a good use of the Court's or the parties' time and resources as we get closer to the May 16th trial date.[11]

CONCLUSION

Plaintiffs continue to believe that all claims and issues can and should be tried together beginning May 16th and that, at the very least, the May 16th trial on the merits of the other claims should be treated as a preliminary injunction hearing on the reinstated claims, with a separate trial date for those reinstated claims to follow as soon as feasible. One thing the Court should *not* entertain is the State's suggestion that the IDPP issues be put off altogether until some undetermined future date. The Court already has made clear that those issues are "important" and need "exceptionally prompt resolution." Mar. 17, 2016 Order at 2 (Dkt. 138). And those issues grow directly out of the claims that the parties have been litigating for the past year.

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[10] The State's argument that footnote 1 of Judge Easterbrook's *Frank* opinion only envisions as-applied relief in *state* court, not *federal* court, is specious. Mot. 7. Nothing in that opinion suggests a departure from the normal principles of follow-up as-applied litigation in *federal* court of *federal* claims. An as-applied Section 2 claim belongs in federal, not state court.

[11] For one example of how a facial ruling of validity can be followed by a broad as-applied ruling of invalidity that significantly narrows the practical effect of the facial ruling, compare *McConnell v. FEC*, 540 U.S. 93, 189-211 (2003) (relying on massive evidentiary record in upholding facial validity of the McCain-Feingold campaign finance law's restrictions on corporate expenditures for express advocacy or its "functional equivalent"), with *FEC v. Wis. Right to Life*, 551 U.S. 449, 481 (2007) (fashioning narrow definition of what constitutes the "functional equivalent" of express advocacy in as-applied follow-up litigation, resulting in significant narrowing of McCain-Feingold's corporate expenditure ban).

Again, the *State* raised the IDPP as an *affirmative defense* to Plaintiffs' voter ID claims under the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments. The parties have spent the past three months focused intensively on the voter ID issues in general and the IDPP issues in particular. We have engaged in intensive voter ID document discovery and analysis, are in the midst of wrapping up fact and expert discovery on the IDPP issues, and will be trial-ready on May 16th.

Despite the State's feigned surprise and inability to understand Plaintiffs' claims, the State fully understands those claims. The State is urgently trying to put off the trial of the IDPP issues because it knows too much about what is coming, not too little. The Court should deny the State's dilatory motion, and we should continue preparing for trial.

Dated this 11th day of April, 2016.

Respectfully submitted,

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