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

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v. Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, LEAVE TO FILE SUPPLEMENTAL PLEADINGS, AND CLASS CERTIFICATION

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INTRODUCTION

Anyone who goes to a Wisconsin DMV office and applies for a free state ID will be mailed, within six days, either an ID card or photo receipt that is valid for voting. (Boardman Decl. ¶ 40.) This is true regardless of whether the applicant brings a birth certificate, regardless of a name mismatch in their documents, and regardless of whether another state holds vital records. This has been true since May 13, 2016, and it is a reality that is ignored in Plaintiffs' filings.

"[T]he inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Opinion of Stevens, J.). Wisconsin DMV requires no more than what *Crawford* describes. Indeed, DMV goes to great lengths to lighten the burden. For those who have difficulty "gathering the required documents," DMV will find the documents for them. Just last month, Judge Peterson from the Western District of Wisconsin described DMV's efforts to find documents for applicants as "heroic." (Murphy Decl. Ex. 1007:P199; Ex. 1004:A108-9) (*One Wisconsin* Tr. 05-24-16, 7-P-199; 05-19-16 at 4-A-108-9.)[1] If no documents can be found, DMV will still issue an ID if it is more

[1] Transcripts from the *One Wisconsin* trial are attached to the Declaration of S. Michael Murphy ("Murphy Decl."). Citations are given both to the exhibits to the Murphy Declaration, and by trial date, with designations of morning and afternoon transcripts as "A" and "P," respectively.

likely than not that the applicant is presenting an accurate identity. EmR1618 § 8.[2] And during the time DMV is assisting in getting a free ID, the applicant has an ID receipt that is valid for voting. EmR1618 § 10.

Plaintiffs attempt to paint a much different picture of the ID issuance process through a confusing mix of old law and stale facts. Much of their argument is based on the previous trial in this case, which occurred in November 2013, and even cites their own trial brief. (*See* Dkt. 165; Dkt. 279:9[3] (citing Dkt. 194.)) Yet they acknowledge that the current process for state ID issuance—the process that they are now challenging—was created after that trial. (Dkt. 279:5.) Much of the remainder of their arguments merely imports transcripts and exhibits from the *One Wisconsin*[4] trial of just weeks ago. But they do not use testimony from the nine-day public trial in *One Wisconsin*. Rather, they cite old deposition transcripts, sometimes from months before the trial. (*See* Dkt. 280-34) (Deposition transcript from January 2016).)

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[2] Available at: https://docs.legis.wisconsin.gov/code/register/2016/725A3/register/emr/emr1618_rule_text/emr1618_rule_text (Last visited on June 29, 2016.)

[3] Docket 279 is Plaintiffs' brief in support of their preliminary injunction request. The brief page numbers do not align with the docketing page numbers. For example, page 7 of the brief is page 9 of the docket entry. This brief cites the page of the docket entry, meaning that it corresponds with the "Page 9 of 32 Document 279" printed on the bottom of the page.

[4] *One Wisconsin Institute, Inc. v. Nichol*, 15-CV-324 (W.D. Wis.).

It is not difficult to understand why Plaintiffs are eager to rely on old facts and old law. Current law leaves nothing to their case. The Court should deny Plaintiffs' motions.

BACKGROUND

I. Procedural posture

This case is on remand from the Seventh Circuit for two purposes. First, Plaintiffs' veterans-ID related challenges are to be dismissed as moot. *Frank v. Walker*, 819 F.3d 384, 388 (7th Cir. 2016). Second, this Court is to inquire as to whether the voter ID law creates "high hurdles" for some persons eligible to vote. *Id.* at 386.

The Seventh Circuit instructed that "the state's administrative agencies may have made other adjustments since the end of discovery," so this Court should "permit the parties to explore how the state's system works today before taking up plaintiffs' remaining substantive contentions." *Id*. at 388.

II. Brief background of ID issuance procedures

ID issuance procedures have changed since the trial in this case, as noted by the Seventh Circuit. *Id.* On May 13, 2016, the ID issuance process was adjusted and improved. Wis. EmR1618; (*see also* Boardman Decl. ¶ 39.) For purposes of this case, the DMV's May 13, 2016, rule contains two key features: it incorporates state ID card receipts that are valid for voting through any application process, and it codifies the best practices that have evolved through DMV's experience. The rule "ensur[es] that qualified applicants who [otherwise] may not be able to obtain

acceptable photographic identification for voting purposes with reasonable effort will be able to obtain photographic identification before the next scheduled elections [in August and November.]" Wis. EmR1618, at 9.

To succeed on their injunction request, Plaintiffs need to show that they can prevail under *current law*. They cannot, because the current process makes it easy for anyone to get an ID who will undertake "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph." *Crawford,* 553 U.S. at 198.

III. Current ID issuance procedures make it easy to get an ID for voting, even without available documentation or inconsistencies in documentation.

The ID issuance process was the topic of many hours of testimony spanning many days, and many trial exhibits, in *One Wisconsin*. (*See generally* Murphy Decl. ¶¶ 5-18, Ex. 1001–12, 1021.) That trial thoroughly examined legal and factual issues essentially identical to the issues in this case, and it was tried after implementation of the May 13, 2016, DMV rule—meaning it includes more current evidence than what has been submitted in Plaintiffs' preliminary injunction papers. (Murphy Decl. ¶ 4.) Records from the *One Wisconsin* trial explain the ID process far more completely than can be done in the context of this preliminary injunction response, so the trial record from *One Wisconsin* is being filed in support of denial of the preliminary injunction. (Murphy Decl. and attached exhibits.)

Generally, to get a free ID, an applicant goes to one of DMV's 92 service centers staffed by over 350 people. (Boardman Decl. ¶ 7.) An applicant then

completes an application and provides documentation of his or her basic identifying information: name, date of birth, legal presence in the United States, identity, Wisconsin residency, and Social Security number. (Boardman Decl. ¶¶ 3, 5; Ex. 1013); Wis. Admin. Code Trans. § 102.15. Explanations of all these requirements are on DMV's website, in both English and Spanish. (Boardman Decl. ¶ 6.)

An application is not denied if a person does not have all the documents, or if there are inconsistencies in the documents. And no applicant has to pay a fee to get documents to get a free ID. Addressing every contingency addressed by DMV's comprehensive procedures for issuing IDs is outside the scope of this response, but each of the alleged problems described in Plaintiffs' three proposed sub-classes are addressed below.

A. DMV has an efficient process for addressing inconsistencies in identity documents.

Name mismatches or inconsistencies in identity documents do not result in denial of an ID. Wis. EmR1618, §§ 1–3; (Boardman Decl. ¶ 37; Ex. 1019.) For a simple single-letter discrepancy, such as an application from a "Shawn Smith" whose birth certificate says "Shaun Smith," an ID is issued in the normal way from a DMV service center. (*See* Boardman Decl. ¶36; Ex. 1018, at 1.) These simple name spelling discrepancies do not require any special processing and are not an impediment to an ID issuance. (*See* Boardman Decl. ¶ 35; Ex. 1018, at 1.)

For someone with an entirely different name on her documents, such as an application from "Jill Bruno" whose documentation shows her name as "Jill Green,"

DMV uses an affidavit to issue an ID. (Boardman Decl. ¶ 37.) DMV has an efficient process to implement the affidavit process. (Boardman Decl. ¶¶ 35, 38; Ex. 1018.) DMV has an affidavit form that the service center collects and sends to DMV's Madison office for issuance of an ID. (Boardman Decl. Ex. 1018, at 2.) It permits DMV employees to witness the signature, to prevent the possibility of anyone needing to pay a notary fee. (Boardman Decl. ¶ 38.) The affidavit does not require an applicant to change his or her name. (Boardman Decl. ¶ 37; Ex. 1019.) Rather, it provides evidence of a legal name that is different than that reflected on a birth record. (Boardman Decl. ¶ 37.)

B. If birth records are unavailable, DMV works with the Department of Health Services and other agencies to verify an applicant's birth record and U.S. citizenship.

If an applicant does not have available documents to verify his or her birth record and citizenship, DMV uses the ID Petition Process (IDPP), which is designed for that situation. (Boardman Decl. ¶ 11.) The IDPP starts by DMV gathering birth record information, such as family maiden names and place of birth. (Boardman Decl. Ex. 1015.) DMV then coordinates directly with DHS to verify birth record information:

> the department of transportation shall forward the petition to the central office of its division of motor vehicles for processing. The administrator shall provide the person's birth record information to the department of health services, for the sole purpose of verification by the department of health services of the person's birth certificate information or the equivalent document from another jurisdiction, other than a province of the Dominion of Canada, or to a federal agency for the sole purpose of verifying the person's certificate of birth abroad issued by the U.S. department of state, or of verifying the person's alien or U.S. citizenship and immigration service number or U.S. citizenship certificate number. The administrator shall open

> a file containing the petition and shall create therein a report with a dated record of events, including all communication to or with the applicant.

Wis. EmR1618, § 7 (editing marks omitted). DMV does the legwork for this matching process. (*See* Boardman Decl. ¶¶ 15, 17, 20.) DHS uses state and national databases to verify information for most applicants, without the need to obtain an individual document. (*See* Boardman Decl. ¶ 17.) If the birth record of an applicant cannot be verified, the application proceeds to the next stage where alternative information is used.

C. If an applicant's birth record cannot be verified through documents or an inter-agency identity match, DMV will process ID applications using other information.

The vast majority of applicants who apply through the IDPP get their ID after the DHS information-matching process. (Boardman Decl. ¶ 32; Ex. 1017 (902 of 1,132 IDPP applications granted after DHS check).) But a non-match does not result in denial. (Boardman Decl. ¶ 20.) In that event, applications are forwarded to DMV's Compliance, Audit, and Fraud Unit (CAFU) to be individually researched by trained investigators. The investigation proceeds with "prompt and due diligence." Wis. EmR1618, § 8. (Boardman Decl. ¶¶ 20, 23.)

The investigators' primary goal is to issue an ID to whoever is eligible. (Boardman Decl. ¶ 23.) They use numerous and varied efforts in helping petitioners obtain IDs, including poring over ancient documents and forms, searching various databases, examining whatever personal documents petitioners might provide, and following up with the petitioners on any possible lead. (Boardman Decl. ¶ 24.)

The investigators are not restricted in the information they can consider. (Boardman Decl. ¶ 25.) If primary documents, such as a birth certificate, are not available, then investigators can consider other evidence such as baptismal certificates, hospital birth certificate, census record, early school record, family bible, and doctors' records of post-natal care. (Boardman Decl. ¶ 27.) If investigators request information or a document from another jurisdiction, and that jurisdiction is slow to respond, the whole process does not stop while the other jurisdiction is working. Instead, investigators use other leads and other methods to issue an ID. (Boardman Decl. ¶ 25.) An ID is issued when it is more likely than not that the name, date of birth, and U.S. citizenship information on an application is correct, based upon secondary documentation or other corroborating information. Wis. EmR1618, § 8. Throughout this process, the applicant will have a photo ID receipt that is valid for voting.

This process does not cost applicants anything. DMV staff makes it very clear that they are under no obligation to pay a fee for a document or birth record and U.S. citizenship verification. (Boardman Decl. ¶ 16.) DMV has funding to get a document that is necessary to issue an ID. (Boardman Decl. ¶ 28.) This process is referred to within DMV as a "Fee Based Resolution," and is part of the standard DMV practices. (Boardman Decl. ¶¶ 22, 28; Ex. 1016, at 12–13.)

D. Applicants have a qualifying ID card receipt while their application is being processed.

The vast majority of people who apply for a free state ID have the required documents and get their card in the mail after one trip to a DMV service center.

(Boardman Decl. ¶¶ 10, 32.) But not having available documents does not prevent an applicant from quickly getting an ID document that is valid for voting.

DMV "shall issue an identification card receipt . . . to *any individual* who has applied for an identification card without charge for the purposes of voting and who makes a written petition [under the administrative procedure for applicants without available documentation]." Wis. EmR1618, § 10 (emphasis added). An applicant gets a receipt even if he or she does not have a Social Security number. Wis. EmR1618, § 4.

These photo receipts must be issued to the applicant not later than the sixth working day after the application. Wis. EmR1618, § 10. But, during an election week, DMV will issue a photo ID receipt by mail on the day that a person makes an application. (Boardman Decl. ¶ 44.) This is done specifically to provide applicants who were not prepared with a compliant voter ID before going to the polls with an opportunity to cast a provisional ballot and produce an ID in time for the provisional ballot to be counted. (Boardman Decl. ¶ 44.)

The photo receipt is renewed automatically, and replacements are sent 10 days before expiration of the prior receipt to ensure that there is no gap when an applicant does not have a valid ID. Wis. EmR1618, § 10. A person will continue getting renewal ID receipts as long as DMV has information to work with, and as long as the petitioner cooperates in the process. Renewed receipts will cease only in the event of fraud, when a person is found to be ineligible, when an applicant does not respond to multiple DMV inquiries with information that can advance the

investigation for a period of 180 days,[5] or when a customer requests that DMV cancel the process. (Boardman Decl. ¶ 41); Wis. EmR1618, § 10.

ARGUMENT

Plaintiffs have no live claim, and cannot meet the legal standards for a preliminary injunction. Even if they could make their basic legal showing, the remedy that they propose is impermissible and unworkable. The Court has already found that it would be judicial legislation to order an affidavit-at-the-polls exception. Plaintiffs have identified no cognizable class or class representatives. Their attempt to re-define this entire case with new plaintiffs and new facts should be denied.

I. This case is moot as to current Plaintiffs, and no proposed Plaintiff has standing because they cannot show that they are unable to vote due to an ID-related problem.

A plaintiff must show that a "challenged action of the defendant caused an 'injury in fact' that is likely to be redressed by a favorable decision." *Judge v. Quinn*, 612 F.3d 537, 544 (7th Cir. 2010), *opinion amended on denial of reh'g*, 387 F. App'x 629 (7th Cir. 2010). And even if there was a past injury, "a suit becomes moot, 'when the issues presented are no longer 'live'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013).

[5] This 180-day period addresses applicants who will not cooperate with DMV or answer questions to help investigators verify their identity. It is a procedural safeguard that applies, for example, when someone applies for an ID, but then completely ignores DMV's follow-up communications.

None of the current or proposed Plaintiffs can demonstrate that he or she is unable to get an ID for voting purposes, because none have used DMV's easy procedure for getting one. Without this basic showing, they have no live claim.

A. The case is moot as to each Plaintiff, who either has a qualifying ID or has not used the simple process for getting one.

At trial, only three of 25 original Plaintiffs testified or submitted evidence to show that they did not have a qualifying ID. (Dkt. 167:1-4 and citations therein.) Those three were Ruthelle Frank, Shirley Brown, and Eddie Lee Holloway, Jr. (*Id.*) Of them, Ruthelle Frank has voted while the ID law has been in effect, Shirley Brown has a valid state ID, and Eddie Lee Holloway, Jr. has not taken advantage of the process to get an ID or photo receipt. (Boardman Decl. ¶¶ 46–48; Haas Decl. ¶ 43.) Ms. Frank's claim is moot because she has voted under the challenged law, Ms. Brown's claim is moot because she has obtained a qualifying ID, and Mr. Holloway's claim is moot because he cannot complain about the new procedure that he has not even tried to use.

Plaintiffs only argue non-mootness for three of the current Plaintiffs: Ms. Frank, Ms. Brown, and DeWayne Smith. (Dkt. 279:25, 27.) Ms. Frank and Ms. Brown are addressed above, and DeWayne Smith testified at trial that he has a state ID card, again mooting any claim that he might have had. (*Frank* Trial Tr. vol. 3, 695–96, Nov. 6, 2013.)

Even looking beyond what Plaintiffs have presented, not a single Plaintiff has a live claim. Seven Plaintiffs have a valid state ID: Justin Luft, Barbara Oden,

Pamela Dukes, Anthony Judd, Anna Shea, Shirley Brown, and Frank Ybarra. (Boardman Decl. ¶ 46.) Another four have a valid Wisconsin driver license: Anthony Sharp, Sarah Lahti, Edward Hogan, and Nancy Lea Wilde. (Boardman Decl. ¶ 47.) Ruthelle Frank, Nancy Lea Wilde, Edward Hogan, Max Kligman, and Barbara Oden *voted* while the voter ID law was in effect. (Dkt. 279:30.) (Haas Decl. ¶ 43.) Nancy Lea Wilde is deceased.[6] And DeWayne Smith testified at trial that he has a Wisconsin state ID card. (*Frank* Trial Tr. vol. 4, 856, Nov. 7, 2013 (Smith testimony).)

None of the others have used the current procedure that would quickly and easily get them an ID. (Boardman Decl. ¶¶ 48, 51.) If they were to visit a DMV service center and fill out an application, and an unavailable documentation form if necessary, they would be issued either an ID card or ID receipt within six days that could be used to vote. (Boardman Decl. ¶¶ 48, 51.)

B. None of the proposed Plaintiffs have standing because none have used the simple process for getting one.

None of the proposed Plaintiffs—Melvin Robertson, James Green, and Leroy Switlick—have taken advantage of DMV's current procedure for easily and quickly getting an ID. (Boardman Decl. ¶¶ 51–52.) Melvin Robertson has *actually voted* while the voter ID law was in effect. (Haas Decl. ¶ 43.) James Green has not used the process for getting one. (Boardman Decl. ¶ 51.)

[6] (Dkt.160-5 (obituary); see also http://www.helke.com/obituary/Nancy-L.-Wilde/Schofield-WI/1190644.)

Leroy Switlick is an unusual case. Long before Plaintiffs' injunction motion, the Director of Field Services of DMV, Jim Miller, became aware of Mr. Switlick's situation, and got personally involved. (Murphy Decl. Ex. 1006:221; *One Wisconsin* Tr. 05-23-16 at 221.) Mr. Miller contacted the local DMV supervisor, who contacted Mr. Switlick try to help him obtain an ID. (*Id.* at 221–22.) The very next day, Mr. Switlick's attorney contacted DMV and instructed DMV not to contact Mr. Switlick, preventing DMV from working toward issuing an ID. (*Id.*) Mr. Miller testified in the *One Wisconsin* trial that if he were permitted to contact Mr. Switlick he would do so. (*Id.*) Plaintiffs cannot manufacture standing by preventing DMV from issuing their IDs.

C. None of the declarants support Plaintiffs' claims, because none of them could demonstrate that anyone in the proposed class has standing.

Like the current and proposed Plaintiffs, none of the declarants have used the current easy process of getting an ID. (Boardman Decl. ¶¶ 51–52.) And each could have an ID mailed to them within six days by doing no more than what *Crawford* has already said is acceptable: make a trip to DMV, present available documents, and pose for a picture. *Crawford,* 553 U.S. at 198.

II. Plaintiffs request a severe disruption to the status quo, and they fail all of the preliminary injunction requirements.

Preliminary injunctions exist to preserve the status quo pending a final decision. A preliminary injunction requires four elements: a reasonable probability of success on the merits, irreparable injury, the lack of serious adverse effects on

others, and sufficient public interest. *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). Plaintiffs have met none of these requirements.

A. Plaintiffs' requested relief would alter the status quo, not preserve it.

The purpose of a preliminary injunction is to preserve the status quo pending a final hearing on the merits. *Harris*, 625 F.2d at 1330. Here, the status quo is Wisconsin's current election administration structure. This is the same structure that was in place during the April 2016 election, where even an election expert who testified against the State acknowledged that voter turnout was so high it was "astounding." (Murphy Decl. Ex. 1002:42; *One Wisconsin* Tr. 05-17-16 at 42.) Indeed, turnout in the April primary was the highest primary turnout in 40 years. (Murphy Decl. Ex. 1022:DX171; Ex. 1008:A26; *One Wisconsin* DX171[7]; Tr. 05-25-16, 8-A-26.)

Plaintiffs ask this Court to *change*, not preserve, this highly effective status quo election procedure. They want this Court to create a polling-place affidavit process that has never before been used in the history of Wisconsin. And they also want an expensive and overbroad mailing to voters that is likely to cause mass confusion. (Dkt. 279:23.) This is a radical, burdensome, and expensive departure from the status quo that should be denied.

[7] Trial exhibits from the *One Wisconsin* trial are designated as either the plaintiff's exhibits ("PX") or the defendant's exhibits ("DX"), followed by the exhibit number.

B. Plaintiffs have no likelihood of success on the merits.

Plaintiffs fall far short of showing that it is "*needlessly* hard"[8] to get photo ID or that they "face daunting obstacles to obtaining acceptable photo ID."[9] Instead, their reliance on old law and stale facts is an attempt to obscure the effectiveness of the ID issuance process.

1. Voters with name mismatches in underlying documents are not prevented from getting an ID.

Plaintiffs' first category of allegations relate to people with documents that contain name inconsistencies. Their arguments rely entirely on out-of-date information. They cite testimony from trial in this case from *years ago*. (*See, e.g.*, Dkt. 279:9-10.) And they cite affidavits from before the law change. (Dkt. 279:9 (citing Dkt. 280-31).) These are all from before the May 13, 2016, rule that formalized the common law name change affidavit procedure. Wis. EmR1618, § 3 (including an affidavit as proof of name and date of birth under Admin. Code Trans. § 102.15(3)). Plaintiffs acknowledge the existence of the current law, but fail to cite the section that specifically addresses common law name change affidavits that cure name discrepancies. (Dkt. 279:10.)

As described above, name inconsistencies do not result in denial of an ID card application. Simple misspellings and typos are resolved right at a DMV service center. And when documents list different names, IDs are issued through an

[8] *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

[9] *Frank v. Walker,* 819 F.3d 384, 385 (7th Cir. 2016).

affidavit that does not require the applicant to change his or her name. Plaintiffs' vague complaints based on stale facts do not meet their burden to show that DMV's current sensible process for handling name changes imposes a severe burden on voting.

2. Applicants are not required to contend with multiple agencies, and photo ID receipts are issued to everyone in the IDPP.

Plaintiffs' description of their proposed sub-class (2) is extremely vague, but it generally relates to people who they believe need to get a birth certificate from the Department of Health Services (DHS), or those who do not have a photo ID that is required to obtain documents from other jurisdictions. (Dkt. 279:10–12.) Plaintiffs predictably rely primarily on citations to the 2013 trial in this case and the corresponding stale facts and out-of-date law. Their arguments fail because current law and DMV procedures address these situations. As described above, DMV coordinates information-matching with DHS. *See also* Wis. Admin. Code § Trans 102.15(5m)(a)(2). No potential member of sub-class (2) needs to visit DHS separately from DMV, and Plaintiffs have no contemporary evidence of this occurring.

Plaintiffs also argue that hypothetical sub-class (2) applicants can be caught in a "Catch 22" of not having a photo ID, but needing an ID to get a document that is required to obtain an ID. (Dkt. 279:10–11.) But applicants have a valid photo receipt while they are in the IDPP process of getting an ID where they have unavailable documentation. DMV can use the state ID card receipts issued to the

customer to request birth records and source documents from other jurisdictions that require a photo ID. (Boardman Decl. ¶ 45.)

The sub-class (2) allegations also include a suggestion that a person without an ID on Election Day will not be able to get an ID in time to vote with a provisional ballot, and may have to pay a fee. (Dkt. 279:11–12.) These allegations are false. During election weeks, photo receipts will be issued the same day as an application, and no one is required to pay for documents to get a free ID. (Boardman Decl. ¶¶ 16, 28, 44.)

Plaintiffs point to five instances where they allege a person could not get an ID because of multiple-agency issues. (Dkt. 279:12.) None of these supposed examples occurred under current law, and none demonstrate a current problem that warrants preliminary relief. Indeed, one of their examples, Ms. Harwell, has a state ID card. (Boardman Decl. ¶ 49.) None of the other four have used DMV's current procedure for obtaining an ID with unavailable documentation. (Boardman Decl. ¶¶ 51–52.) If they take the simple step of going to a DMV office and filling out an unavailable documentation form, they would get a photo receipt that is valid for voting. (Boardman Decl. ¶¶ 51–52.)

3. Lack of a birth certificate does not result in denial of an ID application.

Plaintiffs' proposed sub-class (3) includes voters with nonexistent or unavailable birth records. (Dkt. 279:13–19.) Lack of a birth certificate, or any other particular record, does not result in a denial. Wis. Admin. Code § Trans 102.15(5m); Wis. EmR1618 § 8; (Boardman Decl. ¶ 11.) Instead, DMV considers the totality of

the available information and issues an ID if it is more likely than not that the name, date of birth, or U.S. citizenship status in an application is correct. Wis. EmR1618 § 8. Plaintiffs do not dispute this point

Plaintiffs' core dispute is with the process by which this decision is made, which is the IDPP. (*See* Dkt. 279:13–19; (Boardman Decl. ¶ 11).) As described above, the IDPP engages trained investigators who work diligently to find identification information for applicants. During the *One Wisconsin* trial, the district court heard from DMV investigators and their supervisors. Upon that evidence, Judge Peterson described the investigators' work as "heroic." (Murphy Decl. Ex. 1007:P199; Ex. 1004:A108–9) (*One Wisconsin* Tr. 05-24-16, 7-P-199; 05-19-15 at 4-A-108–9.) Plaintiffs' attempt to disparage DMV's efforts and decision making, using stale facts and law, is unpersuasive.[10]

DMV's decisions are not made on "passing whim or impulse." (Dkt. 279:17.) Decisions are not contingent on having a Social Security card, a birth certificate, or strictly consistent documents. The decision is made based on law, including DMV's administrative code, and an ID is issued when it is more likely than not that the

[10] Plaintiffs misrepresent the nature of errors that are tracked by the investigation team. (Dkt. 279:15.) Much of what the report addresses is completely internal and relates to office efficiency. Indeed, that report includes errors made by *applicants* that have nothing to do with the investigators' work. (Dkt. 280-47:2 ("MV3012 not complete or completed incorrectly.").) Of all the error types included in the error report, most are resolved in an hour or less, with the vast majority of the remainder being resolved within the next business day. The only way that one of these errors would result in the non-issuance of an ID is if it involved field staff not scanning or copying a necessary document from the customer, and the customer did not follow-up by forwarding the necessary information. (Boardman Decl. ¶ 34.)

information on an application is accurate. (Boardman Decl. ¶ 29); Wis. EmR1618, § 8.

Plaintiffs complain that the IDPP process does not guarantee issuance of an ID to every applicant. (Dkt. 279:16.) That is true, because not every applicant is entitled to an ID, and DMV has denied an IDPP application from a person who was not a U.S. citizen. (Boardman Decl. ¶ 33.) Without the verification process, this individual would have likely gotten an ID and been able to vote. (Boardman Decl. ¶ 33.)

4. Any voter who cannot make a trip to DMV is exempt from the voter ID law.

As explained above, it is easy to quickly get an ID for voting purposes with a single trip to DMV. However, it is possible that making that trip is an undue burden on some voters. *See Crawford*, 553 U.S. at 198 (noting that the burden of a trip to a state agency is not an undue burden for "most voters").

Those voters are exempt from the voter ID law. Wis. Stat. § 6.86(2)(a). Anyone who is indefinitely confined or disabled can get a ballot at home automatically for every election. *Id.* That ballot can be returned and counted without proof of identification. Wis. Stat. § 6.87(4)(b)2. Anyone who is confined, such that going to DMV would be an undue burden, does not require an ID for voting.

The effectiveness of this process is demonstrated by the lead plaintiff in this case, Ruthelle Frank. According to Plaintiffs, she votes using this exception. (Dkt. 279:30.) Because this case is about *voting*, not ID possession, Ms. Frank

demonstrates that the exceptions built into the voter ID law prevent any undue burden on voting.

C. None of the plaintiffs can show irreparable harm because a state ID card receipt will preserve voting eligibility while any application is pending.

Anyone who applies for an ID either quickly gets an ID, or is issued a photo receipt that is valid for voting for at least 180 days.[11] 180 days from the filing of the preliminary injunction motion is December 7, 2016. So anyone that is potentially within the scope of the preliminary injunction motion can have an ID that will be valid for the August and November 2016 elections, even assuming the truth of the allegations in the injunction motion. After the election in November 2016, the next statewide election will be held on February 21, 2017, meaning there is no threat of harm for at least eight months. (Haas Decl. ¶ 44.)[12]

D. Public interest and balancing of harms favor denying the preliminary injunction, because the State has a strong interest in regulating elections and preventing fraud that would be undermined by a loophole in the voter ID requirement.

The U.S. Supreme Court has recognized States' interests in preventing fraud, promoting orderly election administration, accurate recordkeeping, and safeguarding public confidence in the integrity of the election process. *Crawford*,

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[11] The only way an applicant would not have a valid photo receipt for 180 days is if they commit fraud, affirmatively cancel their application, or are determined to not be eligible. (Boardman Decl. ¶ 41); Wis. EmR1618, § 10. Anyone in that situation is not "harmed" because they either no longer want to be part of the application process, or they do not meet the criteria for having an ID.

[12] The Declaration of Michael Haas is referred to as the "Haas Decl."

553 U.S. at 191–97 (Opinion of Stevens, J.). Other post-*Crawford* decisions in voter photo ID cases have readily recognized the same state interests.[13] After *Crawford*, the State's interests in an ID requirement are not subject to debate.

These interests are not served by the affidavit exception proposed by Plaintiffs, which would exempt any person from complying with the voter ID law for any "subjective" reason without any process for verifying that reason. (Dkt. 279:19.) Wisconsin should be permitted to preserve its legitimate interest in protecting the integrity of its elections.

And it is important to note that Plaintiffs are asking for their severe remedies on a *preliminary* basis. If granted, the relief sought could be reversed on appeal or reverted to the current status quo after a final decision. Changing election requirements from one procedural stage of this case to another would result in voter confusion and waste election administration resources. A final decision should be in place before the proposed overhaul of voter ID procedures is implemented, if necessary.

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[13] *See, e.g., Frank*, 768 F.3d at 750–51; *City of Memphis v. Hargett*, 414 S.W.3d 88, 103–05 (Tenn. 2013); *South Carolina v. United States*, 898 F. Supp. 2d 30, 43–44 (D.D.C. 2012); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011); *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 767–69 (Ind. 2010); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353–54 (11th Cir. 2009).

III. This Court has already ruled on Plaintiffs' affidavit-at-the-polls request, and correctly held that it is an inappropriate remedy.

This Court has already held that it cannot grant the remedy that Plaintiffs are requesting:

> The plaintiffs suggest that I could order the defendants to allow eligible voters without photo IDs to vote without showing an ID or by signing an affidavit affirming their identities and lack of an ID. However, ordering such relief would be the functional equivalent of enjoining the current law and replacing it with a new law drafted by me rather than the state legislature. It is not clear that this approach would amount to a narrower remedy than simply enjoining the current law. Moreover, the Supreme Court has instructed the federal courts to avoid "judicial legislation," *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), and this is an apt term for the remedy envisioned by the plaintiffs. To grant this remedy, I would need to make a policy judgment as to whether eligible voters who do not have IDs should be required to sign affidavits of identity before receiving a ballot. And, if I found that an affidavit was required, I would need to decide what language the affidavit should contain. Once I issued this relief, I would have to supervise the state's election-administration officials to ensure that they were properly implementing my instructions. These tasks are outside the limited institutional competence of a federal court, and therefore I may not rewrite the photo ID requirement to conform it to constitutional requirements. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329–30, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006).

Frank v. Walker, 17 F. Supp. 3d 837, 863 (E.D. Wis. 2014), *reversed* 768 F.3d 744 (7th Cir. 2014).

Plaintiffs offer no explanation as to why this Court should reverse itself and re-write the voter ID law, engage in improper judicial legislation, make policy decisions regarding the contents of an affidavit, and then supervise state elections. This Court was correct in 2014. Plaintiffs are doing no more than asking for the same thing again—and their request should be denied again.

Plaintiffs point to North Carolina and South Carolina as examples of how an affidavit exception can be an appropriate part of an election system. (Dkt. 279:7.)

Both of those States have statutes defining the affidavit process—in neither state did a federal court impose the affidavit rule. N.C. Gen. Stat. § 163-166.13(c)(2); S.C. Code § 7-13-710(D)(1)(b). The only example served by those States is that the mechanics of state voting procedures is entrusted to States, not federal courts. *See Burdick v. Takushi,* 504 U.S. 428, 433 (1992) ("States retain the power to regulate their own elections.").

A court order mandating an affidavit exception would be a quagmire for Wisconsin election administration, and it would be extremely difficult to implement.[14] (Haas Decl. ¶¶ 4–7.) Municipal clerks, not Defendants, have "charge and supervision of elections." Wis. Stat. § 7.15(1). The election-administration Defendants do not have authority to require clerks to make affidavits available, and the clerks are not parties to this case. (Haas Decl. ¶¶ 13–14.) Ordering Defendants to impose an affidavit exception would place them in the impossible position of having to promulgate rules that are contrary to state law, and impose those rules on clerks, who do not answer to those Defendants. (Haas Decl. ¶¶ 5–7, 11–17.)

[14] Implementing an affidavit exception before the August 2016 election is not possible. (Haas Decl. ¶¶ 8–10.) Ballots for that election could be sent as early as June 10, and certain absentee ballots were required to be sent by June 23. (Haas Dec. ¶ 10.)

Plaintiffs also request an absurd standard for evaluating the contents of a hypothetical affidavit: that "any reason that the voter *subjectively* deems reasonable" would be sufficient. (Dkt. 279:21.) Taken at their word, they propose that valid reasons for an exemption from the voter ID requirement could include simply not wanting to go to DMV or pose for a photo—reasons already ruled insufficient by the U.S. Supreme Court. *Crawford*, 553 U.S. at 198.

And Plaintiffs do not stop at just wanting an impractical and standardless affidavit. They also want a nonsensical and expensive advertising campaign as part of their *preliminary* relief. (Dkt. 279:23 (requesting "at a minimum that Defendants be required to mail individualized notice of the voter ID law and affidavit option to any registered voter who does not appear as having acceptable photo ID in the DMV database, and that the affidavit option be included in any existing publicity material related to Voter ID.").) Mailing notice to voters who are not in the DMV database makes no sense, because Wisconsin's voter ID law approves several types of ID, including many that have nothing to do with DMV. Wis. Stat. § 5.02(6m) (including a U.S. Uniformed Service card, a U.S. Passport, a certificate of U.S. naturalization, an Indian tribe ID, certain college IDs, and veteran ID cards); (Haas Decl. ¶ 22.) There is no centralized list of Wisconsin residents who lack all forms of acceptable ID. (Haas Decl. ¶ 24.) The mailing requested by Plaintiffs would result in many voters who have a qualifying ID getting an unsolicited mailing about an ID exception, which would cause unnecessary expense and confusion. (Haas. Decl. ¶¶ 28–29.)

Performing such a mailing, and re-writing and re-publishing existing election materials, would also be expensive and require expenditure of money that elections administrators do not have. (Haas Decl. ¶¶ 35–37, 42.) That money would be wasted, and mass confusion would be created, if a hypothetical preliminary injunction were reversed, or a final injunction denied, and the situation returned to current procedures.

IV. This Court should deny Plaintiffs' request for leave to file a supplemental pleading.

The trial in this case was held in November 2013—two-and-a-half years ago. (Dkt. 165, 166–71.) Plaintiffs have now proposed adding new facts, and *new parties*. This request should be denied as unnecessary and duplicative of parallel litigation.

Supplemental pleadings are intended to avoid the risk of a "separate, redundant lawsuit" dealing with the same issues. *The Fund for Animals v. Hall*, 246 F.R.D. 53, 55 (D.D.C. 2007); *see also Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 397, 402, (E.D. Wis. 2008). The goal is to "avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted" *Id.* (quoting *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28–29 (4th Cir. 1963)).

That is the opposite of what Plaintiffs are trying to do. The *One Wisconsin* case already addressed the claims of two of the proposed Plaintiffs. (*See* Murphy Decl. Ex. 1003:A129–52; (*One Wisconsin* Tr. 5-18-2016 3-A-129–52.)) (Switlick testimony); (Murphy Decl. Ex. 1001:P26–37; *One Wisconsin* Tr. 5-16-2016 1-P-26–37 (testimony about Robertson). One of the new proposed Plaintiffs, Switlick even *testified* at that trial. (*See* Murphy Decl. Ex. 1003:A129–52; (*One Wisconsin*

Tr. 5-18-2016 3-A-129–52.)) The *One Wisconsin* court indicated that it will have a final decision ready by the end of July. (*See* Murphy Decl. Ex. 1009:9-8 (*One Wisconsin* Tr. 5-26-2016 9-8.)) For Plaintiffs to now ask this Court to expand this case to include those individuals, on an issue that will be disposed of in less than one month, would be the hallmark of inefficiency.

Plaintiffs' proposed supplementation and party addition is "a desperate effort to protract the litigation and complicate the defense." *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). Their request should be denied as redundant and duplicative. *Cf. Van Hollen v. Fed. Election Comm'n*, 291 F.R.D. 11, 13 (D.D.C. 2013) (refusing to allow supplementation where, after trial and appeal, intervenor sought to add new claims which depended entirely on a different record than what was before the court).

V. The Court should deny Plaintiffs' class certification motion because they have not met their burden under Rule 23.

The Court should deny Plaintiffs' class certification motion because the putative class does not meet the requirements of Rule 23. The putative class is vague, indefinite, and would be unmanageable. Certifying the class would be reversible error.

It is Plaintiffs' burden to establish compliance with Rule 23 by a preponderance of the evidence.[15] *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). This Court "may not simply assume the truth of

the matters as asserted by the plaintiff." *Id.* Plaintiffs must "affirmatively demonstrate [their] compliance with [Rule 23]—that is, [they] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Plaintiffs define the putative class as

> eligible Wisconsin voters without acceptable ID for voting and who have one or more of the following barriers to obtaining ID: (1) name mismatches or other errors in a document needed to obtain ID; (2) need to obtain an underlying document from an agency other than the DMV in order to obtain ID; and/or (3) one or more underlying document(s) necessary to obtain ID cannot be found.

(Dkt. 279:25–26.) The proposed class representatives cannot represent the putative classes because none of them has a live claim, as explained above.

Plaintiffs' attempt to save their case by inserting three new Plaintiffs is meritless. Robertson testified at trial *in November 2013* about his past efforts to get an ID card, but his latest declaration does not describe whether he has undertaken any reasonable efforts whatsoever since then to obtain a free State ID card from DMV. (*See* Dkt. 280-5.) His declaration also does not establish whether he falls into sub-class (1), (2), or (3). He does not know if he has a name mismatch, and he already has a Social Security card with his name on it. (Dkt. 280-5:2). Green also does not have a name mismatch problem, and he does not aver that he has made

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[15] Defendants described Rule 23's requirements in their post-trial brief and in briefs opposing class certification. (Dkt. 176:82–89; Dkt. 83:2–7; Dkt. 228:4–5, 5–12.) They adopt that briefing here.

any reasonable effort whatsoever to obtain a free state ID. (Dkt. 280-7.) And Switlick's declarations do not indicate that he has a name mismatch, that he cannot find his Social Security card, or whether he has even tried to find it. (Dkt. 280-6.)

In addition, the putative class is too vague, indefinite, and unmanageable to certify and administer. For example, as to sub-class (1), Plaintiffs fail to define name mismatch, and it could mean different things. Is one letter wrong sufficient? Do the first and last names have to be swapped? Who decides? This Court? DMV? A local election official? It is unreasonably difficult to figure out who is in sub-class (1), making it impossible to administer the class.

The putative class lacks commonality. *See* Fed. R. Civ. P. 23(a)(2). The plaintiff must demonstrate that class members have suffered the same injury. *Wal-Mart*, 564 U.S. at 349–50. A class definition that entails individualized questions of fact and law, and which produces unique answers respective of each claimant, does not meet the requirements for commonality. *See Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 496–97 (7th Cir. 2012). By Plaintiffs' own definitions, each class member has unique facts and circumstances regarding name spellings, "other errors," or deficiencies in their documentation.

The putative class does not meet the typicality requirement. *See* Fed. R. Civ. P. 23(a)(3). The proposed representatives' circumstances are not only completely distinct from each other, but they are not typical of other voters who lack ID cards.

The putative class does not satisfy the numerosity requirement. *See* Fed. R. Civ. P. 23(a)(1). Plaintiffs' brief includes only stale references to evidence from the November 2013 trial that is not reliable now due to the passage of time. (Dkt. 279:26–27.) And their vague generalities do not quantify the putative class size. "Many," "a lot," and "several"—the words used by Plaintiffs—do not meet their burden for the numerosity requirement. (*Id.* at 27.) And we know that 95% of people over 18 years old in Wisconsin have a driver license. (Boardman Decl. ¶ 4.) Add to that the number of people with one of the several other forms of qualifying ID, and the most likely inference in the absence of any evidence is that the number of people in the putative classes is extremely small, and insufficient to justify class certification.

Finally, the putative class does not qualify under any subsection of Rule 23(b). *See* Fed. R. Civ. P. 23(b). Plaintiffs assert that the class qualifies under either Rule 23(b)(1) or (b)(2). (Dkt. 279:26.) Neither proposition is correct.

Plaintiffs cannot meet the standard for a mandatory class action under Rule 23(b)(1), which requires that individual—as opposed to class—treatment would risk the establishment of inconsistent conduct for the defendants, or when individual cases would, as a practical matter, be dispositive of the claims of nonparties. Fed. R. Civ. P. 23(b)(1)(A), (B); *see Spano v. The Boeing Co.*, 633 F.3d 574, 577 (7th Cir. 2011). Here, the class does not pose these risks because it is so vaguely defined, and its likely membership's circumstances are so diverse, that individual treatment would be superior to class treatment.

To satisfy Rule 23(b)(2), Plaintiffs must demonstrate that "interests of the class members are cohesive and homogeneous such that the case will not . . . require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000). But due to the class's vague definition, members will face wildly different circumstances in obtaining qualifying ID. The interests of the putative class are not cohesive and homogenous—they are varied and disparate.

CONCLUSION

This claim is moot as to the existing Plaintiffs, and the new Plaintiffs have no standing. Plaintiffs are not entitled to a preliminary injunction, their remedy is impermissible, and they have not identified a valid class. Defendants respectfully request that Plaintiffs' motion for a preliminary injunction, request for class certification, and request for leave to file supplemental pleadings be DENIED.

Dated this 29th day of June, 2016.

Respectfully submitted,

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