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

RUTHELLE FRANK, et al.,

Plaintiffs,

v. Case No. 11-C-1128

GOVERNOR SCOTT WALKER, et al.,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendants, by their undersigned counsel, hereby submit this Brief in Opposition to the Motion for Class Certification filed by plaintiffs.

INTRODUCTION

The plaintiffs have filed suit challenging 2011 Wisconsin Act 23 ("Act 23"), also known as the Wisconsin photo or voter identification law. They identify seven putative classes (and one sub-class)[1] of eligible voters who, they contend, lack an acceptable form of photo identification under Act 23 and who are, in their view, unable to vote. However, the plaintiffs bear the burden to establish that they are entitled to class certification for at least one of their putative classes. They will not be able to meet that burden.

The plaintiffs have moved the Court certify *all* of their proposed classes. However, at least one potential class has no claim and to fashion and enforce a remedy as to the other putative

[1]Each of the classes is defined below in the sections which address them individually.

classes would be difficult and overly complex. The plaintiffs' scatter-shot approach to defining their putative classes is inappropriate and they should be required to more narrowly hone their arguments. Moreover, because the plaintiffs bear the burden of establishing the requirements for class certification, any doubts should be weighed in favor of the defendants.

The defendants respectfully request that, the plaintiffs' motion for class certification should be denied in its entirety because the plaintiffs have not met their burden of proof.

LEGAL STANDARD

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Because class actions present a number of "downsides," district courts considering motions for class certification under Rule 23 must exercise "caution." *Thorogood v. Sear, Roebuck and Co.*, 547 F.3d 742, 744-46 (7th Cir. 2008). A district court may certify a case for class-action treatment only if it satisfies the four requirements of Federal Rules of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy of representation—and one of the conditions of Rule 23(b) ("Rule 23"). *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 606-07 (1997). In addition, a class must be sufficiently definite that its members are ascertainable. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006).

Plaintiffs have the burden of proof of establishing compliance with Rule 23 by a preponderance of the evidence. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012), *reh'g denied* (Feb. 28, 2012). The court "may not simply assume the truth of the

matters as asserted by the plaintiff." *Id.* Class certification requires a plaintiff to "affirmatively demonstrate compliance with [Rule 23]—that is, [the plaintiff] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original). To certify a class, a trial court must perform a "'rigorous analysis'" which establishes that the "'prerequisites of Rule 23(a) have been satisfied.'" *Id.* Moreover, unlike the standard for a motion to dismiss, the Court is not bound to accept the plaintiffs' allegations as true for the purposes of this motion for class certification. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001).

The court's analysis may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 131 S. Ct. at 2551. However, "the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner*, 669 F.3d at 811.

A class "defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct . . . is defined too broadly to permit certification." *Id.* at 824. "A class definition that requires the Court to assess subjective criteria, like the class members' state of mind, will not be certified." *Lau v. Arrow Fin. Services, LLC*, 245 F.R.D. 620, 624 (N.D. Ill. 2007). A class action which depends on each individual plaintiff's state of mind may be made unmanageable. *See Simer v. Rios*, 661 F.2d 655, 668-69 (C.A. Ill. 1981).

I. CLASS CERTIFICATION REQUIRES PARTIES TO BE SO NUMEROUS SO AS TO MAKE JOINDER IMPRACTICABLE.

Rule 23(a)(1) requires that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all members only if . . . the class is so numerous that joinder of all members is impracticable." A "party supporting the class cannot rely on 'mere speculation'

or 'conclusory allegations' as to the size of the putative class to prove that joinder is impractical for numerosity purposes." *Arreola v. Godinez*, 546 F.3d 788, 797 (7th Cir. 2008). Numerosity requires "examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980).

While joinder need not be impossible in order to be impracticable, it must be extremely difficult or inconvenient. *See Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 398-99 (N.D. Ill. 1987). Class size, geographic dispersion of its members, the nature of the relief sought, and the practicality of forcing relitigation of a common core of issues are relevant considerations. *Id.* at 399.

"While there is no fixed numerosity rule, 'generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.'" *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993) (quoting *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)). "A plaintiff will generally meet the requirement by showing that the class consists of forty or more." *Barden v. Hurd Millwork Co., Inc.*, 249 F.R.D. 316, 319 (E.D. Wis. 2008). *See also Pruitt v. City of Chicago, Illinois*, 472 F.3d 925, 926 (7th Cir. 2006).

II. CLASS CERTIFICATION REQUIRES QUESTIONS OF LAW OR FACT COMMON TO THE CLASS.

For a class to be certified, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A class may satisfy the commonality requirement with a single common question of law or fact. *Rosario*, 963 F.2d at 1018. To raise common questions of law or fact,

the plaintiff must demonstrate that class members have suffered the same injury. *Wal-Mart*, 131 S. Ct. at 2551. The common question raised must give cause to believe that all claims can be "productively litigated at once." *Id.* A question which asks whether all class members have suffered a violation of the same provision of law does not, by itself, raise a valid common question. *Id.*

"'What matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Plaintiffs' "claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2545.

"'Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" *Id.* at 2551 (quoting Nagareda, *Class Certification*, 84 N.Y.U. L. Rev. at 132). A class definition which 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 Public Schools*, 668 F.3d 481, 498 (7th Cir. 2012).

III. CLASS CERTIFICATION REQUIRES CLAIMS OR DEFENSES OF THE REPRESENTATIVE PARTIES TO BE TYPICAL OF THE CLAIMS OR DEFENSES OF THE CLASS.

Rule 23(a)(3) requires a showing that "the claims . . . of the representative parties are typical of the claims . . . of the class." To establish typicality, a plaintiff must specifically present

questions of law or fact that are common to the claims of both the plaintiff and the members of the class he sought to represent. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158-59 (1982). Without such a "specific presentation," it would be an error "to presume that [a] claim was typical of other claims." *Id.* The question of typicality is closely related to the question of commonality. *See Rosario*, 963 F.2d at 1018.

For a class representative's claim to be typical, she "'must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *See Falcon*, 457 U.S. at 156. A representative's claim which arises "from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [which is] based on the same legal theory" satisfies typicality. *Rosario*, 963 F.2d at 1018. Similarity of legal theory may suffice to establish typicality where factual distinctions exist between the claims of class members and those of the representative parties. *See De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

Typicality, however, is lacking where the adjudication of claims entails a fact-specific analysis requiring a case-by-case assessment. *See Jones v. Takaki*, 38 F.3d 321, 323 (7th Cir. 1994), *abrogated on other grounds by Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008).

IV. CERTIFICATION OF CLASS REQUIRES ADEQUATE REPRESENTATION OF THE INTERESTS OF THE CLASS BY REPRESENTATIVE PARTIES.

Finally, "the representative parties [must] fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "[A]bsent class members [must] be

adequately represented in order to be bound by a court's judgment." *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977) (footnote omitted). Adequacy requires each plaintiff to have a live controversy with the defendant on the day a suit begins. *See Holmes v. Fisher*, 854 F.2d 229, 233 (7th Cir. 1988).

The "adequate representation inquiry consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), *as modified* (Sept. 22, 2011); *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986).

"'[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *Amchem*, 521 U.S. at 625-26. A class in which the interests of representative claimants are not aligned with those of class members, fails the adequacy requirement. *See Amchem*, 521 U.S. at 626. The named plaintiffs must not have interests antagonistic to, or conflicting with, those of the class. *See Susman*, 561 F.2d at 90; *see also Fitzsimmons*, 805 F.2d at 697 (citing *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940)). "[C]ertification may be denied because the named plaintiff's claim is atypical of the claims of the other members of the class" and it may be atypical because it is subject to a complete defense which is not applicable to the claims of other class members. *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 821 (7th Cir. 2011).

ARGUMENT

Before certifying a class action, the Court must take a "close look" at whether a class action is "superior to other available methods for the fair and efficient adjudication of the

controversy." *Amchem Prods.*, 521 U.S. at 615. Two factors to be considered are "'the interest of members of the class in individually controlling the prosecution or defense of separate actions'" and "'the difficulties likely to be encountered in the management of a class action.'" *Id.* 521 U.S. at 616. In general "[t]he class action is an ingenious device for economizing on the expense of litigation and enabling small claims to be litigated." *Thorogood*, 547 F.3d at 744. Here, however, there are no "small" claims of the proposed class members. In fact, there are no individualized claims which would *not* be adequately addressed in this case even without this being a class action. While there is little doubt that the named plaintiffs have an interest in controlling the prosecution of the case, they are already doing so. More to the point, there are also already three other actions currently pending which seek the same form of relief—and at least two of those were filed *before* this action. Thus, there is no control that these plaintiffs gain by making this a class action.

Finally, and most significantly, the management of a class action in this context would be untenable. How will all of these different class members be notified? Will they have to "opt in" or "opt out?" How do the plaintiffs intend to contact the homeless individuals they wish to have certified as class members? And, quite frankly, what is the benefit of certifying *any* classes here? If there is relief granted by this Court at all, it can be fashioned to cover all of these putative class members. The plaintiffs will be hard-pressed to explain why any class is necessary given the nature of their case and the remedies they are seeking. If they cannot provide a sufficient basis for certification, because class actions are not a common occurrence, their motion should be denied.

For each of the putative classes (and sub-class), there are areas of concern with each of the requisite standards for which the plaintiffs bear the burden of proof. Each putative class

representative has radically different factual circumstances which suggests that commonality is not present. Each representative class member's claim is not typical of the claims of all of the members of that particular putative class or sub-class. The plaintiffs have not shown that the representatives listed adequately represent their classes. And, finally, the plaintiffs have not shown numerosity because there is no evidence presented that shows how many qualified electors in Wisconsin lack *any* form of photo identification under Act 23. As the plaintiffs broke their argument into four sections by combining some classes, after a statement of the legal standards, this brief will address each grouping below.

I. THE MAIN SOURCE FOR THE PLAINTIFFS' PROOF OF NUMEROSITY IS BASED UPON AN UNSIGNED AND INCOMPLETE EXPERT REPORT.

Plaintiffs rely upon the expert report of Professor Matt Barreto ("Professor Barreto") (the "Barreto Expert Report") to establish numerosity for Classes 1-2, 5-7, and 7.1.[2] Parties must comply with the Federal Rules of Civil Procedure to have expert reports admitted in federal court. In this case, the plaintiffs have neglected to meet two of those prerequisites, and thus, they should not be able to rely upon the Barreto Expert Report.

First, the plaintiffs failed to provide the defendants with the data underlying the Barreto Expert Report by the expert disclosure deadline of April 23, 2012. (*See* Dkt. #48, ¶ 3). Federal R. of Civ. P. 26(a)(2)(B)(i)-(iii) ("Rule 26") provides that an expert report

> (i) must contain a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming [the opinions]; [and]

[2]Classes 3 and 4 have other legal defects which will be described below.

(iii) any exhibits that will be used to summarize or support them[.]

Pursuant to Rule 26, this data was to be provided to the defendants when the Barreto Expert Report was served. The data was not timely served. Instead of providing Professor Barreto's complete survey data on April 23, 2012, when it was due, plaintiffs belatedly provided some of that information three days later following a request made by defense counsel during Professor Barreto's deposition on April 26, 2012. (Second Declaration of Clayton P. Kawski, Ex. B, filed herewith). Even this set of survey data was incomplete, as it included only the responses to the survey that were used for Professor Barreto's report, and not the responses that were incomplete and not used in the report. (*Id.*, ¶ 3).

When asked to explain why Professor Barreto's complete survey data was not provided with plaintiffs' Rule 26 disclosures when they were due on April 23, plaintiffs' counsel stated that: "It's not required to be included in an expert witness report." (Second Kawski Decl., Ex. A).

Plaintiffs are incorrect. The data that Professor Barreto used in his expert report was required to be produced to the defendants with his report. Fed. R. Civ. P. 26(a)(2)(B)(ii). The defendants could not fully prepare to depose Professor Barreto without the ability to analyze the complete survey data that he used to form his opinions. The court in *Olson v. Montana Rail Link, Inc.*, 227 F.R.D. 550, 552 (D. Mont. 2005), addressed the process if there is a failure to timely disclose such underlying expert data as follows:

> Rule 37(c)(1), Fed. R. Civ. P., gives teeth to the expert disclosure requirements "by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Rule 37(c)(1) provides, in relevant part,

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.
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> The Advisory Committee Notes describe Rule 37(c)(1) as "a 'self-executing,' 'automatic' sanction to 'provide[ ] a strong inducement for disclosure of material. . . .'" *Yeti by Molly*, 259 F.3d at 1106 (quoting Fed. R. Civ. P. 37 advisory committee's note 1993).

Here, there is no dispute that the plaintiffs were delinquent in providing the underlying data for the Barreto Expert Report. Even when they provided the survey data on April 26, it was not complete. Thus, the only remaining issue is whether the plaintiffs should be held to the dictates of the Federal Rules and be banned from using the Barreto Expert Report—whether it be at trial or here, in the context of the plaintiffs' motion for class certification. While such a ban is a strong sanction, it is also one that was clearly contemplated by the drafters of the Federal Rules. A failure to use the "teeth" of those Rules is to reward the plaintiffs for their lack of diligence.

In addition, there is a second defect with the Barreto Expert Report which further militates that it should not be used in support of this motion for class certification: the Barreto Expert Report is unsigned. (Dkt. #62-10 at 33). This Court has already held that an unsigned expert report that was attached to an attorney's affidavit is not competent evidence. *State Financial Bank v. City of South Milwaukee*, 2006 WL 2691604, at *3 (Sept. 20, 2006, E.D. Wis.) (Clevert, C.J.). *See also Wittmer v. Peters*, 87 F.3d 916, 917 (7th Cir. 1996) (unsworn expert reports are "not, strictly speaking, admissible to support or oppose summary judgment").

In the instant case, the plaintiffs filed an unsigned expert report and expect the Court to accept and rely upon the same. Because the underlying survey data was not timely provided to

the defendants *and* the fact that the Barreto Expert Report is unsigned, the defendants respectfully urge this Court to bar the use of the Barreto Expert Report for this motion, as well as at trial. Moreover, as the time has passed in which to provide such expert reports and disclosures, the defendants would object to the plaintiffs being provided with an opportunity to "correct" these defects.

Accordingly, if the Barreto Expert Report is not admissible as a proof for the Class Certification Motion, the plaintiffs will fail to meet their burden to establish numerosity with respect to Classes 1-2, 5-7, and 7.1. Therefore, those proposed classes should not be certified.

II. THE PUTATIVE CLASSES ARE UNMANAGEABLE AND THE PLAINTIFFS WILL NOT BE ABLE TO ESTABLISH THAT ANY OF THE CLASSES ARE SUFFICIENTLY DEFINITE SUCH THAT THEIR MEMBERS ARE ASCERTAINABLE.

The plaintiffs have identified seven putative classes (and one sub-class) which have several elements in common as well as many that differ. However, two key points have to be made at the outset: all of the proposed classes (and sub-class) are founded upon speculation and they are not sufficiently identifiable or definite to be certified. The evidence submitted in support of class certification is not legally sufficient to support the plaintiffs' contentions.

"It is axiomatic that for a class action to be certified a 'class' must exist." *Simer*, 661 F.2d at 669 (7th Cir. 1981). Here, the plaintiffs base part of their class definitions upon the subjective state of mind of their putative class members. The plaintiffs' class definitions rely upon systematic barriers, financial burdens, and the purported complexity of the DMV's policies. However, each of those "factors" will differ by individual and are really based upon the perceptions of the members as to what is too much of a barrier and what regulations are too complex. The class definition for Class 1 also will vary by individual as to what constitutes a

"financial burden." The plaintiffs do not attempt to define what they mean by "financial burden" for Class 1. What amounts to a "financial burden" will vary drastically when the range of potential class members consists of individuals who are homeless to students to ordinary everyday residents of Milwaukee or Wisconsin. These classes are plainly too "unmanageable" because they are based upon the "state of mind" of the individual class representatives and members. *Id.* at 668 (unmanageability due to individual state of mind analysis was one basis upon which the court declined to certify the class).

But, here there is another threshold reason why these classes should not be certified: none of the classes are sufficiently definite. *See Oshana*, 472 F.3d at 513. The plaintiffs have so broadly defined all of their proposed classes that they actually lack definition. The plaintiffs will not be able to establish that the members of each class have indeed suffered any injury or will suffer any injury. There are too many hurdles which the plaintiffs must meet. For instance, with respect to Class 1, the plaintiffs have to establish how and which systematic barriers these members will face not to mention that they lack all forms of acceptable identification and that, for each of them, the effort or costs to obtain such documentation is financially burdensome. In any event, there is no reason to have any class certified in this case challenging Act 23 under the Voting Rights Act of 1965—and in fact no classes were proposed in the *Jones v. Deininger*, Case No. 12-CV-185 case before this Court regarding Act 23 nor in the two state court challenges to Act 23 that are also currently pending.

Without a need for a class, without a means to define a definitely ascertainable class, without establishing how any class would be manageable, the plaintiffs have failed at the outset to meet their burden of proof. Each of the individual proposed classes is addressed more fully below.

III. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF PROOF WITH RESPECT TO CLASSES 1, 2, AND 5.

Plaintiffs assert that putative classes 1, 2, and 5 should be certified. These potential classes[3] consist of the following:

> Class 1 consists of
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> all eligible Wisconsin voters who lack accepted photo ID, lack one or more of the documents DMV accepts to obtain a Wisconsin ID card for voting purposes, and face legal or systematic practical barriers to completing the process of obtaining an ID.

(Amended Complaint, ¶ 106).

> This class includes, but is not limited to
>
> individuals who are unable to obtain photo ID from the DMV because they: were never issued birth certificates or lack accurate birth certificates; are unable to obtain certified copies of their birth certificates due to their birth states' identification requirements; lack and cannot obtain proof of Wisconsin residency; and lack and cannot obtain any documentary proof of identity accepted by the Wisconsin DMV.

(*Id.*, ¶ 107).

> Class 2 consists of
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> all eligible Wisconsin voters who lack accepted photo ID and for whom the costs incurred in obtaining a Wisconsin state ID card, including but not limited to the cost of obtaining certified and accurate copies of birth certificates or any other documentary proof accepted by the Wisconsin DMV or the cost of traveling to the nearest Wisconsin DMV office, would constitute a financial burden.

(*Id.*, ¶ 110).

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[3]The proposed representatives for Class 1 include: Ruthelle Frank, Shirley Brown, Nancy Lea Wilde, Eddie Lee Holloway, Jr., Mariannis Ginorio, Barbara Oden, and DeWayne Smith. (*Id.*, ¶ 108; Motion for Class Certification). The proposed representatives for Class 2 include: Pamela Dukes, Mariannis Ginorio, Eddie Lee Holloway, Jr., Carl Ellis, and Sam Bulmer. (*Id.*, ¶ 113; Motion for Class Certification). And, the proposed representatives for Class 5 include: Ruthelle Frank, Shirley Brown, Nancy Lea Wilde, Eddie Lee Holloway, Jr., Mariannis Ginorio, Sam Bulmer, Carl Ellis, and Pamela Dukes. (*Id.*, ¶ 124; Motion for Class Certification).

Class 5 consists of

> all eligible Wisconsin voters who lack accepted photo ID, must obtain one or more primary documents that DMV accepts to obtain a Wisconsin state ID card, including but not limited to certified and accurate copies of birth, marriage, and name change certificates or records or of the non-existence thereof, and will be required to pay one or more fees to obtain these documents.

(*Id.*, ¶ 123; emphasis in original).

A. The plaintiffs have not established numerosity for these proposed classes.

With respect to Class 1, the plaintiffs contend[4] that there are over 63,000 eligible Wisconsin voters "who lack accepted photo ID and over 21,500 of these voters also lack at least one of the documents DMV requires to obtain a Wisconsin state ID card." (Memorandum in Support of Plaintiffs' Motion for Class Certification, dated April 23, 2012 ("Plaintiffs' Memorandum" or "Memorandum") at 7). But, the plaintiffs then assert their ultimate conclusion that "[d]ue to DMV's unreasonably stringent and complicated rules, policies, and procedures, a large number of these eligible voters face legal or systematic practical barriers to completing the process of obtaining an ID." (*Id.*). This statement goes to the merits of the plaintiffs' case. A party may not cite a conclusory statement and rely upon it as proof that they have met their evidentiary burdens. There has to be actual proof.

A closer review of the Barreto Expert Report shows that the figures are based, not upon an actual count of individuals without qualifying ID, but rather an extrapolation following a

[4]The basis for the plaintiffs' assertions of numerosity for Classes 1, 2 and 5 is the unsigned Barreto Expert Report. As argued above, the defendants believe that this Report should be stricken from the record. If that is the case, the plaintiffs have *a fiori* failed to meet the numerosity requirement for these proposed Classes and this part of their Motion should be denied. Should the Court, not strike the Barreto Expert Report, the remainder of the arguments set forth in this Section detail why the plaintiffs still fail to establish numerosity for these classes.

survey of approximately 2,000 individuals in Milwaukee County. (Dkt. #62-10, Barreto Expert Report at 9-16). This seriously reduces the weight to which these figures should be given in the context of this Motion. Because the plaintiffs bear the burden of proof, they should have presented more than extrapolations.

Moreover, the plaintiffs have not established that there are *indeed* legal hurdles and systematic barriers to the members of Class 1, or the nature of those hurdles and barriers. Plaintiffs do not give the Court any clear indication of completely what they mean by "legal or systematic practical barriers." That being the case, there may be some putative class members—an unknown amount—who will never be "harmed" by Act 23. Class 1 is, accordingly, defined much too broadly. *Messner*, 669 F.3d at 824. Moreover, the Court cannot be required to assess subjective criteria such as whether these class members *believe* they are facing insurmountable barriers or legal hurdles. *See Lau*, 245 F.R.D. at 624. Without a clearly ascertainable class, the plaintiffs have failed to meet their numerosity standard for Class 1.

As to Class 2, the plaintiffs again fail to focus upon the key point: they have to establish that obtaining missing documentation is a "financial burden" for a large enough set of eligible voters. Anecdotal statements aside, the plaintiffs have not set forth the costs to obtain such missing documents for the members of the class and why those costs would be burdensome. In order to vote, eligible voters have to go to the polls on Election Day (or during approved early absentee voting) or they have to request documentation for absentee voting. So, they already have to make an effort and make some financial expenditures in order to exercise their franchise.

Furthermore, what the plaintiffs mean by "a financial burden" is not defined, and, frankly, undefinable in this context. Bus fare to travel to the DMV will constitute a financial burden for some putative class members, but not others. The cost of obtaining a certified copy of a birth

certificate will constitute a financial burden for some Class 2 members, but not others. How is the Court to identify those who fall in to Class 2? How is the Court to manage this class?

Finally, as to Class 5,[5] the plaintiffs attempt to cloud the issue regarding numerosity by declaring that payment for copies of certain documents is a "poll tax." (Memorandum, at 10). But this, too, begs the question as to how many potential members lack all forms of acceptable identification. The fact that they can come up with approximately 15[6] individuals (for Classes 1, 2, and 5) altogether, does not mean that they can establish the numerosity for the class as a whole.

The plaintiffs bear the burden to establish numerosity by a preponderance of the evidence, and they have not done so for purposes of this class certification motion.

B. Commonality does not exist for Classes 1, 2, and 5.

The plaintiffs have failed to establish commonality for putative Classes 1, 2, and 5. The plaintiffs must show a "common contention," the "same injury" and/or a "common question." (*See* Memorandum at 10). But, these classes are so diverse that no such commonality can be shown. *See Jamie S.*, 668 F.3d at 498. Here, the plaintiffs have not even nailed down which documents the class members do not have, how much is too much so as to account for a financial burden—and for which members it will indeed be a financial burden—as well as how much of a fee these individuals will have to bear.

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[5]Additionally, this class definition, too suffers from vagueness and ambiguities which render it unmanageable if not merely indefinite. There is no definition for what the plaintiffs mean by "certified and accurate copies." Without sufficient clarity, this class should not be certified.

[6]Even the number of 15 has been reduced because the plaintiffs are now seeking only to have the Court certify 10 of the plaintiffs as class representatives. (Motion for Class Certification).

Again, the plaintiffs assert the ultimate conclusion that the DMV's policies are complex and provide significant barriers to those seeking to obtain photo identification cards. Merely by utilizing the DMV—which already was the entity responsible for providing driver's licenses and photo identification cards—the defendants have not "rendered the exercise of the fundamental right to vote an unreasonably complicated and burdensome task for members of Class 1." (Memorandum at 12).

Likewise, the plaintiffs will be hard-pressed to show that there is commonality for Classes 2 and 5—the individuals in these two classes could have such diverse concerns which have to be separately addressed. The plaintiffs have not shown that these putative class members have a common reason which prevents them from obtaining documentation to enable them to get photo identification cards. In fact, they have not shown that these members are actually—or financially—unable to obtain such documentation.

C. These classes do not have typicality.

The plaintiffs cite several declarations to establish typicality. But, these declarations actually show the opposite. The declarants have disparate experiences and some declarations establish that the individuals actually have the requisite documents. *See* Brown Decl. (Dkt. #35), ¶ 7 (Ms. Brown concedes there is an alternative option available to her); Wilde Decl. (Dkt. #33-11), ¶ 12 (Ms. Wilde notes she can obtain a certification to show no birth certificate exists); Judd Decl. (Dkt. #66), ¶ 10 (Mr. Judd was awaiting his identification card back in February 2012 and may have received it by now—making him no longer an adequate class representative). Moreover, James G. Miller, Chief Examiner, Technical and Training Section, DMV, has stated that Ms. Frank could obtain a photo identification card with the documentation

she currently possesses and that it would be issued to her if she returned to the DMV. Miller Decl. (Dkt. #39), ¶ 8. But, Ms. Frank declines to do so.

Although "'[t]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members,'" the requirement "'primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large.'" *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (quoting *De La Fuente*, 713 F.2d at 232). Each of the individuals have unique situations, unique alleged barriers and their finances are unique. Given this, the plaintiffs cannot establish typicality.

D. Some of the plaintiffs are not adequate class representatives.

Based upon the fact that Mr. Judd has already applied for, and is merely awaiting, his photo identification card, he is not an adequate representative. Judd Decl. (Dkt. #66), ¶ 10. In addition, Ms. Frank could obtain her photo identification card if she returns to the DMV. James G. Miller Decl. (Dkt. #39), ¶ 8. Likewise, Ms. Wilde has declared that there are other options available to her now. Wilde Decl. (Dkt. #33-11), ¶ 12. Accordingly, they are not adequate representatives.

The declarations relied upon in the plaintiffs' motion are mostly dated in February 2012. The plaintiffs bear the burden to establish that the circumstances outlined in those declarations are still true at this time. They have to show that these individuals have not obtained documentation or, more importantly, have not obtained photo identification since they made the declarations.

E. Certification is not warranted under Rule 23(b)(1)-(2).

In reality, the plaintiffs have conflated the number of possible classes and have made this matter much more difficult than it need be. Their concern that a failure to certify Classes 1, 2, and 5 would lead to inconsistent or varying adjudications is incorrect. Should they prevail on their Voting Rights Act claims with respect to Act 23, there is—in reality—no need for any classes as the remedy would invalidate the entire photo identification requirement and cover all of the citizens and registered voters in the State of Wisconsin. That group crosses all of the class definitions, thus rendering them all unnecessary.

Finally, the plaintiffs assume that there is harm and that, therefore, a single remedy is possible to redress that harm. However,

> By virtue of its requirement that the plaintiffs seek to redress a common injury properly addressed by a class-wide injunctive or declaratory remedy, Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members.

Lemon v. International Union of Operating Engineers, Local No. 139, FL-CIO, 216 F.3d 577, 580 (7th Cir. 2000).

Here, the plaintiffs' proposed classes lack cohesiveness. If you look hard at any of them, you see that there are so many various alternatives that could lie within each class that they are, for all practical purposes, fluid. In addition, there is no homogeneous definition which fits all of the proposed class members. That being the case, the plaintiffs fail to meet this last requirement as well.

IV. CLASS 3 HAS NO UNDERLYING BASIS FOR CERTIFICATION.

Plaintiffs next contend that putative Class 3 should be certified, but it is in reality a non-existent class. Class 3[7] consists of:

> [A]ll 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.

(Amended Complaint, ¶ 115).

Quite simply, this is a nonsensical class. How can an individual be a resident of one state for driving (not Wisconsin) and a resident of another state for voting (Wisconsin)? *Compare* Wis. Stat. § 343.01(2)(g) (defining residence for purposes of driving) *with* Wis. Stat. § 6.10(1) (defining residence for purposes of voting). If one is a resident for one of these purposes, one is for the other. By state law in Wisconsin, out-of-state individuals who intend to reside in Wisconsin must surrender their out-of-state licenses when they take up residence in Wisconsin. Wis. Stat. § 343.05(3)(a). Act 23 did not place this imposition upon Wisconsin residents; the existing motor vehicle laws have always required a Wisconsin resident to have a Wisconsin driver's license. *Id.*

Conversely, non-Wisconsin residents may drive in this state legally with out-of-state driver's licenses. But, these individuals are *precisely that*: non-Wisconsin residents, which means that they are not eligible to vote in Wisconsin.

In order to legally drive in Wisconsin, an adult either possess a valid Wisconsin driver's license or be a non-resident with a valid driver's license from that person's home jurisdiction.

[7]The proposed representatives for Class 3 include: Anna Shea, Max Kligman, Samantha Meszaros, and Steve Kvasnicka. (Amended Complaint, ¶ 118; Motion for Class Certification). Because these individuals are not truly injured by Act 23, they are not adequate class representatives, and that is yet another reason to decline to certify Class 3.

Wis. Stat. § 343.05(3)(a) and (4)(b)1. It necessarily follows that if someone is lawfully driving a motor vehicle in Wisconsin under a driver's license from another jurisdiction, they must be a resident of that other jurisdiction (or at the very least not be a Wisconsin resident). If the person is a resident of another jurisdiction, they cannot vote in Wisconsin. Therefore, Class 3 is a non-existent class—or it is composed of individuals who are breaking the laws with respect to the legal operation of motor vehicles in Wisconsin. Either way, Class 3 is not a class that can be certified.

V. CLASSES 4 AND 6 ARE BASED UPON SPECULATION AND THE MEMBERS OF CLASS 4 HAVE NOT BEEN INJURED.

Next, plaintiffs argue that putative Classes 4 and 6 should be certified. These classes[8] are defined as follows:

> Class 4 consists of
>
> all enrolled students at accredited Wisconsin technical colleges who lack any form of accepted photo ID other than technical college ID cards.

(Amended Complaint, ¶ 120).

> Class 6 consists of
>
> all veterans of a uniformed service of the United States who are eligible Wisconsin voters, lack accepted photo ID, and possess a Veterans Identification Card ("VIC") issued by the U.S. Department of Veterans Affairs.

(*Id.*, ¶ 126).

[8]The proposed representative for Class 4 is Edward Hogan. (*Id.*, ¶ 121; Motion for Class Certification). Because Mr. Hogan is not truly injured by Act 23, he is not an adequate class representative, and that is yet another reason to decline to certify Class 4. And, the proposed representatives for Class 6 include: Sam Bulmer, Carl Ellis, and Rickie Lamont Harmon. (*Id.*, ¶ 127; Motion for Class Certification).

A. Class 4 is based upon speculation and cannot be certified.

The plaintiffs concede at the very start of their Memorandum at 1, n.1, that "technical college ID cards (Class and Claim 4) are currently being accepted as ID for voting purposes," but they assert that "their exclusion is still threatened under the administrative rule review process." *Id*. Thus, by the plaintiffs' own admission, Class 4 consists of members who are not impacted by Act 23. Whether they will, at some later date, be impacted by administrative rules is not a sufficient basis upon which to certify a class.

While the Court should not focus entirely upon the merits of the claim when determining whether to certify a class, it can clearly look to see whether *any* merits exist. Here, Class 4 consists of members who are not harmed in any way by Act 23—by the terms of Act 23, they are permitted to vote using their school identification cards. Thus, this class is not merely "too broadly drawn," *Messner*, 669 F.3d at 824, it is impermissibly drawn. Moreover, there is no common question of law or fact. The plaintiffs will not be able to show that the members of Class 4 have "suffered the same injury," *Wal-Mart*, 131 S. Ct. at 2551, because they have suffered *no* injury. Lacking a common question of law or fact, there is no typicality. Therefore, Class 4 has failed to meet the first three requirements for class certification.

B. Class 6 is too speculative and the plaintiffs have not established numerosity.

The plaintiffs have further failed to establish the requisite factors to support certification for putative Class 6. The plaintiffs base their numerosity upon a 2010 HUD-VA count of homeless veterans and then, based upon the unsigned Barreto Expert Report, they extrapolate a 9.5% rate for those who lack identification under Act 23. There is no evidence to support the number of veterans in Wisconsin who actually lack any form of Act 23 identification. The

plaintiffs have submitted no evidence that the homeless veterans noted in the 2010 HUD-VA count lack other forms of identification acceptable under Act 23. Without meeting that burden, they have failed to establish numerosity for Class 6.

VI. CLASS 7 AND SUB-CLASS 7.1 ARE BASED UPON THE VOTING RIGHTS ACT AND CLASS CERTIFICATION IS NOT REQUIRED.

Finally, the plaintiffs contend that putative Class 7 and Sub-Class 7.1 should also be certified. The class and sub-class[9] are defined as follows:

> Class 7 consists of
>
> all eligible African-American and Hispanic/Latino voters in the State of Wisconsin who lack accepted photo ID.

(Amended Complaint, ¶ 129).

> Sub-Class 7.1 consists of
>
> all eligible African-American and Hispanic/Latino voters in Milwaukee County, Wisconsin who lack accepted photo ID.

(*Id.*, ¶ 130).

The plaintiffs have presented no evidence as to the barriers, if any, that African-American and Latino voters in Milwaukee County might incur in obtaining the forms of documentation with which they could secure a state ID card, nor have they presented evidence as to whether any such barriers are different compared to barriers faced by white voters.

The plaintiffs have brought claims under the Voting Rights Act of 1965 and these two putative classes relate to those claims. However, as noted at the start of this brief, there is really

[9]The representatives for Class 7 and Sub-Class 7.1 include: Shirley Brown, Eddie Lee Holloway, Jr., Mariannis Ginorio, Barbara Oden, Carl Ellis, Rickie Lamont Harmon, Pamela Dukes, and DeWayne Smith. (Amended Complaint, ¶ 131; Motion for Class Certification).

no need to certify these classes. Class actions are not favored in general. They are clearly less favored where they are not necessary.

CONCLUSION

For the reasons stated herein, defendants respectfully request that plaintiffs' motion for class certification be denied in its entirety.

Dated this 4th day of June 2012.

Respectfully submitted,

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